Federal Court Cour fédérale

**Date:** [redacted]

**Docket:** [redacted]

**Citation: 2017 FC 136**

**Ottawa, Ontario,** [redacted]

**PRESENT: The Honourable Mr. Justice S. Noël**

**BETWEEN:**

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] **JUDGMENT AND REASONS**

(Note: paragraph 2 was redacted and replaced in this public Judgment and Reasons)

## I. INTRODUCTION

[1] Given that parts of these reasons will be redacted in order to allow for publication, certain terms [redacted] have been replaced by much broader terms in order to obfuscate information which may tend to identify the case and type of proceeding before the Court for national security reasons. [redacted] The purpose of this approach is to make these reasons as public as possible without disclosing anything that could be interpreted as being related to a particular file or proceeding.

[2] [See note above] An issue arose, in a proceeding before the Court, regarding the proper procedure to be followed when the Government claims a privilege pursuant to section 18.1 of the *Canadian Security Intelligence Service Act* (*CSIS Act*) applies in an *in camera*, *ex parte* proceeding.

[3] As a result, Government Counsel and Opposing Counsel disagreed on the applicability of the privilege claimed. They also disagreed, if a privilege does indeed exist, on whether it forbids the designated judge from reading the un-redacted operational report.

[4] The undersigned received submissions from Government Counsel and Opposing Counsel on both issues and took the matter under reserve. Since the issues of scope and temporal applicability of the privilege were the subject matters of an appeal to the Federal Court of Appeal

in *Attorney General of Canada v Almalki*, 2016 FCA 195 ("*Almalki 2016*"), the matter was put on hold until that decision was rendered in July 2016.

[5] As a result of the *Amalki 2016* decision, the issue of privilege is now resolved: a class privilege applies to the facts involving a CSIS human source in the present case.

[6] The only remaining issue before the Court today is whether the redacted information produced to the designated judge [redacted] may be viewed in its un-redacted form by both the Court and Opposing Counsel, the designated judge only, or not at all. Opposing Counsel first contend that the un-redacted information ought never to be produced to any person. Second, alternatively, they contended that both Opposing Counsel and the designated judge ought to receive the information. Government Counsel take the position that the s. 18.1 CSIS human source privilege is not meant to be applicable to the designated judge. This is the only legal issue I will be dealing with. In regard to the question of whether or not the Opposing Counsel have a right to view the redacted information, the submissions presented are so limited that I must leave this issue to be resolved in another proceeding.

## II. OPPOSING COUNSEL'S SUBMISSIONS

[7] In regard to whether or not the designated judge may access the un-redacted operational report, the Opposing Counsel argue that the disclosure of the information to the Court in the absence of an application pursuant to subsection 18.1(4) was an inadvertent breach of the s. 18.1 privilege. The privilege should be restored by the withdrawal of non-redacted operational report.

[8] The Opposing Counsel's written submissions addressing whether the s. 18.1 CSIS human source privilege is applicable to the designated judge were particularly succinct. I insert them here:

> "[16] The [Opposing Counsel] consider s.18.1 to be unconstitutional, in that it purports to deny the judge and [Opposing Counsel] access to any information from which the identity of a human source could be inferred, without distinguishing among circumstances in which such disclosure might be required in the interests of justice, and thus interferes with their constitutionally mandated roles pursuant to [redacted] the *Charter*. However, this is not a circumstance in which the [Opposing Counsel] consider it appropriate to launch a constitutional challenge."

[9] The Opposing Counsel added to the brief written submissions on the topic over the course of a hearing on the matter. First and foremost, Opposing Counsel submitted that the new s. 18.1 statutory regime must be interpreted strictly and literally. Following the enactment of the s. 18.1 CSIS human source privilege, the source is on equal footing with the Service in regard to taking decisions relating to the disclosure of information identifying, or tending to identify the identity of the intelligence human source. Opposing Counsel contend that, if the Ministers cannot obtain the consent of both the Director of the CSIS and of the CSIS human source to provide the designated judge with information identifying, or tending to identify the CSIS human source, then the designated judge must evaluate the validity of the case before him or her accordingly [see Transcript page 40 for details].

[10] In regard to the duty to provide information stemming from *Ruby v Canada (Solicitor General)*, [2002] 4 SCR 3, 2002 SCC 75 ("*Ruby*"), Opposing Counsel contend that the s. 18.1 scheme of necessitating consent from the Director of the CSIS and the CSIS human source to

provide information identifying, or tending to identify, the CSIS human source meets the requirements of *Ruby*. In the alternative, if the s. 18.1 scheme does not meet the duty of disclosure under *Ruby*, then it is the statute's intended effect.

[11] I must admit that I have much difficulty reconciling the position taken by the Opposing Counsel in this case [redacted] As such, given that the written submissions on the subject were limited in length, I put forward my concerns to Opposing Counsel over the course of the oral submissions. Given that a thorough understanding of the issues benefits all, I insert here extracts I think are relevant to confirming and completing Opposing Counsel's written position:

> JUSTICE NOËL: Are you saying as a [Opposing Counsel] that this Court does not have the jurisdiction without a motion to view a source's information to the point of even being able to identify? Is that what you are saying to this Court? The big concern I have is this.
>
> [Opposing Counsel]: Just to be clear, our position is that the statute precludes anyone, you or us, from getting access to the identity of the source in the absence of a section 18.1(4) application or 18.1(3).
>
> JUSTICE NOËL: How would I be assuming my responsibilities [redacted] to use one example? [redacted] I have an obligation to view the information and decide what can be made public through a summary or not. [redacted]
>
> [Opposing Counsel]: The way this new provision is meant to operate, and it changes the landscape, in my respectful submission, from what existed previously, this provision is meant to operate on – your access or the Court's access to the privileged information is triggered by an application under 18.1(4). […] [Transcript pages 4–5]

[…]

JUSTICE NOËL: I hear you. I hear everything you are saying. But what I hear is counsel are telling this Court that the tools we have to operate in the interests of justice should not exist anymore while you have CSIS, the Government of Canada, arguing differently. I'm extremely surprised. [redacted] I'm surprised that you are putting forward this type of argument.

[Opposing Counsel]: You may be surprised, but it follows from the statute and the statute creates a brand new regime. […] [Transcript page 10]

[…]

JUSTICE NOËL: I don't see the bridge you are doing. I will repeat, I will not go so far as – you are so mindset in getting access to that potential power that you are ready to take it away from the judge at the cost of making a big fight, a constitutional fight, at the end to declare that this 18.1 is – that is, in essence, what I hear.

[Opposing Counsel]: I'm not trying to have a constitutional argument. That's not going to arise in this case.

JUSTICE NOËL: But the potential price you are asking the system is the whole thing falls apart because us [Opposing Counsel] do not have the same rights as the judge because we don't think the judge has the right to view it. "If you, judge, view this information, we must see it." That is what I hear from you. […]

JUSTICE NOËL: And I'm going to say that you raised this argument without even putting any substance into it. So you're not helping the Court at all. [Transcript pages 13-14]

[…]

JUSTICE NOËL: You being a very experienced lawyer pushing this argument, you realize that you are limiting the designated judge's power, [redacted] You are even limiting now with an extensive argument that Ruby may be limited when it comes to human source information. And you are limiting, through your argument now, [redacted] will therefore, in the future, be limited. As [Opposing Counsel], officers of the Court, if I follow your argument to the extent that I am pushing you, you are saying "Yes, that's the way it has to be. That's the way we're reading it."

> [Opposing Counsel]: I don't want to sort of rehash this, but I do want to say that the position we are advancing before you is how we read this statute, which is why I should say we think this statute is infirm, and it's infirm for a variety of reasons.
>
> JUSTICE NOËL: But interpretation of statutes says, "Hey, don't look at the facts only. You have to look at the whole thing."
>
> [Opposing Counsel]: Right.
>
> JUSTICE NOËL: That's clear now. You are doing a strict literal interpretation.
>
> [Opposing Counsel]: The reason I am doing this, my Lord – […] [Transcript pages 54-55]
>
> […]
>
> [Opposing Counsel]: […] [O]ur position is that the security of the information to you is equivalent to the security of to us. [Transcript page 56]
>
> […]
>
> JUSTICE NOËL: It's the world upside down for me. CSIS is arguing openness and you are arguing closed-ness. It's unbelievable.
>
> [Opposing Counsel]: I know. It's -- and we were talking about this before, actually, amongst us, about the interpretation of the provision. The concern on our side and the conclusion we reached is we have to deploy a strict interpretation in this way. We concluded that the provision can operate flexibly to give information to designated judges. It's all about identity and it's all about consents. […] [Transcript page 58]

[12] Following the oral hearing, the Opposing Counsel's position was made clear: they are advocating for a strict and literal interpretation of the new s. 18.1 scheme. In the next section, I will detail the interpretation proposed by Counsel for the Government.

## III. COUNSEL FOR THE GOVERNMENT'S SUBMISSIONS

[13] Counsel for the Government contend that the protection of a CSIS human source's life and security stemming from the effect of s. 18.1 is compatible with the Court's statutory duties under the relevant legislative regime. Information from which the identity of a CSIS human source may be inferred should be disclosed to the designated judge but not to the Opposing Counsel when a s. 18.1 claim of privilege is put forward. The proper purposive interpretation of s. 18.1 of the *CSIS Act* should respect the CSIS human source's s. 7 rights (liberty and security) all the while permitting the Court to fulfill its statutory duties.

[14] The wording of subsection 18.1(2), which prohibits disclosure of CSIS human source information, does not specifically address which party is barred from receiving disclosure. Counsel for the Government contend that in a litigation context, disclosure is understood as disclosure to one's litigation opponent. Counsel for the Government rely on Black's Law Dictionary's definition of "disclosure" to support this interpretation: "the act or process of making known something that was previously unknown" or the "mandatory divulging of information to litigation opponent according to procedural rules." Consequently, Counsel for the Government submit that the Court is not the "litigation opponent" of the Counsel for the Government. They argue that s. 18.1 must be interpreted in a way that permits the designated judge to perform his or her role as an independent adjudicator of issues under s. 18.1. They add that disclosure to the designated judge ensures that the Counsel for the Government are not the sole arbiters of what information should or should not be disclosed to any other party.
In practice, the designated judge may be provided the CSIS human source information in order to assess whether the privilege exists or if the innocence at stake exception applies.

[15] Counsel for the Government add that, generally speaking, when Parliament intends for judges to be prohibited from examining information, it explicitly states so in law. Counsel for the Government refer to subsection 39(1) of the *Canada Evidence Act*, RSC 1985, c C-5, regarding cabinet confidences, as one amongst other examples:

| *Canada Evidence Act*, RSC 1985, c C-5 | *Loi sur la preuve au Canada*, LRC (1985), ch C-5 |
|---|---|
| **Confidences of the Queen's Privy Council for Canada** | **Renseignements confidentiels du Conseil privé de la Reine pour le Canada** |
| **Objection relating to a confidence of the Queen's Privy Council** | **Opposition relative à un renseignement confidentiel du Conseil privé de la Reine pour le Canada** |
| 39(1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused <u>without examination or hearing of the information by the court</u>, person or body. | 39(1) Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, <u>sans l'examiner ni tenir d'audition à son sujet</u>, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada. |
| [Emphasis added.] | [Non souligné dans l'original.] |

[16] In response to Counsel for the Government's argument that s. 39 of the *Canada Evidence Act*, in regard to cabinet confidences, explicitly bars judges from receiving any form of un-

redacted information, the Opposing Counsel contends that the stated purpose of the 18.1 privilege is to protect the s. 7 *Charter* rights of the CSIS human source and the fact that subsection 18.1(2) includes the words "no person shall disclose" differentiates the two statutory regimes.

[17] Counsel for the Government also submit that the Supreme Court of Canada, in *Canada (Citizenship and Immigration) v Harkat*, [2014] 2 SCR 33, 2014 SCC 37 ("*Harkat 2014*"), at para 46, confirmed that the designated judge plays the role of gatekeeper in *ex parte*, *in camera* proceedings:

> [46] The judge is vested with broad discretion and must ensure not only that the record supports the reasonableness of the minister's finding of inadmissibility, but also that the overall process is fair […]. Indeed, the *IRPA* scheme expressly requires the judge to take into account "considerations of fairness and natural justice" when conducting the proceedings: s. 83(1)(a), *IRPA*. […]

[18] 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. 18.1 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 intendent

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.

## IV. ISSUE

[19] Is the CSIS human source privilege contained in s. 18.1 of the *CSIS Act* applicable to the designated judge?

## V. ANALYSIS

### A. *Overview of the New CSIS Human Source Privilege*

[20] As a result of *Harkat 2014*, which found that CSIS human sources were not protected by a class privilege, the legislator amended the *CSIS Act* to create such a new statutory privilege. The purposes of this new privilege are to ensure that the identity of CSIS human sources remains confidential in order to protect their life and security and to encourage individuals to provide information to the CSIS (s. 18.1(1) of the *CSIS Act*).

[21] As such, in any proceeding before a Court, disclosure of the identity of a CSIS human source, or any information from which the identity of a CSIS human source may be identified, is forbidden (s. 18.1(2) of the *CSIS Act*). As Counsel for the Government have argued, s. 18.1(2) of the *CSIS Act* does not specify to whom disclosure should be prohibited. As I interpret it, the privilege is applicable to: courts with jurisdiction to compel the production of information or to disclose the identity of a human source or any information from which the identity of a human

source could be inferred; to judges; to parties; and of course to the public, unless the CSIS human source and the Director of the CSIS consent to such disclosure (s. 18.1(3)).

[22] If an application to be provided such disclosure is served and filed, the matter is referred to the Registry of the Federal Court which will forward it to the Designated Proceedings Section. The Chief Justice will then assign the matter to a designated judge. In addition, a copy of the application will be served to the Attorney General of Canada, who, upon being served, becomes a party to the litigation (see s. 2, 18.1(4) to (6), and the definition of "*judge*" in the *CSIS Act*).

[23] In the application served and filed with the Registry of the Federal Court, a party, an *amicus*, or a special advocate (for the purposes of a hearing involving s. 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*")), may seek an order declaring that the individual is not a CSIS human source or that the information sought does not identify, or tend to identify the CSIS human source.

[24] If the proceeding where disclosure is sought relates to the prosecution of an offence, then the above-mentioned individuals may seek an order declaring that disclosure of the identity of the CSIS human source is essential to establishing the innocence of the accused (see s. 18.1(4)(a) and (b).

B. *General Findings and Principles of Interpretation*

[25] I agree with Counsel for the Government's submissions. I am also of the opinion that the CSIS human source privilege of s. 18.1 of the *CSIS Act* is not applicable to a designated judge for the following reasons.

[26] A strong indicator that Parliament expects designated judge to receive extremely sensitive national security information is found at paragraph 38.01(6)(*d*) of the *Canada Evidence Act*. That paragraph refers to a schedule listing designated entities which are excluded from the ambit of the s. 38 scheme of the *Canada Evidence Act*, which prohibits disclosure of sensitive information. In that schedule, it is clear that designated judges, through their national security responsibilities, are often tasked with vetting whether sensitive information ought to be released or kept protected. Such responsibilities include: applications for warrants under the *CSIS Act*, RSC 1985, c C-23; certificates of ineligibility to become a charity under the *Charities and Registration (Security of Information) Act*, SC 2001, c 41, s 113; certain areas of law under the *Immigration and Refugee Protection Act*, SC 2001, c 27; appeals of denials of transportation under the *Secure Air Travel Act*, SC 2015, c 20, s 11; judicial review of denial of access to a requested record under the *Access to Information Act*, RSC 1985, c A-1; judicial review of denial of access to personal information under the *Privacy Act*, RSC 1985, c P-21; applications following the discontinuance of an investigation of a complaint under the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5; and finally appeals of passport cancellations under the *Prevention of Terrorist Travel Act*, SC 2015, c 36, s 42. I note that both special advocates and *amici curiae* are not listed anywhere in the designated entities schedule. Here are the relevant parts of the schedule:

SCHEDULE ANNEXE

(Paragraph 38.01(6)(*d*) and subsection 38.01(8))

DESIGNATED ENTITIES

1. A judge of the Federal Court, for the purposes of section 21 of the *Canadian Security Intelligence Act*.

2. A judge of the Federal Court, for the purposes of sections 6 and 7 of *the Charities Registration (Security of Information) Act*, except where the hearing is open to the public.

3. A judge of the Federal Court, the Federal Court of Appeal or the Immigration Division or Immigration Appeal Division of the Immigration and Refugee Board, for the purposes of sections 77 to 87.1 of the *Immigration and Refugee Protection Act*.

4. A judge of the Federal Court, for the purposes of section 16 of the *Secure Air Travel Act*.

15. A judge of the Federal Court, for the purposes of sections 41 and 42 of the *Access to Information Act*.

16. A judge of the Federal Court, for the purposes of sections 41 to 43 of the *Privacy Act*.

(Alinéa 38.01(6)*d*) et paragraphe 38.01(8)

ENTITÉS DÉSIGNÉES

1. Un juge de la Cour fédérale, pour l'application de l'article 21 de la *Loi sur le Service canadien du renseignement de sécurité*.

2. Un juge de la Cour fédérale, pour l'application des articles 6 et 7 de la *Loi sur l'enregistrement des organismes de bienfaisance (renseignement de sécurité)*, sauf dans le cas où l'audition est ouverte au public.

3. Un juge de la Cour fédérale, la Cour d'appel fédérale ou la Section de l'immigration ou la Section d'appel de l'immigration de la Commission de l'immigration et du statut de réfugié pour l'application des articles 77 à 87.1 de la *Loi sur l'immigration et la protection des réfugiés*.

4. Un juge de la Cour fédérale, pour l'application de l'article 16 de la *Loi sur la sûreté des déplacements aériens*.

15. Un juge de la Cour fédérale, pour l'application des articles 41 et 42 de la *Loi sur l'accès à l'information*.

16. Un juge de la Cour fédérale, pour l'application des articles 41 à 43 de la *Loi sur la protection des renseignements personnels*.

| | |
|---|---|
| 17. A judge of the Federal Court, for the purposes of sections 14 to 17 of the *Personal Information Protection and Electronic Documents Act*. | 17. Un juge de la Cour fédérale, pour l'application des articles 14 à 17 de la *Loi sur la protection des renseignements personnels et les documents électroniques*. |
| 21. A judge of the Federal Court, for the purposes of sections 4 and 6 of the *Prevention of Terrorist Travel Act*. | 21. Un juge de la Cour fédérale, pour l'application des articles 4 et 6 de la *Loi sur la prévention des voyages de terroristes*. |

[27] In addition, as part of their overarching judicial duties to ensure the proper administration of justice and fairness in *ex parte*, *in camera* proceedings, designated judges can raise and address questions of disclosure without a s. 18.1(4) application triggered by the specified persons. I agree with Counsel for the Government's position that allowing the designated judge to review the un-redacted information strikes the appropriate balance between the legislative intent behind s. 18.1, the s. 7 rights of CSIS human sources, and the designated judge's overarching statutory duties to promote fairness and the proper administration of justice.

[28] I also agree with the position that the designated judge can receive disclosure of the un-redacted information because he or she is not the Counsel for the Government's litigation opponent under the scope of the meaning of "disclosure" as enacted at subsection 18.1(2).

[29] I further endorse Counsel for the Government's contention that s. 18.1 must be interpreted in a manner allowing the designated judge to perform his or her duties as an independent adjudicator. Counsel for the Government themselves submit that they should not be the sole arbiters of what information should or should not be disclosed to any other party.

In practice, the designated judge must be provided the un-redacted information in order to determine whether the privilege exists or if any exceptions to it apply.

[30] I also find compelling the argument that Parliament generally explicitly states in law when it intends that judges are to be prohibited from even examining information to determine whether a claim of privilege is valid or to verify a fact related to a CSIS human source. Counsel for the Government refer, as an example of a specific prohibition, to subsection 39(1) of the *Canada Evidence Act* in regard to cabinet confidences. Section 18.1 contains no such specific prohibition on the information the presiding judge may receive to adjudicate a claim of CSIS human source privilege. The words “no person shall disclose” do indeed prohibit anybody holding CSIS human source information from disclosing it. However, when considered in the context of the Act as a whole, they do not forbid communication of that delicate information to the designated judge who has the ultimate responsibility of ensuring fairness and the proper administration of justice.

[31] The designated judge plays an expanded gatekeeper role in national security matters because he or she bears wider responsibilities, due to the confidential and closed nature of the proceedings. Both the jurisprudence and the legislation establish the responsibilities of the designated judge, notably the Supreme Court’s *Harkat* decision in 2014 and the IRPA. The Supreme Court provided a useful synopsis of these responsibilities at paragraph 46 of *Harkat 2014*:

> [46] First, the designated judge is intended to play a gatekeeper role. The judge is vested with broad discretion and must ensure not only that the record supports the reasonableness of the ministers’ finding of inadmissibility but also that the overall process is fair:

> "… in a special advocate system, an unusual burden will continue to fall on judges to respond to the absence of the named person by pressing the government side more vigorously than might otherwise be the case" (C. Forcese and L. Waldman, "Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and new Zealand on the Use of 'Special Advocates' in National Security Proceedings" (2007) (online), at p. 60). Indeed, the *IRPA* scheme expressly requires the judge to take into account "considerations of fairness and natural justice" when conducting the proceedings: s. 83(1)(*a*), *IRPA*. The designated judge must take an interventionist approach, while stopping short of assuming an inquisitorial role.

[32] Given that the designated judge's duties, as elaborated above, stem from an overriding responsibility to ensure fairness and the proper administration of justice, such duties are not limited to security certificate proceedings. The distinction between the responsibilities of the designated judge, *amici curiae*, and special advocates extends beyond certificate proceedings and applies to all relevant situations in the field of national security where confidential information and CSIS human source issues can arise. Justice De Montigny, in *Canada (Attorney General)* v *Telbani*, 2014 FC 1050, highlighted these differences and similarities at paragraph 27:

> [27] That said, there is no precise definition of the role of *amicus* that is applicable to all possible situations where a court may find it beneficial to obtain advice from a lawyer not acting on behalf of the parties: *R v Cairenius* (2008), 232 CCC(3d) 13, at paragraphs 52-59; *R v Samra* (1998), 42 O.R.(3d) 434 (C.A.). It is generally agreed that the appointment of an *amicus* is generally intended to represent interests that are not represented before the court, to inform the court of certain factors it would not otherwise be aware of, or to advise the court on a question of law: see *Attorney General of Canada et al v Aluminium Company of Canada*, (1987) 35 DLR (4th) 495, at page 505 (BCCA).

[33] The Supreme Court provided further useful details in *R v Basi*, [2009] 3 SCR 389, 2009 SCC 52, notably at paragraphs 39, 44, 52-53:

> [39] In determining whether the privilege exists, the judge must be satisfied, on a balance of probabilities, that the individual concerned is indeed a confidential informant. And if the claim of privilege is established, the judge must give it full effect. As we have seen, *Named Person* established that trial judges have no discretion to do otherwise. […]
>
> [44] It thus remains as true in this case as it was in *Named Person* that "[w]hile the judge is determining whether the privilege applies, all caution must be taken on the assumption that it does apply" (para. 47). No one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies. It follows that the trial judge erred in permitting defence counsel to hear the testimony of an officer tending to reveal the identity of the putative informant at the "first stage" hearing. […]
>
> [52] Of course, withheld material over which the informer privilege is claimed might in some instances assist the defence, for example, by providing a trail to other relevant and helpful evidence, or in preparing and conducting the cross-examination of Crown witnesses. The withheld material might even be indicative of innocence, while still falling outside the narrow "innocence at stake" exception to the privilege. It is therefore essential that claims of privilege be resolved accurately and fairly, bearing in mind that *ex parte* proceedings raise serious procedural fairness concerns of particular significance in the conduct of criminal prosecutions, where the liberty of the accused is at stake.
>
> [53] Where a hearing is required to resolve a Crown claim of privilege, the accused and defence counsel should therefore be excluded from the proceedings only when the identity of the confidential informant cannot be otherwise protected. And, even then, only to the necessary extent. In determining whether the claim of privilege has been made out, trial judges should make every effort to avoid unnecessary complexity or delay, without compromising the ability of the accused to make full answer and defence. […]
>
> [Emphasis added.]

[34] The strict and literal arguments put forward by Opposing Counsel do not seem to consider their impact on the work of designated judges in warrant applications (under

the *CSIS Act*), certificate proceedings (under *IRPA*) and s. 38 motions (under the *Canada Evidence Act*), amongst others. A brief review of legislative rules of interpretation is required here before describing the impacts of the strict and literal arguments proposed by Opposing Counsel. In *X (Re)*, 2016 FC 1105, I detailed the accepted modern principles of interpretation at paragraphs 110 to 112, I repeat them here:

> [110] In her book *Sullivan on the Construction of Statutes*, Prof. Sullivan sets forth the classic three-pronged method to interpretation: the ordinary meaning approach using the text of the statute as the primary source, the contextual approach as originally described by Elmer Driedger and refined by the Supreme Court following its endorsement of the method in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, and the purposive approach in order to consider the practical idea behind the enactment of both the relevant section and the statute as a whole, as well as the real world effects of the Court's interpretation. (Ruth Sullivan, *Sullivan on the Construction of Statues*, 6th ed (Markham: Lexis Nexis, 2014) at para 2.1.)
>
> [111] The Federal Court of Appeal, in *X (Re)*, 2014 FCA 249, at paragraphs 68 to 71, summarizes how a statute should be interpreted:
>
> > [68] The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:
> >
> > > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > See: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 (CanLII), [2001] 2 SCR 867 at paragraph 29.

[69] The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54 (CanLII), [2005] 2 SCR 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v Canada*, 1999 CanLII 639 (SCC), [1999] 3 SCR 804, at para. 50.
> The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[70] This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v Canada (Attorney General)*, 2011 SCC 1 (CanLII), [2011] 1 SCR 3 at paragraph 21, and *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306 at paragraph 27.

[71] Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)*, 2006 SCC 4

> (CanLII), [2006] 1 SCR 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v Monney*, 1999 CanLII 678 (SCC), [1999] 1 SCR 652 at paragraph 26).

[112] As expressed by the Federal Court of Appeal, both Prof. Côté and Prof. Sullivan, in their most recent works, proclaim that the ordinary meaning approach by itself is no longer sufficient. Rather, both leading authors agree that context is paramount and interpretation is legitimate even if the ordinary meaning seems clear. Prof. Côté indicates:

> "[…] [W]e want to note our profound disagreement with the idea that interpretation is legitimate or appropriate only when the text is obscure. This idea is based on the view, incorrect, that the meaning of a legal rule is identical to its literal legislative wording. The role of the interpreter is to establish the meaning of rules, not texts, with textual meaning at most the starting point of a process which necessarily takes into account extra-textual elements. The prima facie meaning of a text must be construed in the light of the other indicia relevant to interpretation. A competent interpreter asks whether the rule so construed can be reconciled with the other rules and principles of the legal system: Is this meaning consistent with the history of the text? Do the consequences of construing the rule solely in terms of the literal rule justify revisiting the interpretation? and so on."
>
> (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 268-269 ["PA Côté 2011"].)
>
> [Emphasis added.]

[35] Having generally described my opinion of the arguments presented orally and in writing, the interpretative principles applicable and the scheme surrounding the s. 18.1 CSIS human source privilege, and the role of designated judges in applying claims of privilege, I now turn to

detailing the potential impact of Opposing Counsel's position on various areas of law outside the immediate scope of this case. I will also seize this opportunity to hopefully shed some light on the work of designated judges in various types of proceedings.

C. *Effects of the New Privilege on Various Areas of Law Relating to National Security*

(1) Warrant Applications Under the *CSIS Act*

[36] Before the early 2000's, warrant applications presented to designated judges contained limited information on the CSIS human source involved. Following repeated requests by designated judges, counsel for the CSIS started adding more pertinent information on the CSIS human source to warrant applications. Designated judges rely on such valuable details to assess, examine, and ultimately decide whether a warrant should be issued. The application process has evolved so much over time that a detailed document called a "*précis*" on the topic of the CSIS human source involved must now be included in all warrant applications. The *précis* must be informative, detailed, and address concerns such as the credibility, [redacted] of the CSIS human source. The document does not explicitly identify the source but provides enough information that, through a proper reading of the affidavit(s) in support of the application [redacted] the identity of the CSIS human source could potentially be inferred. [redacted] Further, the designated judge may have good reasons to ask for the identity of the CSIS human source, as has been done in certain cases.

Surely, as Government Counsel argue, the CSIS human source privilege found at s. 18.1 of the *CSIS Act* is not meant to forbid such disclosure.

(2) Certificate Proceedings Under IRPA

[37] A similar situation arises from security certificate proceedings under the IRPA. Shortly following the genesis of modern security certificate proceedings, designated judges made it a point to ensure that fairness was properly applied. Specifically, they wanted to ensure that they were provided a full and fair portrayal of the facts regarding both general public information and confidential information related to CSIS human sources. The designated judges maintained that they must know such confidential CSIS human source information, if it existed, in order to confirm that it was valid and that the Ministers and their counsel were not retaining information of importance which could create an unfair situation for the named person.

[38] In *Harkat (Re)*, 345 FTR 143, 2009 FC 553, and *Harkat (Re)*, [2010] 4 FCR 149, 2009 FC 1050, both mentioned by the Supreme Court in *Harkat 2014*, at para 13, a problematic situation concerning a CSIS human source arose which brought me to actively seek all the information about the source in order to ensure the proper administration of justice. In the end, the identity of the CSIS human source was never communicated to me, the designated judge, but I was provided all the relevant information concerning that person: occupation, whereabouts, marital status, etc. It was a struggle to reach that position of sufficient knowledge to properly assume my judicial duties given that Ministers and their counsel, rightly so at the time, vehemently protected the information. This difficult situation gradually progressed to a positive outcome following several discussions, some involving special advocates. Ultimately, I was

sufficiently informed and able to address the matters at issue. The remedy I selected to answer the identified breach of the integrity of the Court's processes was to give access to the special advocates to the files on the human source; this solution was exceptional and emanated from the specific facts of the case. Yet, although exceptional, the option to provide such remedy allowed fairness and the proper administration of justice to prevail. Surely the CSIS human source privilege created by s. 18.1 of the *CSIS Act* is not meant to forbid similar disclosure to a designated judge who bears the heavy responsibility of ensuring fairness for the named person and the proper administration of justice.

(3) Section 38 of the *Canada Evidence Act*

[39] In regard to the involvement of designated judges in proceedings under s. 38 of the *Canada Evidence Act*, it goes without saying that issues concerning CSIS human sources arise. Designated judges, depending on the particulars of each case, sometime seek additional facts surrounding the CSIS human source in order to ensure that they are fully informed and able to properly assume their judicial duties. Such requests for additional information are made by the designated judge him or herself, not necessarily by the *amicus curiae*. In fact, only the designated judge involved receives the information; the *amicus curiae* who may be part of the proceedings, for example by arguing whether or not the designated judge should receive disclosure, does not receive the information.

[40] There may be other, exceptional, circumstances where a designated judge could consider disclosing the information to Opposing Counsel. I will refrain from addressing this topic further,

as I am only addressing a single issue with these reasons: whether the CSIS human source privilege is applicable to the designated judge or not.

[41] Again, I posit that Parliament cannot have intended to bar the designated judge from requesting CSIS human source information in these types of proceedings through enacting the s. 18.1 CSIS human source privilege. In brief, preventing the designated judge from obtaining this information would hinder the designated judge from assuming his or her judicial duties and compromise the proper administration of justice.

[42] The circumstances affected by the new s. 18.1 CSIS human source privilege I have enumerated above are but examples; there may be other areas of law that will be impacted.

D. *Duty of Candour*

[43] Furthermore, on another matter, as decided in *Ruby* and reiterated in *Harkat 2014*, it is now well recognized that counsel for the CSIS have an elevated duty of candour towards the designated judges presiding over *ex parte, in camera* hearings which obliges them to be fully frank and open with the Court. Counsel for the CSIS must not only inform the Court of the positive aspects of their case, but also of its downsides, if any. If counsel for the CSIS is concerned with certain information regarding a CSIS human source which may impact the underlying proceeding, does the new s. 18.1 CSIS human source privilege bar the judge from receiving notice of these difficulties? This question was put to Opposing Counsel; here is their response:

> [Opposing Counsel]: […] You could receive information -- and I am sure you have in your warrant cases where they don't reveal the identity of the source, but you know what the source has provided them with, the information that they have given. They can give that because it doesn’t reveal the identity of the source and they don't need consent for that. But if they are going to reveal the identity of the source, they need consent.
>
> JUSTICE NOËL: Therefore, if they cannot obtain consent, what will they do?
>
> [Opposing Counsel]: That's the thing about this statute, and that's the thing that is interesting about this statute, from my perspective.
>
> JUSTICE NOËL: What's the next step, then?
>
> [Opposing Counsel]: If they cannot reveal the identity of the source because the source will not consent, then they cannot do that.
>
> JUSTICE NOËL: So they are not assuming their duty under Ruby, then.
>
> [Opposing Counsel]: I'm saying that this conflicts with the duty under Ruby. That's my submission to you. And there is no exemption provided for it. […]
>
> [Transcript pages 49-50]

[44] Such a result cannot possibly be what Parliament intended as a result of the enactment of s. 18.1. If Parliament had wanted to diminish the scope of the duty of candour imposed upon government counsel, it would have addressed this explicitly.

[45] Overall, the consequences of strictly and literally interpreting the new s. 18.1 CSIS human source privilege, as proposed by Opposing Counsel, are extreme and would significantly impact the ability of designated judges to ensure fairness and the proper administration of justice. The s. 18.1 privilege cannot, in practice, be applicable to the designated judge; the fundamental principles of fairness and justice would otherwise be compromised. Such an interpretation also

does not recognize that the judicial duties designated judges must assume shift from proceeding to proceeding and from different spheres of law.

[46] It is my opinion that designated judges, over years of work, have reached an appropriate level of judicial insight and experience into the field of national security. I very much doubt that the legislator intended to destroy years' worth of procedural and substantive jurisprudential evolution when it enacted the s. 18.1 CSIS human source privilege.

[47] The proposed strict, literal, and limited textual legislative interpretation, if accepted, would smother many important aspects of the practical application of the national security legal framework. The practical context in which the new s. 18.1 privilege operates must be taken into consideration; it must be interpreted as fitting within the framework, not eradicating substantive and procedural rights that have been developed over time with great difficulty. Principles of purposive and contextual legislative interpretation and practical considerations call for giving significant weight to the context in which statutes are enacted and significant weight to the context in which they will operate in practice.

## VI. CONCLUSION

[48] In conclusion, near the end of the hearing, Opposing Counsel and I discussed the consequences of their position on the functioning of designated proceedings. To my mind, it is inappropriate to imply that a statute is unconstitutional while not presenting any formal arguments supporting such a claim and expecting the Court to interpret a statutory scheme accordingly. Asking the Court to adopt an interpretation heavy with systemic consequences on

the jurisdiction of the Court [redacted] without properly developed submissions, seems to me to be questionable.

[49] For the purposes of this judgment, I reject the strict and literal interpretation proposed by Opposing Counsel. Based on my reading of the Act as a whole, and on the practical context in which it is applied, I conclude that the 18.1 CSIS human source privilege cannot be applicable to the designated judge. Accordingly, designated judges can bring up issues regarding disclosure of CSIS human source information *de facto*. A subsection 18.1(4) application is a mechanism available to the parties before the designated judge allowing them to raise the issue of disclosure if necessary. 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.

## JUDGMENT

**THEREFORE THIS COURT** declares that the CSIS human source privilege created pursuant to s. 18.1 of the *CSIS Act* is not applicable to designated judges.

**THIS COURT FURTHER ORDERS** that the present reasons shall be reviewed initially by Counsel for the Government to identify, in the public's interest to be informed of legal issues in the national security law, which parts of these judgment and reasons can be made public within five (5) days of the date of the present judgment and reasons. After those five (5) days, Opposing Counsel shall review the redactions suggested within the subsequent five (5) days. Any contentious issues shall be referred to the undersigned within the following three (3) days for determination.

"Simon Noël"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | [redacted] |
| **STYLE OF CAUSE:** | [redacted] |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | [redacted] |
| **TOP SECRET JUDGMENT AND REASONS:** | NOËL S J. |
| **DATED:** | [redacted] |

**APPEARANCES:**

| | |
|---|---|
| [redacted] | [redacted] |
| [redacted] | [redacted] |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| William F. Pentney<br>Deputy Attorney General<br>of Canada<br>Ottawa, Ontario | [redacted] |
| [redacted] | [redacted] |