Federal Court  Cour fédérale

**Date: 20180821**

**Docket: DES-2-18**

**Citation: 2018 FC 850**

**Ottawa, Ontario, August 21, 2018**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**AWSO PESHDARY**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

# ORDER AND REASONS

## I. Overview

[1] Mr Awso Peshdary seeks to challenge a warrant issued by this Court in 2012 authorizing the Canadian Security Intelligence Service to use powers of surveillance over him. The Service turned over some of the information it gathered about Mr Peshdary to the Royal Canadian Mounted Police. The RCMP used that information to obtain additional warrants under the *Criminal Code* to investigate Mr Peshdary for terrorism-related offences. The RCMP's

investigation resulted in two criminal charges against Mr Peshdary, for which he faces trial in the Superior Court of Justice of Ontario.

[2] Mr Peshdary's challenge is proceeding in two stages. In this first stage, I heard the parties' submissions on the question whether the Federal Court has jurisdiction to grant the remedy Mr Peshdary seeks – a quashing of the warrant issued to the Service. The parties also addressed the issue whether Mr Peshdary is entitled to further disclosure of materials in the possession of the Service that would enable him to have a full picture of the basis on which the warrant was issued, and could assist him in challenging the validity of the warrant.

[3] Depending on the answers to these first two questions, two more issues may have to be resolved in the second stage. The first is whether I should appoint an *amicus curiae* to review any additional documents that I order disclosed to Mr Peshdary and to respond to any claims the AGC may make to national security privilege. If no further disclosure is ordered, an *amicus* will not be needed. The second further issue is the challenge to the Service's warrant itself. If I find that I do not have jurisdiction to quash the warrant, this issue would become moot.

[4] Accordingly, two issues are currently before me:

1. Does the Federal Court have jurisdiction to quash a warrant it issued to the Service?
2. Is Mr Peshdary entitled to further disclosure?

[5] For the reasons below, I find that the Court has jurisdiction to grant the remedy Mr Peshdary seeks. No statutory or jurisprudential obstacles stand in the way of this Court's powers

to rule on the validity of its own orders. However, I also find that Mr Peshdary has not justified further disclosure of materials in the Service's possession.

[6] Accordingly, I will hear the parties on the second stage of this proceeding solely on the question whether the Service's warrant should be quashed.

## II. Issue One–Does the Federal Court have jurisdiction to quash a warrant it issued to the Service?

[7] The AGC contends that the Court may have the necessary jurisdiction, but that it exists under common law that has been overtaken by jurisprudence in the criminal law context under the *Canadian Charter of Rights and Freedoms*. The Court's powers, says the AGC, are essentially moribund and should be allowed to perish.

[8] The AGC goes too far. Notwithstanding developments in criminal and constitutional law, this Court retains its power to rule on the validity of its own orders, including warrants issued to the Service.

[9] At common law, a judge who issued an order on an *ex parte* application has the power to rescind it if shown that the order should not have been granted. However, an order could be invalidated only by a direct challenge, that is, by way of an application to the issuing judge (or to another judge of the same court) for the sole purpose of quashing the order. An order could not be nullified collaterally in other proceedings; it was presumed to be valid until vitiated on a

direct attack. More particularly, orders of a superior court could not be quashed in proceedings before a provincial court.

[10] The question whether this common law understanding applied to authorizations to intercept private communications arose in *R v Wilson*, [1983] 2 SCR 594. There, a provincial court judge found that authorizations that had previously been issued by a judge of the Manitoba Queen's Bench were invalid because the applicable statutory conditions in the *Criminal Code* had not been met. In particular, the evidence before the trial judge showed that no other investigative procedures had been tried and failed, or that other investigate tools were unlikely to succeed, or that there was any urgency.

[11] At the Supreme Court of Canada, Justice McIntyre confirmed the basic common law, and found that the trial judge should have recognized that the authorizations were valid and in full effect until set aside in a proceeding specifically devoted to that issue. In addition, the authorizations were orders of a superior court and could not be set aside by a provincial court judge. While the trial judge would have been entitled to consider defects on the face of the authorizations, he had actually gone behind the authorizations, which he was not entitled to do. The *Criminal Code* specifically provided that the documents associated with an authorization should be sealed in a packet openable only by a superior court judge or a judge with judge-alone jurisdiction, so the trial judge had no power to rule on the validity of the authorizations.

[12] The upshot of *Wilson* was that an application to review the validity of an authorization had to be made to the judge who issued it, or to a judge of the same court. In the latter case, the

reviewing judge would not simply substitute his or her discretion for that of the issuing judge but, rather, would determine whether the facts were different from those presented to the issuing judge. Justice McIntyre said little about the grounds that would justify setting aside an *ex parte* order, but mentioned that fraud or the discovery of new evidence would be included. (Later cases added material non-disclosure and misleading disclosure.) Nor did he address the threshold that an accused must meet in order to obtain access to the documents put before the issuing judge, the so-called "sealed packet." However, *Wilson* was interpreted as requiring proof of fraud or other relevant grounds before the accused could access the packet.

[13] Six years after *Wilson*, a related issue came before the Supreme Court of Canada and, once again, Justice McIntyre addressed it (*R v Meltzer*, [1989] 1 SCR 1764). In effect, he confirmed what he had said in *Wilson*. The accused had unsuccessfully challenged a review of an authorization that had been issued by the Supreme Court of British Columbia. The accused pursued an appeal of that decision, but the British Columbia Court of Appeal denied it citing a lack of jurisdiction. Justice McIntyre agreed with that conclusion and went on to address criticisms that had been made of the procedure he had laid out in *Wilson*. He found that concerns about delay and confusion were exaggerated. Moreover, the *Criminal Code* itself placed restrictions on when and by whom sealed packets could be opened. He saw no need to reconsider *Wilson*.

[14] Just a year later, Justice Sopinka described the state of the law on challenging wiretap authorizations as a "procedural quagmire" in *R v Garofoli*, [1990] 2 SCR 1421 at p 1445. He referred to the various grounds on which the admissibility of wiretap evidence could be

challenged and proposed that they be consolidated (for a discussion of these various remedies, see James W O'Reilly, "Reviewing Wiretap Authorizations: The Supreme Court Goes Through the Motions" (1991), 80 CR (3d) 386)).

[15] In respect of the *Wilson* process, Justice Sopinka suggested that applications to open sealed packets be brought before judges who are given that authority under the *Criminal Code*, but that the power to review authorizations be vested in trial judges. The accused would not have to meet any evidentiary threshold to gain access to the packet; an assertion of a Charter right was sufficient. The question for trial judges would be whether the statutory conditions were complied with. If so, no breach of s 8 of the Charter will have occurred. The accused would not have to show fraud, non-disclosure, misleading evidence, or new evidence, although these would be relevant factors. If there was no legal basis for an authorization, any interceptions obtained under it would be inadmissible.

[16] Through *Garofoli* and other related cases, the Supreme Court simplified and clarified the rules surrounding challenges to wiretap authorizations, and made the process fairer to accused persons. An unanswered issue, however, is whether the *Wilson* procedure is still available should a person wish to challenge an authorization before the court that issued it instead of the trial court. An obvious question is why anyone would want to do so given the flexibility of the procedure provided in *Garofoli* before trial courts. One answer is that a remedy before a trial judge is not available to a person who has not been charged with an offence. This was the situation in *R v Vijaya*, 2014 ONSC 1653. There, the accused sought to quash search warrants that had been obtained in relation to his computers and hard drives. He had not yet been charged

with any offence. Justice Nordheimer (now of the Court of Appeal for Ontario) reviewed the *Wilson* procedure and concluded that, in light of *Garofoli*, its survival was highly doubtful. But what he clearly meant was that the *Wilson* approach does not apply to Charter challenges (at paras 21 and 25). In his case, even though there was no trial judge, Justice Nordheimer applied *Garofoli* to the circumstances before him. He ordered, on grounds of procedural fairness, that the accused receive the material that was before the judge who had issued the search warrants–the affidavit and any documents referred to in the affidavit.

[17] Accordingly, *Vijaya* tells us that *Garofoli*, not *Wilson*, should apply to all Charter challenges to warrants. But, again, it does not rule out resort to *Wilson* in the circumstances before me – where the accused applies for a remedy to the issuing court, and does not rely on the Charter.

[18] Another answer to the question why a person would pursue a *Wilson* application instead of relying on *Garofoli* appears in the dissent of Justice McLachlin (before she was Chief Justice) in *Garofoli*. She noted that the burden on a *Wilson* application is high, but the outcome for a successful applicant is automatic exclusion of the evidence. The burden on a *Garofoli* application is low, but the remedy is not automatic exclusion; it involves a balancing of factors under s 24(2) of the Charter.

[19] Nothing in the jurisprudence tells me that *Wilson* applications are extinct or that this Court no longer has jurisdiction to review one of its *ex parte* orders. It appears, therefore, that *Atwal v Canada*, [1988] 1 FC 107 (FCA), the only case cited to me that deals with a similar

application, remains good law. It must be remembered, though, that at the time *Atwal* was decided, *Garofoli* had not yet been decided. Naturally, Justice Mahoney relied on *Wilson* for the proposition that the applicant had to challenge a warrant issued to the Service by this Court in this Court. Notably, Justice Mahoney also ordered disclosure to the applicant of the affidavit used to obtain the warrant without requiring the applicant to show fraud or the other available grounds identified in *Wilson* and its progeny.

[20] While the Supreme Court of Canada addressed the difficulties of reviewing wiretap authorizations and the provisions of the *Criminal Code* that apply to those warrants, it has never addressed the situation before me in this case. Here, we are dealing with a warrant issued by the Federal Court, a superior court. The warrant is valid according to *Wilson* until it has been quashed in a Federal Court proceeding in which its legitimacy has been directly impugned, or it has been successfully challenged on Charter grounds in a superior court.

[21] This Court's jurisdiction to set aside or vary an *ex parte* order is also specifically recognized in the *Federal Courts Rules*. Rule 399 gives the Court that power where the party against whom the order is made discloses a *prima facie* case why the order should not have been issued, where a matter arose or was discovered subsequent to the making of the order, or where the order was obtained by fraud.

[22] Accordingly, this Court clearly has jurisdiction to receive and rule on a challenge to a warrant issued to the Service.

III. Issue Two - Is Mr Peshdary entitled to further disclosure?

[23] Mr Peshdary submits that disclosure is required in order to allow him a meaningful opportunity to challenge the authorization. Since *Wilson* requires a showing of fraud, material non-disclosure, misleading disclosure, or new facts, the person affected must have access to the documentation supporting the issuance of the warrant; otherwise, the person will simply be unable to mount a challenge. Further, Mr Peshdary points out the social benefits that derive from an open and transparent justice system, which favour maximum disclosure of the grounds on which investigative powers are authorized. For example, openness helps ensure that the Service meets its duty of candour to the Court when it requests investigative warrants.

[24] I cannot disagree with Mr Peshdary on principle. However, for three reasons, I find that further disclosure is not warranted in the circumstances before me.

[25] First, Mr Peshdary has elected to pursue a remedy based on *Wilson*. *Wilson* requires a preliminary showing of fraud or some other serious issue in the evidence before disclosure of the contents of the sealed packet can be granted. Mr Peshdary rightly points out that this places the affected person in a serious predicament–he or she has to show fraud, for example, before getting any access to documents that might support that claim. But this predicament is inherent in the *Wilson* process. Under the *Wilson* approach, applicants "could not possibly put forward evidence of fraud or other misconduct without knowing what had been put before the issuing judge." In essence, "[a]ccess to the packet was needed before evidence of misconduct could be obtained, yet this evidence had to be tendered before access was permitted" (O'Reilly, above, at p 387). It

is this problem with the *Wilson* approach that caused the Supreme Court of Canada to devise an alternate, fairer approach based on the Charter. In effect, therefore, Mr Peshdary complains about the restrictions that exist within the very process he has elected to follow. His alternative is to present a *Garofoli* motion before the trial judge, which does not require the kind of evidentiary threshold that exists on a *Wilson* application. Indeed, I fully expect that Mr Peshdary will make a *Garofoli* application when his trial resumes.

[26] Second, *Wilson* did not anticipate the degree of disclosure Mr Peshdary seeks on this application. *Wilson* dealt only with access to the sealed packet containing the documents actually put before the issuing judge. Here, Mr Peshdary is seeking disclosure of all source documents in the Service's possession, relying on *R v Pires; R v Lising*, 2005 SCC 66. But that case arose under s 8 of the Charter, not *Wilson*, and, in any case, does not contemplate disclosure of materials beyond the contents of the sealed packet (at para 25). Mr Peshdary also relies on *Vijaya*, above, where Justice Nordheimer stated that a person who is subject to an *ex parte* order is entitled to obtain the material used to obtain that order, including copies of documents cited in the affidavit. As pointed out, above, however, *Vijaya* was based on the Charter, not *Wilson*. In addition, Justice Nordheimer found that the applicant was entitled to the affidavit and the documents referred to in it. But, here, Mr Peshdary is seeking disclosure far beyond those documents. I see no legal basis for his disclosure claim.

[27] Third, Mr Peshdary has already received substantial disclosure, beyond what was contemplated in the cases he relies on. He has made three requests for disclosure of materials from the Service and was successful on two of them, relying on *R v O'Connor*, [1995] 4 SCR

411. While Mr Peshdary has not received all of the source documents he seeks, he has been provided with the underlying affidavit and many other documents relating to an informant on whom the Service relied. He has already received what he would have been entitled to obtain on a *Wilson* application.

[28] Accordingly, I cannot grant Mr Peshdary's request for further disclosure.

## IV. Conclusion and Disposition

[29] This Court has jurisdiction to rule on an application challenging a warrant issued to the Service. The Court will receive the parties' submissions on that challenge at a hearing on August 24, 2018. No further disclosure is ordered.

**ORDER in DES-2-18**

**THIS COURT ORDERS that**

1. Mr Peshdary's motion challenging the warrant issued by this Court to the Service will be heard on August 24, 2018; and
2. No further disclosure of materials be provided to Mr Peshdary.

"James W. O'Reilly"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | DES-2-18 |
| **STYLE OF CAUSE:** | AWSO PESHDARY v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | AUGUST 13, 2018 |
| **ORDER AND REASONS:** | O'REILLY J. |
| **ORDER AND REASONS ISSUED:** | AUGUST 21, 2018 |

**APPEARANCES:**

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|---|---|
| Mr. Andre Seguin<br>Mr. Marc Edmunds | FOR THE RESPONDENT |
| Mr Fady Mansour<br>Mr Solomon Friedman | FOR THE APPLICANT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| William F. Pentney<br>Deputy Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |
| Edelson & Friedman<br>Barristers LLP<br>Ottawa, Ontario | FOR THE APPLICANT |