SCRS-10-07
2008 CF 301

Dans l'affaire d'une demande de mandats faite par ... en vertu des articles 12 et 21 de la *Loi sur le Service canadien du renseignement de sécurité*, L.R.C. (1985), ch. C-23

et dans l'affaire visant le ...

INDEXED AS: CANADIAN SECURITY INTELLIGENCE SERVICE ACT (RE) (F.C.)

Federal Court, Blanchard J.—Ottawa, April 24, 27; June 14, 2007.

Security Intelligence — Application pursuant to Canadian Security Intelligence Service Act, ss. 12, 21 for warrant relating to investigative activities outside Canada — Act, s. 21(3) permitting judge to issue warrant under certain conditions for stated purposes — Act not expressly providing extraterritorial mandate for Service to engage in investigative activities in nature of activities sought to be authorized by warrant — Inference not sufficiently obvious to conclude Service having clear mandate to conduct activities sought to be authorized in warrant in countries other than Canada, that Federal Court having jurisdiction to authorize such activities — Application dismissed.

Constitutional Law — Charter of Rights — Unreasonable search or seizure — Application pursuant to Canadian Security Intelligence Service Act, ss. 12, 21 for warrant relating to investigative activities outside Canada — Charter subject to same jurisdictional limits as Canada's other laws; Canadian law unenforceable in another state's territory without state's consent — Warrant powers concerning activities within Canada's enforcement or investigative jurisdiction — Absent consent, Canadian law could not apply to such investigative activities in other state's territory — Therefore, Charter, s. 8 not applicable.

Construction of Statutes — Application pursuant to Canadian Security Intelligence Service Act, ss. 12, 21 for warrant relating to investigative activities outside Canada — International law norms, values relevant in interpretation of domestic law — R. v. Hape, affirming presumption legislation conforming to international law, customary rules of international law directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation — "Binding customary principles of . . . international law" prohibiting interference with sovereignty, domestic affairs of other states — Activities contemplated in warrant sought clearly impinging upon principles of territorial sovereign equality, non-intervention — Likely to violate law of jurisdiction where investigative activities will occur — Applicable provisions of Act could not be construed as providing Court with jurisdictional basis to issue warrant sought.

International Law — Application pursuant to Canadian Security Intelligence Service Act, ss. 12, 21 for warrant relating to investigative activities outside Canada — Extraterritorial jurisdiction, prescriptive, enforcement or adjudicative existing under international law, subject to strict limits under international law based on sovereign equality, non-intervention, territorial principle.

Federal Court Jurisdiction — Application pursuant to Canadian Security Intelligence Service Act, ss. 12, 21 for warrant relating to investigative activities outside Canada — As legislation presumed to conform to international law, applicable provisions not conferring jurisdiction to issue warrant in absence of express enactment authorizing Court to issue extraterritorial warrant.

This was an application pursuant to sections 12 and 21 of the *Canadian Security Intelligence Service Act* (Act) for a warrant in respect of 10 subjects. The warrant powers sought relate to investigative activities in countries other than Canada. All subjects, except for one, are Canadian citizens, permanent residents or refugees and are currently named in warrants relating to an investigation within Canada by the Canadian Security Intelligence Service (CSIS or Service). The warrant powers sought were essentially directed at collecting information and intelligence. CSIS's main contention was that the warrant sought was required to ensure that Canadian agents engaged in executing the warrant abroad would do so in conformity with Canadian law since the impugned investigative activities might, absent the warrant, breach the *Canadian Charter of Rights and Freedoms* (Charter) and contravene the *Criminal Code of Canada* (Code). Since the present application was filed, the Supreme Court of Canada released its decision in *R. v. Hape*, which dealt with security intelligence investigations and international law. The issues in this application were (1) whether the Federal Court has jurisdiction to issue the warrant requested; and (2) whether the Code and the Charter apply to activities of the Service and its agents in undertaking threat-related investigations in a country other than Canada.

Held, the application should be dismissed.

(1) Section 12 outlines CSIS's mandate, and provides that it shall collect, by investigation or otherwise, information respecting activities that may be suspected of constituting threats to the security of Canada. The Court's role with respect to the issuance of warrants is stated at section 21 of the Act. Where the Director of the Service believes, on reasonable grounds, that a warrant is required to enable it to investigate a threat to the security of Canada or to perform its duties under section 16, the Director may, with the approval of the Minister, apply to the Court for a warrant. Subsection 21(2) of the Act sets out the information that must be provided on a warrant application while subsection 21(3) provides that a judge may issue a warrant under certain conditions for the purposes stated therein. The Act does not expressly provide an extraterritorial mandate for the Service to engage in investigative activities in the nature of the activities sought to be authorized by the warrant. Section 21 of the Act also contains no express provision vesting the Court with jurisdiction to authorize such extraterritorial activities. Both sections 12 and 21 are silent on the issue of territoriality. Factors such as the express territorial limitation in section 16, which provides for the collection of information concerning foreign states and persons "within Canada", the absence of express territorial limitation or reference in sections 12 and 21, and the definition of "threats to the security of Canada" provided in section 2 were considered to construe the applicable legislative provisions. While the language of the legislative text may allow for an inference to be drawn in respect of a mandate for the Service to conduct certain activities extraterritorially, that inference was not sufficiently obvious to provide a basis to conclude that the Service has a clear mandate to conduct the activities sought to be authorized in the warrant in countries other than Canada and that the Court has jurisdiction to authorize such activities. Upon consideration of extratextual factors such as legislative history, the limited evidence failed to establish a clear intention by Parliament regarding the extraterritorial reach of the Service's activities and particularly regarding the Court's role in authorizing such activities.

In construing the applicable provisions of the Act in circumstances that involve investigative activities in countries other than Canada, the principles of international law must be considered. International law norms and values are relevant in the interpretation of domestic law. In *Hape*, the Supreme Court affirmed the well-established principle of statutory interpretation that legislation is presumed to conform to international law. That decision also stated that customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. It also declared that Parliament's "clear constitutional authority" to enact legislation with extraterritorial effect is informed by the "binding customary principles of . . . international law", which prohibit interference with the sovereignty and domestic affairs of other states. The intrusive activities that are contemplated in the warrant sought are activities that clearly impinge upon the above-mentioned principles of territorial sovereign equality and non-intervention and are likely to violate the laws of the jurisdiction where the investigative activities are to occur. By authorizing such activities, the warrant would therefore be authorizing activities that are inconsistent with and likely to breach the binding customary principles of territorial sovereign equality and non- intervention, by the comity of nations. These prohibitive rules of customary international law have evolved to protect the sovereignty of nation states against interference from other states. Extraterritorial jurisdiction, prescriptive, enforcement or adjudicative, exists under international law and is subject to the strict limits under international law based on sovereign equality, non-intervention and the territorial principle. The applicable provisions of the Act could not be construed as providing the Court with a jurisdictional basis to issue the warrant sought in the absence of an express enactment authorizing the Court to issue an extraterritorial warrant.

(2) While the Charter serves as a constitutional instrument to enshrine rights, it does not endow any powers. In *Hape*, the Supreme Court of Canada confirmed that the Charter is subject to the same jurisdictional limits as Canada's other laws and concluded that Canadian law is unenforceable in another state's territory without that state's consent. The pronouncements in *Hape* articulate the current state of Canadian law on its applicability, including the Charter, on matters that arise as a result of the extraterritorial investigative jurisdiction of the Canadian state. *Hape* described and distinguished a state's prescriptive, enforcement or investigative and adjudicative jurisdictions. Although the warrant powers sought here may not have been directed at enforcement *per se*, they concerned activities directed at the collection of information by "investigation or otherwise", which are activities that fall clearly within the "enforcement" or "investigative" jurisdiction of the Canadian state. Consequently, these activities occurring in a foreign state would impinge upon the territorial sovereignty of that state. Absent consent, Canadian law, particularly as it relates to the "investigative jurisdiction," could not apply to such investigative activities conducted in another state's territory. Therefore, section 8 of the Charter, which protects against unreasonable search and seizure, could not apply. Where Parliament elected to provide for the application of Canadian law to events occurring extraterritorially, it has done so expressly. A heightened requirement for clarity by Parliament arises in circumstances where the statute seeks to provide for activities that would in all likelihood violate the binding principles of customary international law, which are incorporated in Canadian law.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 8, 32.

Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23, ss. 2 "threats to the security of Canada" (as am. by S.C. 2001, c. 41, s. 89), 12, 16 (as am. by S.C. 1995, c. 5, s. 25; 2001, c. 27, s. 224), 17 (as am. by S.C. 1995, c. 5, s. 25), 21.

Criminal Code, R.S.C., 1985, c. C-46, ss. 7(2)(*a*) (as am. by S.C. 1993, c. 7, s. 1), 46(3)(*a*), 57(1)(*a*), 74(2), 465(4) (as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 61).

CASES JUDICIALLY CONSIDERED

APPLIED:

R. v. Hape, [2007] 2 S.C.R. 292; (2007), 280 D.L.R. (4th) 385; 220 C.C.C. (3d) 161; 47 C.R. (6th) 96; 160 C.R.R. (2d) 1l; 363 N.R. 1; 227 O.A.C. 191; 2007 SCC 26.

CONSIDERED:

Canadian Security Intelligence Service Act (Re), [2008] 3 F.C.R. 477; 2008 FC 300; *R. v. Harrer*, [1995] 3 S.C.R. 562; (1995), 128 D.L.R. (4th) 98; 64 B.C.A.C. 161; 101 C.C.C. (3d) 193; 42 C.R. (4th) 269; 32 C.R.R. (2d) 273; 186 N.R. 329; 105 W.A.C. 161; *R. v. Cook*, [1998] 2 S.C.R. 597; (1998), 164 D.L.R. (4th) 1; [1999] 5 W.W.R. 582; 112 B.C.A.C. 1; 57 B.C.L.R. (3d) 215; 128 C.C.C. (3d) 1; 19 C.R. (5th) 1; 55 C.R.R. (2d) 189; 230 N.R. 83; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; (1998), 36 O.R. (3d) 418; 154 D.L.R. (4th) 193; 50 C.B.R. (3d) 163; 33 C.C.E.L. (2d) 173; 221 N.R. 241; 106 O.A.C. 1.

REFERRED TO:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1; 2002 SCC 1; *R. v. Sharpe*, [2001] 1 S.C.R. 45; (2001), 194 D.L.R. (4th) 1; [2001] 6 W.W.R. 1; (2001), 88 B.C.L.R. (3d) 1; 146 B.C.A.C. 161; 150 C.C.C. (3d) 321; 39 C.R. (5th) 72; 86 C.R.R. (2d) 1; 2001 SCC 2; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241; (2001), 200 D.L.R. (4th) 419; 40 C.E.L.R. (N.S.) 1; 19 M.P.L.R. (3d) 1; 271 N.R. 201; 2001 SCC 40.

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APPLICATION pursuant to sections 12 and 21 of the *Canadian Security Intelligence Service Act* for a warrant in which powers relating to investigative activities in countries outside Canada were sought with respect to 10 subjects. Application dismissed.

APPEARANCES:

Isabelle Chartier for Canadian Security Intelligence Service.
Ronald Atkey as *amicus curiae.*

SOLICITORS OF RECORD:

Deputy Attorney General of Canada.

The following are the reasons for order and order rendered in English by

[1] BLANCHARD J.: This is an application pursuant to sections 12 and 21 of the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23 (the Act), for a warrant in respect of 10 subjects. The warrant powers sought relate to investigative activities in countries other than Canada. The subjects of investigation are currently named in certain warrants in application SCRS-10-07 which I granted on April 25, 2007, in relation to the Canadian Security Intelligence Service (the Service or CSIS) investigation of [portion deleted by order of the Court]. The warrants issued in April are for investigative activities within Canada and are valid for a period of one year from May 1, 2007 to April 30, 2008. All subjects of investigation, except for one, are Canadian citizens, permanent residents or refugees. The exception is a foreign national [portion deleted by order of the Court].

[2] At the time I issued the warrants on April 25, 2007, I was satisfied of the matters referred to in paragraphs 21(2)(*a*) and (*b*) of the Act based on the information provided in the April 19, 2007 affidavit of [portion deleted by order of the Court] sworn in support of the application. The only issue remaining to be determined, and which will be dealt with in these reasons, is the question of whether this Court can issue the extraterritorial warrant sought.

[3] At the time I issued the initial warrants in application SCRS-10-07, I was not prepared to authorize investigative activities by the Service outside Canada as requested, without further consideration. To that end, I appointed Mr. Ron Atkey, Q.C., to serve as *amicus curiae* (the *amicus*) on the application and requested that both the Service and the *amicus* file written submissions to address first, whether the Service has a mandate to undertake threat-related investigations outside Canada and second, whether the Federal Court has jurisdiction to issue the warrant requested.

[4] Upon reviewing the written submissions filed and the relevant jurisprudence and upon hearing counsel on behalf of the Service and the *amicus* at an *ex parte in camera* hearing held on June 19, 2007, I determined that further submissions from the Service and the *amicus* were required. Since the filing of the within application, the Supreme Court of Canada decided *R. v. Hape*, [2007] 2 S.C.R. 292 on June 7, 2007. Following my review of *Hape*, I thought it useful to seek further written submissions and, as a consequence, directed the Service and the *amicus* to answer the following questions:

(i) On what basis or foundation does the Court then issue a warrant which admittedly would not be enforceable outside Canada and which would likely involve the authorization of illegal activity in the host state? More specifically, what would be the purpose of seeking such a warrant?

(ii) Further, if such Parliamentary intent can be established and pursuant to section 21 of the Act, it can be construed to provide the Court authority to issue such extraterritorial warrants, should the Court be engaged in the issuance of such warrants, which would not be enforceable outside Canada, and which would likely involve the authorization of illegal activity in the host state?

[5] Both the Service and the *amicus* filed supplementary submissions which I considered before deciding the application.

Preliminary Issue

[6] In June 2005, the Service filed application CSIS-18-05 [*Canadian Security Intelligence Service Act (Re)*, [2008] 3 F.C.R. 477 (F.C.)] an application for a warrant pursuant to sections 12 and 21 of the Act which raised the same questions of law as the present application.

[7] My colleague, Mr. Justice Simon Noël, who was seized of that matter, had appointed Mr. Ron Atkey, Q.C., to serve as *amicus* in that proceeding. Justice Noël raised a preliminary issue as to whether the question of law could be dealt with in a public hearing. After receiving written and oral submissions on the issue from counsel for the Deputy Attorney General of Canada and the *amicus*, the learned Judge concluded that the hearing of the application should be conducted in private. Comprehensive reasons for that decision were filed and have not yet been made public.

[8] On August 23, 2006, a notice of discontinuance in relation to application CSIS 18-05 was filed by counsel for the Deputy Attorney General of Canada.

[9] Upon the filing of the within application, the same legal issues in respect to extraterritorial warrants raised in CSIS-18-05 were again before the Court. I raised the issue of whether the question of law could be dealt with in a public hearing. Both the *amicus* and counsel for the Attorney General of Canada were of the view that the question had been decided by Justice Noël and were content to accept his decision as deciding the issue for the purpose of this application.

[10] I have reviewed Justice Noël's reasons for order and order in application CSIS-18-05. I agree with his decision and his reasons. Consequently, I am also of the view that the hearing of this application is to be conducted in private.

[11] I now turn to the substantive issues raised in this application.

Issues

[12] In my view, the following issues are raised in this application:

(A) Does the Federal Court have jurisdiction to issue the warrant requested?

(B) Does the Service have a mandate to undertake threat-related investigations in a country other than Canada?

(C) Does the *Criminal Code*, R.S.C., 1985, c. C-46 (the Code) of Canada and the *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (the Charter) apply to activities of the Service and its agents in undertaking threat-related investigations in a country other than Canada?

(D) Can Communications Security Establishment Canada (CSEC) assist the Service in the execution of the warrant sought?

[13] In my considered opinion, for reasons that follow, I conclude that the answer to the first issue is in the negative. It is therefore unnecessary to deal with the other issues raised. I will nevertheless deal with the third issue stated since it is the central focus of the Service's submissions before the Court.

The warrant sought

[14] The Service seeks a warrant authorizing the Director of the Service (the Director) and any person under his authority to intercept any telecommunication destined to or originating from the subjects of investigation, to obtain information or record relating to the targets [portion deleted by order of the Court].

[15] The Service further requests that the warrant provide that it may be executed at: [portion deleted by order of the Court].

[16] Finally, the warrant sought would provide that, for the above purposes, the Service and its agents may: (i) install, maintain or remove any thing; [portion deleted by order of the Court]; (ii) install, maintain or remove any thing [portion deleted by order of the Court]; to obtain access to, search, search for, examine, take extracts from, make copies of, or otherwise record the information; and (iii) install, maintain or remove any thing [portion deleted by order of the Court] to obtain access to, search for, examine, take excerpts from, make copies of, or otherwise record the information.

(A) Does the Federal Court have jurisdiction to issue the warrant requested?

[17] Before beginning my analysis, I propose to review the applicable statutory framework regarding the issuance of warrants under the Act and the respective positions of the Service and the *amicus* on this issue.

[18] Section 12 of the Act outlines the Service's mandate and provides that it shall collect, "by investigation or otherwise", to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada. The Service is further required to advise and report to the Government in respect of such activities. "Threats to the security of Canada" [as am. by S.C. 2001, c. 41, s. 89] is defined at section 2 of the Act and includes "activities within or relating to Canada directed toward or in support of the threat" (my emphasis).

[19] The Court's role with respect to the issuance of warrants is stated at section 21 of the Act. Where the Director of the Service believes, on reasonable grounds, that a warrant is required to enable it to investigate a threat to the security of Canada or to perform its duties under section 16 [as am. by S.C. 1995, c. 5, s. 25; 2001, c. 27, s. 224], the Director may, with the approval of the Minister, apply to the Court for a warrant. Subsection 21(2) of the Act sets out the information that must be provided on a warrant application. Subsection 21(3) provides that "[n]otwithstanding any law but subject to the *Statistics Act*", upon being satisfied that the requirements in subsection 21(2) are met, a judge may issue a warrant for the following purposes:

21. (1) . . .

(3) . . .

(*a*) to enter any place or open or obtain access to any thing;

(*b*) to search for, remove or return, or examine, take extracts from or make copies of or record in any other manner the information, record, document or things; or

(*c*) to install, maintain or remove any thing. [My emphasis.]

[20] Subsection 21(4) requires that the type of communication authorized to be intercepted, the type of information, records or things to be obtained, the persons or classes of persons to whom the warrant is directed, a general description of the place where the warrant may be executed and other terms as the judge considers advisable in the public interest must be included in the warrant.

[21] The full text of the above provisions of the Act and other pertinent provisions are reproduced and attached to these reasons as Schedule A.

Position of the Service and the *amicus*

[22] The Service contends that the authorizations sought are to enable it to fulfill its mandate under section 12 of the Act. Section 12 differs from section 16 of the Act which limits the Service's collection of foreign "intelligence" to "within Canada". The Service submits that Parliament, by not imposing the same territorial limitation in section 12 as it did in section 16, must have intended its section 12 mandate to have an extra-territorial reach.

[23] The Service further contends that the warrant is required to ensure that Canadian agents engaged in executing the warrant abroad do so in conformity with Canadian law. The Service maintains that the warrant is required to judicially authorize activities that, absent the warrant, may breach the Charter and contravene the Code. This is so because the warrant powers sought to be authorized are directed at Canadians and arguably might impact on their expectation of privacy. The Service argues that the warrant would enable it to perform its duties and functions by removing the legal impediments to the conduct of a part of its security intelligence investigations outside Canada and would respect the rule of law and be consistent with the regime of judicial control mandated by Part II of the Act.

[24] The Service submits that the scope of the Supreme Court of Canada decision in *Hape*, cited above, is unclear. In particular, it is unclear as to whether the decision was intended to apply to the conduct of security intelligence investigations outside Canada where those investigations involve persons having a real and substantial connection to Canada, as in this case.

[25] More particularly, the Service submits that the decision in *Hape* does not stand for the broad proposition that, absent the consent of a foreign state or a principle of international law as contemplated by the Supreme Court of Canada, the Charter does not apply to <u>any</u> search and seizure by Canadian officials in a foreign state. Rather, it contends that *Hape* was based on the facts of that case and the principles of international law at play in the fight against transnational criminal activity, which include international co-operation and the comity of nations. It is argued that, here, different principles are at play. In matters of national security, the state always reserves the right to "go at it alone." A state's authority to investigate threats to its national security, by whatever means the state considers appropriate, can never be dependent on first securing the consent of another state, be it the state implicated in the threat or the state in which an individual who is implicated in the threat may be situated.

[26] To the extent that the scope of *Hape* is unclear, the Service argues a possibility exists that the security intelligence investigations outside Canada may raise Charter issues where those investigations implicate persons having a real and substantial connection to Canada, as in this case. The Service submits that the majority in *Hape* did not expressly or by necessary implication foreclose consideration of the Charter's application in the context of security intelligence investigations outside Canada.

[27] The Service further submits that customary international practice as it relates to intelligence-gathering operations in a foreign state constitutes an overriding principle of international law that affords a basis on which to find that the Charter was intended to apply, and does apply, to security intelligence investigations outside Canada. The Service, however, produced neither evidence nor authority in support of this argument.

[28] The Service also contends that the enforceability of a warrant in a foreign state or the legality of investigative conduct in a foreign state is irrelevant to the issuance of a warrant pursuant to section 21 of the Act. In the Service's submission, subsection 21(3) of the Act authorizes the Court to issue warrants "[n]otwithstanding any other law but subject to the *Statistics Act*". It is said that "any other law" includes international law. In support of this proposition, the Service cites the following passage from the secret reasons of Mr. Justice Heald in application CSIS 4-84 issued on December 27, 1984:

> Subsection 21(3) authorizes the Court to issue warrants thereunder "Notwithstanding any other law but subject to the *Statistics Act* . . ." The sweep of the language used is clear. It surely confers paramountcy over any other law including the existing customary international law and subject only to one statute namely the *Statistics Act.* I think it crystal clear and without doubt that Parliament has expressed an unambiguous intention in the *Canadian Security Intelligence Service Act* to provide the Director with the powers contained therein to provide for the security of Canada, notwithstanding the principles of customary international law.

I note that Justice Heald's decision related to an entirely different factual context. [Portion deleted by order of the Court]. Thecircumstances here are significantly different.

[29] The Service adopts the position that it is not asking the Court to authorize a violation of foreign law, although it acknowledges that the activities to be authorized by the warrant are likely to constitute a violation of foreign law. It also acknowledges that the Federal Court has no jurisdiction to authorize such activities on foreign soil and that the warrant sought on this application is not "enforceable" in the foreign jurisdiction.

[30] The Service submits that the existing statutory scheme under the Act provides the necessary authority for the Court to issue such warrants. Subsection 21(3) of the Act provides that a judge, upon being satisfied that the conditions in subsection 21(2) of the Act are met, may issue a warrant authorizing certain investigative activities. Since the empowering provision has no territorial limitation, the Service maintains that a judge of this Court has the jurisdiction to issue the warrant.

[31] The *amicus* agrees with the proposition advanced by counsel for the Service that there is no territorial limitation on the activities of CSIS related to the collection, analysis and retention of information respecting threats to the security of Canada as set forth in section 12 of the Act. According to the *amicus*, it follows that any application for a warrant under section 21 of the Act, which is "to enable the Service to investigate a threat to the security of Canada", may extend to investigative activities of CSIS outside Canada. However, the *amicus* adopts the position that given the current state of the law, the Service could not execute a warrant obtained under section 21 of the Act and exercise its information-gathering powers in another country unless the Service had obtained the permission of the country where the targets of the warrants reside or was a party to a treaty or agreement covering exercise of its powers in that other country. The *amicus* contends that absent such a permission or treaty, the Service would be in violation of international law should its agents or officers attend another country to execute a warrant issued under section 21 of the Act and intercept communications. The *amicus* points to section 17 [as am. by S.C. 1995, c. 5, s. 25] of the Act which provides for the Service, with ministerial approval, to enter into co-operation agreements with foreign states for the purpose of performing its duties and functions under the Act. No such agreements are in evidence in respect of the intended investigative activities abroad covered under the warrant application.

[32] In his initial written submissions, the *amicus* cites the following cases by the Supreme Court of Canada in support of his arguments.

[33] *R. v. Harrer*, [1995] 3 S.C.R. 562, is cited for the proposition that section 32 of the Charter restricts its application to matters within the competence of the legislative bodies of the governments of Canada and the provinces. The Charter therefore finds no application in foreign states.

[34] The *amicus* cites *R. v. Cook*, [1998] 2 S.C.R. 597, for the proposition that if a state permits Canada to enforce its law within its territory for limited purposes, the Charter would apply. In *Cook*, the Supreme Court of Canada found that notwithstanding the general prohibition in international law against extraterritorial application of domestic law, the Charter can, in certain rare circumstances, apply beyond Canada's borders. The Court found that such circumstances arise where "the impugned act falls within the scope of s. 32(1) of the *Charter* on the jurisdictional basis of the nationality of the state law enforcement authorities engaged in governmental action, and where the application of *Charter* standards will not conflict with the concurrent territorial jurisdiction of the foreign state" (see *Cook*, at paragraph 48).

Analysis

[35] The Service, in its submissions to the Court, speaks of the "enforceability" of the warrant. This is misplaced and a potentially confusing use of language. In contrast to laws that are enforced, warrants are executed. The warrant powers sought are essentially directed at collecting information and intelligence. It is acknowledged by all concerned that while such warrants may be issued in Canada, the Court has no jurisdiction in respect of the execution of the warrant in a foreign state. What matters, for our purpose, is whether the Court has the authority to issue the warrant for investigative activities which are intended to be executed in a foreign state. The answer must be found in the enabling statute, to which I now turn.

[36] The Service contends, based on its argument which I summarized in paragraphs 22, 27 and 28 above, that it is not limited to Canadian territory in the exercise of its section 12 mandate and as a consequence, the Court's warrant oversight authority under section 21 of the Act also extends extraterritorially. As a result, the Service argues that the Court has authority pursuant to section 21 of the Act, to issue the warrant sought.

[37] The Act does not expressly provide an extraterritorial mandate for the Service to engage in investigative activities in the nature of the activities sought to be authorized by the warrant. Section 21 of the Act, which provides for the Court's warrant oversight, also contains no express provision vesting the Court with jurisdiction to authorize such extraterritorial activities. Both sections 12 and 21 are silent on the issue of territoriality. The question to be resolved is whether, in the absence of express statutory authority for the Service to engage in the extraterritorial activities at issue, the Court has jurisdiction to issue a warrant authorizing extraterritorial activities. To answer this question, I turn to the established principles of statutory interpretation.

[38] In order to construe the applicable provisions that concern us, it is useful to turn to the modern principle of statutory interpretation as articulated by Professor Driedger, in *Sullivan and Driedger on the Construction of Statutes*, 4th ed., Toronto: Butterworths, 2002, at pages 1 and 10 and which provides that the "words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament." This principle is often cited and relied upon by Canadian courts. It was declared to be the preferred approach of the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd.(Re)*, [1998] 1 S.C.R. 27, at paragraph 21. The modern principle guides us in determining whether the meaning of the legislative text is plain or ambiguous. If the text has plain meaning, then extratextual evidence of legislative intent, such as legislative history and international law, will be inadmissible to contradict that plain meaning. If however, the text is ambiguous or uncertain, then extratextual factors may be considered in interpreting the legislative text. The question to be determined here is whether it can be inferred from the plain meaning of applicable provisions, read in their entire context, that the Court has the jurisdiction to issue the warrant sought.

[39] In construing the applicable legislative provisions, I have considered the following factors:

(i) The express territorial limitation in section 16 of the Act which provides for the collection of information concerning foreign states and persons "within Canada";

(ii) The absence of express territorial limitation in section 12 which provides for the collection, analysis and retention of information and intelligence relating to threats to the security of Canada;

(iii) The definition of "threats to the security of Canada" provided for in section 2 of the Act, which includes: "(*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" (my emphasis); and

(iv) The absence of any territorial reference in section 21 of the Act, the section which provides for judicial control on warrant applications. The Service contends that the Court's oversight role should therefore extend to the Service's section 12 mandate, which it argues is extraterritorial in scope.

Upon considering the applicable provisions of the Act and the above factors, I am unable to attribute a plain, or sufficiently clear, meaning to the provisions in terms of their extraterritorial application. While the language of the legislative text may allow for an inference to be drawn in respect of a mandate for the Service to conduct certain activities extraterritorially, that inference is not sufficiently obvious to provide a basis to conclude that the Service has a clear mandate to conduct the activities sought to be authorized in the warrant in countries other than Canada, and that the Court has jurisdiction to authorize such activities. In my view, such a construction cannot be taken or implied from the applicable provisions of the Act, read together.

[40] Flowing from this lack of clarity, I will now turn to certain extratextual factors to assist in interpreting the legislative provisions. I will first deal with legislative history. The Service adduced two specific excerpts from the McDonald Commission [Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police] (see Schedule B) in support of its position and which recommend that the security intelligence agency should: (i) not be required to confine its intelligence collection and countering activities to Canadian soil; and (ii) be permitted to carry out certain investigative activities abroad. I have included the two excerpts in Schedule B as well as other recommendations of the McDonald Commission which outline a "clear and effective system of control" to ensure that the conduct of such activities is always within the mandate of the agency. It is interesting to note that many of these recommendations regarding controls were not included in subsequent legislation.

[41] While this information might be of historical interest, what matters for our purpose is Parliament's intention. The only evidence adduced from proceedings in the House of Commons with respect to Bill C-9, the precursor to the Act, is reported in *Minutes of Proceedings and Evidence* of the Standing Committee on Justice and Legal Affairs, 2nd Sess., 32nd Parl., No. 9 (April 2, 1984), at page 9:25. The then-Solicitor General, Robert Kaplan, in response to a question respecting extraterritorial activities of the Service stated:

Ms. Kaplan:

> There is no statutory requirement that the entire activities of the Security Intelligence Service be performed in Canada. I think that would be unduly inhibiting. If for example — and this is very common, and you know it . . . an individual who is under surveillance, or who is a source of the Security Service, has some purpose for leaving the country in relation to the activities the security Service is interested in putting under surveillance, they may very well want to become aware of what he does on his trip.

This evidence is insufficient to permit an inference to be drawn that Parliament intended the Service to be provided with a mandate to conduct investigative activities in the nature of those contemplated in the warrant sought to be authorized. Further, the evidence is silent with respect to the Court's jurisdiction to authorize such activities. Based on the limited evidence before me, the legislative history fails to establish a clear intention by Parliament with respect to the extraterritorial reach of the Service's activities in a country other than Canada, and particularly regarding the Court's role in authorizing such activities.

[42] I will now turn to the principles of international law as a guide to construing the legislation. It is argued that the applicable legislative provisions here provide for judicial authorization of investigative activities in a country other than Canada. To that end, the legislation has an extraterritorial effect and can be said to be extraterritorial legislation. The activities sought to be authorized by the warrant fall under Canada's enforcement or adjudicative jurisdictions as defined by the Supreme Court in *Hape*, at paragraph 58.

[43] Justice LeBel equates "enforcement or executive" jurisdiction to "investigative" jurisdiction, which refers to the ability of the police "or other government actors" to investigate a matter. The Service and its agents in conducting the investigative activities in a foreign state can therefore be said to be acting under Canada's investigative jurisdiction.

[44] The Service may also be operating under the adjudicative jurisdiction of the state, which refers to the Court's power to resolve disputes or interpret the law through binding decisions. Here, the warrant is issued pursuant to a Court decision.

[45] In construing the applicable provisions of the Act in circumstances that involve investigative activities in countries other than Canada, the Supreme Court of Canada teaches that the principles of international law need be considered. The Court has repeatedly confirmed the relevancy of international law norms and values in the interpretation of domestic law. (See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *R. v. Sharpe*, [2001] 1 S.C.R. 45; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241.)

[46] At paragraph 53 of its reasons in *Hape*, the Court affirmed the well-established principle of statutory interpretation that legislation is presumed to conform to international law. The Supreme Court explained that this presumption of conformity is based on the rule of judicial policy that, as a matter of law, a court will strive to avoid construction of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compelled that result. It is expected that "[i]n deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations."

[47] The Supreme Court of Canada also affirmed that the principle of international comity which "induces every sovereign state to respect the independence and dignity of every other sovereign state", will bear on the interpretation of our laws — "statutory and constitutional" — where such laws could have an impact on the sovereignty of other states (see *Hape*, at paragraphs 47 and 48).

[48] In *Hape*, the Supreme Court of Canada also adopts the proposition that customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. Justice LeBel, writing for the majority, states that Parliament may violate international law, "but that it must do so expressly." At paragraph 39 of his reasons for judgment he writes:

In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law. [My emphasis.]

[49] In *Hape*, at paragraph 68, the Supreme Court of Canada further declares that Parliament's "clear constitutional authority" to enact legislation with extraterritorial effect is informed by the "binding customary principles of . . . international law", which prohibit interference with the sovereignty and domestic affairs of other states. At paragraph 45 of his reasons, Mr. Justice LeBel writes:

Each state's exercise of sovereignty within its territory is dependent on the right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference.

[50] The intrusive activities that are contemplated in the warrant sought are activities that clearly impinge upon the above-stated principles of territorial sovereign equality and non-intervention. Further, the activities are likely to violate the laws of the jurisdiction where the investigative activities are to occur. This is not disputed by the Service. The *amicus* maintains that there is no evidence which would allow the Court to make such a determination. In my view, to require such evidence to be adduced would be to place a heavy burden on the Service. 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.

[51] Among the powers sought to be authorized under the warrant are: the ability to obtain access, install any thing [portion deleted by order of the Court]; search for, examine, take extracts from, make copies of, or otherwise record information. Given the intrusive nature of the activities at issue, it is reasonable to infer that the activities are likely to violate the laws of the jurisdiction(s) where the warrant is to be executed. In any event, absent consent of the foreign state, the investigative activities at issue impinge upon the territorial sovereignty of the foreign state.

[52] By authorizing such activities, the warrant would therefore be authorizing activities that are inconsistent with and likely to breach the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations. These prohibitive rules of customary international law (*Hape*, at paragraph 39) have evolved to protect the sovereignty of nation states against interference from other states. Antonio Cassese, a renowned international law jurist, cited in *Hape* [at paragraph 40], referred to the "sovereign equality of nations" as "the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest" [in *International Law*, 2nd ed., at page 48]. As stated earlier in these reasons, these "prohibitive rules of customary international law" are directly incorporated into Canadian domestic law.

[53] The Service argues that the principles of international law at play in matters of national security are different and that the customary international practice as it relates to intelligence-gathering operations in a foreign state constitutes an overriding principle of international law that affords a basis on which to find that the Charter was intended to apply, and does apply, to security intelligence investigations outside Canada. I am not persuaded that in the national security context, the practice of "intelligence-gathering operations" in foreign states is recognized as a "customary practice" in international law. Again, no evidence or authority was adduced in support of this contention. I will deal with the Service's Charter arguments later in these reasons.

[54] As stated in *Hape*, at paragraph 65, extraterritorial jurisdiction is governed by international law rather than being at the absolute discretion of the individual state. Extraterritorial jurisdiction, prescriptive, enforcement or adjudicative, exists under international law and is subject to the strict limits under international law based on sovereign equality, non-intervention and the territorial principle. As discussed earlier in these reasons, it is well established that a state's laws cannot apply within the territory of another state absent either the consent of that state, or in exceptional cases, some other basis under international law (see *Hape*, at paragraph 65). No other basis under international law has been put before me that would warrant displacing the above-stated principles of sovereign equality, non-intervention and territoriality recognized by the Supreme Court of Canada as "binding customary principles" of international law.

[55] In construing the applicable provisions of the Act, I am guided by the principle of statutory interpretation that legislation is presumed to conform to international law. Applying the above-stated principles, I am unable to construe the applicable provisions of the Act, as drafted, as providing the Court with a jurisdictional basis to issue the warrant sought. To do so would require that I read into the applicable provisions of the Act, a jurisdiction for the Court to authorize activities that violate the above-stated principles of customary international law. As stated earlier in these reasons, such a mandate must be expressly provided for in the Act. Given the principles of law in play, and guided by the teachings of the Supreme Court of Canada in *Hape*, I am left to conclude that, absent an express enactment authorizing the Court to issue an extraterritorial warrant, the Court is without jurisdiction to issue the warrant sought.

[56] My above finding is determinative of the application. I will nevertheless now turn to the arguments raised by the Service in respect to the extraterritorial application of the Charter and the Code in the context of the warrant sought. These arguments were the main focus of the Service's submissions before the Court.

[57] The Service's main contention in this application is that the warrant sought is required to ensure that Canadian agents engaged in executing the warrant abroad do so in conformity with Canadian law since the impugned investigative activities may, absent the warrant, breach the Charter and contravene the Code. I will address first the Charter and the Service's position that the majority in *Hape* did not expressly or by necessary implication foreclose consideration of the Charter's application in the context of security intelligence investigations outside Canada.

[58] The Charter serves as a constitutional instrument to enshrine rights. It does not endow any powers. Canadian law is subject to the Charter, and may be challenged in circumstances where its application impinges Charter rights. Charter issues arise only with the application of Canadian law. In *Hape*, the Supreme Court of Canada confirmed that the Charter is subject to the same jurisdictional limits as Canada's other laws. It concluded that Canadian law is unenforceable in another state's territory without that state's consent. At paragraph 69 of its reasons, Mr. Justice LeBel wrote:

> As the supreme law of Canada, the *Charter* is subject to the same jurisdictional limits as the country's other laws or rules. Simply put, Canadian law, whether statutory or constitutional, cannot be enforced in another state's territory without the other state's consent. This conclusion, which is consistent with the principles of international law, is also dictated by the words of the *Charter* itself. The *Charter*'s territorial limitations are provided for in s. 32, which states that the *Charter* applies only to matters that are within the authority of Parliament or the provincial legislatures. In the absence of consent, Canada cannot exercise its enforcement jurisdiction over a matter situated outside Canadian territory. Since effect cannot be given to Canadian law in the circumstances, the matter falls outside the authority of Parliament and the provincial legislatures.

[59] The issue before the Court in *Hape* concerned the application of the Charter to investigations conducted by Canadian officers outside Canada. The Service argues that the case can be distinguished since *Hape* involved a criminal investigation, and in this case the investigative activities are not intended to gather evidence for a criminal prosecution, but rather to enable the Service to carry out its mandate as provided for in the Act.

[60] I am not convinced that *Hape* can be so easily distinguished. While it is true that *Hape* did not deal with security intelligence investigations outside Canada, and that the objective or ultimate purpose of the investigative activities may be different, the investigative activities of the Canadian police officers in *Hape* and those intended by agents of the Service pursuant to the warrant sought both engage the "investigative jurisdiction" of the Canadian state.

[61] In my view, the pronouncements in *Hape* articulate the current state of Canadian law on its applicability, including the Charter, on matters that arise as a result of the extraterritorial investigative jurisdiction of the Canadian state. In *Hape*, at paragraph 58, the Supreme Court of Canada provided the following guidance in respect of the distinctions to be drawn between prescriptive, enforcement or investigative and adjudicative jurisdictions of the state:

> Prescriptive jurisdiction (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities. The legislature exercises prescriptive jurisdiction in enacting legislation. Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld. As stated by S. Coughlan *et al.* in "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007), 6 *C.J.L.T.* 29, at p. 32, "*enforcement* or *executive* jurisdiction refers to the state's ability to act in such a manner as to give effect to its laws (including the ability of police or other government actors to investigate a matter, which might be referred to as *investigative jurisdiction*)" (emphasis in original). Adjudicative jurisdiction is the power of the state's courts to resolve disputes or interpret the law through decisions that carry binding force. See Cassese, at p. 49; Brownlie, at p. 297.

[62] The warrant powers sought here may not be directed at enforcement *per se*, but do concern activities directed at the collection of information by "investigation or otherwise," which are activities that fall clearly within the "enforcement" or "investigative" jurisdiction of the Canadian state. Consequently, these activities occurring in a foreign state impinge upon the territorial sovereignty of that state. Absent consent, Canadian law, particularly as it relates to the "investigative jurisdiction," cannot apply to such investigative activities conducted in another state's territory. It therefore follows in these circumstances that section 8 of the Charter which protects against unreasonable search and seizure, can find no application.

[63] As for the Service's position that a warrant is required to protect its agents against potential criminal charges in Canada which might result from the impugned activities, the Service fails to point to any specific provision of the Code that would expressly extend its application to the impugned activities occurring outside Canada's territory and thereby exposing the Service or its agents to the risk of such a prosecution. I can find no such provision. Again, as with the Charter, in the absence of consent, Canada cannot enforce the Code over matters situated outside Canadian territory. In the circumstances, I fail to see why the warrant sought would be required for the stated purpose of protecting the Service or its agents from prosecution under the Code.

[64] Even if the Service could establish that it has an extraterritorial mandate to collect, retain and analyse information and intelligence, and that its stated reasons for requiring the warrant are well-founded, this would not, in my view, give the Court jurisdiction to issue the warrant sought. The investigative activities which are sought to be authorized by the warrant are activities which are inconsistent with and likely to breach the binding customary principles of territorial sovereign equality and non-intervention. As stated earlier in these reasons, while Parliament may have jurisdiction to enact laws with extraterritorial application, it must do so in clear and express terms. In instances where Parliament has opted to extend the reach of Canadian law extraterritorially, it has done so in express terms. The Code contains several examples of Parliament using express language to extend the reach of Canadian law extraterritorially. I set out below several of these examples.

[65] In dealing with offences committed on an aircraft, paragraph 7(2)(*a*) [as am. by S.C. 1993, c. 7, s. 1] of the Code explicitly recognizes that an act or omission committed <u>outside Canada</u> is an offence that "shall be <u>deemed to have [been] committed. . . in Canada</u>" (my emphasis).

[66] Similarly, paragraph 46(3)(*a*) of the Code states that high treason takes place whenever a Canadian citizen, "while <u>in or out of Canada</u>" (my emphasis) does anything mentioned at subsection (1). Again, express language is used to recognize acts committed outside of Canada.

[67] Another example is that of forgery and uttering forged passports. Paragraph 57(1)(*a*) of the Code states "[e]very one who, <u>while in or out of Canada</u>, (*a*) forges a passport. . . is guilty of an indictable offence" (my emphasis). In the same way, subsection 74(2) of the Code, which deals with piracy, states that "[e]very one who commits piracy <u>while in or out of Canada</u> is guilty of an indictable offence" (my emphasis).

[68] Finally, subsection 465(4) [as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 61] of the Code discusses the issue of conspiracy and uses the same express language when it states "[e]very one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada" (my emphasis).

[69] The above examples reveal that where Parliament elected to provide for the application of Canadian law to events occurring extraterritorially, it has done so expressly. It seems to me that a heightened requirement for clarity by Parliament arises in circumstances where the statute seeks to provide for activities that would in all likelihood violate the binding principles of customary international law, which are incorporated in Canadian law. To accept less in relation to investigations risks undermining public confidence in the justice system and in the judiciary whose primary function is to uphold the law.

[70] With respect to the issue of whether CSEC can assist in the execution of the warrant, while I find the arguments by the Service to be persuasive, given my above determinative findings regarding the Court's jurisdiction, it is my view that it is not necessary to decide the issue at this time.

Conclusion

[71] For the above reasons, I find that this Court is without jurisdiction to issue the warrant sought. Accordingly, the application will be dismissed.

[72] Both the Service and the *amicus* shall, within 20 days of the date of the order issued with these reasons, make submissions to the Court in respect of whether these reasons for order and order, or any portion thereof, should be made public. After considering the submissions, I shall determine whether the reasons for order and order, or an expurgated version thereof shall be made public.

ORDER

THIS COURT ORDERS that:

The application for a warrant authorizing investigative activities in countries other than Canada is dismissed.

The Service and the *amicus* shall within 20 days of the date of the order issued with these reasons, make submissions to the Court in respect of whether these reasons for order and order, or any portion thereof, should be made public.

SCHEDULE A

2. In this Act,

. . .

"threats to the security of Canada" means

(*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,

(*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,

(*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

(*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,

but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (*a*) to (*d*).

. . .

12. The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.

. . .

16. (1) Subject to this section, the Service may, in relation to the defence of Canada or the conduct of the international affairs of Canada, assist the Minister of National Defence or the Minister of Foreign Affairs, within Canada, in the collection of information or intelligence relating to the capabilities, intentions or activities of

(*a*) any foreign state or group of foreign state; or

(*b*) any person other than

(i) a Canadian citizen,

(ii) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, or

(iii) a corporation incorporated by or under an Act of Parliament or of the legislature of a province.

(2) The assistance provided pursuant to subsection (1) shall not be directed at any person referred to in subparagraph (1)(*b*)(i), (ii) or (iii).

(3) The Service shall not perform its duties and functions under subsection (1) unless it does so

(*a*) on the personal request in writing of the Minister of National Defence or the Minister of Foreign Affairs, and

(*b*) with the personal consent in writing of the Minister.

. . .

21. (1) Where the Director or any employee designated by the Minister for the purpose believes, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate a threat to the security of Canada or to perform its duties and functions under section 16, the Director or employee may, after having obtained the approval of the Minister, make an application in accordance with subsection (2) to a judge for a warrant under this section.

(2) An application to a judge under subsection (1) shall be made in writing and be accompanied by an affidavit of the applicant deposing to the following matters, namely,

(*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 have failed or 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;

(*c*) the type of communication proposed to be intercepted, the type of information, records, documents or things proposed to be obtained and the powers referred to in paragraphs (3)(*a*) to (*c*) proposed to be exercised for that purpose;

(*d*) the identity of the person, if known, whose communication is proposed to be intercepted or who has possession of the information, record, document or thing proposed to be obtained;

(*e*) the person or classes of persons to whom the warrant is proposed to be directed;

(*f*) a general description of the place where the warrant is proposed to be executed, if a general description of that place can be given;

(*g*) the period, not exceeding sixty days or one year, as the case may be, for which the warrant is requested to be in force that is applicable by virtue of subsection (5); and

(*h*) any previous application made in relation to a person identified in the affidavit pursuant to paragraph (*d*), the date on which the application was made, the name of the judge to whom each application was made and the decision of the judge thereon.

(3) Notwithstanding any other law but subject to the *Statistics Act*, where the judge to whom an application under subsection (1) is made is satisfied of the matters referred to in paragraphs (2)(*a*) and (*b*) set out in the affidavit accompanying the application, the judge may issue a warrant authorizing the persons to whom it is directed to intercept any communication or obtain any information, record, document or thing and, for that purpose,

(*a*) to enter any place or open or obtain access to any thing;

(*b*) to search for, remove or return, or examine, take extracts from or make copies of or record in any other manner the information, record, document or things; or

(*c*) to install, maintain or remove any thing.

(4) There shall be specified in a warrant issued under subsection (3)

(*a*) the type of communication authorized to be intercepted, the type of information, records, documents or things authorized to be obtained and the powers referred to in paragraphs (3)(*a*) to*(c)* authorized to be exercised for that purpose;

(*b*) the identity of the person, if known, whose communication is to be intercepted or who has possession of the information, record, document or thing to be obtained;

(*c*) the persons or classes of persons to whom the warrant is directed;

(*d*) a general description of the place where the warrant may be executed, if a general description of that place can be given;

(*e*) the period for which the warrant is in force; and

(*f*) such terms and conditions as the judge considers advisable in the public interest.

(5) A warrant shall not be issued under subsection (3) for a period exceeding

(*a*) sixty days where the warrant is issued to enable the Service to investigate a threat to the security of Canada within the meaning of paragraph (*d*) of the definition of that expression in section 2; or

(*b*) one year in any other case.

SCHEDULE B

The McDonald Commission, short for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report: Freedom and Security under the Law*, Vol. 1 (Ottawa: Supply and Services Canada, 1981) is a Commission of Inquiry established by the Governor in Council in 1977 as a result of allegations that the Security Service of the Royal Canadian Mounted Police (RCMP) had been involved in illegal and improper activities. As a result of recommendations made by the McDonald Commission, the Service was established on July 16, 1984 after Bill C-9 was passed into law. In its Report, the Commission dealt with the geographic location of security intelligence activities by an intelligence agency. The Commission noted at page 628 of its Report:

14. Now, turning to the third dimension—the geographic location of the security intelligence agency's activities—we do no think that the agency should be required to confine its intelligence collecting or countering activities to Canadian soil. If security intelligence investigations which begin in Canada must cease at the Canadian border, information and sources of information important to Canadian security will be lost. Thus a total ban on security intelligence operations outside Canada would be an unreasonable constraint. If to operate abroad is 'offensive', then Canada's security intelligence agency should be offensive in this sense, although we are cognizant of the very great risks — diplomatic, moral and practical — in carrying out security intelligence activities abroad. Because of these risks it is important to confine such activities to those that are essential, to subject them to a clear and effective system of control, and to ensure that they are always within the mandate of the security intelligence agency. In what follows we shall endeavour to define more precisely the circumstances in which a security intelligence agency should be permitted to extend its operations abroad and the controls which should apply to such operations.

With respect to these controls, the Commission made the following further recommendations at page 631 of its Report:

The system we propose recognizes that it is a ministerial responsibility to ensure that the Department of External Affairs is consulted in advance about foreign operations with serious implications for foreign policy and provides a process whereby the department of External Affairs can be kept comprehensively informed of the security intelligence agency's foreign operations.

24. There may well be situations in which the Department of External Affairs would consider that the risk to Canada's foreign relations exceeds the potential worth of the security intelligence that might be obtained from a foreign operation. In resolving differences of this kind it is important that one set of interests should not automatically take precedence. Thus, when the Solicitor General and the Secretary of State for External Affairs could not agree over a foreign operation, the matter should be decided by the Prime Minister.

WE RECOMMEND THAT for intelligence purposes falling within the security intelligence agency's statutory mandate and subject to guidelines approved by Cabinet Committee on Security and Intelligence, the security intelligence agency be permitted to carry out certain investigative activities abroad.

WE RECOMMEND THAT the Director General of the Security intelligence agency inform the Minister responsible for the agency in advance of all foreign operations planned by the security intelligence agency.

WE RECOMMEND THAT in cases which on the basis of policy guidelines are deemed to involve a significant risk to Canada's foreign relations, the Minister responsible for the security intelligence agency inform the Department of External Affairs sufficiently in advance of the operation to ensure that consultation may take place.

WE RECOMMEND THAT the Director General and appropriate officials of the security intelligence agency should meet with the Under Secretary of State for External Affairs and the responsible Deputy Under Secretary on an annual basis to review foreign operations currently being undertaken or proposed by the security agency.