

FEDERAL COURT

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

(Pursuant to sections 18 and 18.1 of the *Federal Courts Act*)

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa.

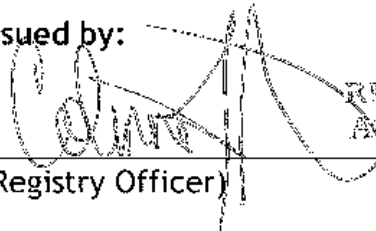
IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: October 2, 2017

Issued by:


C. MARTIN
REGISTRY OFFICER
AGENCY DO CREATE

 (Registry Officer)

Address of local office:

Registries of the Federal Courts
Thomas D'Arcy McGee Building
90 Sparks Street, 5th floor
Ottawa, ON K1A 0H9

TO: Nathalie G Drouin
Deputy Attorney General of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW in respect of a decision of the Security Intelligence Review Committee (“SIRC” or the “Committee”), dated May 30, 2017, but received by the Applicant on September 1, 2017. By its decision, SIRC dismissed a complaint brought by the Applicant, British Columbia Civil Liberties Association (“BCCLA”), under section 41 of the *Canadian Security Intelligence Service Act*, RSC 1985, c.C-23 (“*CSIS Act*”).

The Applicant initiated the complaint under section 41 of the *CSIS Act* on February 6, 2014, alleging that the Canadian Security Intelligence Service (“CSIS” or “the Service”) had engaged in improper and unlawful actions by collecting information about Canadian citizens and groups engaging in peaceful and lawful expressive activities, and by sharing it with other bodies and private sector actors. Specifically, the complaint alleged that documents obtained under the *Access to Information Act*, RSC 1985, c. A-1 (“*ATI Act*”), showed that CSIS officials had collected intelligence and information about organizations opposed to the Northern Gateway Project, a proposal to build an oil pipeline in Western Canada, and had shared this information with the National Energy Board (“NEB”), the regulatory body tasked with holding hearings and recommending whether or not the project should proceed. It was also alleged that CSIS had shared this information with oil companies and held secret conferences with those same petroleum industry actors at CSIS headquarters, with hospitality paid for by the oil companies.

The Applicant’s position was that this intelligence gathering targeting environmentalists opposed to the Northern Gateway Project was contrary to section 12 of the *CSIS Act*, which prohibits the Service from gathering information about Canadian citizens unless there were reasonable grounds to suspect they constituted a threat to the security of Canada. The records obtained through the *ATI Act* suggested that certain organizations were viewed as potential security risks simply because they advocate for the protection of the environment.

The Applicant further contended that section 19 of the *CSIS Act* did not authorize sharing this information with the NEB or private sector actors. The *CSIS Act* strictly prohibits the Service from sharing information with anyone other than enumerated branches of the Canadian government and, in certain circumstances, law enforcement officials. The *ATI* documents revealed that CSIS may be sharing information with the NEB and oil companies, contrary to section 19 of the *CSIS Act*.

Finally, the Applicant complained that this spying activity by CSIS created a chilling effect as it appeared to criminalize those who simply wished to participate in the NEB hearings, a forum for public expression and engagement in decision-making processes regarding projects of significant public interest. The Applicant alleged that these activities violated sections 2(b), 2(c), 2(d) and 8 of the *Canadian Charter of Rights and Freedoms*.

During the course of its investigation, SIRC held *in camera* hearings in Vancouver, British Columbia in August 2015. The Applicant BCCLA participated in these hearings and called witnesses who testified before the SIRC. The witnesses came from well-known environmental and public interest organizations in British Columbia, namely, LeadNow, ForestEthics, the Dogwood Initiative, and the Sierra Club of BC. The witnesses had all engaged in advocacy around the Northern Gateway Project, and had learned through media stories that CSIS may be spying on them and their members. The witnesses were examined by the Applicant's counsel and cross examined by CSIS legal counsel. The Executive Director of the BCCLA, Josh Paterson, also testified.

At that time, the Committee member raised section 48 of the *CSIS Act*, which provides that SIRC investigations "shall be conducted in private". The presiding SIRC member advised the parties that, in his view, subsection 48(1) of the *CSIS Act* prohibited any discussion or disclosure of the evidence heard by the Committee. The SIRC member directed the Applicant not to speak publicly about the testimony of its own witnesses, nor disclose it "in any form, either by way of summary" or by way of a

will-say statement. The Applicant complied with the order, but advised the SIRC member that it would raise this issue again in its submissions.

The SIRC subsequently provided the Applicant with full transcripts of the August 2015 hearings. The Committee also later heard evidence from CSIS *ex parte*, and provided summarized versions of that evidence to the Applicant after it had been vetted by CSIS.

The Applicant BCCLA made final written representations on the complaint on September 16, 2016. The Applicant's comprehensive submissions were over 70 pages long, and included a review of the evidence and extensive legal submissions. The Applicant also argued that section 48 of the *CSIS Act* did not prohibit the public disclosure or discussion of the Applicant's own evidence and arguments after the proceeding was complete. In its submissions, CSIS did not object to the Applicant disclosing information about its own witnesses and arguments.

On September 1, 2017, the Applicant received the Committee's final decision on the complaint, which was dated May 30, 2017. In a 58-page decision, the SIRC dismissed the Applicant's complaint. The decision includes extensive discussion of the evidence and detailed analysis of sections 12 and 19 of the *CSIS Act*. The SIRC also concluded that, pursuant to section 48 of the *CSIS Act*, the BCCLA was prohibited from publicly disclosing, in any form or even by way of summary, the evidence of its own witnesses, including its own Executive Director as well as witnesses from LeadNow, ForestEthics, the Dogwood Initiative, and the Sierra Club of BC. The SIRC further decided that the BCCLA could not publicly disclose "any part" of its own final submissions.

Following receipt of the decision and the order not to disclose "any part" of its own evidence or submissions, the Applicant corresponded with the Committee to clarify whether its order prevented the BCCLA from publicly disclosing the final decision itself. The SIRC responded by way of a letter, simply stating that the member has "nothing further to add to his final report".

The Applicant challenges the SIRC final decision by this application for judicial review. The Applicant asserts that the SIRC final decision includes errors of law and misinterprets sections 12 and 19 of the *CSIS Act* as it relates to the incidental or ancillary gathering of information about Canadian citizens and sharing information with the NEB and oil companies. The Applicant also challenges the SIRC findings with respect to any chilling effect created by CSIS activities and the test for infringement of the *Canadian Charter of Rights and Freedoms*.

The SIRC's decision to prohibit the Applicant BCCLA from publicly disclosing "any part" of its own evidence and final submissions constitutes a violation of freedom of expression and section 2(b) of the *Canadian Charter of Rights and Freedoms*. The language of section 48 of the *CSIS Act* does not require this interpretation, and the SIRC member erred by failing to interpret the provision in a manner that complies with the *Charter*. In the event the SIRC member is correct, the Applicant submits that section 48 of the *CSIS Act* infringes on section 2(b) of the *Charter* and ought to be struck down as it cannot be justified in a free and democratic society.

THE APPLICANT MAKES APPLICATION FOR:

1. An Order setting aside the Security Intelligence Review Committee's decision, dated May 30, 2017;
2. An Order specifically quashing the Security Intelligence Review Committee's decision to prohibit the Applicant from publicly disclosing or speaking about the evidence of its own witnesses or its own final submissions;
3. An Order remitting the complaint back to the Security Intelligence Review Committee, for consideration in accordance with the directions of this Court;
4. The costs of this application; and
5. Such further and other relief as counsel may request and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

1. The Security Intelligence Review Committee's decision erred in law with respect to its interpretation of sections 12 and 19 of the *CSIS Act*;
2. The Security Intelligence Review Committee's decision erred in law with respect to its interpretation of section 48 the *CSIS Act*;
3. If the Security Intelligence Review Committee's interpretation of section 48 of the *CSIS Act* is correct, the statutory provision violates section 2(b) of the *Canadian Charter of Rights and Freedoms* and cannot be justified in a free and democratic society;
4. The Security Intelligence Review Committee's decision erred in law with respect to the "chilling effect" and the threshold at which the *Canadian Charter of Rights and Freedoms* are engaged;
5. The Security Intelligence Review Committee failed to disclose portions of the *ex parte* evidence to the Applicant which did not constitute any kind of risk to national security, and this failure to disclose constitutes a violation of the principles of procedural fairness and natural justice;
6. *Canadian Security Intelligence Service Act*, RSC, 1985, c.C-23;
7. The *Canadian Charter of Rights and Freedoms*;
8. *Federal Courts Act*, RSC, 1985, c. F-7, ss. 18(1) and 18.1(1);
9. *Federal Courts Rules*, SOR/98-106; and
10. Such further and other grounds as counsel may advise and this Honourable Court may permit.

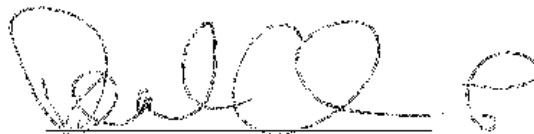
THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL

1. The supporting affidavit of Josh Paterson, or similar affidavit, together with the exhibits attached thereto;
2. The full record of the material that was before the presiding member in preparing his report, dated May 30, 2017; and
3. Such further and other material as counsel may advise and this Honourable Court may permit.

THE APPLICANT REQUESTS, pursuant to Rule 317 of the *Federal Courts Rules*, the Security Intelligence Review Committee send a certified copy of the following material that is not in the possession of the Applicant but is in possession of the Committee to the Applicant and to the Registry:

- (a) The full record of all transcripts and documents in the possession of the Security Intelligence Review Committee and relied upon by the presiding member in preparing his report, dated May 30, 2017.

Dated this 2nd day of October, 2017.



Paul Champ / Bijon Roy

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