Federal Court  Cour fédérale

Date: 20211028

Docket: DES-1-18

Citation: 2021 FC 1153

Ottawa, Ontario, October 28, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

HASSAN ALMREI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Introduction

[1] This is a motion by the *amici curiae* for the determination of a question of law in an application pursuant to Rules 3 and 4 and, by analogy, to Rule 220 of the *Federal Courts Rules* pertaining to such a motion brought in an action.

[2] The motion is for determination of the following question:

Where:

(i) a party has a legal obligation to disclose information in a proceeding before a court, and

(ii) a claim of privilege pursuant to s l8.1 of the *Canadian Security Intelligence Act* RSC 1985, c C-23 [*CSIS Act*] is made in respect of that information; and

(iii) an application is made to a judge pursuant to paragraph l8.1(4)(a) of the *CSIS Act* for an order declaring that certain information that may be derived, extracted and/or summarized from the privileged information (the "Summary") is not information that identifies a human source or from which the identity of a human source could be inferred; and

(iv) the judge determines that the Summary is not information that discloses the identity of a human source or from which the identity of a human source could be inferred,

may the judge order the disclosure of the Summary?

II. **Context**

[3] Mr. Almrei is the plaintiff against the Government of Canada in the Superior Court of Justice of Ontario. He was previously the subject of security certificate proceedings in this Court under the former *Immigration Act*, RSC 1985, c I-27 and the *Immigration and Refugee Protection Act* SC 2001, c 27 ("*IRPA*"). The first security certificate, issued in 2001, was struck down by the Supreme Court of Canada in *Charkaoui, Re*, [2007] 1 SCR 350. A second certificate, issued in 2008, was found to be unreasonable and quashed by this Court in *Almrei, Re*, 2009 FC 1263 [*Almrei (Re)*].

[4] In the civil action before the Ontario Superior Court of Justice, initiated in 2010, Mr. Almrei is seeking damages and other relief against the Government of Canada for breaches of his

rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the *Charter*) and related civil wrongs such as negligent investigation and false imprisonment arising from the issuance of the security certificates and his detention for almost eight years.

[5] The civil discovery process in the Ontario action began in 2017. On an ongoing basis, documents held by the several Government departments and agencies in possession of the information have been provided to Mr. Almrei and his counsel by the Respondent in a redacted form with portions subject to national security claims omitted or blacked out. Transcripts of the *in camera* and *ex parte* proceedings related to the 2008 certificate have also been subject to review and redaction.

[6] In respect of the redacted information or other evidence disclosed or to be disclosed to Mr. Almrei in the Ontario proceedings, two parallel applications have been filed in this Court; one pursuant to para 38.04(2)(c) of the *Canada Evidence Act* RSC 1985, c C-5 [*CEA*] in file DES-3-17 for the disclosure of information which the Attorney General of Canada seeks to protect in the discovery process; and the second in file DES-1-18 pursuant to para 18.1(4)(a) of the *Canadian Security Intelligence Service Act* RSC, 1985, c C-23[*CSIS Act*] for the disclosure of information which is currently subject to claims of human source privilege by the Attorney General of Canada.

[7] This motion pertains to the *CSIS Act* application brought by Mr. Almrei. In his Notice of Application under s 18.1(4), Mr. Almrei requested relief in the form of summaries of information

that can be derived from the information over which the s 18.1 privilege has been claimed. He does not seek information which would identify a human source or from which the identity of a human source can be inferred.

[8] By Orders dated May 25, 2017, June 14, 2018, and February 19, 2020, Mr. Gordon Cameron and Ms. Shantona Chaudhury were appointed as *amici curiae* with respect to both applications. This motion for determination of a legal question was initiated by notice filed by the *amici* on October 9, 2020, with a view to clarifying the procedure to be followed during the review of the information subject to s 18.1 privilege claims.

[9] Following case management discussions, a schedule was determined for the filing of motion records and written submissions from the parties. As the subject matter of the motion concerned an unclassified question of law, a public hearing was conducted on April 27, 2021, by video conference and oral submissions were received from counsel for the parties. Oral submissions were also received from the *amici* in a closed hearing, to which the Attorney General of Canada responded in that same hearing. The public was excluded from the hearing as a classified document was referenced to illustrate the question raised by the *amici*.

III. **Issue**

[10] The issue can be succinctly described as follows:

A. *Does s 18.1 of the CSIS Act allow the issuance of summaries?*

IV. **Legislation**

[11] The following provisions of the *CSIS Act* and the *Federal Courts Rules* are relevant to this motion.

CSIS Act	*Loi sur le SCRC*
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 information to the Service;	source humaine Personne physique qui a reçu une promesse d'anonymat et qui, par la suite, a fourni, fournit ou pourrait vraisemblablement fournir des informations au Service.
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	**(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

identity of a human source could be inferred.

information qui permettrait de découvrir cette identité.

Exception — consent

Exception — consentement

(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.

(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.

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 a prosecution of an offence, an order declaring that the disclosure of the identity of a human source or information from which the identity

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

of a human source could be inferred is essential to establish the accused's innocence and that it may be disclosed in the proceeding.

pour établir l'innocence de l'accusé et que cette communication peut être faite dans la poursuite.

Contents and service of application

(5) The application and the applicant's affidavit deposing to the facts relied on in support of the application shall be filed in the Registry of the Federal Court. The applicant shall, without delay after the application and affidavit are filed, serve a copy of them on the Attorney General of Canada.

Contenu et signification de la demande

(5) La demande et l'affidavit du demandeur portant sur les faits sur lesquels il fonde celle-ci sont déposés au greffe de la Cour fédérale. Sans délai après le dépôt, le demandeur signifie copie de la demande et de l'affidavit au procureur général du Canada

Attorney General of Canada

(6) Once served, the Attorney General of Canada is deemed to be a party to the application.

Procureur général du Canada

(6) Le procureur général du Canada est réputé être partie à la demande dès que celle-ci lui est signifiée.

Hearing

(7) The hearing of the application shall be held in private and in the absence of the applicant and their counsel, unless the judge orders otherwise.

Audition

(7) La demande est entendue à huis clos et en l'absence du demandeur et de son avocat, sauf si le juge en ordonne autrement.

Order — disclosure to establish innocence

(8) If the judge grants an application made under paragraph (4)(b), the judge may order the disclosure that

Ordonnance de communication pour établir l'innocence

(8) Si le juge accueille la demande présentée au titre de l'alinéa (4)b), il peut ordonner la communication qu'il estime

the judge considers appropriate subject to any conditions that the judge specifies.

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.

Confidentiality

Confidentialité

(10) The judge shall ensure the confidentiality of the following:

(10) Il incombe au juge de garantir la confidentialité :

(a) the identity of any human source and any information from which the identity of a human source could be inferred; and

a) d'une part, de l'identité de toute source humaine ainsi que de toute information qui permettrait de découvrir cette identité;

(b) information and other evidence provided in respect of the application if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person.

b) d'autre part, des informations et autres éléments de preuve qui lui sont fournis dans le cadre de la demande et dont la communication porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui

Confidentiality on appeal

(11) In the case of an appeal, subsection (10) applies, with any necessary modifications, to the court to which the appeal is taken.

Confidentialité en appel

(11) En cas d'appel, le paragraphe (10) s'applique, avec les adaptations nécessaires, aux tribunaux d'appel.

Authorized disclosure of information

19 (1) Information obtained in the performance of the duties and functions of the Service under this Act shall not be disclosed by the Service except in accordance with this section.

Autorisation de communication

19 (1) Les informations qu'acquiert le Service dans l'exercice des fonctions qui lui sont conférées en vertu de la présente loi ne peuvent être communiquées qu'en conformité avec le présent article.

(2) The Service may disclose information referred to in subsection (1) for the purposes of the performance of its duties and functions under this Act or the administration or enforcement of this Act or as required by any other law and may also disclose such information,

(2) Le Service peut, en vue de l'exercice des fonctions qui lui sont conférées en vertu de la présente loi ou pour l'exécution ou le contrôle d'application de celle-ci, ou en conformité avec les exigences d'une autre règle de droit, communiquer les informations visées au paragraphe (1). Il peut aussi les communiquer aux autorités ou personnes suivantes

…

…

Federal Court Rules

Règles des Cours fédérales

General principle

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

Principe général

3 Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

Matters not provided for

4 On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates.

Cas non prévus

4 En cas de silence des présentes règles ou des lois fédérales, la Cour peut, sur requête, déterminer la procédure applicable par analogie avec les présentes règles ou par renvoi à la pratique de la cour supérieure de la province qui est la plus pertinente en l'espèce

Preliminary determination of question of law or admissibility

220 (1) A party may bring a motion before trial to request that the Court determine

(a) a question of law that may be relevant to an action;

(b) a question as to the admissibility of any document, exhibit or other evidence; or

(c) questions stated by the parties in the form of a special case before, or in lieu of, the trial of the action.

Décision préliminaire sur un point de droit ou d'admissibilité

220 (1) Une partie peut, par voie de requête présentée avant l'instruction, demander à la Cour de statuer sur :

a) tout point de droit qui peut être pertinent dans l'action;

b) tout point concernant l'admissibilité d'un document, d'une pièce ou de tout autre élément de preuve;

c) les points litigieux que les parties ont exposés dans un mémoire spécial avant l'instruction de l'action ou en remplacement de celle-ci.

Contents of determination

(2) Where, on a motion under subsection (1), the Court orders that a question be determined, it shall

Contenu de la décision

(2) Si la Cour ordonne qu'il soit statué sur l'un des points visés au paragraphe (1), elle :

(a) give directions as to the case on which the question shall be argued;	**a)** donne des directives sur ce qui doit constituer le dossier à partir duquel le point sera débattu;
(b) fix time limits for the filing and service of motion records by the parties; and	**b)** fixe les délais de dépôt et de signification du dossier de requête;
(c) fix a time and place for argument of the question.	**c)** fixe les date, heure et lieu du débat.
Determination final	**Décision définitive**
(3) A determination of a question referred to in subsection (1) is final and conclusive for the purposes of the action, subject to being varied on appeal.	(3) La décision prise au sujet d'un point visé au paragraphe (1) est définitive aux fins de l'action, sous réserve de toute modification résultant d'un appel.

V. **Analysis**

[12] This motion arises in the context of preparations for the adjudication of the underlying application under s 18.1 of the *CSIS Act* (the s 18.1 hearings) prior to the related application under *CEA* s 38 (the 38 hearings). In a decision issued on January 12, 2021, the Court dismissed a Motion by the Applicant to have all of the claims for national security privilege dealt with in a single hearing and directed, as sought by the Attorney General, that the hearings in DES-1-18 (the s 18.1 hearings) would begin first to be followed by those in DES-3-17: *Almrei v Canada (Attorney General)* 2021 FC 46 (the s 38 hearings).

[13] In the course of meeting its discovery obligation in the Ontario civil action, the Attorney General has disclosed the existence of a number of documents that are relevant to the matters at

issue in those proceedings. The disclosure process is continuing as additional documents in the possession of government departments and agencies have been found to be relevant. The Attorney General has claimed the s 18.1 privilege in respect of information in those documents and has redacted that information in the documents produced to the Applicant thus far. The Attorney General has also advised that should any of those s 18.1 privilege claims not be established in these proceedings, a claim under *CEA* s 38 may be advanced in respect of the same information. In other words, the same information may be subject to privilege claims under both statutes for different reasons: to protect the identity of a human source or, should that claim fail, on the basis that disclosure would be injurious to national security, international relations or national defence. And the provisions for dealing with the claims under the two statutes are significantly different.

[14] The *CEA* contains a code of procedure for dealing with the disclosure of sensitive or potentially injurious information in court or tribunal proceedings, which includes rules for the release of information in various forms. *CEA* s 38.06(2) expressly empowers the judge hearing an application under s 38.04 of that statute to authorize the disclosure, subject to conditions as appropriate, of all or part of the information or a summary of the information that the Attorney General of Canada seeks to protect. There is no similar provision in *CSIS Act* s 18.1.

[15] In practice, the “summary” of the information disclosed is often in the form of a description that informs the reader of the general nature of what is redacted without providing sensitive details. I take the *amici* to include such descriptions in their reference to information “derived, extracted and/or summarized from” in their motion.

[16] Counsel for the Attorney General and the *amici* have been engaged for some time in reviewing the information subject to *CSIS Act* s 18.1 and *CEA* s 38 privilege claims with a view to determine whether any of the claims may not need to be adjudicated, subject to the approval of the Court. This is a common practice in applications involving a large volume of documents and multiple claims of privilege.

[17] In *CEA* s 38 applications, similar reviews have reduced the amount of time required for evidentiary hearings and the Court's determination of contentious issues. This promotes judicial economy in conducting such proceedings. In many instances, the risk of injury to the protected public interests of national security, national defence and international relations from disclosure of the information is clear and also clearly outweighs the public interest in disclosure. In other instances, counsel for the Attorney General and the *amici* have often been able to reach agreement on information that may be disclosed in a summary or descriptive form without fear of injury to the protected interests. This facilitates the Court's review although the Court must nevertheless be satisfied that the joint proposal is appropriate. It remains the responsibility of the Court to determine whether the public interest in disclosure outweighs the public interest in protecting the information, the third stage of the test set out in *Ribic v Canada (Attorney General)*, 2003 FCA 246. In the result, summaries may serve the interests of judicial economy while also meeting the government's disclosure obligations and protecting truly sensitive or injurious information.

[18] The purpose of the human source privilege, as set out in s 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 Canadian Security Intelligence Service (CSIS, or the Service). The enactment prohibits disclosure of the identity of a human source of any information from which the identity of a human source could be inferred.

[19] The prohibition on disclosure of the identity of a human source in s 18.1 is on its face absolute but is dependent on a finding that the person identified by the information falls within the definition of "human source" in s 2 of the *CSIS Act.* That requires a finding by the Court that the person has provided information to the Service after receiving a promise of confidentiality. There may be opposing submissions with respect to the quality of the evidence to establish those facts but assuming the Court accepts the position of the Attorney General that the definition has been satisfied, it is clear on a plain reading of the statute that the Court may not authorize the issuance of a summary that would identify a human source.

[20] What is more problematic is where the Court is considering whether the identity of a human source "could be inferred" from redacted information which is claimed to be "identifying information". During the course of their review of the information, the Court expects that counsel for the Attorney General and the *amici* will discuss whether the basis for such an inference is made out or not on the face of the document. Should it be disputed, the Court expects that the Attorney General will call evidence from witnesses in closed hearings to testify as to why the Court should accept that the identity of a human source could be inferred from the information and submissions will be received from the Attorney General and *amici* for a determination to be made on the issue. Should the Court accept the claim, there will be no disclosure of the information which may adversely affect the ability of the Applicant to seek

redress from the Superior Court. However, that is not a factor to be taken into consideration in applying the privilege.

[21] As this Court has noted, national security privilege claims by the Service advanced on its behalf by the Attorney General may be exaggerated: *Canada (Attorney General) v. Almalki*, 2010 FC 1106, [2012] 2 F.C.R. 508, at para. 108; *Khadr v. Canada (Attorney General)*, 2008 FC 549, 329 FTR 80, at paras. 73-77 and 98. The Supreme Court of Canada has cautioned that they require vigilance by the Designated Judge in the context of the security certificate regime: *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37 at paras 63-64.

[22] On this motion, the Applicant and the *amici* do not challenge the Attorney General's redactions of identifying information in general. Rather, they argue that there will be instances in which there is information that can be derived, extracted and summarized from the identifying information that does not identify or allow an inference as to the identity of the human source. This is consistent, they contend, with the statutory purpose of the enactment. Nor does it involve any balancing of the public interests or other considerations that might outweigh the s 18.1 privilege as in *CEA* s 38 privilege claims.

[23] Subsection 18.1(4)(a) provides that a party to the proceeding, an *amicus curiae* appointed in respect of the proceeding or a Special Advocate in proceedings under *IRPA*, may apply to a judge for 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. It does not expressly address the question of whether a party, *amicus* or Special Advocate can seek an order for a

summary of information that does not identify the human source or from which the identify could be inferred.

[24] The Applicant and the *amici* submit that it is evident from the plain meaning and purposive interpretation of s 18.1 that a court is not prohibited from disclosing non-identifying summary information. This interpretation, they submit, would limit the impairment of the interests of justice in the underlying litigation to the extent necessary to fully protect the human source privilege. Sub-paragraph 18.1(4)(a) restricts a party's disclosure obligation only to the extent that it is necessary to preserve the privilege. The plaintiff in the underlying litigation is otherwise entitled to production of the information. Providing a summary, they argue, would fulfill the purpose of the legislation by protecting the identity of the source while providing the Applicant with as much of the information that he is, by law, entitled to receive through discovery in his action against the Government.

[25] The Applicant and the *amici* acknowledge the importance of protecting the identity of CSIS human sources. They contend, however, that it does not follow from the recognition of the importance of the legislative scheme that any summary which the Court might authorize would include information that would identify a human source or from which the identity of a human source could be inferred.

[26] In the determination of the reasonableness of the second security certificate, this Court commented in its reasons on the lack of credibility of the human source information relied upon by the Government to justify the certificate and the Applicant's lengthy detention: *Almrei (Re)* at

paras 162-164. These issues are highly relevant to the underlying action. The Applicant argues that the production of evidence in relation to the failure of CSIS to assess that there was objective evidence in their possession that contradicted what they were told by their human sources is crucial to his ability to seek redress for the alleged breach of his *Charter* interests and torts committed against him. The Government should not be able to use the provisions of s 18.1 to shield it from liability through the civil action, he contends. The legislation must be interpreted in a manner consistent with the rule of law and the Government's production obligations.

[27] Based on its experience in other proceedings, the Court is concerned that the Respondent 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. That may include reports, for example, from sources previously found not to be credible when their information conflicted with objective evidence collected by CSIS, such as observations by the Service's physical surveillance units. On the interpretation of the legislative scheme put forward by the Respondent in this proceeding, the Court would be unable to authorize disclosure of a summary of those facts once it was established that the source had provided the false information after being promised confidentiality by the Service and thus met the statutory definition of a human source.

[28] The interpretation that the legislative scheme allowed for summaries was the position taken by the Attorney General of Canada in a proceeding before Mr. Justice Noël in responding to an argument that s 18.1 was unconstitutionally rigid:

> In regard to the steps following the determination of whether the claim of privilege is valid or not, Counsel for the Government posit that the s. l8.l scheme does not prevent alternatives to disclosure of information identifying, or tending to identify the CSIS human source. **For example, the scheme does not prevent the issuance of summaries of the information that do not identify the source.** In addition, even if the designated judge sees the CSIS human source information, he or she can choose to give no weight to the information, refuse to order the warrant, refuse to declare a certificate reasonable etc. **A purposive interpretation of the 18.1 scheme allows the jurisdiction of designated judges overseeing national security matters to function unimpeded across multiple legal topics all the while fulfilling the enactment's intended purpose, which is to protect the disclosure of sensitive information identifying, or tending to identify a CSIS human source.** Counsel for the Government are cognizant of the fact that adopting such an interpretation will impact other files.
>
> [Emphasis added]
>
> *X (Re)*, 2017 FC 136 at para 18.

[29] In this proceeding, the Attorney General of Canada seeks to distinguish the position it took in the matter before Justice Noël in *X (Re)* as that case turned on the question of whether the source identifying information could even be disclosed to the presiding Designated Judge. Opposing counsel had argued that s 18.1 was constitutionally infirm on a strict literal reading of the legislation. The Attorney General urged a flexible reading of the enactment to avoid that conclusion. Justice Noël agreed with that approach and discussed several situations in which it may be necessary for a Designated Judge to probe deeply into the facts pertaining to a CSIS human source in order to carry out his or her judicial duties. He concluded at para 49:

> …The legislator did not intend to restrict the designated judges' abilities to properly fulfil their duties of ensuring fairness and maintaining the proper administration of justice by limiting their power to question and address the appropriateness of communicated information over the course of *ex parte, in camera* proceedings.

[30] Here, the Attorney General submits that the protection afforded by s 18.1 is absolute subject to one exception: where disclosure of the information is essential to establish an accused's innocence in a criminal proceeding: *CSIS Act* para 18.1(4)(b). That exception is very narrow and has been found in criminal matters to apply only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction: *R v Brassington,* 2018 SCC 37, at para 36. The Act does not provide for any discretion to be exercised by the Court when the underlying proceedings are civil in nature. Only upon the consent of both the human source and the Director of CSIS can the privilege be waived: *CSIS Act*, s 18.1(8).

[31] Applying the modern approach to statutory interpretation, the Attorney General argues, the words of a statute must 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: *1704604 Ontario Ltd. v Pointe Protection Association,* 2020 SCC 22 at para 6; *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27 at para 21.

[32] The context in which s 18.1 was enacted, the Attorney General reminds the Court, was the determination by the Supreme Court of Canada that the common law informer privilege did not apply to CSIS human sources: *Harkat,* above, at paras 85, 87. The Government's response to this decision was the introduction of Bill C-44, the *Protection of Canada from Terrorists Act*, a few months later. Bill C-44 came into effect on April 23, 2015, creating s 18.1.

[33] The Attorney General argues that the position advanced by the Applicant and the *amici* would undermine the protection afforded by s 18.1. Answering the question of law brought

forward on this motion in the affirmative would go beyond what the statute authorizes, the Respondent contends.

[34] Much of the Attorney General's argument emphasizes the importance of a class privilege, such as that embodied in s 18.1, and relies on the jurisprudence relating to police informer privilege as described in this passage:

> [...] In a class privilege what is important is not so much the content of the particular communication as it is the protection of the type of relationship. Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation. **Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case.** Anything less than this blanket confidentiality, the cases hold, would fail to provide the necessary assurance to the solicitor's client or the police informant to do the job required by the administration of justice. [Emphasis added]
>
> *R. v. National Post*, 2010 SCC 16, para. 42

[35] Among the reasons cited by the Attorney General in support of the importance of the 18.1 class privilege is that CSIS human sources require the full protection afforded by the statute to protect their safety and to encourage others to provide information to the Service. This is not disputed by the Applicant or the *amici*.

[36] The Respondent contends that summaries would pose a serious danger of harm or death to CSIS human sources. Their lives or safety may be compromised as much by reference to the nature of the information they supplied as by the publication of their names, the Attorney General argues. The Attorney General submits that any confidence judges may have about

editing out information that might disclose the identify of an informant could be misplaced and possibly dangerous.

[37] The Attorney General contends that summaries of privileged informer information can be issued in the context of criminal law proceedings only by application of the innocence at stake exception similar to that found in s 18.1(4) (b).

[38] If an application under s 18.1(4)(b) is granted under the innocence at stake exception, the judge may order the disclosure that the judge considers appropriate subject to any conditions that the judge specifies (s 18.1 (8)). This is a clear statement of Parliamentary intent to preserve the role of the Court in making findings of fact in relation to the subject information and to control the manner in which it may be disclosed even where it may be identifying.

[39] As the *amici* point out, summaries of information protected by the informer privilege are provided in the normal course of criminal proceedings where the exception does not apply in order to fulfill the Crown's disclosure obligations: *R v Crevier*, 2015 ONCA 619 at paras 23-24, 48-51. This while respecting the absolute requirement to not identify the source.

[40] The criminal courts carefully craft judicial summaries of information protected by informer privilege without compromising the privilege. As noted in *R. v Shivrattan* 2017 ONCA 23 at para 68, the Crown's participation in this process, with the assistance of the police, will ensure that nothing is disclosed in the summaries that might inadvertently lead to the identification of the informant. Similarly, counsel for the Attorney General of Canada, with the

assistance of experienced members of the Service, could work with the *amici* to carefully craft non-identifying summaries for the consideration of the Court. This has been done on many occasions in proceedings under *CEA* s 38.

[41] The police informer privilege has been found to be absolute in civil proceedings, where the innocence at stake exemption or the Crown's disclosure obligations do not apply: *Iser v Canada (Attorney General)*, 2017 BCCA 393. Normally, as the privilege belongs to both the Crown and the informer, the consent of both is required to waive it: *Named Person v Vancouver Sun*, 2007 SCC 43 at paras 24-25.

[42] The requirement of dual consent is incorporated in s 18.1(3) of the *CSIS Act* privilege. However, notwithstanding that provision, the Director of the Service retains a broad discretion under s 19 of the *CSIS Act* to disclose information obtained in the performance of the duties and functions of the Service under the *CSIS Act* for, among other purposes such as law enforcement, national defence and international relations, "the performance of its duties and functions under this Act." There is no dispute that this would include disclosure of the identity of a human source or information from which the identity of the source could be inferred without the consent of the source.

[43] Moreover, s 18.1(2) is not absolute in that it is restricted only to proceedings where disclosure is sought before "a court, person or body with jurisdiction to compel the production of information". The prohibition does not, therefore, extend to disclosures by the Service for other purposes.

[44] While s 18.1 on its face appears to impose an absolute prohibition on disclosure in court or tribunal proceedings, subject to the innocence at stake exception in criminal matters, it has to be read in the context of the Act as a whole. As noted, there is no absolute bar to disclosure outside the context of discovery, production or testimony in court or tribunal proceedings and s 19 permits the Director to disclose the identity of a human source to foreign and domestic partners of the Service for operational reasons. Such disclosures could compromise the safety of the sources. Efforts may be made to protect the sources, indeed that could be the purpose of the disclosure where they may be at risk of exposure by a foreign agency. And caveats may be placed by the Service on the use of the information. However, once it is shared, the information is beyond the direct control of the Service.

[45] Parliament's silence with respect to the issuance of summaries in s 18.1 should also be taken into consideration, the Attorney General submits. Other legislative schemes expressly provide for the issuance of summaries in proceedings involving national security matters: *CEA*, s. 38; *IRPA*, s 83(1)(e), *Prevention of Terrorist Travel Act*, SC 2015, c 36, s 42, s 4(4)(c) and 6(2)(c), and the *Secure Air Travel Act*, SC 2015, c 20, s 11, s 16(6)(c).

[46] By way of context, the issuance of summaries pursuant to s 38 of the *CEA* requires a few steps: first, it 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.

[47] Each of the other legislative schemes cited provides for the issuance of summaries not containing sensitive information. 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. Only *CEA* s 38 and *CSIS Act* s 18.1 extend to proceedings before other tribunals or courts such as, in this instance, the Ontario Superior Court of Justice. 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.

[48] The application of the class privilege in *CSIS Act* s 18.1 is dependant upon a finding that the information at issue was provided by a human source, as defined in s 2 of the statute, and would if disclosed identify or tend to identify that human source. Recognizing that the evidence may fail to establish either the fact that the information was provided by a human source or that it would identify or tend to identify the source, the Attorney General has successfully argued in a previous motion that the government should be permitted to claim the protection of *CEA* s 38 in respect of the same information if its proof fails under *CSIS Act* s 18.1. In the result, the Attorney General will have two opportunities to persuade the Court that the information should not be disclosed. At least not without the conditions contemplated by *CEA* s 38.06. The Attorney

General also retains the discretion to issue a certificate barring release of the information under *CEA* s 38.13.

[49] It thus appears that any decision by the Court that does not uphold the application of s 18.1 to information which the Service has redacted from the documents produced to the Applicant on discovery may lead to a claim for protection of the same information under *CEA* s 38. It would be in the interests of judicial economy to encourage counsel for the Attorney General and the *amici* to explore during their review of the documents whether identifying information could be severed to protect the human sources or, barring that, described in some form to satisfy the Attorney General's discovery obligations and the Court's responsibilities of ensuring fairness and the proper administration of justice. Agreement on this would obviate the need to review the information again during the *CEA s 38* proceedings.

[50] To illustrate by a hypothetical example, such a description of redacted information might state that a source reported that the subject was at a certain place at a certain time and made certain statements while other information in the possession of the Service at the time established beyond question that the report could not be accurate.

[51] In the result, I am satisfied that the Applicant and the *amici* have made their case for an interpretation of s 18.1 that would preserve the legislative intent to protect the identities of Service human sources while allowing for the disclosure of information to aid the trial court in its consideration of the *Charter* and tort issues raised by the action. Such a result, in my view, is in the interests of justice and not contrary to the purpose of the legislation.

VI. **Conclusion**

[52] For the above reasons, I grant the *amici*'s motion and find, as a question of law, that 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 l8.1(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.

[53] For greater certainty, I have added the word "described" to the list of what constitutes a summary proposed by the *amici.*

ORDER IN DES-1-18

THIS COURT DECLARES that where**:**

(v) a party has a legal obligation to disclose information in a proceeding before a court; and

(vi) a claim of privilege pursuant to s l8.1 of the *Canadian Security Intelligence Act* RSC 1985, c C-23 [*CSIS Act*] is made in respect of that information; and

(vii) an application is made to a judge pursuant to paragraph l8.1(4)(a) of the *CSIS Act* for an order declaring that certain information that may be derived, extracted, described and/or summarized from the privileged information (the "Summary") is not information that identifies a human source or from which the identity of a human source could be inferred; and

(viii) the judge determines that the Summary is not information that discloses the identity of a human source or from which the identity of a human source could be inferred,

The Court may order the disclosure of the information.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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