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# Acting Out of Order: The Need for Real Time Oversight of CSIS Judicial Warrants

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**Case Commented On: Sections 12 to 12.2 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23**

**Editor's Note: This is the second in a series of three posts on Reviewing Canada's National Security Framework.**

A recent Federal Court ruling, which has been referred to in the media as the "Metadata Case", has renewed questions about the secrecy of judicial warrants granted to the Canadian Security Intelligence Service (CSIS) as well as CSIS's duty of candour to the Court (see *In the Matter of an Application by [REDACTED] for Warrants Pursuant to Sections 12 and 21 of the Canadian Security Intelligence Act, RSC 1985, c C-23 and In the Presence of the Attorney General and Amici and In the Matter of [REDACTED] Threat-Related Activities*,(2016) FC 1105). This post will discuss the specific difference between review and oversight in Canadian national security law, provide an overview of recent Federal Court decisions related to CSIS judicial warrants, and look to future options related to CSIS judicial warrants.

In this post, we suggest that a robust system of real-time operational *oversight* is needed throughout Canada's national security agencies, including CSIS, in order to improve the coordination and effectiveness of these agencies and to ensure the protection of citizens' civil liberties. Particularly, we will be focusing on the oversight needed in the CSIS judicial warrant architecture. We propose the return of the Office of the Inspector General – which was eliminated in 2012 – that would act as an active, expert, and full-time oversight body over CSIS and handle real time oversight of judicial warrants. We also suggest the introduction of a special advocate regime within the judicial warrant process to act for the targets of CSIS warrants.

## Distinction between "Review" and "Oversight

The terms "review" and "oversight" are often used interchangeably in the context of Canadian national security. However, these terms refer to two fundamentally different processes. Review is a retroactive check by an independent body on whether the agency in question carried out its functions in accordance with the law. Oversight is real-time operational control providing coordination of security and intelligence services. Canada has traditionally focused on review with agencies like the Security Intelligence Review Committee (SIRC) to provide after the fact review of intelligence activities.

**Background of CSIS Judicial Warrants**

Canada's primary intelligence service, CSIS, is empowered under s 12 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (the *CSIS Act*), to "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…." Under s 21 of the *CSIS Act*, CSIS may seek a warrant from the Federal Court where it "believes, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate a threat to the security of Canada."

CSIS warrants are adjudicated in secret, with only the governmental body being represented. The target of the warrant will not only likely never know that they were the target of such a warrant, but they will also have no one advocating for their rights or for any limitations to authorized breaches of their privacy. Due to the secret nature of this process, there is not much known about the manner in which CSIS warrants operate.

Bill C-51, the *Anti-terrorism Act, 2015,* introduced an additional provision to the *CSIS Act*, s 12.1(3), which allows the authorization of *Charter* breaches by obtaining a judicial warrant. The section provides as follows:

> The Service shall not take measures to reduce a threat to the security of Canada if those measures will contravene a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms or will be contrary to other Canadian law, unless the Service is authorized to take them by a warrant issued under section 21.1.

This power is unprecedented because no other government body has ever been granted powers to obtain pre-authorization to infringe upon the privacy and *Charter* rights of citizens.

The issue in the Metadata Case stemmed from "third party information" that CSIS had been collecting relating to individuals who were currently under investigation. The judgement defines "third party information" as "information unrelated to the threat", and noted that such information "is frequently collected through the operation of warrants" (Metadata Case at para 31). This information was stored at the Operational Data Analysis Centre (ODAC), however the Court was not informed of this storage (at paras 11, 12). This situation was reported by SIRC in its 2014-15 Report and brought about strong comments from Justice Noël about the duty of candour CSIS owes to the Court (Metadata Case at paras 86-108). In the case of *Re: X* (*In the Matter of an application by [REDACTED] for a warrant pursuant to Sections 12 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23; And In the Matter of [REDACTED]*, 2013 FC 1275 (Can LII) at para 118), Justice Mosely also had strong words for CSIS and their duty to the Court.

**Why We Need Oversight of Judicial Warrants**

It is of the utmost importance to have accountability of government organizations, and this extends to oversight for the judicial warrants that CSIS seeks. As observed in the above example, CSIS has been known to act beyond the exact specifications of their warrants by taking and retaining information that is outside the scope of what was granted to them through the warrant. Also, CSIS does not have a pristine record with respect to candour with the courts and sharing of information with SIRC.

These incidents have resulted in some criticism from both the SIRC and the courts. Implementing strong oversight mechanisms within the judicial warrant system may bring this process onto firmer grounds. One of the key issues with the judicial warrant process is its secretive nature and the tendency for CSIS to keep much of its information confidential in the interest of protecting national security information. By implementing an oversight system with unfettered access to all CSIS activities, CSIS could not only be held accountable, but there would be a better understanding of how to keep them from breaching the subsequent warrant. Having oversight would help make the system much more honest, effective, and efficient and would allow the Canadian public, other intelligence agencies, and the courts to have more confidence and trust in CSIS itself and in our intelligence organizations as a whole. This would allow CSIS to operate with less suspicion, thereby enabling them to focus more on intelligence gathering and action instead of needing to justify their every move.

**Looking Forward**

As noted above, under s 12.1(3) of the *CSIS Act*, CSIS may contravene *Charter* rights in taking measures to reduce threats to the security of Canada where they obtain a warrant allowing them to do so. Under s 12.1(1) of the Act, there must be reasonable grounds to believe that "a particular activity constitutes a threat to the security of Canada"; if that threshold is met, then CSIS may take measures to reduce the threat either inside or outside of Canada. These actions are limited to those that are reasonable and proportional for the circumstances (*CSIS Act*, s 12.1(2)). Additionally, CSIS may not cause intentional death or bodily harm, willfully attempt to obstruct justice or violate the sexual integrity of the target of the threat disruption (*CSIS Act*, s 12.2).

The portion of Bill C51 adding s 12.1(3) to the *CSIS Act* attracted much attention in regards to the potential uses of this provision and the dangers of pre-authorizing *Charter*-breaching activities. While SIRC has stated that general "threat disruptions" have occurred (see SIRC Annual Report 2015-2016: Maintaining Momentum at 9), there have not been any warrant applications of this kind since the legislation's assent in June of 2015.

The Metadata Case is an example of a successful SIRC review. However, the cost of using only a review body is that SIRC is always looking at the previous conduct of CSIS. In terms of time periods, SIRC may be looking at incidents from one week ago to one year ago, but always after the event has taken place. In the Metadata Case, it was shown that CSIS was able to collect metadata for a period of time before SIRC became aware of the unauthorized retention of data. Once the warrant is issued, the only mechanism currently in place to ensure the actions of CSIS are compliant with the warrant is SIRC, and they did not find the breech immediately but after this data had already been collected. When looking specifically at "threat disruption powers", the warrants associated with *Charter* infringing activities have the potential to be problematic. This can be explored through the use of the example the government provided in the 2016 National Security Green Paper, Our Security, Our Rights (at 22):

> CSIS identifies a website that has videos supporting terrorist groups and promoting extremism. The website is posted outside of Canada and contains videos on how to make explosives. CSIS applies for a threat reduction warrant through the Federal Court to modify the content related to making explosives on the website. CSIS would then "replace some of the terrorism related details with misinformation that will make the devices fail."

Certain questions arise from this hypothetical, such as: how specific will the modifications be? Will other aspects of the website be modified? Are contingencies in place if the individuals of interest discover the changes? Once the warrant is issued then the next opportunity to evaluate the operation would be through SIRC's annual review of CSIS activities. This would be the best case scenario in that SIRC catches the breach, as any organization with limited resources could potentially miss something during review. While the use of threat disruption through judicial warrants hasn't yet occurred, there remain important considerations given the recent Federal Court decisions discussed above. Future warrant applications may require a form of oversight to ensure that throughout the intelligence gathering process, CSIS maintains compliance.

**Recommendations**

SIRC has proven to be an effective review body when judged in light of the limitations of its resources and access to information. And yet, SIRC has raised concerns in recent annual reports that they encountered significant delays and problems with respect to documentation provision by CSIS (see SIRC Annual Report 2013-2014: Lifting the Shroud of Secrecy at 19). In the most recent report to the Minister, SIRC noted that the lack of a clear process for seeking legal opinions within CSIS "can create scenarios where legal clarity on certain matters is jeopardized." (see SIRC Annual Report 2015-2016: Maintaining Momentum under Findings).

The Office of the Inspector General served as a full time watchdog that provided an "early warning system" to point out issues to the Minister in an expedited manner (see "Axing CSIS watchdog 'huge loss,' says former inspector general", CBC News). The previous government scrapped the position in 2012 as part of an omnibus budget implementation bill (see Craig Forcese, Fewer Eyes On The Spies: Going Backwards On Accountability). The budget for the staff of eight only amounted to about $1 million. Compared to the potential layer of oversight this Office could provide, that is a bargain to the taxpayer – as Forcese argues, consider that the Arar Commission cost over $20 million (plus a $10 million settlement with Mr. Arar).

The reintroduction of the Inspector General's office would certainly result in an infusion of oversight with an immediate impact. There was very little evidence to suggest that the role of the Inspector General was redundant with SIRC's functions. The reintroduction of the Inspector General provides an opportunity to have an active, expert, and full-time oversight body that could handle real time oversight of judicial warrants. Not only could the Office of the Inspector General facilitate this potentially complex procedure, they could also serve as an ongoing oversight mechanism to preclude another Metadata fiasco, for example.

In addition to the reintroduction of the Inspector General model, it is also necessary to provide a greater system of checks and balances within the overall process of granting judicial warrants. As mentioned earlier, the current regime of granting judicial warrants is carried out in secret court hearings, where no counsel is provided to advocate for the rights of the individual target against whom the judicial warrant is being sought. In order to address the issues with the current process, a special advocate regime, similar to the one provided for by section 85 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 should be adopted.

A special advocate regime should be adopted in order to give the individual against whom the judicial warrant is being sought, a voice through an advocate protecting their rights in the secret hearing process. This is a very important element because unlike in a criminal process, where the accused has the opportunity to go to trial and challenge the infringement of their freedoms directly, during the judicial warrant process the individual in question is unaware of their

freedoms being infringed. Thus, the special advocate regime would provide that much needed voice and opportunity to challenge the infringement of the rights and freedoms of an individual who is not even aware that such a situation is taking place. This regime would also give CSIS a form of legitimate pushback during secret hearings in order to test the strength of their evidence and determine whether there is enough information to obtain a warrant against the individual in question. This barrier to obtaining a judicial warrant may also be just enough to require CSIS to think twice about the necessity of using measures that require obtaining a judicial warrant due to the pushback they will receive. Instead, they may become more inclined to consider alternative measures that can stand to achieve their intended goal without unnecessarily infringing an individual's rights and also avoiding a potentially lengthy and unsuccessful secret hearing process. In cases where oversight or review of CSIS behavior may fall short, this potential hurdle to the process of obtaining a judicial warrant may help provide yet another interim safeguard against unauthorized or abusive use of power by CSIS.

The current government's proposed creation of the National Security and Intelligence Committee of Parliamentarians (NSICOP) in Bill C-22 would neither conflict with the reintroduction of the Office of the Inspector General nor with the proposed special advocate regime during the judicial warrant process. NSICOP's mandate will be to provide oversight of all 17 federal agencies involved in security issues and to give elected officials more access into the world of national security. The Inspector General fulfills the real-time operational oversight role needed in CSIS and could effectively liaise with the NSICOP to ensure an objective flow of specifically CSIS related information. In addition, the special advocate regime would be a precursory tool, which only stands to add to the oversight powers of NSICOP. Therefore, these suggestions would work in conjunction with NSICOP's mandate to oversee the patchwork of Canadian national security organizations, specifically in dealings with CSIS.

**Conclusion**

Bill C-51 gave CSIS unprecedented powers. With great power comes great responsibility. Thus, it is now more important than ever to ensure that we have effective oversight mechanisms embedded within our national security framework so that we do not risk civil liberties in the name of national security or any other interest for that matter. If we are giving an agency the power to circumvent fundamental civil liberties, including even those protected by the *Charter*, then we need to make sure that CSIS does not overstep. We also need to make sure that whoever we task with this oversight role has the experience, skills, access, and power necessary to intervene and stop any acts that may violate citizens' rights or may not actually be in the best interests of Canada's national security. The proposed return of the Office of the Inspector General and the introduction of a special advocate regime in the judicial warrant process could help provide this salient oversight function needed to counter emerging threats to Canada while maintaining overall public confidence in not only CSIS, but all of our national security organizations.

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