Federal Court Cour fédérale

~~**TOP SECRET**~~

Date: 20210217

Docket: [redacted]

Citation: 2021 FC 105

IN THE MATTER of an application by [redacted]
[redacted] **for warrants pursuant to sections 12 and 21 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23**

AND IN THE MATTER OF [redacted]

PUBLIC REASONS

NOËL S. J.

[1] These reasons are being issued following the granting by the Court of warrants sought by the Canadian Security Intelligence Service [CSIS] pursuant to sections 12 and 21 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*].

[2] CSIS applied for warrants seeking full extraterritorial warrant powers. Extraterritorial warrant powers would allow CSIS to conduct investigative activities in foreign countries, either directly or with the assistance of foreign partners. The application was supported by an affidavit sworn by a senior CSIS employee.

[3] The matter of CSIS seeking to exercise extraterritorial warranted powers in the context of section 12 of the *CSIS Act* has some history, as is succinctly explained by the Federal Court of Appeal in *X (Re)*, 2014 FCA 249 [*X (Re) FCA*], which constitutes the most recent judicial decision on the matter of a section 12 extraterritorial warrant application. Briefly reviewing this history will underscore the purpose of the within reasons.

[4] In 2007, CSIS applied to the Federal Court to obtain warrants pursuant to sections 12 and 21(1) of the *CSIS Act* to investigate threat-related activities of individuals who would be travelling outside of Canada. In that application, CSIS conceded the warranted powers sought would violate the laws of the foreign country where they would be exercised. In *Re CSIS Act*, 2008 FC 301 [*Re CSIS Act*], the application was denied by Justice Blanchard on the basis that the Federal Court did not have the jurisdiction to grant these warranted powers where they would likely violate the law of the foreign jurisdiction.

[5] Justice Blanchard's decision was issued in the immediate aftermath of the Supreme Court of Canada's decision in *R v Hape*, 2007 SCC 26 [*Hape*] concerning the applicability of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*, in an international context. Justice Blanchard noted that he was guided by the teachings of *Hape* regarding "matters that arise as a result of the extraterritorial investigative jurisdiction of the Canadian state" (*Re CSIS Act* at para 61). He specifically pointed to the Supreme Court of Canada's statement

that "[a]bsent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law" (*Hape* at para 39). In his case, Justice Blanchard thus found that "absent an express enactment authorizing the Court to issue an extraterritorial warrant, the Court is without jurisdiction to issue the warrant sought" (*Re CSIS Act* at para 55). This decision was not appealed.

[6] In 2009, CSIS asked the Court to distinguish Justice Blanchard's decision in seeking a warrant to intercept, from within Canada, foreign telecommunications and conduct computer searches located outside of Canada. Justice Mosley accepted that the circumstances before him were different than those that had been before Justice Blanchard. Consequently, in *X (Re)*, 2009 FC 1058, Justice Mosley explained that he had been persuaded to issue the warrant because the Court would be able to ensure judicial control over Canadian officials acting pursuant to the warrants as the authorized activities would all take place in Canada.

[7] In the 2012-2013 Annual Report of the Commissioner of the Communications Security Establishment Canada (CSEC) (now the Communications Security Establishment), it came to light that in intercepting foreign telecommunications of Canadians travelling abroad, CSEC might have been providing assistance to CSIS by requesting second party partners in the United States, United Kingdom, Australia and New Zealand to engage in the interception. The Commissioner, Robert Décary (a former judge of the Federal Court of Appeal), advised CSIS to

provide the Federal Court with explicit evidence in such warrant applications that CSEC's assistance to CSIS might include interceptions conducted by these second party partners.

[8] Justice Mosley read the Commissioner's report and ultimately directed that further evidence and argument be presented on two issues. The first issue, whether CSIS met its duty of candour, is not relevant to this application. The second issue was framed as follows:

> Did CSIS possess the legal authority, acting through CSEC, to seek assistance from its foreign partners to intercept the telecommunications of Canadians while they are outside of Canada?

[9] In Further Reasons for Order in *X (Re)*, 2013 FC 1275, Justice Mosley concluded that CSIS had no lawful authority under section 12 of the *CSIS Act* to request, through CSEC, that foreign agencies intercept the communications of Canadians travelling abroad. More specifically, he found that section 12 of the *CSIS Act* did not grant express legislative authority to CSIS to violate international law and the sovereignty of foreign nations either directly or indirectly though the agency of CSEC and a partner foreign agency. He further concluded that CSIS could not seek the assistance of CSEC, pursuant to CSEC's assistance mandate, to intercept communications of Canadians travelling abroad.

[10] This decision was appealed.

[11] In *X (Re) FCA*, the Federal Court of Appeal affirmed Justice Mosley's decisions and agreed with him that Parliament did not intend to give CSIS the authority to engage foreign agencies to intercept private communications of Canadians under section 12 of the *CSIS Act* given the intrusive nature of such interceptions.

[12] However, the Federal Court of Appeal stated it did "not endorse [Justice Mosley's] conclusion that intrusive investigative measures conducted abroad would necessarily violate international law or the principle of comity between nations" (para 80). Indeed, according to the Court of Appeal, "section 21 contains no geographic limit. Given that "threats to the security of Canada" may include events outside of Canada, it appears that Parliament intended that warrants may be applied for in the context of extraterritorial operations" (para 84). Ultimately, the Federal Court of Appeal noted that it was of the view that the Federal Court could issue a warrant where the interception authorized by the warrant is in accordance with the domestic law of the state in which the interception takes place. It further noted that it remained an open question whether such jurisdiction existed where the interception was not legal in the country in which it would take place (para 90, 103).

[13] Following the decision in *X (Re) FCA*, Parliament amended the *CSIS Act* through the adoption of Bill C-44 in 2015 (*An Act to amend the Canadian Security Intelligence Service Act and other Acts*, 2nd Sess, 41st Parl, 2015 (assented to 23 April 2015), SC 2015, c 9 [Bill C-44]). The new provisions made it explicitly clear that CSIS could perform its duties and functions under subsection 12(2) "within or outside of Canada", that pursuant to subsection 21(1), a threat

to the security of Canada could be investigated "within or outside of Canada", and that pursuant to the newly adopted subsection 21(3.1), a judge may authorize activities outside Canada to enable the Service to investigate a threat to the security of Canada "[w]ithout regard to any other law, including that of any foreign state."

[14] The complete text of these three provisions now read as follows:

12 (1) The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.	**12 (1)** Le Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et analyse et conserve les informations et renseignements sur les activités dont il existe des motifs raisonnables de soupçonner qu'elles constituent des menaces envers la sécurité du Canada; il en fait rapport au gouvernement du Canada et le conseille à cet égard.
(2) For greater certainty, the Service may perform its duties and functions under subsection (1) <u>within or outside Canada</u>.	**(2)** Il est entendu que le Service peut exercer les fonctions que le paragraphe (1) lui confère <u>même à l'extérieur du Canada</u>.
21 (1) If the Director or any employee designated by the Minister for the purpose believes, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate, <u>within or outside Canada</u>, a threat to the	**21 (1)** Le directeur ou un employé désigné à cette fin par le ministre peut, après avoir obtenu l'approbation du ministre, demander à un juge de décerner un mandat en conformité avec le présent article s'il a des motifs raisonnables de croire que le

security of Canada or to perform its duties and functions under section 16, the Director or employee may, after having obtained the Minister's approval, make an application in accordance with subsection (2) to a judge for a warrant under this section.	mandat est nécessaire pour permettre au Service de faire enquête, au Canada ou à l'extérieur du Canada, sur des menaces envers la sécurité du Canada ou d'exercer les fonctions qui lui sont conférées en vertu de l'article 16.
21 (3.1) Without regard to any other law, including that of any foreign state, a judge may, in a warrant issued under subsection (3), authorize activities outside Canada to enable the Service to investigate a threat to the security of Canada.	**21 (3.1)** Sans égard à toute autre règle de droit, notamment le droit de tout État étranger, le juge peut autoriser l'exercice à l'extérieur du Canada des activités autorisées par le mandat décerné, en vertu du paragraphe (3), pour permettre au Service de faire enquête sur des menaces envers la sécurité du Canada.
[Emphasis added.]	[Non souligné dans l'original.]

[15] An application for a warrant is made without notice to any other party and in accordance with section 27 of the *CSIS Act*, where a hearing is necessary, the application is heard in private. Pursuant to subsection 21(3) of the *CSIS Act*, if a judge designated by the Chief Justice for purposes of the *CSIS Act* is of the view that the statutory requirements for the issuance of a warrant outlined at paragraphs 21(2)(a) and (b) are met, the judge may, at his or her discretion, sign the warrant. The warrant includes the specific powers that are authorized as well as the conditions for the exercise of those powers. As a result, it is not automatic for reasons to follow the issuance of warrants, which themselves are not made public, except where they raise matters of an exceptional nature.

[16] In this case, there have been no reported judicial pronouncements with respect to an application pursuant to section 12 of the *CSIS Act* seeking authorization for intrusive investigative powers outside Canada since the legislative amendments. Furthermore, considering the request made by counsel for the Attorney General of Canada to consider issuing reasons in the within application and our Chief Justice's request to Designated Judges to proceed in a manner that is as public as possible in matters where a statute requires that some of the information not be publicly disclosed, the Court is of the view that these reasons will be useful to the Canadian public, CSIS and the Attorney General of Canada in promoting the open court principle to ensure that the public's confidence in a judicial process that must at times operate contrary to this principle.

[17] Given the nature of the warranted powers sought in this application and the fact that it is the first application seeking these full extraterritorial warrant powers, as well as the suggestion of the Chief Justice to designated judges to consider appointing an *amicus curiae* when novel issues are raised in warrant applications, I appointed Mr. Gordon Cameron, one of the country's most experienced security cleared lawyers on matters of national security, as *amicus curiae* to assist the Court.

[18] The Court convened an *ex parte*, *in camera* hearing that lasted a full day, during which the affiant answered questions from counsel for the Attorney General, me as presiding judge, as well as some questions posed by the *amicus*.

[19] Having heard the factual evidence, I am satisfied that the matters referred to in paragraphs 21(2)(a) and (b) of the *CSIS Act* have been met.

[20] I am additionally satisfied that pursuant to subsections 12(2) and 21(3) of the *CSIS Act*, this Court has the jurisdiction to grant warranted powers that may be executed outside of Canada. Indeed, as I noted in *X (Re)*, 2018 FC 738 (paras 60-63), in adopting Bill C-44, Parliament amended the *CSIS Act* to, among other things, expressly authorize CSIS to conduct activities abroad in fulfilling its section 12 mandate to investigate threats to the security of Canada.

[21] I am cognizant that CSIS may execute these extraterritorial powers with the assistance of CSE and with foreign agencies acting under their own legal frameworks. Indeed, the possibility of such cooperation is provided for by paragraphs 17(1)(a) and (b) of the *CSIS Act*. Further, the CSIS affiant was explicit in explaining that, in the context of these warrants, CSIS would not conduct activities that would be contrary to the legal regime in a foreign country. As such, there is no need to make any comments at this time on the application of the component of subsection 21(3.1) of the *CSIS Act* that allows for CSIS to investigate a threat to Canada without regard to the law of a foreign state. As noted, that issue had been noted but not decided in *X (Re)* FCA (see paras 91-96, 103), and given Parliament's subsequent express authorisation to act without regard to any other law, it remains a matter for another day.

[22] In conclusion, and as stated above, based on the evidence before me, I conclude that the legal threshold per subsections 12, 12(2), 21(2)(a) and (b) and 21(3) of the *CSIS Act* is met, and

the warrants should issue with the amendments that were requested by the Court to reflect both the state of the law and to clarify some of the assurances provided by CSIS.

"Simon Noël"
Judge

Ottawa, Ontario
February 17, 2021

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	[redacted]
STYLE OF CAUSE:	**IN THE MATTER of an application by [redacted] for warrants pursuant to sections 12 and 21 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23** **AND IN THE MATTER OF [redacted]**
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