Federal Court  Cour fédérale

Date: 20151218

Docket: DES-3-15

Citation: 2015 FC 1398

Ottawa, Ontario, December 18, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

JOHN STUART NUTTALL and AMANDA MARIE KORODY

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC ORDER AND REASONS

I. Background

[1] On June 2, 2015, following a jury trial in the British Columbia Supreme Court, the applicants were convicted on two counts of terrorism related offences arising from events which occurred in June 2013. The Trial Judge has not entered the guilty verdicts pending the determination of a motion by the applicants seeking a remedy based on entrapment and abuse of process. In the context of the applicants' motion, the Trial Judge has considered and ordered

production and disclosure of other specific documents, including from the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Service (CSIS).

[2] This Court has reviewed, among other information, the Trial Judge's Chronology of Events and Overview of the Evidence, the June 25, 2015 Oral Ruling on the Disclosure of CSIS related Information, the affidavit of Ms. Marilyn Sandford dated October 5, 2013 which references the Order of the British Columbia Supreme Court dated September 17 , 2015 and the documents ordered to be produced to the applicants based on the Trial Judge's review of the documents in accordance with the two step *O'Connor* approach. This material has provided context for the consideration of the issues before this Court.

[3] On July 10, 2015 the applicants filed an application with this Court pursuant to section 18.1 of the *Canadian Security Intelligence Service Act* (*CSIS Act*) seeking an order with respect to whether a particular individual is a human source as defined in section 2 of the *CSIS Act*.

[4] The applicants seek, pursuant to paragraph 18.1(4) (a) an order declaring that the particular individual is not a human source. Alternatively, the applicants seek an order pursuant to paragraph 18.1(4)(b), that if this Court determines that the particular individual is a human source, information in the possession of CSIS relating to that individual be disclosed to the applicants or that a judicial summary of the information in the possession of CSIS be provided by this Court to the applicants for the purpose of their defence, more particularly, their allegations of entrapment and abuse of process, in the proceedings before the British Columbia

Supreme Court. The applicants submit that such disclosure is essential to establish their innocence in those proceedings.

[5] This Court has held several case management conferences to advance the application and address the procedure that should be followed with respect to section 18.1, a recently enacted provision, which does not provide details of the procedure to be followed and does not set out the threshold to be met.

[6] The parties agreed that the application should be considered in three stages: first, to determine whether the affidavit of Ms. Sandford, which sets out the facts relied on in support of the application, is appropriate and may be received by this Court; second, to determine the scope of the definition of "human source", the threshold that the applicants' must meet to advance their application for an order that the individual is or is not a human source and whether the applicants have met the applicable threshold; and, third, to determine whether an order should be made pursuant to subsection 18.1(4)(a) or (b) and the conditions, if any, that should be imposed pursuant to subsection 18.1(8).

[7] The applicants have diligently pursued their application and have highlighted that its determination should be made in a timely manner given that the section 18.1 determination will have an impact on the ongoing proceedings in the British Columbia Supreme Court.

[8] In an Order dated November 25, 2015, the Court found that the affidavit of Ms Sandford is admissible and that it sets out sufficient facts to permit the application to proceed to the next

stages. The Court also noted that the parties had made preliminary submissions on the threshold to be met, and expressed the preliminary view that the jurisprudence in the criminal context provides helpful guidance. The parties were invited, as agreed, to make more detailed submissions on the applicable threshold and whether it had been met.

[9] Given the Reasons for Judgment issued by Justice Mosley in *Attorney General of Canada v Almalki et al* 2015 FC 1278, (*Almalki 2015*) issued on November 23, 2015, the parties were invited, by a Direction dated November 25, 2015, to provide submissions on the impact of *Almalki 2015* on this application along with their submissions on the threshold to be met pursuant to section 18.1.

II. The Issue

[10] Upon consideration of the submissions of the parties and of the *amicus* on the impact of *Almalki 2015* and the jurisprudence cited therein, the issue to now be addressed is whether this Court has the jurisdiction to determine the section 18.1 application now before it.

[11] The Reasons for Judgment of Justice Mosley in *Almalki 2015* arose in the context of civil proceedings which were initiated over a decade ago in the Superior Court of Justice of Ontario. In those proceedings, the Attorney General of Canada applied for an order to prohibit the disclosure of information pursuant to section 38 of the *Canada Evidence Act*.

[12] In an earlier decision (*Almalki 2010* in DES-1-10), the disclosure of certain human source information had been sought. The Order issued in *Almalki 2010* did not authorize the disclosure

of the identities of human sources but did authorize the release of information in some documents from which the Attorney General argued that the identity of a human source could be inferred. The Court was not persuaded that disclosure of the information would in fact reveal the identity of the source (see *Almalki 2015* at para. 23).

[13] The current review of the claims in relation to the redacted information was initiated by Justice Mosley's Order of September 19, 2011 where the initial section 38 proceeding continued.

[14] Due to the coming into force of Bill C-44, the *Protection of Canada from Terrorists Act*, on April 23, 2015, Justice Mosley considered the submissions of counsel on the interpretation and application of the amendments, in particular, section 18 and the new section 18.1 of the *CSIS Act*.

[15] Justice Mosley noted that Bill C-44 did not include any transitional provisions to address the temporal application of the new provisions.

[16] Justice Mosley described the differences between the pre-Bill C-44 law and the post-Bill C-44 law, including that the amended section 18 maintained the offence of disclosing information about a CSIS employee and added the requirement that the offence be committed knowingly, but removed the offence of disclosing information about a CSIS source. The new section 18.1 created a statutory privilege to protect CSIS human sources.

[17] One of the issues before Justice Mosley was whether the statutory human source privilege enacted by section 18.1 applied to the information sought in the proceedings before him.

[18] Justice Mosley considered the principles of statutory interpretation and the jurisprudence governing the temporal application of legislation. He noted, among other principles, that: it is presumed that legislation does not operate retroactively or retrospectively, although the presumption can be rebutted by clear statutory language; purely procedural provisions have immediate effect and apply to pending and future matters; rules of evidence are generally regarded as procedural and subject to the principle that they would apply to pending and future matters; if a rule of evidence affects substantive or vested rights, it is not purely procedural and would apply only prospectively; the principles yield where there is clear statutory language to the contrary (*Almalki 2015* at paras 57-62).

[19] Justice Mosley disagreed with the Attorney General of Canada's argument that the relevant point in time to determine the application of section 18.1 is when the privilege is asserted and not when any promise of confidentiality may have been given. He noted that CSIS maintains records on their relationships with human sources and could determine when the source was promised confidentiality. He further noted that the Parliamentary record did not suggest that Parliament had considered the application of section 18.1 to matters underway.

[20] Justice Mosley commented that it appears that the new class privilege is in response to the Supreme Court of Canada decision in Canada *(Citizenship and Immigration) v Harkat* 2014

SCC 37 which found that a human source privilege did not exist at common law. Therefore, the legislation could have stated that it was intended to apply to proceedings that arose before enactment and were continuing, if that were Parliament's intention, but it did not. He concluded that for any "fresh proceedings", i.e. proceedings enacted after April 23, 2015, section 18.1 would protect the confidentiality "of those engaged as human sources after April 23, 2015". In other words, section 18.1 would apply where the proceedings and the relationship with the human source, (the promise of confidentiality), arose on or after April 23, 2015.

[21] Justice Mosley also disagreed with the Attorney General of Canada's contention that disclosure (in the context of a section 38 proceeding) is a precise event within a proceeding, and, that because disclosure has not yet taken place, no vested rights to disclosure exist (see *Almalki 2015* at para. 107).

[22] In the proceedings before Justice Mosley, he noted that the relationships at issue were developed thirteen or more years previously and the actions were launched at least ten years previously. He found that applying section 18.1 to information obtained many years earlier would give the legislation retrospective effect, and went on to consider whether retrospective effect should be given or whether the legislation affected substantive rights.

[23] Justice Mosley noted that the parties agreed that section 18.1 creates a new rule of evidence, but did not agree whether that new rule of evidence created substantive rights. He concluded that the section 18.1 privilege does create substantive rights for human sources and could have a substantive effect on the scope of the permissible disclosure in the proceedings

before him. He found that it would limit the ability of the respondents to prove their claims against the Attorney General of Canada and their ability to establish that their constitutional rights were infringed. As a result, section 18.1 did not apply. Pre-existing human sources would continue to be protected by section 38 of the *Canada Evidence Act*.

[24] The Court is aware that the Attorney General of Canada has filed a notice of appeal of *Almalki 2015*. The Court is also aware that the Attorney General of Canada argued that section 18.1 should apply as a rule of evidence to matters underway and that the privilege arises only when asserted. The Attorney General of Canada makes consistent arguments in the present case, as noted below. The Court also observes, as noted by the applicants, that counsel for the Attorney General of Canada also participated in *Almalki 2015* and was aware that the application of section 18.1 was a live issue in that case and provided submissions to Justice Mosley many weeks ago, yet did not raise this issue in the context of this application.

III. The Applicants' Submissions

[25] The applicants submit that as a result of *Almalki 2015*, section 18.1 does not apply to the information sought by the applicants; the Court does not have jurisdiction to continue to determine the section 18.1 application.

[26] The applicants provided an analysis of *Almalki 2015* noting the conclusion that the new class privilege enacted by section 18.1 creates substantive rights for human sources which could have a substantive effect on the scope of permissible disclosure. Therefore, section 18.1 cannot have retrospective application.

[27] The applicants submit that, although the decision in *Almalki 2015* is not strictly binding, based on the convention of horizontal stare decisis, the reasoning in *Almalki 2015* should be followed because there are no compelling reasons not to do so.

[28] The applicants submit that the material facts underpinning the Court's decision in *Almalki 2015* in respect of the application of section 18.1 are the same in the current circumstances.

[29] The applicants note that the relationship with the potential human source at issue in this case would have been developed before the enactment of section 18.1 and the underlying proceeding (the criminal prosecution) was initiated prior to the enactment and the proceedings are ongoing with respect to the applicants' motion for a stay of proceedings based on their allegations of entrapment and abuse of process. The applicants add that the application of section 18.1 to protect or prevent disclosure of information obtained by CSIS years earlier would impact the scope of permissible disclosure and may have an impact on the vindication of the applicants' *Charter* rights.

[30] Accordingly, the applicants ask the Court to declare that it is without jurisdiction to continue to determine their application.

[31] The applicants highlight that if the Court agrees that it lacks jurisdiction to continue to determine the section 18.1 application, i.e., that section 18.1 does not apply in these circumstances, the applicants will seek disclosure of the information from the Trial Judge. If disclosure is ordered, the applicants note that the respondent would then determine whether to

apply for protection of that information pursuant to section 38 of the *Canada Evidence Act*. The proceedings to determine that issue would be determined by the Federal Court.

[32] The applicants note their efforts in pursuing the section 18.1 application since July 2015 and note that a change of approach and reliance on the pre-Bill C-44 law will likely cause further delays. The applicants emphasize the need for any section 38 application that may eventually be made to be considered expeditiously.

IV. The Submissions of the *Amicus*

[33] The *amicus* agrees with the submissions of the applicants that the Court should follow *Almalki* on the basis of horizontal *stare decisis* and judicial comity.

[34] The *amicus* notes the findings of Justice Mosley, that: applying section 18.1 to information obtained by CSIS prior to the enactment of the provision would give the enactment retrospective effect; section 18.1 creates a new class privilege and creates substantive rights for human sources; and, there could be a substantive effect on the permissible disclosure. The *amicus* submits that, as a result, section 18.1 should not be applied retrospectively.

V. The Respondent's Submissions

[35] The respondent submits that *Almalki 2015* is wrongly decided and should not be followed. Alternatively, the respondent argues that the present case is distinguishable from the

circumstances in *Almalki 2015* and, therefore, the Court is not precluded from making a determination on the section 18.1 application.

[36] The respondent distinguishes *Almalki 2015* in three respects: (1) according to the respondent, there was no prior and ongoing section 38 proceeding and, therefore, the Court's jurisdiction would not be ousted; (2) there is no pre-existing proceeding that would have created any pre-existing substantive right to disclosure, analogous to the situation relied on in *Almalki 2015*, which would prevent retrospective application, if indeed it is retrospective application; and, (3) the applicants have no vested right to an established disclosure regime given that their application for disclosure was commenced in June 2015 (the date of the *O'Connor* application in the British Columbia Supreme Court) which was after the enactment of Bill C-44.

[37] The respondent submits that section 18.1 applies on a go-forward basis to the potential disclosure of human source information that may take place after the enactment of section 18.1. In the present circumstances, it cannot be retrospective in effect.

[38] The respondent adds that even if *Almalki 2015* is upheld on appeal, its application should be limited to its particular litigation context, which differs from the present case.

[39] Alternatively, the respondent agrees that if this Court follows *Almalki 2015* and finds that section 18.1 does not apply, the applicants would need to seek a disclosure order from the British Columbia Supreme Court and, if they do so, the respondent would determine whether to make privilege claims pursuant to the *Canada Evidence Act* and /or the common law.

VI. The Reasons in *Almalki 2015* Are Adopted and Apply to the Present Case

[40] I agree with the applicants and *amicus* that on the principle of judicial comity and horizontal *stare decisis* I should be guided by the Reasons of Justice Mosley in *Almalki 2015* issued on November 23, 2015. Justice Mosley thoroughly analyzed the relevant principles regarding the retroactive and retrospective application of legislation in a broader context as well as with respect to the facts before him. Upon consideration of *Almalki 2015*, the relevant jurisprudence and the submissions of counsel before me, I find that there is no basis to depart from Justice Mosley's well-reasoned conclusions.

[41] Despite the respondent's able arguments, I do not agree that *Almalki 2015* can be sufficiently distinguished from the facts of this case to permit a different outcome. While the facts differ in some respects, the applicable principles remain the same.

[42] First, the Court is not concerned about losing jurisdiction but about ensuring it has the jurisdiction to determine the application. The Court is concerned with the proper application of section 18.1 which, as noted by Justice Mosley, does not include any transitional provisions to address its temporal application.

[43] Second, with respect to the argument that section 18.1 applies on a go-forward basis to the disclosure of human source information after its enactment, the respondent's view is that in the present case, the issue remains to be determined i.e., to date there has been no such disclosure and, therefore, there is no pre-existing proceeding that has created any substantive right to

disclosure. While it is true that the application for disclosure, within the proceedings for abuse of process, was made in June 2015 after the enactment of Bill C-44, I do not agree that there was no pre-existing right to seek disclosure. If the applicants had not relied on section 18.1, based on their view at that time that the application for disclosure of human source information was governed by the new statutory privilege and should be brought in this Court, the applicants would have included a request for the disclosure of the same information from CSIS in the context of their broad disclosure application in the British Columbia Supreme Court, pursuant to the two step *O'Connor* approach. The criminal proceedings which are the subject of a motion for a stay of proceedings based on the allegations of abuse of process and entrapment were commenced in 2013. While it cannot be predicted what the determination of a broader disclosure application would have been, the applicants would have had an established approach to pursue and the respondent could have then considered whether to advance a claim for privilege or rely on section 38 of the *Canada Evidence Act*.

[44] Third, the new rule of evidence created by Bill C-44 is a statutory privilege which cannot be characterized as merely procedural to permit retrospective application. As Justice Mosley noted in *Almalki 2015*, the section 18.1 statutory privilege creates substantive rights for human sources. In the present case, the evidence provided to date establishes that if there is any human source involved, the relationship existed long before section 18.1 was enacted. The application of the new statutory privilege could have a substantive effect on the permissible disclosure and, as a result, section 18.1 should not be applied retrospectively. A pre-existing human source relationship would still have triggered the protection of section 38 of the *Canada Evidence Act*.

[45] The result that section 18.1 does not apply in these circumstances, given that the relationship which may involve a human source relates to information dating back to before the enactment of the provision means that the applicants should pursue an application in the British Columbia Supreme Court which may lead to further proceedings in this Court. The ultimate determination whether information regarding a possible human source should be disclosed may not be resolved in the time frame originally contemplated. However, this Court would endeavour to address any subsequent applications expeditiously.

VII. The Threshold for a Section 18.1 Application

[46] The applicants, *amicus* and respondent also provided comprehensive submissions on the threshold that should apply to applications pursuant to section 18.1. In summary, the applicants and *amicus* take the position that a threshold similar to that applicable to police informer privilege should apply although they note that police informer privilege differs from the human source privilege and the different contexts must be considered. The respondent argues that the disclosure or confirmation of a human source requires careful consideration and the articulation of a much more robust threshold to ensure that the purpose of the statutory privilege is respected and that current and future sources are appropriately protected.

[47] Given the determination that section 18.1 has no application to the present circumstances and the Court is without jurisdiction to determine the application before it, there is no need to determine the applicable threshold and whether it has been met in the present circumstances.

[48] However, the Court notes, based on the submissions provided, that although the respondent stresses the importance of a robust threshold as a "gatekeeper", the threshold cannot be so high as to lock the gate and absolutely prevent any disclosure of essential information regarding a particular human source in the name of protection of all current and future human sources. Section 18.1 permits the disclosure of a human source where it is essential to establish the accused's innocence and provides appropriate safeguards for the information disclosed. The appropriate threshold must be one that permits the Court to make that determination and not to demand that the applicant prove the ultimate issue. Determinations pursuant to section 18.1 will, of course, be made carefully with full consideration of the interests at stake. To date, the Court has exercised extreme caution with respect to this application in accordance with the provisions of subsection 18(10).

[49] In conclusion, the applicants' application for a declaration pursuant to section 18.1 of the *CSIS Act* is dismissed due to lack of jurisdiction to determine the application.

ORDER

THIS COURT ORDERS that the applicants' application for a declaration pursuant to section 18.1 of the *CSIS Act* is dismissed due to lack of jurisdiction to determine the application.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-3-15
STYLE OF CAUSE:	JOHN STUART NUTTALL and AMANDA MARIE KORODY v ATTORNEY GENERAL OF CANADA

APPLICATION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

PUBLIC ORDER AND REASONS OF:	KANE J.
DATED:	DECEMBER 18, 2015

APPEARANCES:

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Ms. Donnaree Nygard Mr. Lorne Ptack	FOR THE RESPONDENT
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