Federal Court of Appeal Cour d'appel fédérale

Date: 20140731

Docket: A-145-14

Citation: 2014 FCA 249

CORAM: **BLAIS C.J.**
DAWSON J.A.
MAINVILLE J.A.

BETWEEN:

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

AND IN THE MATTER OF [redacted]

Heard at Ottawa, Ontario, on March 17, 2014.

Judgment delivered at Ottawa, Ontario, on July 31, 2014.

REASONS FOR JUDGMENT BY: THE COURT

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AND IN THE MATTER OF [redacted]

REDACTED REASONS FOR JUDGMENT BY THE COURT

I. Introduction

[1] In 2007, in Court File CSIS-10-07, the Canadian Security Intelligence Service (CSIS or the Service) applied to the Federal Court to obtain a warrant to assist in the investigation of threat-related activities CSIS believed individuals would engage in while traveling outside of Canada. For reasons reported as *Re CSIS Act*, 2008 FC 301, Justice Blanchard (a designated judge of the Federal Court) dismissed the warrant application. In Justice Blanchard's view, the Federal Court did not have jurisdiction to authorize CSIS employees to conduct intrusive investigative activities outside of Canada in circumstances where the activities authorized by the warrant were likely to constitute a violation of foreign law.

[2] No appeal was taken from this decision.

[3] Instead, in 2009, in Court File CSIS-30-08, CSIS asked the Federal Court to revisit and distinguish Justice Blanchard's decision. Another designated judge of the Federal Court, Justice Mosley (Judge), was persuaded to issue a warrant authorizing CSIS to intercept foreign telecommunications and conduct ██████ searches from within Canada. For reasons reported as *X(Re)*, 2009 FC 1058, the Judge was persuaded that the prior decision of Justice Blanchard was distinguishable and he issued the requested warrant. Briefly stated, the Judge reached this conclusion based upon a legal argument different from that before Justice Blanchard and upon a description of the facts concerning the methods of interception and seizure of information different from that put before Justice Blanchard.

[4] Specifically, CSIS argued that the Federal Court had jurisdiction to issue the requested warrant to ensure a measure of judicial control over activities of government officials acting in Canada in connection with an investigation that extended beyond Canada's borders. Counsel for CSIS justified this argument on the basis that the acts the Court was asked to authorize would all take place in Canada.

[5] Since the Judge issued this warrant, other designated judges of the Federal Court have issued fresh or renewal warrants in relation to targets of investigation under sections 12 and 21 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 (CSIS Act). These warrants are referred to as Domestic Interception of Foreign Telecommunications and Search (DIFTS) warrants.

[6] In the 2012-2013 Annual Report of the Commissioner of the Communications Security Establishment Canada, the Honourable Robert Décary, Q.C. recommended that the Communications Security Establishment Canada (CSEC) advise CSIS to provide the Federal Court with explicit evidence in DIFTS warrant applications that CSEC's assistance to CSIS might include the interception of private communications of the Canadian subjects of the DIFTS warrants by CSEC's second party partners in the United States, United Kingdom, Australia and New Zealand, and also involve the sharing of identity information of those Canadians with the four partners. These partners are, together with Canada, referred to as the "Five Eyes".

[7] After reading a public version of Commissioner Décary's report, the Judge issued an order requiring counsel for both CSEC and CSIS to appear before him. The order directed that:

> […] counsel should be ready to speak as to whether the application of the CSE Commissioner's recommendation "that CSEC advise CSIS to provide the Federal Court of Canada, when the occasion arises, with certain additional evidence about the nature and extent of the assistance CSEC may provide to CSIS" relates to the evidence presented to the Court in the application to obtain CSIS-30-08 and all other similar applications since, and, if yes, whether the evidence would have been material to the decision to authorize the warrant(s) in CSIS-30-08 or any subsequent applications.

[8] On the basis of documents provided for that hearing, the Judge was of the view that the focus of Commissioner Décary's concern was that information that had been before Justice Blanchard in the CSIS-10-07 application was not presented to the Federal Court in the CSIS-30-08 application or in any subsequent application for a DIFTS warrant. The evidence that was before Justice Blanchard was evidence that if the requested warrant was issued, CSEC would provide assistance to CSIS by, among other things, tasking its partners within the "Five Eyes" alliance to conduct surveillance on warrant targets.

[9] After reading the top secret version of Commissioner Décary's 2012-2013 report (one of the documents provided for the initial hearing) and hearing the preliminary submissions of counsel for CSIS and CSEC, the Judge directed that further evidence and argument be presented on two issues. The issues were:

1) Did CSIS meet its duty of full and frank disclosure when it applied for a DIFTS warrant in application CSIS-30-08 and any subsequent DIFTS warrant application?

2) 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?

[10] The Judge appointed Mr. Gordon Cameron as *amicus curiae* to assist in the examination of these two issues.

[11] After receiving additional evidence and hearing oral submissions by counsel for the Deputy Attorney General of Canada (Attorney General) and the *amicus*, the Judge concluded that CSIS breached its duty of candour by failing to disclose to the Federal Court in DIFTS warrant applications that it intended to make requests to foreign agencies to intercept the telecommunications of Canadians abroad. The Judge also concluded that CSIS had no lawful authority under section 12 of the CSIS Act to make such requests and section 21 of the CSIS Act did not allow the Court to authorize CSIS to request that foreign agencies intercept the communications of Canadians travelling abroad. On a going forward basis the Judge directed that:

- When an application is made to the Federal Court for a DIFTS warrant, the Court must be informed whether there has been any request for foreign assistance and, if so, what the results were in respect of the subjects of the application.

- It must be made clear in any grant of a DIFTS warrant that the warrant does not authorize the interception of the communications of a Canadian person by any foreign service on behalf of CSIS, either directly or through the assistance of CSEC.
- There must be no further suggestion in any reference to the use of second party assets by CSIS and CSEC, or their legal advisors, that such use is conducted under the authority of a section 21 warrant issued by the Federal Court.
- Finally, a copy of the Court's reasons was to be provided to the Chair of the Security Intelligence Review Committee and to the CSEC Commissioner.

[12] The Judge's conclusions were contained in a document entitled "Further Reasons for Order". The Judge explained in his Further Reasons for Order that they were intended to respond to recent developments and were intended to clarify the scope and limits of the Judge's reasons issued in 2009. Subsequently, Further Amended Reasons for Order (Further Reasons) were issued by the Judge, correcting four clerical errors contained in the initial version of the reasons. Nothing turns on this.

[13] Notwithstanding the title of the document, no order was issued by the Judge and he denied a request by the Attorney General that an order issue reflecting the Judge's views.

[14] The Attorney General now seeks to appeal from the Further Reasons.

[15] At a case management conference held by the then Chief Justice of this Court, three preliminary issues were identified:

i. Does this Court have jurisdiction to hear an appeal from the Further Reasons in light of the fact that no formal order was rendered by the Judge?

ii. Should the Court grant the appellant an extension of time to file the notice of appeal from the Further Reasons?

iii. Is a challenge to the Further Reasons moot on the ground that the warrant granted by the Judge in CSIS-30-08 has expired?

[16] The Chief Justice directed that these issues be addressed at a hearing to be held on March 17, 2014. Mr. Cameron's appointment as an *amicus* was renewed and counsel were also directed to be prepared to argue the merits of the appeal at the hearing.

[17] On March 17, 2014, we heard all submissions on the three preliminary issues. We reserved our decision and then heard arguments on the merits of the appeal.

[18] These are our reasons for extending the time in which to file the notice of appeal, taking jurisdiction to hear the appeal, concluding the appeal is not moot and that the appeal should be dismissed.

II. Preliminary Issues

A. *Does this Court have jurisdiction to hear an appeal from the Further Reasons in light of the fact no formal order was rendered by the Judge?*

[19] The *amicus* argues that the Further Reasons were issued in an application for a warrant that was granted and has expired. The Further Reasons therefore did not affect the outcome of the warrant application. As such, no appeal should lie from the Further Reasons.

[20] We disagree for the following two reasons.

[21] First, we accept the Attorney General's characterization of the proceeding before the Judge: it had the character of a generalized inquiry as opposed to the continuation of the warrant application. This is reflected in the order that commenced the inquiry. Counsel for CSIS and CSEC were required to appear and be prepared to speak to whether Commissioner Décary's recommendation to CSEC "relates to the evidence presented to the Court in the application to obtain CSIS-30-08 or any subsequent applications" (Order volume 1, Appeal Book Tab 13 at page 245).

[22] The generalized nature of the inquiry is also reflected in the Judge's reasons at paragraph 75. The Judge noted that while there may not have been non-disclosure in CSIS-30-08, there was no disclosure of the request for foreign assistance in the applications that followed. The Judge then referenced the Attorney General's agreement that "[r]ather than have the matter addressed in each of those files it should be dealt with in a single proceeding". Given this, and

the significance of the Judge's finding that CSIS has repeatedly failed in its duty of candour, the absence of a formal order should not be an impediment to the appellant's right to have the Judge's findings of fact and law reviewed by this Court. In the unique circumstances before us, the absence of a formal order is an irregularity.

[23] Our second reason for this conclusion is that the Judge's Further Reasons were declaratory in nature. It is trite law that a declaration declares what the law is. An entity that is subject to a declaration is bound by it and so is obliged to comply with the declaration. If the entity has doubts about the propriety of a court's declaration, the entity is obliged to appeal it (*Assiniboine v. Meeches*, 2013 FCA 114, 444 N.R. 285 at paragraphs 12 through 15). The finding of lack of candour and the legal conclusions on the scope of sections 12 and 21 of the CSIS Act were declaratory in nature. They are of such importance that they cannot be immunized from review.

B. *Should the Court grant an extension of time to file the notice of appeal from the Further Reasons?*

[24] The Judge issued his Further Reasons on November 22, 2013. Therefore, a notice of appeal should have been filed on or before December 23, 2013. Counsel for the Attorney General mistakenly believed that the Christmas recess suspended the 30 day filing deadline. She therefore calculated the appeal period to expire on January 9, 2014. The registry declined to accept the notice of appeal for filing on January 8, 2014 on the ground the appeal period had expired. The Attorney General therefore moves for an extension of time to file the notice of appeal.

[25] The *amicus* took no position on the motion for an extension of time.

[26] In deciding whether to grant an extension of time to file a notice of appeal, the over-riding consideration is whether the interests of justice favour granting the extension. Relevant factors to consider are whether:

(a) there is an arguable case on appeal;

(b) special circumstances justify the delay in filing the notice of appeal;

(c) the delay is excessive; and

(d) the respondent will be prejudiced if the extension is granted.

[27] We are of the view that the interests of justice favour granting the extension. We reach this conclusion for the following reasons:

(a) there are arguable issues raised in the appeal and they are issues of importance;

(b) counsel's misunderstanding of the effect of the Christmas recess is a special circumstance that explains the delay;

(c) the delay was not excessive; and

(d) the *amicus* is not prejudiced by the granting of the extension.

[28] For these reasons, the extension is granted.

C. *Is a challenge to the Further Reasons moot on the ground that the warrant granted by the Judge in CSIS-30-08 has expired?*

[29] We are of the view that the appeal is not moot for the following two reasons.

[30] First, as explained above, the proceeding before the Judge had the character of a generalized inquiry. It therefore affects existing warrant applications.

[31] Second, also as explained above, the Further Reasons were declaratory in nature. As such, the reasons bound, and continue to bind, CSIS.

[32] The appeal, therefore, is not moot.

III. The Issues

[33] Two substantive issues are raised in this appeal:

1) Did CSIS breach the duty of candour owed to the Court in its application for a DIFTS warrant in CSIS-30-08 or in subsequent applications for DIFTS warrants?

2) Does CSIS have the legal authority to seek assistance, through CSEC, from foreign partners to intercept the telecommunications of Canadians while they are outside of Canada?

[34] Before considering these issues, it is helpful to review the relevant findings of the Judge.

IV. The Judge's Decision

[35] After describing in detail the factual background, framing the issues to be decided and dealing with a preliminary question of privilege, the Judge commenced his analysis. No appeal is brought from the Judge's conclusion that certain material was not privileged.

[36] The issues framed by the Judge were:

1) Whether CSIS met its duty of full and frank disclosure when it applied for a DIFTS warrant in application CSIS-30-08 and any subsequent DIFTS warrant applications; and
2) The legal authority of CSIS, through CSEC, to seek assistance from foreign partners to intercept the telecommunications of Canadians while they are outside of Canada.

[37] With respect to the first issue, the Judge concluded that:

i. It was not clear that a request for foreign assistance was made in CSIS-30-08. The Attorney General conceded, however, that foreign assistance was requested in connection with the DIFTS warrants granted following the rationale developed in CSIS-30-08 and further conceded that those requests were not disclosed to the Court. The Attorney General acknowledged that the issue of compliance with the duty of full and frank disclosure should not be decided on the basis that there was no actual nondisclosure in CSIS-30-08 (reasons paragraph 75).

ii. The CSEC employee who provided affidavit evidence and was cross-examined before the Judge "candidly stated that his evidence in CSIS-30-08 was 'crafted' with legal counsel to exclude any reference to the role of the second parties described in his affidavit [filed] before Justice Blanchard" (reasons paragraph 76).

iii. CSEC knew the collection efforts of [redacted] (reasons paragraph 76).

iv. In relation to the individuals who were subject to a DIFTS warrant, in the preceding 12-month period [redacted]. It was a

reasonable inference that the results in previous years would be similar (reasons paragraph 78).

v. While CSIS acknowledged that the duty of full and frank disclosure (also known as the duty of utmost good faith and candour) applies to all of its *ex parte* warrant applications, CSIS submitted that it complied with this duty (reasons paragraphs 82 and 83).

vi. Specifically, CSIS submitted that:

> […] the fact that in addition to seeking warrants from the Court the Service may also seek the assistance, through CSEC, of foreign partners to intercept under their own legal framework telecommunications of a Canadian subject of investigation abroad as part of a lawful investigation in Canada is not a material fact which could have been relevant to the designated judge in making determinations required for the purpose of exercising a discretion in the context of a warrant application pursuant to section 21 of the CSIS Act.

vii. In advancing this argument, the Attorney General relied on the definition of "material facts" developed in decisions relating to criminal proceedings. In this context, evidence is material if what is offered to prove or disprove is a fact in issue. What is in issue is a function of the allegations contained in the indictment and the governing procedural and substantive law (reasons paragraph 85).

viii. The Attorney General submitted that in the context of a warrant application, materiality referred to information that is probative to the legal or factual determination that a judge would make when deciding whether to grant the requested warrant. It followed, in the submission of the Attorney General, that reference to requests for assistance made to foreign partners was legally and

factually irrelevant to the issuance of the requested warrant. This was a consequence of Justice Blanchard's earlier decision that the Court lacked jurisdiction to govern the relationship between CSIS and the foreign partners (reasons paragraph 86).

ix. The Judge accepted the submission that in the context of a warrant application, material facts are those which may be relevant to the determination of whether the criteria contained in paragraphs 21(2) and (3) of the CSIS Act were made out. The Judge described the criteria as follows:

> (a) the facts relied on to justify the belief, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate a threat to the security of Canada or to perform its duties and functions under section 16;
>
> (b) that other investigative procedures have been tried and had failed and why it appears that they are unlikely to succeed, that the urgency of the matter is such that it would be impractical to carry out the investigation using only other investigative procedures or that without a warrant under this section it is likely that information of importance with respect to the threat to the security of Canada or the performance of the duties and functions under section 16 referred to in paragraph (a) would not be obtained.

x. That said, the Judge rejected a narrow concept of relevance. In his view, relevant matters included the prior history of attempts to have the Court authorize the collection of security intelligence abroad and the potential implications of sharing information about Canadian persons with foreign security and intelligence agencies (reasons paragraph 89).

xi. Based on the evidence before him the Judge was satisfied "that a decision was made by CSIS officials in consultation with their legal advisors to strategically omit information in applications for DIFTS warrants about their intention to seek the assistance of the foreign partners. As a result, the Court was led to believe that all of the interception activity would take place in or under the control of Canada." (reasons paragraph 90).

xii. The Judge found that the CSEC witness understood the importance of providing the Court with information about the process "so that the Court would have a good understanding of how these activities would be undertaken." At paragraph 91 of his reasons, the Judge quoted the following excerpt from the witness' cross-examination:

> […] if we are seeking this assistance, the Court should be aware of what the second party agency would see and what they may or may not choose to do with that information. (Transcript, October 23, 2013 p. 59)

xiii. The Judge concluded that "[i]t was a material omission for the Service not to explain its new, different and never articulated to the Court theory that, contrary to its position before Justice Blanchard, it did not require warrant authority to task the assets of the second party allied nations to conduct foreign interceptions" (reasons paragraph 92).

[38] With respect to the second issue, the Judge reasoned as follows:

i. The interception of the communications for which authorization was sought in the applications before Justice Blanchard in 2008 and the Judge in 2009 would come within the broad meaning of the term "intercept" as defined in section 2 of the

CSIS Act by reference to the definition contained in the *Criminal Code*, R.S.C. 1985, c. C-46. Section 26 of the CSIS Act provides that Part VI of the *Criminal Code* does not apply in relation to any interception of a communication under the authority of warrant issued under section 21 of the Act. Without this protection, Part VI of the *Criminal Code* would apply to the interception of any "private communication"; a "private communication" is any private communication when either the originator or the recipient was in Canada. Given that the place of "interception" under the *Criminal Code* has been interpreted as the location where a call has been acquired and recorded, the concern about potential liability in the absence of a warrant expressed to the Court in the application before Justice Blanchard was realistic (reasons paragraphs 23 and 24).

ii. CSEC's mandate is set out in the *National Defence Act*, R.S.C. 1985, c. N-5 as amended by the *Anti-terrorism Act*, S.C. 2001, c. 41. Under paragraph 273.64(1)(*a*) of this legislation, CSEC is authorized to acquire and use information obtained from communication systems, information technology systems, networks and the like for the purpose of providing foreign intelligence to the government of Canada. Prior to the amendments made in 2001, it was unlawful for CSEC to intercept the communications of a foreign target that either originated or terminated in Canada. The 2001 legislation allowed the Minister of National Defence to authorize CSEC to target foreign entities physically located outside of Canada that may engage in communications to or from Canada, for the sole purpose of obtaining foreign intelligence (reasons paragraphs 13 and 14).

iii. Paragraph 273.64(2) of the *National Defence Act* expressly prohibits CSEC from directing these activities at Canadian citizens and permanent residents (together "Canadian persons") wherever located, or at any person in Canada, regardless of their nationality. The limitations respecting Canadian persons and any persons in Canada do not apply to technical and operational assistance which CSEC may provide to federal law enforcement and security agents in the performance of their lawful duties pursuant to paragraph 273.64(1)(*c*) of the *National Defence Act*. Subsection 273.64(3) of the legislation provides that such assistance activities are subject to any limitations imposed by law on the federal agencies in the performance of their duties (reasons paragraphs 15 and 16).

iv. In the warrant application before Justice Blanchard, CSIS' main argument was that the warrant sought was required in order to ensure that Canadian agents engaged in intrusive searches and seizures abroad did so in conformity with Canadian law, because the impugned investigative activities might, absent a warrant, breach the *Charter* and contravene the *Criminal Code*. In its submission, the requested warrant could be issued under section 21 of the CSIS Act; this approach would respect the rule of law and be consistent with the mandated regime of judicial control (reasons paragraph 93).

v. CSIS now asserts that it accepted the outcome of Justice Blanchard's decision, particularly his conclusion that the Court had no authority to issue the requested warrant. In light of that, with the assistance of counsel, CSIS concluded that a warrant was not required for the Service to engage the assistance of second parties through CSEC in order to intercept the private communications of Canadians

outside the country. In CSIS' submission, CSEC does not breach the prohibition against targeting Canadians contained in the *National Defence Act* when it provides assistance to CSIS operating under the general investigative authority granted to the Service by section 12 of the CSIS Act (reasons paragraph 94).

vi. On the record before the Judge, it appeared that no attempt was made to rely on section 12 as the lawful authority required by CSEC to target Canadians until after the Court had issued the first DIFTS warrant (reasons paragraph 95).

vii. In the view of the *amicus*, this interpretation of the scope of section 12 allows CSIS "to contract out interceptions of Canadians' communications or accessing Canadians' information without any warrant or supervision by this Court". While the *amicus* submitted that the Judge did not have to determine the scope of section 12 of the Act, the Judge disagreed. In his view, it was necessary for the Court to express an opinion on the issue because of the public association, through the CSEC Commissioner's Report, between the issuance of the DIFTS warrants by the Federal Court and the requests for second party assistance (reasons paragraphs 96 and 97).

viii. Section 12 of the CSIS Act allows CSIS to conduct investigations, collect, analyze and retain information and report to the Government of Canada respecting any activities which may reasonably be suspected of constituting threats to the security of Canada. The scope of this power must be read in conjunction with the scheme of the Act, the guarantees of protections set out in

the *Charter* and any limitations imposed under domestic law (such as the *Criminal Code*) (reasons paragraph 99).

ix. Section 12 does not exempt CSIS from the operation of these laws of general application. When required, the Service may seek the authority of a warrant under section 21 of the CSIS Act to engage in investigative methods that would otherwise constitute a crime or a breach of the *Charter* guarantee against unreasonable search and seizure (reasons paragraph 100).

x. Section 12 does not expressly authorize CSIS to invoke the interception capabilities of foreign agencies. While such interceptions may be lawful where they are initiated under the domestic legislation of the requested state, it may be unlawful in the jurisdiction where the interception actually occurs. Legislation such as the *Foreign Intelligence Surveillance Act of 1978*, Pub.L. 95-511, 92 Stat. 1783, 50 U.S.C. ch. 36 (FISA) permits warrantless searches for foreign intelligence collection as authorized by the President of the United States and, also authorizes the surveillance of foreign subjects under court order. FISA therefore authorizes the violation of foreign sovereignty in the manner the Supreme Court of Canada recognized as contrary to the principles of customary international law, but permissible under domestic law with express legislative authority (*R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292.) (Reasons paragraph 102).

xi. Nothing in the Act or its legislative history suggested that when enacting section 12 Parliament granted express legislative authority to CSIS to violate

international law and the sovereignty of foreign nations either directly or indirectly through the agency of CSEC and the second parties (reasons paragraph 103).

xii. As discussed by the Supreme Court in *Hape*, at paragraphs 51, 52 and 101 and in *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125, at paragraph 18, the principle of comity between nations that implies the acceptance of foreign laws and procedures when Canadian officials are operating abroad ends where clear violations of international law and human rights begin. In tasking the other members of the "Five Eyes" to intercept the communications of Canadian targets, CSIS and CSEC officials knew, based on the legal advice they had been given about the implications of *Hape* and Justice Blanchard's decision, that this would involve the breach of international law by the second parties (reasons paragraph 105).

xiii. The record before the Judge indicated that CSEC consistently interpreted Parliament's references to "lawful duties" and "limitation imposed by law" in the 2001 amendments to the *National Defence Act* as requiring a warrant. Legal advice given to CSEC in May 2009 stipulated that CSIS would make a request for second party assistance only where a warrant was in place (reasons paragraph 107).

xiv. The CSIS witness responsible for the warrant process in 2009 acknowledged that CSIS looked primarily to the judicial warrants issued by the Federal Court for the

authority to ask CSEC to request the assistance of second parties to intercept and collect communications of Canadians (reasons paragraph 108).

xv. The exercise of the Federal Court's warrant issuing authority was used as protective cover for activities the Court has not authorized (reasons paragraph 110).

xvi. The Judge was not persuaded that Parliament intended to give CSIS authority to engage the collection resources of the second party allies to intercept the private communications of Canadians under the general power to investigate contained in section 12. Moreover, nothing in the legislative history of the amendments to the *National Defence Act* in 2001 suggested that Parliament intended that CSEC could extend such assistance to CSIS solely on the authority of section 12 (reasons paragraph 111).

xvii. The Judge was satisfied that CSIS and CSEC "chose to act upon the new broad and untested interpretation of the scope of s.12 only where there was a DIFTS warrant in place". This view was reinforced by the 2012-2013 Annual Report of the Security Intelligence Review Committee (SIRC) which refers to a review of a new section 21 warrant power. After reviewing both the public and classified versions of this report the Judge was of the view that passages of the report suggest that SIRC is operating under the mistaken belief that the DIFTS warrants issued by the Federal Court authorize the collection of intercepts respecting Canadian persons by foreign agencies (reasons paragraphs 112 and 115).

xviii. As soon as it was determined that CSIS would rely on the general power to investigate contained in section 12 of the CSIS Act to request second party assistance with the interception of communications of Canadian subjects abroad, that determination constituted facts known to individuals who swore affidavits in support of warrant applications which could lead the Court to find that there was no investigative necessity to issue a DIFTS warrant. The failure to disclose that information was the result of a deliberate decision to keep the Federal Court "in the dark about the scope and extent of foreign collection efforts that would flow from the Court's issuance of a warrant". This was a breach of the duty of candour owed by CSIS and its legal advisers to the Court, and has led to misinformation in the public record about the scope of the authority granted to CSIS by the issuance of the DIFTS warrants (reasons paragraphs 117 and 118).

xix. The conclusion that the Federal Court has jurisdiction to issue a warrant under section 21 for the domestic interception of foreign telecommunications under certain defined conditions remains valid. That jurisdiction does not extend to the authority to empower CSIS to request that foreign agencies intercept the communications of Canadian persons travelling abroad either directly or through the agency of CSEC under its assistance mandate (reasons paragraph 119).

xx. The interpretation of section 12 asserted by CSIS and the Attorney General is inconsistent with the scheme of the act as a whole and with the position of the Supreme Court of Canada in *Hape* that the violation of international law can only be justified if expressly authorized by Parliament (reasons paragraph 122).

V. The asserted errors

[39] The Attorney General asserts that with respect to the first issue, that is whether CSIS breached the duty of candour it owed to the Court, the Judge committed the following errors:

i) Erroneously finding that information had been strategically omitted because such finding was not supported by the record.

ii) Erroneously finding that the information said to have been omitted was material to the relevant warrant applications.

[40] With respect to the second issue, the scope of section 12 of the CSIS Act, the Judge is said to have erred by:

i) Erroneously concluding that section 12 does not provide CSIS with authority to request that foreign partners intercept telecommunications of Canadians abroad.

ii) Erroneously concluding that asking foreign partners to intercept the telecommunication of Canadians abroad is contrary to international law.

VI. The standard of appellate review

[41] The parties did not make detailed submissions on the standard of appellate review to be applied to the Judge's decision. In our view, the standard to be applied is that articulated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[42] It follows that:

i) The standard of review on a pure question of law is correctness (*Housen* at paragraph 8).

ii) Findings of fact may not be reversed unless it is established that the Judge at first instance made a palpable and overriding error. The same standard is to be applied to inferences of fact drawn by the Judge. A palpable and overriding error is one that is plainly seen (*Housen* at paragraphs 7, 10 and 19-23).

iii) Findings of mixed fact and law are reviewed on the standard of palpable and overriding error, unless an extricable error in principle is established. Such an extricable error is reviewed on the standard of correctness (*Housen* at paragraph 36).

VII. Application of the standard of appellate review

A. *Did the Judge err in finding that CSIS had breached the duty of candour?*

[43] As explained above, two errors are asserted in connection with this finding. The first is that the evidentiary record does not support the conclusion that there was a decision to "strategically omit" information in applications for DIFTS warrants. This Court may only set aside this finding if there was a palpable and overriding error with respect to underlying findings of fact or if the inference-drawing process used to reach this conclusion was palpably in error.

[44] The Attorney General asserts palpable and overriding error on the basis that:

i) The omitted information had been fully disclosed on the previous application before Justice Blanchard, who purportedly found that the Federal Court lacked jurisdiction to authorize such requested warrants.

ii) There was no evidence to support the finding that CSEC's evidence was "crafted".

[45] In our view, these arguments must fail for the following reasons.

[46] First, it does not assist CSIS to argue that information the Judge found to be material to the warrant application before him was disclosed to the Court in the prior warrant application made before Justice Blanchard. This is particularly the case when the Judge found the Court to have jurisdiction to issue the requested warrant based upon a different description of the facts concerning the methods of interception and seizure of information than that described to Justice Blanchard. Specifically, the Judge was told that the acts the Court was asked to authorize would all take place in Canada. The evidence before Justice Blanchard established that, if granted, the warrant would authorize activities outside of Canada.

[47] Second, it is not fair to characterize Justice Blanchard's decision to be that the Federal Court lacked jurisdiction to issue a warrant authorizing the making of requests for assistance to second parties. It is clear from Justice Blanchard's reasons that on that warrant application CSIS acknowledged that the activities sought to be authorized by the warrant were "likely to constitute a violation of foreign law" (Justice Blanchard's reasons paragraph 29, see also paragraph 50).

[48] What Justice Blanchard did decide was that section 21 of the CSIS Act did not authorize the Federal Court to issue the requested warrant because the intrusive activities the warrant would authorize were activities that would likely violate the laws of the jurisdiction where the activities were likely to occur (Justice Blanchard's reasons paragraph 50).

[49] Further and importantly, Justice Blanchard expressly acknowledged that not all extraterritorial intrusive activities would be illegal in every jurisdiction. Thus, he concluded paragraph 50 by noting that:

> […] The Service intends to execute the warrant wherever the targets are located. Understandably, no specific foreign state is identified in the application since the Service is likely unable to predict where these targets may travel once they leave Canada. It is therefore difficult, if not impossible, to lead evidence as to the legality of the investigative activities sought to be authorized in a given jurisdiction at the application stage, since no foreign state is identified.

[50] This passage is wholly inconsistent with the Attorney General' assertion that Justice Blanchard held the Federal Court lacked jurisdiction to authorize second party requests. It is also inconsistent with the further submission of the Attorney General that Justice Blanchard found that section 21 does not authorize the issuance of the warrant having extraterritorial effect.

[51] It is readily apparent from a fair reading of the whole of Justice Blanchard's decision that his preoccupation was that the Court was asked to issue a warrant that CSIS conceded would likely violate the principles of territorial sovereign equality and non-intervention, and thus violate international law.

[52] Finally, in oral argument the Attorney General briefly argued that the evidence does not support the Judge's finding that CSEC's affidavit evidence on the warrant application was "crafted" to exclude reference to the role of second parties. As we understand this argument, it is that the evidence was not crafted, nor was it capable of being crafted, because it was not until after the first DIFTS warrant issued that a decision was made to seek second party assistance.

[53] In our view, this submission must fail because of the Attorney General's agreement that there was no disclosure of the requests for second party assistance in the applications that followed CSIS-30-08, and his further agreement that rather than addressing the issue of disclosure in all of the subsequent files, the issue of the adequacy of disclosure should be dealt with in a single application. We are satisfied that it was open to the Judge to conclude, at the least, that once the decision was made to routinely seek foreign assistance, a strategic decision was made not to include that information in the affidavit evidence filed in support of DIFTS warrants.

[54] We now turn to consider the Attorney General's second argument on this issue: whether the information said to be omitted was material to the relevant warrant applications.

[55] As explained in more detail at subparagraphs 37(vi) to (vii) above, the Judge accepted that what was material to his decision to issue the first DIFTS warrant was information which was relevant when determining whether the criteria found in paragraphs 21(2)(*a*) and (*b*) of the CSIS Act had been met.

[56] The Attorney General acknowledges that this was the correct test at law (appellant's memorandum of fact and law at paragraph 49). He asserts, however, that the Judge erred in his application of the test. This is said to be reflected in paragraph 89 of the Judge's reasons where he wrote:

> However, I do not accept the narrow conception of relevance advocated by the DAGC in this context as it would exclude information about the broader framework in which applications for the issuance of *CSIS Act* warrants are brought. In my view it is tantamount to suggesting that the Court should be kept in the dark about matters it may have reason to be concerned about if it was made aware of them. In the circumstances under consideration that would include matters relating to the prior history of attempts to have the Court authorize the collection of security intelligence abroad and the potential implications of sharing information about Canadian persons with foreign security and intelligence agencies.

[57] The Attorney General argues that:

i) any requirement that CSIS disclose "matters [the Court] may have reason to be concerned about" is not an intelligible standard;

ii) the concern about the prior history of attempts to obtain prior authorization is "puzzling" because Justice Blanchard's decision "made it plain that the Federal Court has no jurisdiction to issue warrants for foreign requests"; and,

iii) the final concern about information sharing, while important, is not relevant to the issue of whether the preconditions in paragraphs 21(2)(*a*) and (*b*) of the CSIS Act have been met.

[58] In our view, the Attorney General has failed to establish any palpable and overriding error on the part of the Judge or any extricable error of principle. We reach this conclusion for the following reasons.

[59] First, read fairly, the Judge did not articulate an unintelligible standard for disclosure. While perhaps paragraph 89 could have been more elegantly crafted, the Judge's reference to matters the Court could reasonably be concerned about reflects the discretionary nature of a section 21 warrant. That the relief is discretionary is made plain by subsection 21(3) of the CSIS Act which states that if satisfied of the matters enumerated in paragraphs 21(2)(*a*) and (*b*) a judge "may" issue a warrant.

[60] The discretionary nature of a ruling on warrant application was acknowledged by the Deputy Attorney General in the legal opinion he provided to CSIS dated October 2, 2008 (volume 2 Appeal Book page 431 at page 437).

[61] As submitted by the *amicus*, it follows from this discretionary nature that a decision whether to issue a section 21 warrant is not the simple "box-ticking" exercise the Attorney General suggests. Based on the particular circumstances before the Court in any particular warrant application, factors beyond those enumerated in paragraphs 21(2)(*a*) and (*b*) will be material to the judicial exercise of discretion. Had Parliament intended otherwise, subsection 21(3) would provide that upon being satisfied of the enumerated matters a judge "shall" issue a warrant.

[62] We agree with the Judge that on the record before him, considerations material to the decision whether to issue the requested warrant included the prior application before Justice Blanchard and the potential implications of sharing information about Canadian persons with foreign security and intelligence agencies.

[63] The submission of the Attorney General that the Judge's concern about the prior application before Justice Blanchard is "puzzling" is, in our view, again premised upon the same mis-characterization of Justice Blanchard's reasons discussed above - Justice Blanchard did not find that the Federal Court was without jurisdiction to issue warrants authorizing CSIS to seek foreign assistance through CSEC. Rather, he ruled that section 21 did not authorize a judge of the Federal Court to issue a warrant such as that requested of him when CSIS conceded that it would likely violate foreign domestic law and therefore violate international law. As noted above, Justice Blanchard was alive to the notion the investigative activities could be legal in some jurisdictions.

[64] Having dismissed the submissions of the Attorney General, it follows that he has not established any palpable and overriding error in the application of the test for materiality.

[65] To conclude on the first issue, on the record before us:

i) Justice Blanchard understood that if he granted the requested warrant, CSEC would, pursuant to its assistance mandate, task the foreign signal intelligence collection systems under its control as well as those under the control of allied agencies.

ii) Justice Blanchard also understood that CSEC had the capacity to direct activities from within Canada to [redacted] search [redacted] [redacted] in order to obtain information and that, if granted the warrant would authorize such conduct.

iii) Following his decision, CSIS considered whether other options were available in order to lawfully intercept the telecommunications of Canadians and to search [redacted] who are outside of Canada. This led to a legal opinion being requested from the Department of Justice. In consequence, on October 2, 2008 a legal opinion was given to CSIS by the Deputy Attorney General. In it, the Deputy Attorney General opined such activity could be undertaken without a warrant pursuant to CSIS' power, conferred by section 12 of the CSIS Act, to investigate through requests for assistance made on CSIS' behalf to foreign partners.

iv) Following receipt of this opinion, CSIS decided to make a warrant application requesting authority to, from within Canada, intercept telecommunications of Canadian subjects of investigation abroad and search [redacted] [redacted].

v) As a result of this application, the first DIFTS warrant was issued in CSIS-30-08. This warrant authorized CSIS to, from within Canada, intercept telecommunications of Canadian subjects of investigation abroad and search [redacted] [redacted].

vi) When issuing CSIS-30-08 the Judge did not understand that requests would be made to foreign agencies. He understood that the only interception of a target's communication would be from sites controlled from within Canada under the authority of a warrant.

vii) After this warrant was issued further discussions that took place between CSIS and CSEC about the possibility to also seeking assistance from foreign partners.

viii) CSEC explained to CSIS that only [redacted] CSEC recommended the requests for assistance to foreign partners should be made at the same time as requests for assistance are made by the service to CSEC under a DIFTS warrant. CSIS accepted this recommendation.

ix) Subsequently, a CSIS internal memorandum issued entitled "Domestic Interception of Foreign capital communications and Search (DIFTS)-Options for Regions and Procedures" was issued. The memorandum addressed issues surrounding the execution of the DIFTS warrants as well as requests for assistance to foreign partners. This is what was said about request to foreign partners:

> 2nd PARTY ASSETS: These are CSEC's SIGINT counterparts within the 5-Eyes community – namely the US, UK, Australia and New Zealand. Allowing CSEC to share our collection requirements with 2nd party assets [redacted] Although the Service has recognized that the use of 2nd Party SIGINT assets for targeting could eventually lead to the taskings being attributed to the Service, upper Service management has agreed that the use of 2nd party assets will be the norm. The 2nd party assets will not be privy to specific details about our targets; [redacted] and could infer that the collection is being

> conducted on behalf of the Service as it would be outside the normal practice for CSEC to be adding Canadian ████████████████ [underlining added]

Thus, seeking the assistance of foreign agencies became the norm when a DIFTS warrant issued.

x) Activities carried out by CSEC for CSIS under CSEC's assistance mandate are conducted under the lawful authority of CSIS and subject to any limits on CSIS.

xi) The Judge found that CSEC consistently interpreted the requirements of "lawful duties" and "limitation imposed by law" contained in paragraph 273.64(1)(*c*) and subsection 273.64(3) of the *National Defence Act* to require that CSIS obtain a warrant. Legal advice given to CSEC in May 2009 stipulated that CSIS would make a request of CSEC for second parts assistance only when a warrant was in place.

xii) The CSIS witness responsible for the warrant process in 2009 acknowledged that CSIS looked primarily to the warrants issued by the Federal Court for the authority to ask CSEC to request the assistance of second parties to intercept and collect communications of Canadians.

xiii) The Judge further found the DIFTS warrants gave officials of both CSIS and CSEC comfort that they were acting within the scope of their lawful authority.

xiv) Requests for foreign assistance have only been made when a DIFTS warrant has been issued by the Federal Court. CSEC only targeted communications referred in

> a DIFTS warrant, for the duration of the warrant, and complied with any conditions in the DIFTS warrant.

[66] On this evidence we are satisfied that once the decision was made to routinely seek the assistance of foreign agencies after the issuance of a DIFTS warrant, the duty of candour and utmost good faith required that CSIS disclose to the Federal Court the scope of its anticipated investigation, and in particular that CSIS considered itself authorized by section 12 of the CSIS Act to seek foreign agency assistance without a warrant. CSIS failed to make such disclosure.

B. *Did the Judge err in finding CSIS did not have the legal authority to seek assistance, through CSEC, from foreign partners to intercept telecommunications of Canadians while they are outside of Canada?*

[67] Whether CSIS has authority to seek such assistance depends upon the proper interpretation of section 12 of the CSIS Act.

[68] The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

[69] The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[70] This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

[71] Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 26).

[72] Section 12 is as follows:

The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and	Le Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et

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.

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.

[73] The phrase "threats to the security of Canada" found in section 12 is defined in section 2 of the CSIS Act to mean:

(*a*) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

a) l'espionnage ou le sabotage visant le Canada ou préjudiciables à ses intérêts, ainsi que les activités tendant à favoriser ce genre d'espionnage ou de sabotage;

(*b*) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

b) les activités influencées par l'étranger qui touchent le Canada ou s'y déroulent et sont préjudiciables à ses intérêts, et qui sont d'une nature clandestine ou trompeuse ou comportent des menaces envers quiconque;

(*c*) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and

c) les activités qui touchent le Canada ou s'y déroulent et visent à favoriser l'usage de la violence grave ou de menaces de violence contre des personnes ou des biens dans le but d'atteindre un objectif politique, religieux ou idéologique au Canada ou dans un État étranger;

(*d*) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada.

d) les activités qui, par des actions cachées et illicites, visent à saper le régime de gouvernement constitutionnellement établi au Canada ou dont le but immédiat ou ultime est sa destruction ou son renversement, par la violence.

[74] Lawful advocacy, protest or dissent do not constitute threats to Canada's security, unless accompanied by one of the four enumerated activities.

[75] We begin consideration of the scope of section 12 with the uncontroversial observation that nothing in the text of section 12 suggests any geographic limit on the sphere of the Service's operations. Indeed, references in the definition of "threats to the security of Canada" to such things as "foreign influenced activities within or relating to Canada" and "activities within or relating to Canada directed toward [… the] use of acts of serious violence […] for the purpose of achieving [… an] objective within Canada or a foreign state" are inconsistent with any notion of a geographic limit on CSIS' areas of operation.

[76] This textual analysis is supported by a contextual analysis when section 12 is compared with subsection 16(1) of the CSIS Act. Section 16 deals with the collection of information concerning foreign states and persons, and provides that the Service may assist the Ministers of National Defence and Foreign Affairs "within Canada". Thus, a contextual analysis reveals that when Parliament wished to limit the Service's geographic sphere of operations it did so expressly.

[77] As for the required purposive analysis, it is undisputed that a state's ability to protect itself from national security threats depends upon its ability to obtain accurate and timely intelligence relating to such threats. For that reason, [t]he Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, 1981 (McDonald Commission) recommended that Canada's intelligence agency should not be confined to collecting intelligence

or countering activities on Canadian soil; otherwise, information and sources of information important to Canada's security would be lost. Given that the report of the McDonald Commission led to the creation of CSIS, its recommendations support the conclusion that CSIS was intended to conduct activities at home and abroad.

[78] Having concluded on the basis of the required textual, contextual and purposive analysis that the Service is not confined to operating within Canada, it is next necessary to consider whether section 12 of the CSIS Act permits the Service to seek foreign assistance to intercept the telecommunications of Canadians while they are abroad.

[79] As explained in some detail at paragraph 38 above, the Judge concluded that Parliament did not intend to give the Service authority to engage foreign agencies to intercept private communications of Canadians under the general power to investigate granted to the Service by section 12 of the CSIS Act.

[80] Subject to one caveat, we agree with the Judge's conclusion, substantially for the reasons given by the Judge. Our caveat, developed below, is that we do not endorse his conclusion that intrusive investigative measures conducted abroad would necessarily violate international law or the principle of comity between nations.

[81] To the Judge's reasons we would add the following: on the required textual, contextual and purposive analysis, judicial authorization in the form of a warrant issued pursuant to section 21 of the CSIS Act is required when the Service's methods of investigation are intrusive,

as in the case of the interception of telecommunications, whether conducted directly, or indirectly through the auspices of a foreign intelligence service. We reach this conclusion on the following basis.

[82] As the Judge noted, section 12 does not give CSIS an exemption from the operation of laws of general application. Thus, when intrusive investigation methods are resorted to, which methods would otherwise constitute a crime or a breach of the *Charter* guarantee against unreasonable search and seizure, the Service may apply to the Federal Court for the issuance of a warrant under section 21 of the CSIS Act.

[83] The condition precedent for the making of such an application is that the CSIS Director, or a designated CSIS employee, "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 […]".

[84] Again, 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.

[85] This textual analysis is supported contextually by section 26 of the CSIS Act, which renders Part VI of the Criminal Code inapplicable in relation to any interception of a communication under the authority of a warrant or in relation to any communication so intercepted. It may be inferred that Parliament intended that such legal protection be available to all Service personnel, no matter where they are conducting investigations. Such an interpretation

also ensures that issues with respect to the admissibility of any intercepted communication or derivative evidence will be unlikely to arise.

[86] A purposive interpretation leads to the same conclusion. The need for strict controls on the operations of security intelligence agencies has long been recognized. In *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326 the Supreme Court considered the legislative purpose and guiding principles that attended the creation of CSIS. At paragraph 22 of the reasons the Court quoted from the report of the Special Committee of the Senate on the Canadian Security Intelligence Service to the effect that:

> A credible and effective security intelligence agency does need to have some extraordinary powers, and does need to collect and analyze information in a way which may infringe on the civil liberties of some. But it must also be strictly controlled, and have no more power than is necessary to accomplish its objectives, which must in turn not exceed what is necessary for the protection of the security of Canada.
>
> (Report of the Special Senate Committee, at para. 25)

[87] Requiring judicial authorization of all interception of private telecommunications is consistent with the need to impose strict controls over intrusive collection methods carried out by CSIS.

[88] This conclusion is also consistent with the *National Defence Act*. Under subsection 273.65(2) of that Act, ministerial authorization is required to intercept communications to or from Canada. Paragraph 273.64(2)(*a*) of that Act prohibits CSEC from directing collection activities against Canadian persons. It is inconsistent with this scheme to

interpret section 12 of the CSIS Act to allow CSEC to conduct otherwise prohibited collection activities without any ministerial or judicial oversight.

[89] Having concluded that judicial oversight is required, it is next necessary to consider the ability of the Federal Court to issue such search warrants. This requires, to some extent, consideration of the effect of Justice Blanchard's decision that, on the facts before him, the Federal Court lacked jurisdiction to issue the requested warrant.

[90] Here, we emphatically endorse the submission of the *amicus* that the question of whether the Federal Court had jurisdiction to issue a warrant authorizing the Service to lawfully intercept the communication of Canadians abroad (through the agency of CSEC and another country) was not before Justice Blanchard. Further, we see no legal impediment to the issuance of such a warrant. Thus, for example, 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.

[91] What Justice Blanchard found was that the Federal Court lacked jurisdiction to issue a warrant that authorized activities in another country that CSIS conceded would violate the laws of that country. This issue does not properly arise on this record and cannot be decided on the record before us.

[92] That said, we express concern that the argument presented to Justice Blanchard does not appear to have been well-developed. Notably, two important and interrelated legal doctrines do not appear to have been addressed before Justice Blanchard.

[93] First, as Justice LaForest wrote in *R. v. Libman*, [1985] 2 S.C.R. 178 at pages 212-213, what is required to make an activity that occurs outside of Canada subject to the jurisdiction of our courts is that there be a "real and substantial link" between the activity (in that case a criminal offence) and Canada. The real and substantial link or connection test is well-established in both public and private international law.

[94] In *Hape*, at paragraph 62, the majority quoted with approval Justice LaForest's comment in *Libman* that what constitutes a "real and substantial link" justifying extraterritorial jurisdiction may be "coterminous with requirements of international comity".

[95] It appears from *Hape* at paragraphs 61 to 64, that the stronger the real and substantial link between Canada and the extraterritorial enforcement of its law, the less such enforcement offends the principle of comity.

[96] It is for another day on another application with a more fully developed record for the Federal Court to consider whether in the national security context, section 21 warrants necessarily have a sufficient real and substantial link to Canada that the Court may issue a warrant that authorizes intrusive extraterritorial activity without offending the principle of comity and principles of international law.

[97] The second argument that apparently was not developed before Justice Blanchard was the unique principles of extraterritorial jurisdiction that can arise in the context of national security.

[98] In *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, in the opening line of the opening paragraph, the Chief Justice acknowledged that one of the most fundamental responsibilities of a government is to ensure the security of its citizens. This is so because the maintenance of national security is essential to the maintenance of the Rule of Law.

[99] It follows from the primacy of national security that:

> National security is arguably the most important justification that can be advanced in support of legislation, springing, as it does, from the necessity to safeguard and preserve the very existence of the state and its democratic institutions and ensure their continued survival. The need to safeguard the security of the nation can also be rooted in the ability of the state to take measures to protect the national interest, conduct its national defence or in the power to enact laws to ensure the "peace, order and good government" of Canada. [footnotes omitted]
>
> (Stanley A. Cohen "Safeguards in and Justifications for Canada's New Anti-terrorism Act", 14 N.J.C.L. 99)

[100] Again, Justice Blanchard would have benefited from developed legal arguments about the ability of Canada to take measures proportionate to threats to its national security, including arguments based upon the doctrines of necessity, self-defence and precautionary state activity.

[101] In the result, we respectfully question the conclusion that the Federal Court lacks the jurisdiction to issue warrants authorizing CSIS to conduct activities in another state where those activities may violate the laws of that state. The intricacies of international law and the

complexities of the national security context do not lend themselves to an answer on such a topic without a better record and fully developed arguments.

VIII. Conclusion

[102] For the foregoing reasons, we have concluded that an appeal lies from the Judge's decision, the necessary extension of time should be granted and that the decision is not moot. We have also decided that the Judge did not err in his finding that CSIS breached its duty of candour or in his finding that section 12 of the CSIS Act does not authorize CSIS to make requests to foreign partners for the interception of telecommunications of Canadians abroad.

[103] We have additionally noted that a warrant is required when the Service either directly, or through the auspices of a foreign intelligence service, engages in intrusive investigative methods such as the interception of telecommunications. In our view, the Federal Court has jurisdiction to issue such a warrant when the interception is lawful where it occurs. In our further view, it remains an open question as to whether the Federal Court possesses such jurisdiction when the interception is not legal in the country where it takes place.

[104] It follows that we will dismiss the appeal. Counsel for the Service and the *amicus* have 10 days to provide written submissions on any redactions required before these reasons are translated and released to the public.

"Pierre Blais"
C.J.

"Eleanor R. Dawson"
J.A.

"Robert M. Mainville"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-145-14
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*, R.S.C. 1985, c. C-23 AND IN THE MATTER OF [redacted]
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 17, 2014
REASONS FOR JUDGMENT BY THE COURT:	BLAIS C.J., DAWSON, MAINVILLE JJ.A.
DATED:	JULY 31, 2014

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