



July 31, 2014

VIA FAX

The Judicial Administrator
Courts Administration Service
Federal Court of Appeal
90 Sparks Street
Ottawa, ON, K1A 0H9
Fax: (613) 952-7226

Dear Sir/Madam,

Re: FCA File Number A-145-14: *In the Matter of an application by [XXXX] for a warrant pursuant to Sections 12 and 21 of the Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23 or X (Re)*
Request for Direction Regarding Proposed Motion for Leave to Intervene

We write the court to seek instructions with respect to our intention to seek intervention in File A-145-14 (henceforth the "Appeal" or "Re X").

The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) is a non-governmental organization based at the University of Ottawa. CIPPIC's mandate is to ensure that the public interest is accounted for in matters arising at the intersection of law and technology. CIPPIC has long standing interest in securing privacy rights in the context of electronic surveillance, and has been active on a number of legal and policy issues arising from state surveillance practices.

It is CIPPIC's intention to file a motion for leave to intervene in Re X, an appeal which raises a number of critical issues relating to the electronic surveillance framework of Canada's national security intelligence agencies, the Canadian Security Intelligence Service (CSIS) and Communications Security Establishment Canada (CSEC). However we are experiencing a number of preliminary issues in our attempt to move for leave to intervene in this Appeal. These issues arise from the secret nature of the subject matter of this proceeding – a proceeding that implicates national security concerns. As such we are writing to seek instructions from the Court on how best to proceed. Some background on the history and nature of this appeal might be helpful in understanding CIPPIC's desire to intervene, as well as the need for instructions at this very preliminary stage.

BACKGROUND AND PROCEDURAL HISTORY OF THE APPEAL

The decision under appeal in *Re X* was issued by Justice Mosely of the Federal Court on November 22, 2013: *X (Re)*, 2013 FC 1275 (the “2013 Decision”). The 2013 Decision constituted a re-consideration of an earlier decision issued by Justice Mosely in 2009: *X (Re)*, 2009 FC 1058, [2010] 1 FCR 460 (the “2009 Decision” or “CSIS 30-08”). The 2009 Decision addressed novel questions relating to the conditions under which CSEC may rely upon its foreign partners in assisting CSIS to conduct surveillance of individuals abroad. The 2009 Decision created a new framework for such activities, and since its issuance, several warrants (commonly referred to as CSIS 30-08 warrants after the eponymous 2009 Decision) have been based on the model established in the 2009 Decision.¹

In June 2013, a statutorily mandated annual report on the activities of CSEC was issued by then Communications Security Establishment Commissioner, Robert Décary, Q.C. This annual report flagged certain potential concerns arising from CSEC surveillance activities carried out in assistance to CSIS further to CSIS 30-08 style warrants. Specifically, the annual report indicated that the federal court may not be aware of the full scope of assistance offered by CSEC to CSIS in its ongoing issuance of CSIS 30-08 style warrants.² Upon reading the annual report, Justice Mosley called upon counsel for CSEC and CSIS to appear before the Court to provide the missing factual details referred to in the annual report in order to assess its impact on his initial order in the 2009 Decision.³ This ultimately led to the 2013 Decision which is the object of the current appeal. In late December 2013, Justice Mosley issued a redacted public version of his reasons in the 2013 Decision. On February 3, 2014, Mr. Stephen Rigby, National Security Advisor to the Prime Minister, publicly announced that the Attorney General of Canada had decided to appeal the 2013 Decision.⁴

Given the national security nature of the subject matter at issue in the Appeal, there is minimal public information regarding the parties, nature scope or filings in the Appeal. As such, discovering information regarding even the status of the Appeal based on its style of cause has been a challenge. In March and again in May 2014, CIPPIC staff contacted the Registry for the Federal Court of Appeal in order to gain information on the progress of this Appeal. CIPPIC was informally advised that preliminary procedural issues regarding the Appeal were being resolved. In late July 2014, CIPPIC contacted the Registry once again to inquire as to the status of this Appeal. On July 29, 2014, CIPPIC was provided a docket number of this Appeal from the Registry and advised that it should seek instructions from the Court on how best to proceed with its intended motion for leave to intervene.

ISSUES POTENTIALLY RAISED BY THE CURRENT APPEAL

The Appeal at issue potentially raises a number of issues that are of significant public importance. First and foremost, the 2013 Decision under appeal established a precedent that is of great significance to the protection of individual privacy through the additional safeguards it puts in place. Therefore, overturning this framework decision on either procedural or substantive grounds will have direct privacy implications regardless of the particular reasoning by which this is brought about. Moreover, the 2013

¹ *X (Re)*, 2013 FC 1275, paras. 3, 75 and 112-113.

² Communications Security Establishment Commissioner, Annual Report 2012-2013, June 2013, <http://www.ocsec-bccst.gc.ca/ann-rpt/2012-2013/ann-rpt_e.pdf>, p. 18.

³ *X (Re)*, 2013 FC 1275, para. 53.

⁴ Testimony of Mr. Stephen Rigby, National Security Advisor to the Prime Minister, Privy Council Office, to the Standing Senate Committee on National Security and Defence, 2nd Session, 41st Parliament, 2013-14, February 3, 2014, <<http://www.parl.gc.ca/Content/SEN/Committee/412/secd/pdf/02issue.pdf>>, 2:43.

Decision addressed a number of legal issues that have ancillary importance for privacy rights and broader accountability. These include:

- Questions regarding the scope and nature of the obligation to provide full and frank disclosure in the context of *ex parte* legal proceedings that implicate privacy rights;⁵
- Questions relating to the potential impact on individuals that may result when a Canadian investigative agency asks a foreign state partner to assist in an investigation of that individual;⁶
- Questions regarding the application of human rights protections to Canadian government-initiated surveillance activities conducted extra-territorially and, particularly, whether the right to be free from unreasonable search and seizure as protected by section 8 of the *Charter*, and the right to be free from arbitrary interference with privacy as protected by Article 12 of the *Universal Declaration of Human Rights* and Article 17 of the *International Covenant on Civil and Political Rights* apply to such extra-territorial activities;⁷ and
- Questions relating to the substantive impact on privacy rights that occurs when Canadian state agencies are permitted to make use of the substantial investigative capacities and resources⁸ available to foreign state investigative agencies in an assistive capacity;⁹

To the extent any of these and other constituent elements of the 2013 Decision are implicated in this Appeal, it could have meaningful public interest implications. More broadly, the 2013 Decision raises key questions regarding the framework under which our domestic and foreign intelligence agencies operate – an issue that has significant public interest implications.

⁵ *X (Re)*, 2013 FC 1275, paras. 80-81 and 89-90.

⁶ *X (Re)*, 2013 FC 1275, paras. 115 and 122.

⁷ *X (Re)*, 2013 FC 1275, para. 86, 101-102

⁸ In the context of this Appeal, these foreign intelligence partners will invariably be Canada's 'Five Eyes' partners, namely, CSEC's primary foreign intelligence partners: the United States National Security Agency (NSA), the United Kingdom Government Communications Headquarters (GCHQ), the Australian Signals Directorate (ASD) and New Zealand's Government Communications Security Bureau (GCSB). See *X (Re)*, 2013 FC 1275, paras. 55 and 113. The foreign intelligence capacities of these agencies and questions regarding their consistency with international human rights protections have recently received significant attention in Canada and around the world. See, generally: United Nations General Assembly Resolution, *The Right to Privacy in the Digital Age*, November 20, 2013, A/C.3/68/L.45/Rev.1, <http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/68/L.45/Rev.1&Lang=E>; U.N. Human Rights Council, "The Right to Privacy in the Digital Age: Report of the Office of the United Nations High Commissioner for Human Rights", June 30, 2014, A/HRC/27/37, <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf >; U.N. Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression, Frank La Rue, April 17, 2013, A/HRC/23/40, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf >, para. 59; President's Review Group on Intelligence and Communications Technologies, "Liberty and Security in a Changing World", December 12, 2013, <http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf>. See also: Electronic Frontier Foundation & Article 19, "International Principles on the Application of Human Rights to Communications Surveillance: Background and Supporting International Legal Analysis", May 2014, <https://cippic.ca/uploads/IPAHRCS-legal_analysis.pdf>.

⁹ *X (Re)*, 2013 FC 1275, para. 89, 92, 102 and 105.

INTERVENING IN THIS APPEAL

As noted above, the issues raised by this Appeal intersect directly with CIPPIC's public interest mandate and CIPPIC accordingly wishes to move for leave to intervene in this matter in order to submit a written memorandum on the matters of fact and law raised herein and their impact on the public interest. However, a number of challenges impede our capacity to do so.

CIPPIC has not been able to uncover the style of cause, parties and counsel of record for this matter. Nor have we been able to determine what the timelines for this Appeal may be. Only recently (on July 29), was CIPPIC able to confirm the file number for this Appeal. Access to these items of information is a prerequisite for filing and service of any motion for leave to intervene.

CIPPIC is also unable to determine the specific issues under appeal as filings in this matter and in the application for leave to appeal that preceded it are confidential. CIPPIC does not, in its intervention, seek access to confidential materials. However, it is possible, in CIPPIC's view, to separate the broader legal questions at issue here from any specific confidential facts. Whereas in some instances, questions of confidential fact and law may be so inter-twined that it is impossible for this form of public intervention to occur, this is not such a case. Indeed, the 2013 Decision itself, while redacted in part, provides a sufficient level of public disclosure for CIPPIC to effectively assess the legal implications and basis for the matters at issue.

CIPPIC can, if required, file a motion for leave to intervene based on its current understanding of the legal issues raised by the 2013 Decision. However, an effective intervention would require knowledge of, at minimum, the specific grounds for appeal raised by the Appellant in its pleadings, which can be disclosed in redacted or summary form. An effective intervention would also greatly benefit from redacted or summarized versions of any memorandum of fact and law filed in this matter.

We look forward to any guidance you might offer on this matter. If you have any questions or concerns, please do not hesitate to contact me.

Yours truly,



Tamir Israel
Staff Lawyer
Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)