Federal Court Cour fédérale

~~**TOP SECRET**~~

Date: 20210610

Docket: [redacted]

Citation: 2021 FC 585

Ottawa, Ontario, June 10, 2021

PRESENT: The Honourable Mr. Justice Simon Noël

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]

PUBLIC SUPPLEMENTARY REASONS

[1] These supplementary 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] These supplementary reasons are also being issued in respect of the original decision I issued (the Signed Warrants), the reasons I issued on February 17, 2021, as well as subsequent affidavit evidence and a hearing during which certain factual details from the original hearing

were clarified. As noted by the AGC, "[t]he Federal Court's Reasons dated February 17, 2021 give rise to the need to clarify the Service's intended execution of the warrants."

[3] The original warrants I signed contained the following recital:

> Having heard the factual evidence, I am satisfied that the matters referred to in paragraphs 21(2)(a) and (b) of the Act have been met and that pursuant to subsections 12(2), 21(3) and 21(3.1) of the Act this Court has the jurisdiction to grant the powers. I am also cognizant that the Service may execute powers with the assistance of foreign agencies acting under their own legal frameworks.
>
> [Added underline]

[4] In my original reasons I noted the following at paragraph 21:

> [T]he 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.

[5] In subsequent affidavit and oral evidence, the CSIS affiant explained that there might, in fact, be situations in which CSIS may need to conduct activities that would be contrary to the legal regime in a foreign country.

[6] Accordingly, the AGC takes the position that the decision I issued, that is, the Signed Warrants, authorised the Service to use the powers without regard to the law of a foreign state, but that paragraph 21 of my original reasons cast doubt on that fact. The AGC thus requested I

issue supplementary reasons to clarify that the Service may in fact use the powers without regard to the law of a foreign state.

[7] Upon convening an additional hearing, 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, I am satisfied that in this case factual circumstances exist that might necessitate the Service using the powers without regard to the law of a foreign state.

[8] I am further satisfied that, as I noted in my original reasons:

> 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."
>
> It is now necessary for me to address the procedural peculiarities in which the Signed Warrants appear to be incongruous with the subsequent reasons issued, and the question of whether I am *functus officio*, having signed the final decision previously, and thus whether I can in fact receive additional evidence and issue supplementary reasons.

[9] In their recent motion dated April 16, 2021, counsel for the AGC proposes that "[t]he Court is authorized to admit this evidence pursuant to its plenary power to regulate its proceedings, and Rules 3 and 55 of the *Federal Courts Rules*; and that the proposed evidence

will facilitate the Court‘s issuance of supplemental reasons necessary to reflect the scope of the warrant.”

[10] The AGC further notes that “Rule 55 allows for the varying of a rule and dispensing with compliance of a rule in special circumstances. Though typically a written motion record would be filed in advance of a hearing, in this case, the Court first called for an oral hearing. Given that the issue at bar deals with the scope of warrant authorities, it was appropriate for the Court to vary the rules applying to motion records and the process for adducing additional evidence, i.e. to promptly call a hearing of the matter to clarify the record and to direct the AGC to file a written record thereafter.”

[11] The *amicus* responds that “[i]f the Court grants the requested relief, it will approve the receipt of further evidence after an application has been heard and the Court’s order (November 26, 2020: the “Order”) and reasons (February 17, 2021: the “Reasons”) have been issued”, which would ordinarily render me *functus*.

[12] However, the amicus further notes the following: “On its face Rule 397, which pertains to the variance of orders, does not apply exactly to the within request for supplemental reasons. To meet the case, Rule 397 could be interpreted purposively in accordance with Rule 3 and varied in accordance with Rule 55 to give the requisite jurisdiction. In particular, as varied by Rule 55, Rule 397 can be taken as authority to vary the Reasons as opposed to the Order. The supplemental evidence can have been received by the Court as evidence on the motion.”

[13] I am satisfied that I am not *functus*, and pursuant to Rules 3, 55 and 397 of the *Federal Courts Rules* I have the authority to admit the additional evidence and modify my reasons to accord with the original decision, that is, the Signed Warrants. I take care to emphasise that I am in no way varying my original decision, which authorised the Service to use the powers without regard to the law of a foreign state. That original decision stands as it was when the warrants were signed. Instead, I am modifying Rule 397 in accordance with Rules 3 and 55 so that I can align my reasons more perfectly with that original decision.

[14] In conclusion, I issue these supplementary reasons to state unequivocally that the Service does indeed have the authority to use the powers authorised in the warrants I signed without regard to the law of a foreign state, as per subsection 21(3.1) of the *CSIS Act*.

"Simon Noël"

Judge

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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]**
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 16, 2021
PUBLIC SUPPLEMENTARY REASONS:	NOËL S. J.
DATED:	JUNE 10, 2021

APPEARANCES:

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