Federal Court  Cour fédérale

Ottawa, November 3, 2016 – A public version of the confidential Judgment and Reasons, with citation 2016 FC 1105, was issued today by the Honourable Simon Noël of the Federal Court:

IN THE MATTER OF AN APPLICATION BY [redacted] FOR WARRANTS PURSUANT TO SECTIONS 12 AND 21 OF THE *CANADIAN SECURITY INTELLIGENCE ACT*, R.S.C. 1985, C. C-23 AND IN THE PRESENCE OF THE ATTORNEY GENERAL AND AMICI AND IN THE MATTER OF [redacted] THREAT-RELATED ACTIVITIES

Summary: In an application for warrants presented by the Canadian Security Intelligence Service (the "CSIS") before a designated judge of the Federal Court pursuant to sections 12(1) and 21 of the *Canadian Security Intelligence Service Act* ("CSIS Act"), the CSIS, aside from seeking specific warrants, also asked the Court to amend some of the conditions of the draft warrant templates. Following closed hearings on February 25 and 26, March 1, March 31, and May 9, 2016, the Court issued confidential reasons on October 4, 2016. Redactions were then proposed by *amici curiae* and counsel for the Attorney General and for the CSIS for review by the Court to allow for issuance of these public reasons.

The issues raised by the present application are the following:

1. Does the CSIS's omission to disclose and explain the existence of the Operational Data Analysis Centre [the "ODAC"] program since its launch in 2006 amount to a behaviour breaching the duty of candour that the CSIS owes the Court?

2. If the collection function is to be performed only "[…] to the extent … that it is strictly necessary", does the "strictly necessary" limit also apply to the retention function in regard to information collected through the operation of warrants issued pursuant to sections 12(1), 2, and 21 of the CSIS Act?

3. Can the associated data, as defined at paragraphs 33-34 of the reasons, collected by the CSIS through the operation of warrants issued by this Court since 2006 be retained for future inquiries as part of the ODAC program pursuant to sections 12(1), 2, and 21 of the CSIS Act?

4. Are the amendments sought to the warrant conditions within the legal parameters set by sections 12(1), 2 and 21 of the CSIS Act?

5. What is the appropriate period of retention for information collected through the operation of warrants in order to permit the CSIS to assess whether the information may be of assistance to investigate a threat to the security of Canada, or may be useful in a prosecution, to international relations, or to the defence of Canada? If the information is assessed as being unrelated to any of these three objectives, when should it be destroyed?

First, in regard to the CSIS's duty of candour, the Court concluded that CSIS had an obligation, beginning in 2006, to fully inform the Court of the existence of its collection and retention of

associated data program. The CSIS also had the duty to accurately describe this program to the Court. The fact that it did not do so, other than alluding to it under the guise of "stylistic reasons", amounted to a breach of the CSIS's duty of candour. As a party appearing ex parte and in camera before the Court on a regular basis, the CSIS had an elevated obligation to inform the Court of the use it was making of non-threat-related information collected through the operation of warrants; it failed to do so.

Second, the Court concluded that the qualifier "to the extent that it is strictly necessary" found in section 12(1) establishes that the CSIS's mandate is restricted. The CSIS's limited mandate incorporates the three functions of collection, retention and analysis of information. The qualifier "to the extent that it is strictly necessary" applies not only to the function of collection but also to the function of retention. In addition, section 12(1) must not be read solely in conjunction with the definition of threats to the security of Canada as found at section 2 of the Act but also in conjunction with section 21. Section 21 is a procedural section which describes the threshold required that CSIS must meet in order to present an application to obtain intrusive warrants before a designated judge of the Federal Court. It also contains the pertinent components of a warrant application. Section 21 does not enlarge the scope of the jurisdiction given by legislation to the CSIS; its jurisdiction is clearly established at sections 12(1) to 16 in conjunction with the section 2 definition of threats to the security of Canada.

Third, the Court concluded that the retention of associated data (as defined at paragraphs 33 and 34 of the reasons) falls outside the CSIS's legislatively defined jurisdiction and does not respect the CSIS's limited primary mandate and functions, and that therefore this retention of associated data is illegal.

Fourth, the Court concluded that the amendments to the warrant conditions template proposed by counsel for the CSIS in the letter dated December 8, 2015 and further developed at the en banc hearing are granted in part (as detailed in the reasons).

Fifth and finally, the Court concluded that information collected through the operation of warrants must be assessed in order to determine whether it may assist with a national security investigation, may be of some use to prosecution, relate to international affairs or to the defence of Canada. The information thus collected must be assessed using the binary categorization test that the Court describes in its reasons.

The public version of the judgment and reasons can be obtained via the Web site of the Federal Court: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Index

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