Federal Court of Appeal | Cour d'appel fédérale

Date: 20160708

Docket: A-520-15

Citation: 2016 FCA 195

CORAM: **GAUTHIER J.A.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

ABDULLAH ALMALKI, KHUZAIMAH KALIFAH, ABDULRAHMAN ALMALKI, by his Litigation Guardian Khuzaimah Kalifah, SAJEDA ALMALKI, by her Litigation Guardian Khuzaimah Kalifah, MUAZ ALMALKI, by his Litigation Guardian Khuzaimah Kalifah, ZAKARIYY A ALMALKI, by his Litigation Guardian Khuzaimah Kalifah, NADIM ALMALKI, FATIMA ALMALKI, AHMAD ABOU-ELMAATI, BADR ABOU-ELMAATI, SAMIRA AL-SHALLASH, RASHA ABOU-ELMAATI, MUAYYED NUREDDIN, ABDUL JABBAR NUREDDIN, FADILA SIDDIQU, MOFAK NUREDDIN, AYDIN NUREDDIN, YASHAR NUREDDIN, AHMED NUREDDIN, SARAB NUREDDIN, BYDA NUREDDIN

Respondents

Heard at Ottawa, Ontario, on June 14, 2016.

Judgment delivered at Ottawa, Ontario, on July 8, 2016.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

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

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The Attorney General of Canada (AGC) appeals from the decision of Justice Richard Mosley of the Federal Court (the judge), who concluded that the application of section 18.1 of

the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 [*CSIS Act*] in the particular circumstances of this case would be "invalid" (2015 FC 1278). More particularly, the judge found that section 18.1 was not merely a procedural rule of evidence, that it would have a retrospective application, and that applying it would affect the vested rights of the respondents in the disclosure of the information identifying the human source involved in this matter, subject only to the weighing of the factors provided for at section 38 and following of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 [*CEA*]. I note that reference in these reasons to section 38 encompasses sections 38 to 38.16 of the *CEA*.

[2] The finding of the judge in respect of the application of subsection 18(1) of the *CSIS Act* is not the subject of the appeal. Thus, the question involving the redacted information relating to Canadian Security Intelligence Service (CSIS) employees will be dealt with in the section 38 proceeding in accordance with the judge's finding at paragraph 55 of his reasons.

[3] It is worth mentioning immediately that this appeal only requires the application of well-established principles of statutory interpretation to the particular provision under review. That said, this does not mean that the question before us is easy, for it concerns the temporal application of the new statutory class privilege given to CSIS human sources pursuant to section 18.1 of the *CSIS Act*. As noted by Professors Côté, Beaulac and Devinat in *Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011) at 116, transitional law is one of the most difficult fields in law.

[4] For the reasons that follow, I would allow the appeal.

I. Background

[5] The general background and relevant procedural history of the civil proceedings instituted by Messrs. Abdullah Almalki, Ahmad Abou-Elmaati, Muayyed Nureddin and certain family members (collectively referred to as the respondents), and the ensuing applications made by the AGC under section 38 of the *CEA*, are fully set out in the judge's reasons (see paragraphs 14 to 36).

[6] For our purposes, it is sufficient to say that more than ten years ago, the respondents instituted civil proceedings before the Ontario Superior Court to claim damages arising from an alleged breach of their rights and freedoms protected under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 [*Charter*].

[7] In the context of mediation attempts, as well as in the course of the pre-trial discovery process after the mediation failed, the AGC produced many redacted documents but refused to produce information that would tend to identify covert human sources of CSIS. Among other things, the AGC invoked the national security privilege.

[8] As a result, the AGC commenced two applications pursuant to section 38 of the *CEA*. The first application, which related to documents provided in contemplation of mediation, was addressed in file DES-1-10. The second application, which related to the respondents' request for disclosure of all relevant documents after the mediation failed, was addressed in DES-1-11. The

DES-1-10 application was disposed of in *Canada (Attorney General) v. Almalki et al,* 2010 FC 1106, [2012] 2 FCR 508 [*Almalki 2010*] and *Canada (Attorney General) v. Almalki,* 2011 FCA 199, [2012] 2 FCR 594 [*Almalki 2011*].

[9] It is over the course of the current section 38 proceeding in DES-1-11, in October 2014, that Bill C-44, an *Act to Amend the Canadian Security Intelligence Service Act and other Acts,* was introduced. It came into effect on April 23, 2015 as the *Protection of Canada from Terrorists Act,* S.C. 2015, c. 9. It is generally understood and agreed that the amendments at issue in this appeal were made in response to recent jurisprudential developments which indicated that contrary to CSIS's belief, their human sources did not benefit from the common law absolute privilege afforded to police informers. Indeed, the Supreme Court of Canada noted in *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37 at para. 87, [2014] 2 S.C.R. 33 [*Harkat*] that if this was felt to be desirable, only the legislator could create such a new class privilege. A similar message had been sent by our Court in *Almalki 2011* at para. 34.

[10] Consequently, the parties, including the duly appointed *amici*, made oral and written submissions to the judge with regard to the interpretation and application of the new and revised legislation, which could impact on the judge's ability to weigh the factors set out in section 38 of the *CEA* with respect to information that could identify human sources.

II. The Federal Court decision

[11] On November 23, 2015, the judge issued what he characterized as an interlocutory decision on this important and distinct question. Indeed, the judge notes at paragraph 63 of his

reasons that if section 18.1 applied to the case, "it [would] effectively oust [his] jurisdiction […] to adjudicate the disclosure of information which may identify a human source under s 38 of the *CEA*."

[12] The judge starts his analysis by stating that there is a strong presumption that the legislator does not intend its laws to apply either retroactively or retrospectively. He mentions that the distinction between retrospectivity and retroactivity can be difficult to ascertain. He then explains that while the parties agree that section 18.1 should not apply retroactively or retrospectively, they differ on whether its application in the proceeding before him would be prospective (see judge's reasons at para. 63).

[13] It appears that the debate before the judge was focused on whether section 18.1 was meant to apply to all proceedings, regardless of when they had started, provided there had been no disclosure of the human source information prior to that date. The judge appears to have accepted the arguments of the respondents that the focus should be on the definition of "human source" at section 2 of the *CSIS Act* (see para. 23 below), because when one applies the definition to this case, it refers to events that took place well before the amendments were adopted. Thus, the respondents argued that the application of section 18.1 would make it at least retrospective, if not retroactive.

[14] Interestingly, the judge notes that the respondents argued that the AGC seeks to confer new legal status on past events (see judge's reasons at para. 67), but does not discuss this argument any further before concluding that to apply section 18.1 to a human source that

provided information thirteen or fourteen years before the date of the enactment would be to give the legislation a retrospective effect (see judge's reasons at para. 72).

[15] In his view, the only question left to be resolved was whether the legislation affects substantive or vested rights. The judge's approach appears to have been based on paragraph 10 of *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272 [*Dineley*] (see judge's reasons at para. 61; see also my comments in that regard at paragraphs 30-31).

[16] The judge concludes that section 18.1 established a new class privilege that creates, in his view, substantive rights for human sources. The respondents and the *amici* contended that the right to confidentiality conferred to human sources is substantive, because it stems from a person's status as a source, which is attained as soon as certain events occur (see judge's reasons at para. 84). They submitted that both the right and status exist irrespective of whether there is litigation. It is on this basis that the judge finds that section 18.1 could not merely be a rule of evidence or procedure.

[17] Although he does not clearly explain why this is necessary in the context of his analysis, the judge then goes on to say that without expressing a view on the merits of the allegations in the respondents' civil actions, the court "could reasonably infer" that the application of section 18.1 "could have" an adverse effect on the respondents' ability to establish their claims before the Ontario Superior Court (see judge's reasons at para. 92).

[18] In the last part of his reasons, the judge considers an alternative basis for the conclusion that section 18.1 should not be applied. He goes on to review the application of the presumption against interference with vested rights and whether the respondents had a vested right in the disclosure of human source information subject only to a section 38 balancing assessment. At paragraphs 95-98, he sets out the legal principles that he intends to follow. However, it is difficult to ascertain the judge's reasoning in respect of the weight given to the presumption, since he mainly discusses arguments dealing with the nature of the rights that would be vested in the respondents, including the fact that his earlier decision in DES-1-10 could not be considered *res judicata* in respect of the new documents involved in DES-1-11. There is little discussion of the legislator's intent to rebut the presumption.

[19] The judge mentions that he could not accept that in a section 38 review, the right to information is not vested until the very moment it is disclosed. Rather, in his view, the respondents had a right to discovery as part of the civil trial process "from the outset" (see judge's reasons at para. 107). In a section 38 review, the question is whether the information which would normally be disclosed during discovery can be protected from disclosure on public interest grounds.

[20] The judge then mentions that in his view, he is not dealing with the repeal of an existing statute or even of an existing common law privilege. He found that *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271 [*Gustavson*] was of little help given that it was dealing with an income tax issue and the analogy with this case was weak. For him, it

was overreaching to compare the right to disclosure in an ongoing proceeding with the right to a specific tax exemption where annual changes ought to have been anticipated by taxpayers.

[21] On that basis, he concludes that he is satisfied that, at the time section 18.1 of the *CSIS Act* was brought into force, the respondents had a vested right to the established disclosure regime for the duration of the section 38 proceeding (see judge's reasons at para.110).

III. Legislation

[22] The new section 18.1 reads 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.
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	(3) L'identité d'une source humaine ou une information qui permettrait de découvrir cette identité peut être communiquée dans une instance visée

to in subsection (2) if the human source and the Director consent to the disclosure of that information.

au paragraphe (2) si la source humaine et le directeur y consentent.

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:

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.

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

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 indiquée sous réserve des conditions qu'il précise.

Effective date of order

(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.

Prise d'effet de l'ordonnance

(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

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

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

(b) information and other evidence

Confidentialité

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

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

b) d'autre part, des informations et

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.	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	**Confidentialité en appel**
(11) In the case of an appeal, subsection (10) applies, with any necessary modifications, to the court to which the appeal is taken.	(11) En cas d'appel, le paragraphe (10) s'applique, avec les adaptations nécessaires, aux tribunaux d'appel.

[23] "Human Source" is defined as follows at section 2:

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.

IV. Analysis

A. *Standard of review*

[24] The only question before us is the temporal application of section 18.1. This is a question of law, which is subject to the standard of review of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[25] However, the respondents and *amicus* (only one appeared before us) take the position that the distinct question of whether or not the respondents have a vested right is a question of mixed fact and law subject to the standard of palpable and overriding error. The AGC argues that this question is an integral part of the interpretation of section 18.1 and thus only involves a pure

question of law. In my view, which standard of review applies in respect of whether the respondents have a vested right is of no consequence in this case (see para. 57 below).

B. *Preliminary remarks*

[26] Before starting my analysis, I would like to make a few preliminary remarks that are important to keep in mind when reviewing the case law relied upon by the parties as well as any case law dealing with the difficult question of temporal application of statutes.

[27] The first hurdle, as mentioned by the judge, is the difficulty created by the inconsistent use of terminology in older textbooks and in the case law. Second, we ought to keep the various applicable principles of statutory construction distinct.

[28] The meaning of "retrospective" is not always clear, not only in the older authorities, but in modern authorities as well. In fact, it is often used as synonymous of "retroactive". This problem, as I said, persists to this very day despite consistent efforts by authors such as Elmer A. Driedger, Ruth Sullivan and P.A. Côté to warn against it. This is unfortunately compounded by the fact that distinct presumptions, such as those against the retroactive and the retrospective application of statutes (as defined and discussed by Driedger in "Statutes: Retroactive Retrospective Reflections" (1978) Can. B. Rev. 265 [*Retroactive Retrospective Reflections*], and by Côté in *Interpretation of Legislation in Canada* at 140-144), are often insufficiently distinguished from the presumption against interference with vested rights. The latter generally applies to all statutes, not only those that are retroactive or retrospective.

[29] It is obviously tempting to write more concisely in an attempt to summarise our thinking by merging various elements of these very distinct principles of construction. However, the risk in doing so is to unintentionally conflate presumptions that do not have the same strength and that may be rebutted by different methods.

[30] One such presumption provides that procedural provisions apply immediately to all proceedings under way in respect of all future steps taken. It may well be accurate to say that this presumption will not apply if the procedural provisions in question create or infringe upon substantive rights. However, this is not because it is an exception to the application of the presumption; rather, it is simply because a provision, by its very nature, is not merely or solely a procedural provision if it affects substantive rights. Thus, the presumption is simply not in play in such cases. In a different but related vein, even provisions that are of immediate or prospective application are subject to the presumption against interference with vested rights.

[31] As noted by Driedger, it is wrong to hold that a statute is either retroactive or retrospective simply because it interferes with vested rights (*Retroactive Retrospective Reflections* at 266). Indeed, once again, the presumption against interference with vested rights is quite distinct and does not have the same weight as the presumption against retroactivity or the presumption against retrospectivity. It may be that in practice, the same result is achieved. Still, because of the difficulty involved in temporal application in the absence of clear transitional provisions, one should keep those concepts separated to ensure that proper weight is given throughout the purposive analysis. For example, it is clear that Justice Deschamps did not mean to change the applicable rules of interpretation at paragraph 10 of *Dineley*. Such rules are more

fully described by Justice Cromwell at paragraph 35 of the same decision (see also Justice Bastarache in *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73 at paras. 45-51, [2005] 3 S.C.R. 530 [*Dikranian*]).

[32] Vested rights are necessarily substantive rights, for there is no vested right in a mere process or procedure. Thus, in that sense only, if a new provision interferes with vested rights it is an indication that it is not merely procedural. This explains the wording used by Justice Deschamps at paragraph 10 of *Dineley* in reference to *Wildman v. R.*, [1984] 2 S.C.R. 311, in which Justice Lamer was dealing with whether or not the rule of evidence in question involved substantive rights or was merely procedural.

[33] I will now turn to my analysis.

[34] In this appeal, the parties have raised arguments that are intended to address the following four distinct presumptions:

i. The presumption that the legislature does not intend legislation to be applied retroactively, that is, applied so as to change the past legal effect of a situation that has occurred completely in the past. This presumption is strong (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis, 2014) at 761, para. 1);

ii. The presumption that the legislature does not intend legislation to be applied retrospectively (as that term is defined by Driedger in *Retroactive Retrospective Reflections*), that is, applied so as to change the future legal effect of a situation that has

occurred completely in the past, unless it is enacted to protect the public. The weight of this presumption is variable (*Ibid* at 761, para. 2); it thus cannot simply be described as "strong", like the presumption against retroactivity;

iii. The presumption that the legislature intends procedural legislation to apply immediately to any ongoing proceeding and in respect of steps to be taken in the future (*Ibid* at 761, para. 5);

iv. The presumption that the legislature does not intend to interfere with vested rights. Again, the weight of this presumption varies depending on factors such as the nature of the protected right and how unfair or arbitrary it would be to abolish or curtail that right. The presumption is often rebutted without reference to express legislative language (*Ibid* at 761, para. 3; see also *Interpretation of Legislation in Canada* at 167).

[35] I do not intend to deal in much detail with the first or third presumption referred to above for in my view, they simply have no application here.

[36] Indeed, it is clear, in my view, that section 18.1 of the *CSIS Act* is not intended to have retroactive effect, i.e., to affect the past legal effects of a situation that has completely arisen in the past.

[37] I also agree with the respondents and the *amicus* that section 18.1 is not merely a procedural rule of evidence. As noted in *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para. 56, [2004] 2 S.C.R. 248, "[…] for a provision to be regarded as procedural,

it must be exclusively so." The judge's comment that the application of section 18.1 would oust his jurisdiction under section 38 in respect of information tending to identify human sources (see judge's reasons at para. 63) lends additional support to the other arguments discussed herein in respect of the substantive nature of section 18.1.

[38] Although some of the provisions in section 18.1 deal with the applicable procedure (see subsections 18.1 (4) to (7)), it does create a substantive right in favour of human sources based on the status of the individuals and their special relationship with CSIS. The class privilege created at section 18.1 is akin (albeit somewhat different) to the common law class privilege applicable to police informers which is described by this Court in *Almalki 2011* as "a legal rule of public order by which a judge is bound" (see paragraphs 15-18). This is consistent with the AGC's contention that the adoption of Bill C-44 resulted from the comments of the Supreme Court of Canada in *Harkat SCC*, where the Court confirmed that only the legislator could create such a class privilege for CSIS human sources if deemed desirable.

[39] Section 18.1 thus creates an exception to the right of the public "to every person's evidence" (*R. v. National Post*, 2010 SCC 16 at para. 1, [2010] 1 S.C.R. 477). It trumps the public interest in the disclosure of all the evidence by taking it out of the Federal Court jurisdiction under section 38 of the *CEA*.

[40] This interpretation is the only one consistent with the legislator's choice to include a specific paragraph spelling out very clearly that the purpose of the provision is to protect the life and security of human sources and to encourage individuals to provide information to CSIS (see

subsection 18.1(1)). It would make little sense to make such a declaration if the provision dealt with a mere process or procedure.

[41] The next question is thus whether the second presumption is in play (because section 18.1 deals with the future legal effect of a situation that has completely arisen before its enactment) or whether section 18.1 is simply prospective (i.e., whether it deals with the future legal effect of an ongoing situation, including an individual's status as a human source).

C. *Is the presumption against retrospectivity in play?*

[42] As mentioned at paragraph 16 above, when presenting their arguments to the judge, the respondents and the *amicus* argued that the right set out in section 18.1 is based on the status of an individual as a human source. I agree.

[43] Although this was meant to address the third presumption, this is an important point to consider when identifying the "situation" to which the statutory provisions under review are intended to apply or to which they attach legal consequences.

[44] Indeed, as both Côté and Driedger note, the most important step in applying the various presumptions is to correctly characterise the situation to which the statute applies: Pierre-André Coté, "La position temporelle des faits juridiques et l'application de la loi dans le temps" (1988) 22 R.J.T. 207 at 210-211 [*Position temporelle des faits juridiques*]; *Interpretation of Legislation in Canada* at 135. This is rarely an easy task and it requires a purposive interpretation of the

provision. As mentioned by Justice Iacobucci, writing for the Court in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at paras. 45-46, 208 N.R. 81 [*Benner*]:

> The question […] is one of characterization […].
>
> [M]any situations may be reasonably seen to involve both past discrete events and on-going conditions. A status or on-going condition will often, for example, stem from some past discrete event. A criminal conviction is a single discrete event, but it gives rise to the on-going condition of being detained, the status of "detainee". Similar observations could be made about a marriage or divorce. Successfully determining whether a particular case involves applying the *Charter* to a past event or simply to a current condition or status will involve determining whether, in all the circumstances, the most significant or relevant feature of the case is the past event or the current condition resulting from it. This is, as I already stated, a question of characterization, and will vary with the circumstances. Making this determination will depend on the facts of the case, on the law in question, and on the *Charter* right which the applicant seeks to apply.

[45] That a statutory provision is meant to attach consequences to a status or an ongoing situation is very different from when it is intended to deal with the future or past legal effect of an event that has completely arisen in the past: see *Benner* at para. 42, where Justice Iacobucci relies on Driedger's proposition as reasserted in *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983). It appears that this important step was not considered by the judge, who focused on the fact that in this case the individual events that brought about the relationship between an individual and CSIS took place long before section 18.1 was enacted. At the same time, the judge accepted that it is the ongoing status of the individual as a human source that gives rise to the so-called class privilege.

[46] The expression "human source" or "CSIS human source" is not new. It has often been used in the past (see for example *Canada (Attorney General) v. Telbani*, 2014 FC 1050 at paras. 45-47). It has even been used by the respondents in this very case well before the drafting of Bill

C-44 (see the part entitled *Human Source Information* in the judge's decision in *Almalki 2010* at paras. 163-170; see also *Almalki 2011* at paras. 10-34). In *Harkat* SCC at paras. 78-87, the same expression was also used where a different statutory regime was in play.

[47] There was no real need to include a definition of "human source" in the *CSIS Act*. Without one, there would be little doubt that the Act was meant to apply to the ongoing status (or the "state of being") of a human source. However, given the various jurisprudential comments about the past interpretation of this term by CSIS itself, one can surmise that the legislator found it desirable to define the "ingredients" that establish the relationship giving rise to the status of human source.

[48] When one considers the wording of the definition (see paragraph 23 above) in context, including the wording of paragraph 18.1(4)(a) which gives the right to argue that "an individual is not a source", the intention of the legislator is clear. Once an individual meets the criteria set out at section 2, he or she is a source and he or she keeps that status on an ongoing basis. To use the words of Driedger, it is "being" a source that brings about the legal consequences set out in section 18.1, even if the relationship which brought about this status was created before the enactment of the CSIS Act (see also *Position temporelle des faits juridiques* at 215-219, 228-29 and 236-237).

[49] At the hearing, the *amicus* agreed that the Court could reach such a conclusion. He noted that, in his view, the crucial question in this appeal was really the application of the presumption against interference with vested rights. I agree and will address this principle next.

[50] To conclude this part, considering that the new provisions are meant to apply to an ongoing situation, that is, the status as a human source, the presumption against the retrospective application of the statutory provisions under review is not in play.

[51] As the presumptions against retrospectivity and retroactivity are not in play, it is unnecessary to deal with the judge's finding that section 18.1 "could" ultimately have adverse effects on the respondents' ability to establish their claims in the Ontario Superior Court (see judge's reasons at para. 92).

[52] Indeed, he only appears to have considered necessary to deal with this issue, which he characterized as distinct from the one of whether the respondents had vested rights in the disclosure of the human source identifying information subject to section 38 (Part V.B.(3) of his reasons), because of his understanding that this made section 18.1 retrospective in its application (see judge's reasons at para. 61).

[53] In any event, given the limited nature of the information protected by section 18.1, the type of information that has been disclosed in section 38 proceedings in the past, and without knowing all the information that is already available to the respondents, it is impossible to assess the basis for this inference "of a possible impact."

D. *The presumption against interference with vested rights*

[54] Throughout my analysis, I have obviously followed the modern approach to statutory interpretation which requires one to read the words of the Act in their entire context (which

includes the applicable presumptions), in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. As noted by Justice Bastarache in *Dikranian*, it is particularly important in respect of the presumption against interference with vested rights to avoid falling into the trap of literal construction of the statutory provision: *Dikranian* at para. 36.

[55] Although this is the last part of the analysis, I thought that it would be more appropriate to discuss the purpose and the legislative evolution and history of the provision under review in more detail in this part to avoid repetition. I will do so after determining whether or not the respondents have a vested right that puts in play the presumption against interference with such rights.

[56] Except for the issue of *res judicata*, the arguments of the parties were substantially the same as those mentioned in Part V.B.(3) of the judge's reasons.

[57] As I noted earlier (see para. 25 above), I do not believe that the standard of review to be applied to this question is relevant, for I believe that the judge correctly decided that the right of the respondents to the disclosure of all relevant information subject to the application of section 38 is not merely a right to a process.

[58] In *Abou-Elmaati v. Canada (Attorney General)*, 2011 ONCA 95 at paras. 17-21, 330 D.L.R. (4th) 69 (a decision issued in the civil proceedings instituted by some of the respondents), the Ontario Court of Appeal found that the scheme established by section 38 of the *CEA* is in fact

a liberalization of the common law Crown privilege based upon international relations, national security and national defence which had previously been absolute and not open to any scrutiny.

[59] As alluded to earlier, the new section 18.1 effectively replaced the former rule that applied to CSIS human sources by deleting the reference to such sources in former subsection 18(1) of the *CSIS Act*. Indeed, former subsection 18(2) allowed the application of section 38 of the *CEA* up until the amendments were introduced in April 2015 (the former provisions are reproduced in Appendix A).

[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.

[61] In that sense, I agree with the *amicus* that the recent amendments change the "rules of the game to the disadvantage of the respondents" (Memorandum of Fact and Law of the *Amicus Curiae* at para. 29). This means that I must proceed to determine whether the presumption that the legislator did not intend such a result has been rebutted.

[62] As mentioned earlier at paragraph 34, the weight of this last presumption depends on various factors such as the nature and importance of the right the respondents seek to protect and how unfair or arbitrary it would be to deprive them of such a right. The Court must also try to

determine through purposive interpretation whether such unwanted consequences are necessary or warranted by the goal(s) the legislator sought to achieve.

[63] As noted by the judge at paragraph 43 of his reasons, "[i]n the words of the Bill's sponsor, the Minister of Public Safety and Emergency Preparedness, the purpose of this amendment [new section 18.1] was to give greater protection to CSIS's human sources."

[64] Subsection 18.1(1) expressly provides that:

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.

[65] The respondents say that, in respect of "true" human sources, the amendments are redundant and bring nothing over and above the protection afforded pursuant to section 38. In their memorandum, the respondents also say that to encourage individuals to provide information does not necessarily warrant an interference with their vested rights.

[66] I cannot accept those arguments. The legislator does not speak unnecessarily and the new legislation is presumed to be remedial. As argued by the AGC, the new statutory provisions were meant to fill a perceived gap after it was confirmed by the Supreme Court of Canada that the absolute common law privilege protecting police informers did not apply to CSIS human sources. This meant that, in theory, a judge could decide to release information identifying such

sources if he or she felt that the public interest in the disclosure prevailed. The adoption of section 18.1 signals that the legislator has balanced all the relevant factors and found that the public interest in the non-disclosure of this specific and somewhat limited type of information must trump all other rights, subject to paragraph 18.1(4)(b).

[67] It is also important to keep in mind that the legislator is presumed to know the law and how it has been applied. This means that the legislator, before adopting section 18.1, is presumed to have been aware of how section 38 has been applied and how the balancing between public interest in a disclosure versus the public interest in non-disclosure has been carried out. Indeed, the following remarks are also useful to assess the parameters of the vested right here in play.

[68] There was general agreement before us that as of now, the identity of human sources or of information tending to identify human sources has never been disclosed in the context of section 38 proceedings. This includes the section 38 proceeding in DES-1-10: the judge expressly notes at paragraph 25 of his reasons that no such information was disclosed to the respondents in DES-1-10.

[69] The judge also stated in his decision in *Almalki 2010* that the primary public interest in disclosure, which exists to ensure that the trial court has the fullest possible access to all relevant material, is not an overriding consideration that will compel a decision to disclose when national security is at stake (see *Almalki 2010* at para. 178). It is also relevant to mention that in *Almalki 2010*, the judge was very well aware of the public interest in holding government accountable for the alleged action and omission referred to in the respondents' civil proceedings. He noted

however that despite the alleged breaches of their *Charter* rights, the security and *Charter* rights of the respondents are not presently at stake in the underlying proceedings (see judge's reasons; *Almalki 2010* at paras. 181-185; see also the comments of this Court in *Almalki 2011* at paras. 32-33).

[70] When one considers the short delay between the Supreme Court decision in *Harkat* (May 2014) and the filing of Bill C-44 (October 2014), one can assume that Parliament saw the need to deal with the mischief addressed by the adoption of section 18.1 as urgent. That mischief was the perception that CSIS human sources were not automatically protected by a privilege of confidentiality akin to that of police informers, and that their protection was thus left entirely to the process set out in section 38.

[71] From this, I can only conclude that inasmuch as the respondents still have a "possibility" – albeit a remote one – of obtaining the disclosure of information identifying human sources under section 38, it is that very possibility that the legislator was addressing in adopting section 18.1.

[72] I agree with the *amicus* that section 18.1 would have been clearer and certainly made our task easier if the legislator had added, after "a proceeding before the Court" in subsection 18.1(2), the words "commenced before or after the coming into force of this subsection" (i.e., something similar to a transitional provision). However, when the actual words of the section are read in their proper context in accordance with the principles of purposive interpretation, the absence of this additional wording is not sufficient in my view to avoid the conclusion that the

legislator intended to protect the disclosure of the information described in section 18.1 in all proceedings.

[73] I agree with the AGC that when one considers the slight possibility of the respondents obtaining information that would identify human sources in the context of their section 38 proceeding, against the clear intention of Parliament to protect the life and security of every individual who is a human source (ongoing status), it is difficult, if not impossible, to conclude that Parliament would have intended to leave the possibility of a disclosure open. This is so because in the legislator's view, disclosure could have a direct impact on the life and security of human sources. Moreover, in my view, if it became known that the life of a human source was actually threatened or lost, regardless of when that person became a source, it could have an impact on CSIS' ability to recruit new human sources.

[74] Although this is not decisive, I also consider that the interference with the rights under review is not in this case arbitrary, nor is it unduly unfair. Under section 38, the judge would still ensure that the respondents get as much information as possible in respect of the substance of the information that was actually conveyed by the source. Further, subsection 18.1(4) sets out a number of protections to which the respondents may resort to, if necessary.

[75] Indeed, it is important to recall that the new scheme set out in section 18.1 includes the ability for parties like the respondents or the *amicus* to apply to the Court to challenge whether an individual is a human source within the meaning of the *CSIS Act* and whether information said to tend to identify such a source actually does.

[76] I also have some reservations with the view that the definition of "human source" in the *CSIS Act* is much broader than the definition of human source used by judges in the past. It may well be that CSIS has not been discriminate enough in the past in determining whether an individual is a "true" human source or not, but given the impact of section 18.1, I am confident that the courts will now very carefully monitor this process. It is too early to assume that the definition in section 2 of the *CSIS Act* will be construed broadly. One must wait for the jurisprudence to develop in the context of applications under subsection 18.1(2).

[77] I am satisfied that the presumption against interference with vested rights is rebutted in this case.

[78] For all the foregoing reasons, I conclude that section 18.1 is applicable to the section 38 proceeding in DES-1-11 and I propose to allow the appeal. I would set aside the judgment of the Federal Court and, rendering the decision that should have been made, I would declare that section 18.1 of the *CSIS Act* applies in the proceeding in DES-1-11.

"Johanne Gauthier"

J.A.

"I agree
A.F. Scott J.A."

"I agree
Yves de Montigny J.A."

APPENDIX A

18. (1) Subject to subsection (2), no person shall disclose any information that the person obtained or to which the person had access in the course of the performance by that person of duties and functions under this Act or the participation by that person in the administration or enforcement of this Act and from which the identity of

(a) any other person who is or was a confidential source of information or assistance to the Service, or

(b) any person who is or was an employee engaged in covert operational activities of the Service can be inferred

18. (1) Sous réserve du paragraphe (2), nul ne peut communiquer des informations qu'il a acquises ou auxquelles il avait accès dans l'exercice des fonctions qui lui sont conférées en vertu de la présente loi ou lors de sa participation à l'exécution ou au contrôle d'application de cette loi et qui permettraient de découvrir l'identité :

a) d'une autre personne qui fournit ou a fourni au Service des informations ou une aide à titre confidentiel;

b) d'une personne qui est ou était un employé occupé à des activités opérationnelles cachées du Service.

Exceptions

(2) A person may disclose information referred to in subsection (1) for the purposes of the performance of duties and functions under this Act or any other Act of Parliament or the administration or enforcement of this Act or as required by any other law or in the circumstances described in any of paragraphs 19(2)(a) to (d).

Exceptions

(2) La communication visée au paragraphe (1) peut se faire dans l'exercice de fonctions conférées en vertu de la présente loi ou de toute autre loi fédérale ou pour l'exécution ou le contrôle d'application de la présente loi, si une autre règle de droit l'exige ou dans les circonstances visées aux alinéas 19(2)a) à d).

Offence

(3) Everyone who contravenes subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Infraction

(3) Quiconque contrevient au paragraphe (1) est coupable :

a) soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable par procédure sommaire

19. (1) Information obtained in the performance of the duties and functions of the Service under this Act

19. (1) Les informations qu'acquiert le Service dans l'exercice des fonctions qui lui sont conférées en vertu de la

shall not be disclosed by the Service except in accordance with this section.

présente loi ne peuvent être communiquées qu'en conformité avec le présent article.

Idem

Idem

(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 :

(a) where the information may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province, to a peace officer having jurisdiction to investigate the alleged contravention and to the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged contravention may be taken;

a) lorsqu'elles peuvent servir dans le cadre d'une enquête ou de poursuites relatives à une infraction présumée à une loi fédérale ou provinciale, aux agents de la paix compétents pour mener l'enquête, au procureur général du Canada et au procureur général de la province où des poursuites peuvent être intentées à l'égard de cette infraction;

(b) where the information relates to the conduct of the international affairs of Canada, to the Minister of Foreign Affairs or a person designated by the Minister of Foreign Affairs for the purpose;

b) lorsqu'elles concernent la conduite des affaires internationales du Canada, au ministre des Affaires étrangères ou à la personne qu'il désigne à cette fin;

(c) where the information is relevant to the defence of Canada, to the Minister of National Defence or a person designated by the Minister of National Defence for the purpose; or

c) lorsqu'elles concernent la défense du Canada, au ministre de la Défense nationale ou à la personne qu'il désigne à cette fin;

(d) where, in the opinion of the Minister, disclosure of the information to any minister of the Crown or person in the federal public administration is essential in the public interest and that interest clearly outweighs any invasion of

d) lorsque, selon le ministre, leur communication à un ministre ou à une personne appartenant à l'administration publique fédérale est essentielle pour des raisons d'intérêt public et que celles-ci justifient nettement une éventuelle

privacy that could result from the disclosure, to that minister or person.

violation de la vie privée, à ce ministre ou à cette personne.

Report to Review Committee

(3) The Director shall, as soon as practicable after a disclosure referred to in paragraph (2) (d) is made, submit a report to the Review Committee with respect to the disclosure.

Rapport au comité de surveillance

(3) Dans les plus brefs délais possible après la communication visée à l'alinéa (2) (d), le directeur en fait rapport au comité de surveillance.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED NOVEMBER 23, 2015, DOCKET NO. DES-1-11 (2015 FC 1278)

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STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA V. ABDULLAH ALMALKI ET AL
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 14, 2016
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	SCOTT J.A. DE MONTIGNY J.A.
DATED:	JULY 8, 2016

APPEARANCES:

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