Federal Court Cour fédérale

~~TOP SECRET~~

Date: 20200727

Docket: [redacted]

Citation: 2020 FC 757

Ottawa, Ontario, July 27, 2020

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

IN THE MATTER OF AN APPLICATION BY [redacted] FOR WARRANTS PURSUANT TO SECTIONS 16 AND 21 OF THE *CANADIAN SECURITY INTELLIGENCE SERVICES ACT*, RSC 1985 C C-23

AND IN THE MATTER OF [A FOREIGN STATE, GROUP OF STATES, CORPORATION OR PERSON]

JUDGMENT AND REASONS

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Explanatory Note

This public version of the Court’s Judgment and Reasons has been redacted to prevent the public disclosure of information that would be injurious to national security and the conduct of international relations or national defence of Canada. The redactions can make it difficult for the reader to appreciate the legal issues raised in this matter. Where appropriate, redacted text has been summarized to assist the reader. This Explanatory Note also seeks to assist the reader by providing an overview of the legal issues at play. This Explanatory Note does not form a part of the Court’s Judgment and Reasons.

These reasons consider applications by the Canadian Security Intelligence Service (“the Service”) for warrants pursuant to sections 16 and 21 of *the Canadian Security Intelligence Service Act* [*CSIS Act*]. The warrants were sought to enable the Service to provide assistance to a Minister pursuant to section 16 of the *CSIS Act*. The investigative powers sought in the warrants included the authority to initiate, from a location inside Canada, the collection of information outside Canada (the “investigative powers”).

The Court considered the meaning of the requirement, in section 16 of the *CSIS Act*, that the Service’s assistance to the Minister be provided “within Canada” and concluded that the use of the investigative powers, in the manner proposed in the applications, did not meet that requirement.

The Court concurred in the analysis of the same issue by Justice Noël in *X (Re)*, 2018 FC 738 [*X (Re)*].

Also, the Court heard evidence on factual points that were not put in issue before Justice Noël, on the basis of which the Court made a factual finding that the investigative powers would allow for the collection of information in specific and knowable countries (other than Canada). This finding supported the legal conclusion that the use of the investigative powers would not involve assistance to the Minister "within Canada". This evidence also supported the conclusion that the use of the investigative powers would be a violation of foreign domestic and/or international law and/or the international law principle of non-intervention.

The Court agreed with the conclusion in *X (Re)*: one of the reasons that Parliament imposed, and has maintained, the "within Canada" requirement in section 16 is that Canada's collection of foreign intelligence in foreign countries could harm Canada's international relations. The Court found that the evidence in the underlying case—including the fact that the use of the investigative powers would take place in, and violate the domestic laws and/or international law and/or the international law principle of non-intervention in respect of specific foreign countries—made it even more evident that the use of the investigative powers had the potential to cause the harm that Parliament intended to avoid with the "within Canada" requirement.

This finding formed part of the basis upon which the Court found that a body of Canadian jurisprudence dealing with information in foreign jurisdictions was distinguishable, because that jurisprudence did not involve the collection of information in violation of foreign law, international practice or the comity of nations.

I. Introduction

[1] Section 16 of the *Canadian Security Intelligence Service Act*, RSC 1985 c C-23 [*CSIS Act*] authorizes the Canadian Security Intelligence Service [CSIS or the Service] to assist the Minister of National Defence or the Minister of Foreign Affairs in the collection of information relating to foreign states and persons "within Canada". Section 21 provides that the Service may seek a warrant from this Court to allow it to perform its duties under section 16.

[2] In *X (Re)*, 2018 FC 738 [*Within Canada FC*], Justice Simon Noël considered whether the words "within Canada" prevent the Service from obtaining a section 21 warrant for investigative activities undertaken pursuant to section 16 where those activities are not carried out entirely within Canada. More specifically the issue before him was whether this Court could authorize [a collection] - effected from within Canada - [for information] outside Canada.

[3] Justice Noël held that the proposed [collection] was contrary to the "within Canada" limitation imposed by Parliament.

[4] The refusal decision was appealed, where it was found that the evidentiary record was inadequate to allow the Federal Court of Appeal to fully consider and address the questions

raised. The appeal was dismissed (*Sections 16 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23 (Re)*, 2018 FCA 207 [*Within Canada FCA*]).

[5] In this Application the Service has returned to the Court seeking authority to [collect the information] of [foreign persons] performing their work in Canada. The Service relies upon an evidentiary record that responds to a series of questions that the Court of Appeal identified as bearing directly upon the issues that arise.

[6] I have carefully considered the evidence, including evidence relating to how, and where, the [collection will occur]. I too conclude that in the circumstances disclosed, in the manner proposed, this Court lacks the jurisdiction to authorize the collection [of the information sought]. My reasons follow.

II. Background

[7] In July 2018, the Minister [Minister] wrote the Minister of Public Safety seeking the assistance of the Service in collecting intelligence relating to the capabilities, intentions and activities of [a foreign state, group of states, corporation or person] as required by paragraph 16(3)(b) of the *CSIS Act*. This assistance has been sought and provided, with limited

exceptions, on an annual basis since ███ In August 2018, the Minister of Public Safety provided the requested consent.

[8] The Service subsequently brought this application seeking warrants pursuant to sections 16 and 21 of the *CSIS Act*. In doing so, the Applicant affirmed that non-warranted techniques would not provide the Service with all required information and expressed the belief that warranted powers were required. The Court had previously granted warrants to enable the Service to collect information relating to the capabilities, intentions or activities of [the foreign state, group of states, corporation or person].

[9] The warranted powers sought included ███ warrant. The ███ warrant authorizes ███ identified in the warrant. This authority is not new, and the Service has [collected this type of electronic information] ███ in Canada using this warranted power. Although the Service remains able to intercept and obtain [information] of interest, [some collection is no longer practical using prior methods] ███.

[10] The [issue] confronting the Service in this instance mirrors that which arose in *Within Canada FC* and was succinctly described by Justice Noël:

[6]

[7] Information and intelligence collected, through past section 16 warrants, permitted the Service to provide the Minister with useful information on It also provided the Service with information concerning of which is deemed essential for the Service to be able to fulfill requests for assistance from the Minister.

[8]

[9]

[11] The Service believes, as was the case in *Within Canada FC*, that . The result is

To address this change [and collect the information sought] the Service has identified two [methods of collection].

[12] [The first method is not preferred by the Service].

[13] [The second method is the one that the Service seeks authorization to employ and is described in greater detail later in these reasons].

[14] The Attorney General acknowledges that [the information may be] outside of Canada's geographic borders but nonetheless takes the position that the [proposed method of collection] occurs "within Canada" as that term is used in section 16 of the *CSIS Act*. The Court may therefore authorize the [use of the proposed method of collection].

[15] The application for warrants was heard on September 12, 2018. I was satisfied that the facts set out in the supporting affidavit and disclosed in the course of the affiant's examination satisfied the requirements identified at subsection 21(3) of the *CSIS Act*, allowing for the issuance of the requested warrants. I remained seized of the matter for the purpose of determining the "within Canada" question [for the proposed method of collection].

[16] To assist the Court in addressing the issue raised, Mr. Gordon Cameron and Ms. Shantona Chaudhury were appointed as *amici curiae* (*amici*).

[17] A similar issue arises in [a contemporaneous application] *In the matter of* [a foreign state, group of states, corporation or person]. Warrants had previously been issued in [the contemporaneous application] and the Attorney General had brought a motion seeking to have the "within Canada" question addressed. To avoid multiple hearings on the same legal issue, the motion was abandoned and the records in *Within Canada FC* and , 2018 FCA 207 (*Within Canada FCA*), and [the contemporaneous application] were filed, and form part of the record in this proceeding. The Attorney General and the *amici* were notified by way of Direction that any material they intended to rely upon from the other records filed was to be specifically drawn to my attention before or during the hearing of oral submissions.

[18] The evidence specific to this matter has addressed in [the contemporaneous application] but has otherwise primarily focussed on [the foreign state, group of states, corporation or person at issue].

III. Issue

[19] The issue before the Court is as follows:

> May a judge acting under section 21 of the *CSIS Act*, on an application for warrants in relation to section 16 of the *CSIS Act*, authorize persons who are located within Canada to [use the proposed method of collection to] obtain information without regard to whether [the information is] inside or outside Canada?

IV. Prior judicial treatment of section 16 of the *CSIS Act*

[20] Prior to addressing the arguments advanced, it will be helpful to summarize the reasons of Justice Noël and the Federal Court of Appeal in *Within Canada FC* and *Within Canada FCA*.

A. *The decision in Within Canada FC*

[21] Justice Noël defines the issue in *Within Canada FC* as whether the proposed [method of collection] contradicts the express geographic limitation imposed by section 16 of the *CSIS Act*. In answering this question, he undertakes a detailed and comprehensive analysis of the meaning of the phrase "within Canada". He applies the modern or contextual approach to statutory interpretation, noting that the ordinary meaning approach, by itself, is not sufficient when interpreting legislation. Instead, context is paramount. A statutory provision is to be interpreted according to a textual, contextual and purposive analysis that seeks a meaning that is harmonious with the Act as a whole (*Within*

Canada FC at paras 19, 20 and 21 citing Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed (Markham: Lexis Nexis, 2014); *X(Re),* 2014 FCA 249, and Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011)). He also notes that legislation that infringes upon civil liberties, the *CSIS Act* being such legislation, is to be interpreted cautiously. Investigative powers are to be scrutinized by the Courts to ensure judges do not inadvertently authorize the overstepping of the mandate and powers meticulously prescribed by Parliament. The infringement on fundamental liberties is to be minimized and the rule of law respected (*Within Canada FC* at paras 22-29, citing *X (Re)*, 2016 FC 1105 [*Associated Data*]). He concludes that the circumscribed and strict mandate of the Service is applicable to not only the Service's security intelligence functions, but extends to what he describes as the Service's secondary functions, including foreign intelligence collection in an assistance role under section 16 of the *CSIS Act (Within Canada FC* at paras 25-29).

[22] In interpreting section 16, Justice Noël engages in the required three part analysis of the words "within Canada" – "dans les limites du Canada" in French.

[23] In considering the textual meaning of "within Canada", Justice Noël concludes that "within", used in English and "dans les limites" used in French clearly and unambiguously reference Canada's physical and geographical boundaries. The Service's foreign intelligence collection function is limited to Canada and subject to additional strictly prescribed statutory limitations or parameters (*Within Canada FC* at para 46). Despite the unambiguous meaning of

the phrase, he notes that this textual interpretation is only available if it does not conflict with the broader scheme and objects of the *CSIS Act*.

[24] In addressing the words within their broader context, Justice Noël analyzes both the scheme of the *CSIS Act*, including recent legislative amendments, and the legislative history of the Act.

[25] In considering the scheme of the Act, he notes that Parliament limited the geographic scope of the Service's foreign intelligence collection mandate, something it did not expressly do in setting out the Service's primary domestic security intelligence mandate at section 12. He also notes that in 2015, Parliament amended the *CSIS Act* to, among other things, clearly indicate the Service was authorized to conduct activities abroad in fulfilling its section 12 mandate to investigate threats to the security of Canada (Bill C-44, *An Act to amend the Canadian Security Intelligence Service Act and other Acts*, 2nd Sess, 41st Parl, 2015 (assented to 23 April 2015), SC 2015, c 9 [Bill C-44]). Justice Noël notes that no similar change was made to section 16 at that time – the "within Canada" limitation was maintained. He concludes that there is a clear intent on the part of Parliament to limit section 16 activities to that which occurs within Canada's borders (*Within Canada FC* at paras 60-63). In reaching this conclusion he points to (1) the express geographic limitation at section 16; (2) that section 12 contained no such express geographic limitation; (3) in the absence of an express limitation, Parliament nonetheless recently clarified that the section 12 mandate is not geographically limited; and (4) the limitation has been maintained in respect of the section 16 mandate.

[26] In addressing the *Act's* legislative history Justice Noël highlights the distinction between the security intelligence and foreign intelligence mandates. He identifies the policy reviews that have addressed Canada's foreign intelligence collection requirements over the last almost forty years, noting numerous proposals to remove the "within Canada" limitation from section 16 of the *CSIS Act*. He concludes Parliament has consistently "reconfirmed its intention to restrict foreign collection to within Canada…reflecting the clear intention of Parliament to ensure that the collection of foreign information and intelligence occurs solely in Canada" (*Within Canada FC* at para 100).

[27] In considering section 16 in a manner that is consistent with Parliament's purpose for having enacted the *CSIS Act*, Justice Noël acknowledges that Canada has a material interest in the [electronic information]. However, he concludes that interest cannot lead one to an interpretation of section 16 that allows [the collection of information] outside Canada [by using the proposed collection method].

[28] Justice Noël accepts that interpreting section 16 to exclude the collection, by the Service, of information [outside Canada] highlights a gap as between the foreign intelligence collection mandates of the Service and the Communications Security Establishment. He finds this gap has always existed, but acknowledges developments in technology have exacerbated it. The collection gap he finds is an insufficient basis upon which to adopt a purposive interpretation of section 16 that is inconsistent

with the plain meaning of the words and the intent of Parliament as revealed in the prior two prongs of the interpretative analysis.

[29] Similarly, he finds that the changing nature of [redacted] and the use of modern technology do not lead to a different interpretation of section 16. Citing extrinsic evidence, he finds Parliament clearly did not intend that section 16 be interpreted in a manner that permitted the conduct of foreign intelligence operations abroad. The legislative history demonstrates that the geographic limitation was intended to mitigate potential political, moral and diplomatic risks linked to foreign intelligence collection, activities that might be contrary to international and foreign domestic law. He finds section 16 represents Parliament's middle ground between Canada's interest in obtaining high quality foreign intelligence at home and abroad, and Canada's interest in protecting its diplomatic relations and international reputation. Covert activities that could have the result of damaging Canada's diplomatic relations and international reputation run contrary to Parliament's intent to limit foreign intelligence collection to "within Canada".

[30] Justice Noël finds that the purposive interpretation advanced by the Attorney General that supports the presence of an extraterritorial dimension when providing assistance from "within Canada" could open the door to covert activities such as hacking and cyber espionage. Such activity would go well beyond the purpose Parliament had intended for section 16 and expose Canada to the very risks posed by foreign intelligence collection that Parliament sought to mitigate through section 16.

[31] Parliament's failure to pursue any amendment to the geographic limitation contained in section 16 when, in 2015, it amended the *CSIS Act* (Bill C-44) to clarify the Service's section 12 mandate undermines any suggestion Parliament was unaware of or unable to anticipate technological change when it originally enacted section 16. Justice Noël concludes that the Attorney General's purposive interpretation of section 16 might well reflect compelling reasons to amend the *CSIS Act*, but the arguments advanced do not allow the Court to ignore the clear words of the statute or to detract from the purpose for which the provision was enacted.

[32] Justice Noël also relies upon international law and the principles of statutory interpretation holding that domestic legislation is presumed (1) to conform with international law and (2) not to apply extraterritorially. He finds that these principles support his conclusions, there being no evidence to rebut these principles of statutory interpretation. He acknowledges and accepts the merits of jurisprudence recognizing the borderless nature of the Internet, but rejects the notion that the principles expressed extend so far as to encompass ██████████ (*Within Canada FC* at para 145).

[33] Finally, Justice Noël addresses the argument that the [collection] is occurring "within Canada" because [some aspects of the collection] ██████████ occur within Canada, what he refers to as the ██████████ argument. He rejects this on the basis that [other aspects of the collection] ██████████ occur outside Canada in the territory of [a foreign state]. He distinguishes jurisprudence that relies on ██████████

. That presumption cannot be rebutted where Parliament has expressly limited the collection activity to “within Canada”.

[34] Justice Noël concludes by acknowledging the information at issue does, at law, have [more than one point of geographic importance]. However, he concludes context may result in [these points] being of differing legal significance and this must inform the analysis. In the case of [the proposed collection of electronic information], the legally consequential action occurs [outside Canada]. Although the [process] is initiated from Canada, the legally consequential actions, [the collection of information] occurs in a foreign jurisdiction. Justice Noël concludes that orchestrating [the collection] from Canada does not change the character of what is being done, a covert collection activity [outside Canada] that is inconsistent with section 16 of the *CSIS Act*.

B. *The decision in Within Canada FCA*

[35] The Attorney General appealed the judgment insofar as it refused the authority to [collect information] [redacted] outside of Canada. The Attorney General took the position on appeal that the application had been mischaracterized, the *CSIS Act* misinterpreted and the jurisprudence relied upon by the Attorney General was improperly distinguished.

[36] In dismissing the appeal, Justice Laskin notes a number of issues were raised that could potentially require consideration. However, he concludes the evidentiary record was insufficient to allow the issues to be properly addressed, despite a request from the designated judge for evidence that would clearly and explicitly describe what was happening (*Within Canada FCA* at paras 5, 29). In dismissing the appeal, he notes that doing so does not foreclose the possibility a future application might advance sufficiently specific information to demonstrate the authority sought is consistent with section 16 of the *CSIS Act*. He identifies a series of 13 questions, all, or many of which, bear directly on the issues:

> [30] For example, the evidence leaves the following questions, among others, unanswered:
>
> - the nature of [redacted]
> - [redacted]
> - [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[31] These – or at a minimum many of these – matters bear directly on issues that we are asked to consider in this appeal.

V. Analysis

[37] The Attorney General submits that the record and the applicable jurisprudence require that the Court conclude the [proposed collection method] takes place "within Canada". He submits that whether the issue is considered from the perspective of jurisdiction, statutory

interpretation or as a question of fact, the Court must conclude [the proposed collection method] can be authorized.

[38] The *amici* submit that the [proposed collection method] cannot be properly characterized as occurring within Canada. However, even if it could, the *amici* argue [the proposed collection method] is contrary to foreign and international law. The *amici* submit that in the absence of an express legislative basis upon which to act without regard to foreign or international law, this Court lacks jurisdiction to authorize the [proposed collection method].

[39] *Recognizing* the evidentiary gaps identified by the Court of Appeal in *Within Canada FCA,* I will first review the evidence in some detail and set out my key findings of fact.

A. *The Evidence*

[40] To begin, I again note that this issue also arises in [the contemporaneous application], involving [a foreign state, group of states, corporation or person]. Although that record is before me, the evidence in this matter has focussed on [the foreign state, group of states, corporation or person at issue]. In my view the evidence as it relates to [the foreign state, group of states, corporation or person at issue] is, in all meaningful respects, consistent with the circumstances as they relate to [the contemporaneous application]. The Attorney General has not suggested otherwise and any differences do not impact on the conclusions I have reached.

[41] I further note that although the record before me is more detailed and specific than that which was before the Court in *Within Canada FC*, it is broadly consistent with that which was before Justice Noël.

(1) Agreed facts

[42] The *amici* and the Attorney General have agreed that:

> The Court can reasonably infer that the collection of information in the manner described in the question before the Court will violate [foreign domestic and/or international law and/or the international law principle of non-intervention] over the location in which [aspects of the collection will occur].

(2) The Service affiants

[43] Three affidavits were filed in support of the Application. The affidavit of [the affiant] as elaborated upon in the course of *viva voce* evidence, details how the Service proposes to collect information I need only summarize [the affiant's] evidence, and do so below.

[44] [The affiant] is currently the supervisor of within the Service's Branch, . Her evidence is focused on two areas. First, she addresses data flow on the Internet how users access that data, and how

Secondly, she describes how the Service proposes to [collect information] .

(a) *The Internet and*

[45] [The affiant] describes the Internet as a network consisting of a series of electronic devices (including computers and mobile devices) and network equipment [devices] connected by various wired and wireless connections. These devices receive, transmit, and interpret electronic signals to accomplish tasks, some which occur in the background and are not apparent to a user of the Internet or the connected device. These background tasks include the routing of requests for and the transmission of information that allows Internet users to do such things as view websites, use social media, engage in online banking or shopping, and send or receive email.

[46] Each device has its own unique Internet Protocol [IP] address that facilitates the flow of information to the correct destination device. Users need not know individual IP addresses to access a device that contains information of interest. Instead, a user will access a webpage through a web browser by naming the webpage or website. The device and network will associate the website name with the correct IP address. Accessing information over a network does not allow a user to determine where the accessed information was stored or located. No special technical knowledge of the Internet and how it functions is needed to engage in any of these activities.

[47] Connections are made between devices using specific protocols. Any Internet-connected device can query another Internet-connected device, the request being routed through the Internet to the IP address being queried. The receiving device will determine if and how to respond. A negotiation process ensues, referred to as a "handshake". The handshake forms the basis of establishing communications between devices. This all occurs without human intervention.

[48] [A discussion of evidence on Internet technology, including the manner in which electronic information is transmitted, stored, and accessed].

[49] [A discussion of evidence on Internet technology, including the manner in which electronic information is transmitted, stored, and accessed].

[50] [A discussion of evidence on Internet technology, including the manner in which electronic information is transmitted, stored, and accessed].

(b) *The [proposed collection method]*

[51] [Based on its review of the matter, the Service has determined some but not all of the particulars of the information it seeks].

[52] [The Service proposes to gain access to the information it seeks using the proposed method within Canada].

[53] [Description of the proposed collection method].

The information collected would be that which responds to the Minister of Foreign Affairs' or the Minister of National Defence's request for assistance and may include all of the types of information described above.

[54] Alternatively the Service may [description of the proposed collection method].

[55] [Description of the proposed collection method].

[56] [Description of the proposed collection method].

[57] [Description of the proposed collection method].

[58] [Description of the proposed collection method].

[59] The [proposed collection method] accesses the information of interest while it is [The proposed collection method] does not involve

[60] [Description of the proposed collection method].

[61] [Description of the proposed collection method].

(3) [Evidence relating to the particulars of the information sought]

[62] was not addressed in [the affiant's] affidavit. However, she was examined on the issue by the *amici*.

[63] [The affiant] described as [the affiant] agreed that

[64] The *amici* placed a series of documents before her (Exhibits A-2 to A-13) that address [the particulars of the information the Service seeks]. These documents included a series of open source media reports and documents indicating that

[65] [The affiant] indicated she was unaware of this information and did not come across it in the course of her research. She acknowledged that, on the basis of documentation, it was likely the but this could not be verified by her:

> A. I can't comment on the accuracy of the information published. I don't have any way to verify it myself.
>
> Q. Okay, thank you. You don't have any way of verifying it yourself, but do you have some reason to revisit your statement in your affidavit that the Service [cannot verify the particulars of the information it seeks] ?
>
> A. We still don't have a way to verify this. It looks very likely from all of these articles that but I don't have a way to verify that information.
>
> Q. Can you look at paragraph 26 of your affidavit? Because I'm going to ask you to think about your answer to that question again. Do you have paragraph 26 there?
>
> A. I do, yes.
>
> Q. You use almost identical language for -- as a matter of fact, it might be identical language -- And the language you use is that, although and I'm reading from the middle of paragraph 26:
>
> And I'm just asking, wouldn't you qualify that, given the information you've just been shown over the last hour? Would you

> still say that there is no practical way of verifying [the particulars of the information sought]?
>
> A. I would stand behind my statement that I don't have a way to verify it. Given the information you've presented here, I would certainly be in a position to strengthen the statement here saying it is likely that [redacted] but I cannot verify it.
>
> Q. Okay. I think we'll have to leave that, and I'll move on to another point. (Emphasis added)

[66] [The affiant] also acknowledged that although not true in all instances, [redacted]

> JUSTICE GLEESON: Now, then, I'm still on paragraph 37 [of [the affiant's] affidavit]. And the next sentence makes reference to:
>
> [redacted]
>
> In the context of the discussion that you had with Mr. Cameron this morning [redacted] is that a statement that you would continue to maintain?
>
> THE WITNESS: Given the information we discussed here today, there are certainly some who [redacted]
>
> In a generic sense, [redacted] but some of them certainly do.
>
> JUSTICE GLEESON: And you had spoken earlier today in your evidence about [redacted]
>
> THE WITNESS: Yes.

JUSTICE GLEESON: Would [redacted] in your view or opinion fall within the category of [redacted]

THE WITNESS: Yes.

JUSTICE GLEESON: And presumably you would consider [redacted] as [redacted]

THE WITNESS: I would.

(a) *The significance of the* [redacted] *evidence*

[67] The Attorney General asserts the evidence relating to [redacted] is of little value in addressing the issue before the Court. He submits that the [redacted] documents simply demonstrate [redacted] and the evidence offers no certainty that [redacted] Secondly, the Attorney General notes that the Service is in no position to verify the truth of the claims made in the documentary evidence, including those relating to [the particulars of the information it seeks]. He submits that any suggestion that the Service must attempt to verify [the particulars relating to the information sought] would impose an impossible burden given the wide array of possibilities [for information on the Internet].

[68] The suggestion that the [redacted] evidence is only of value if [all the particulars of the information] can be "verified" and that verification imposes an impossible burden on the Service is simply not tenable.

[69] In seeking warrants, the Service has a duty to place all reasonably available relevant information before the Court. In fulfilling this obligation, the Service must go beyond providing the Court with information known to, or within the possession of, the Service. The duty also requires that reasonable inquiries be undertaken to ensure the Court is provided with all reasonably available and relevant information where warrants are sought on an *ex parte* basis. While fulfilment of this duty can be difficult, it must be remembered that it is for the Court to determine the relevant facts (Review of CSIS Warrant Practice, Report of Murray D. Segal, December 2016 [Segal Report] pgs 30 and 31).

[70] In this instance, evidence that [relates to the particulars of the information sought] is of potential relevance. This is highlighted by the content of [the affiant's] affidavit, which makes numerous generalized references to the fact that [not all the particulars of the information are knowable] and that the research undertaken only allows one to conclude with any certainty that

[71] The evidence speaks to these very issues. Evidence need not be verified beyond all doubt before it may be of value to the Court. Where evidence does not establish a fact with absolute certainty, or the Service prefers a certain view of the evidence be taken, it may make those representations and submissions to the Court. The Service's duty is to make all reasonable inquiries in respect of the issues raised in an application and to put the result of those

inquiries before the Court. While I have had the benefit of the [redacted] evidence in addressing the issues here, it is unfortunate that the inquiries needed to identify the evidence were pursued by the *amici* and not initially undertaken by the Service.

[72] The [redacted] evidence demonstrates that [redacted] (see Exhibit A-1 at p 2). This evidence discloses [redacted] and demonstrates that [redacted] (see Exhibit A-1 at p 2).

[73] In the absence of the [redacted] evidence, [the affiant] noted in her affidavit that she expects [redacted] In light of that evidence, she then acknowledged that [redacted]

[74] I acknowledge that [the affiant] has testified that she is not in a position to verify that [redacted] are in fact consistent with the [redacted] evidence. However, that evidence is internally consistent; it is not inconsistent with any other evidence before the Court including the evidence provided by [the affiant] nor has the evidence been

contradicted. While the Attorney General has suggested a general concern with the evidentiary value of news articles, it has not particularized those concerns.

(4) Findings of fact

[75] Following are my key factual findings reached on a balance of probabilities standard:

A. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it];

B. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it];

C. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it];

D. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it];

E. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it];

F. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it];

G. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it];

H. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it] is undertaken from within Canada;

I. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it] ;

J. Once [factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it] within Canada, no further human intervention need occur until ;

K. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it] ;

L. The [proposed method of collection] results in access to the information and it can be reasonably inferred, in this particular case, that access is also contrary to [foreign domestic and/or international law and/or the international law principle of non-intervention] ;

M. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it] ;

N. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it] ;

O. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it] and no other information is accessible or otherwise impacted; and

P. [Factual finding regarding technological, and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it].

B. *The impact of Within Canada FC*

[76] The Attorney General takes the position that Justice Noël's interpretative analysis improperly considered the Bill C-44 amendments and the principles of extraterritoriality and international comity. However, the Attorney General has not taken issue with the broad conclusions reached as they relate to the meaning of the words "within Canada" or Parliament's intent in imposing the geographic limitation at Section 16.

[77] Instead, the Attorney General argues that a contextual interpretation of section 16 must include a consideration of a designated judge's jurisdiction to issue a warrant, as provided for at section 21. The [proposed method] must be properly characterized in regards to the [location and information sought] . The Attorney General argues that doing so leads one to conclude that the "within Canada" limitation requires only that collection occur

"from" within Canada rather than from abroad. This interpretation of the geographic limitation, he submits, fully accords with the jurisprudence recognizing [the borderless nature of the Internet]

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[78] As the underlying interpretative analysis undertaken by Justice Noël has not been put in issue, I adopt that analysis except to the extent where I indicate otherwise in addressing the submissions that have been made. This approach is both reflective of the arguments that have been advanced and consistent with the principle of judicial comity, a principle which seeks to encourage consistency as between judges of the same court in matters that engage highly similar facts, evidence and arguments.

[79] Although the principle of comity is usually considered not to be binding in the same way as the doctrine of *stare decisis*, it is to be generally respected unless circumstances warrant a departure from a prior decision. Those circumstances have not been categorically formulated. However, the jurisprudence generally establishes that the principle should be respected unless (1) the facts differ; (2) a different question is before the Court; (3) the prior decision is clearly wrong; (4) subsequent decisions have affected the validity of the prior decision; (5) the prior decision was made in circumstances that prevented full consideration of authorities; or (6) applying the decision would result in an injustice (*Alyafi v Canada (Citizenship and*

Immigration), 2014 FC 952 at para 45; *Baron v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 341).

[80] In dismissing the appeal in *Within Canada FCA*, Justice Laskin notes that the dismissal does not foreclose the possibility that evidence in a future application might be sufficiently specific to demonstrate that the granting of the authority would be consistent with the requirements of section 16.

[81] I must therefore consider whether the more detailed record now before me leads to a conclusion that differs from that reached in *Within Canada FC*. The *amici* submit and I agree, that to reach a contrary conclusion I must find both that:

1. The collection of [information] without regard to whether [the information is] inside or outside Canada [using the proposed method] satisfies the "within Canada" limitation as prescribed at section 16 of the *CSIS Act*; and

2. Section 21 of the *CSIS Act* provides this Court with the jurisdiction to authorize the Service to engage in activity that is in breach of foreign domestic or international law.

C. *Interpreting section 16*

(1) The relationship between sections 16 and 21 must be considered

[82] As noted above, the Attorney General has argued that section 16 must be interpreted in a manner that gives effect to the relationship between sections 16 and 21of the *CSIS Act*. To

properly interpret the “within Canada” limitation it is necessary, the Attorney General submits, to first properly characterize the [collection] that is to be undertaken and consider what section 21 of the *CSIS Act* authorizes a judge to do where a warrant is sought by the Service.

[83] Section 21 of the *CSIS Act* reads as follows:

Application for warrant	**Demande de mandat**
21 (1) If 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, within or outside Canada, 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 Minister’s approval, make an application in accordance with subsection (2) to a judge for a warrant under this section.	**21** (1) Le directeur ou un employé désigné à cette fin par le ministre peut, après avoir obtenu l’approbation du ministre, demander à un juge de décerner un mandat en conformité avec le présent article s’il a des motifs raisonnables de croire que le mandat est nécessaire pour per- mettre au Service de faire enquête, au Canada ou à l’exté- rieur du Canada, sur des menaces envers la sécurité du Canada ou d’exercer les fonctions qui lui sont conférées en vertu de l’article 16.
Matters to be specified in application for warrant	**Contenu de la demande**
(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,	(2) La demande visée au paragraphe (1) est présentée par écrit et accompagnée de l’affidavit du demandeur portant sur les points suivants :
(a) the facts relied on to justify the belief, on reasonable grounds, that a warrant under this section is	a) les faits sur lesquels le demandeur s’appuie pour avoir des motifs raisonnables de croire que le mandat est

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 with- out 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;

nécessaire aux fins visées au paragraphe (1);

b) le fait que d'autres méthodes d'enquête ont été essayées en vain, ou la raison pour laquelle elles semblent avoir peu de chances de succès, le fait que l'urgence de l'affaire est telle qu'il serait très difficile de mener l'enquête sans mandat ou le fait que, sans mandat, il est probable que des informations importantes concernant les menaces ou les fonctions visées au paragraphe (1) ne pourraient être acquises;

c) les catégories de communications dont l'interception, les catégories d'informations, de documents ou d'objets dont l'acquisition, ou les pouvoirs visés aux alinéas (3)a) à c) dont l'exercice, sont à autoriser;

d) l'identité de la personne, si elle est connue, dont les communications sont à intercepter ou qui est en possession des informations, documents ou objets à acquérir;

(e) the persons or classes of persons to whom the war- rant is proposed to be directed;	e) les personnes ou catégories de personnes destinataires du mandat demandé;
(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;	f) si possible, une description générale du lieu où le mandat demandé est à exécuter;
(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	g) la durée de validité applicable en vertu du paragraphe (5), de soixante jours ou d'un an au maximum, selon le cas, demandée pour le mandat;
(h) any previous application made under subsection (1) in relation to a person who is identified in the affidavit in accordance with paragraph (d), the date on which each such application was made, the name of the judge to whom it was made and the judge's decision on it.	h) la mention des demandes antérieures présentées au titre du paragraphe (1) touchant des personnes visées à l'alinéa d), la date de chacune de ces demandes, le nom du juge à qui elles ont été présentées et la décision de celui-ci dans chaque cas.

[84] The Attorney General notes that prior to authorizing a warrant the Court must be satisfied, that, among others, the application discloses [the information to be collected] and the place [where it will be collected] (paras 21(2)(c) and 21(2)(f)). However, Parliament has taken a large and liberal approach to identification of both [the information to be collected] and the description of the place [where it will be collected]. The Attorney General argues that this large and liberal approach is important in the context of [the information in question, because the location is difficult to describe and the terminology does not fit the type of collection].

[85] The Attorney General submits that in *Within Canada FC*, [a location was assigned to a certain aspect of the collection]. However, the jurisprudence has recognized the difficulty of [assigning a location to information in this context]. The Attorney General submits that this potentially difficult question need not be addressed [in the particular context of this application]. This approach, it is submitted, better recognizes that [the characteristics of the information sought] and allows the Service to consistently access this information in fulfilling its mandate regardless of what knowledge it may have of [all the particulars of the transmission and location of the information].

[86] The Attorney General further argues that Subsection 21(3) refers to a judge authorizing the Service to [collect information]. This language does not limit the Court to authorizing and [the proposed collection method] is not analogous to Instead [the proposed collection method] allows the Service acting from within Canada to [collect the information sought] .The authority sought is directed at

– and will result in the Service [collecting the information]. This characterization of the activities is consistent with the legal context as set out in Section 21 and reflects present day technological realities.

[87] The Attorney General's reliance on the general nature of [the type of information in question] - in advancing its position that [the type of information in question fits within] subsection 21(2) is not, in my view, of any assistance for two reasons.

[88] First, the general attributes [of the type of information in question] upon which the Attorney General relies, while not disputed, simply do not accord with the specific evidence before me. The [information sought using the proposed method is outside Canada]. The evidence goes further and demonstrates that Further, the evidence does not disclose any circumstance where

[89] The fact that the precise [particulars of the information] cannot be ascertained is not a factor that supports the Attorney General's view that section 16 should be read as permitting collection "from" Canada.

[90] Secondly, it matters not whether or, as submitted by the *amici*, but rather is simply [a label for the information

sought]. Instead one must consider what [the proposed collection method] seeks to achieve.

[91] [Description and legal characterization of the proposed collection method].

[92] Demonstrating that an application satisfies each of paragraphs (a) through (f) of subsection 21(2) is not, in my view, enough to allow a Judge to authorize a warrant under section 21. Section 21 also requires that the issuing Judge be satisfied that the warrant being sought is required to enable the Service to "perform its duties and functions under section 16" (paragraph 21(2)(b)). This requires the issuing judge to be satisfied that the proposed collection is consistent

with the limitations imposed on the collection of foreign intelligence by section 16, and of course this includes the geographic limitation.

[93] I am not convinced that either the requirements set out in subsection 21(2), or demonstrated compliance with those requirements assists in the interpretation of section 16. However, section 21 of the *CSIS Act*, together with sections 12 and 12.1, are of assistance in interpreting section 16 for another reason.

[94] Sections 12 and 12.1 expressly authorize the performance of the mandated activity provided for in those sections to occur “within or outside Canada”. Section 21 provides for the judicial authorization “of activities outside Canada” in furtherance of a section 12 investigation or to permit measures to be taken to reduce a threat to the security of Canada (subsections 21(3.1) and 21.1(4)). Parliament’s authorization of extraterritorial activity in these instances is to be contrasted against the express geographic limitation at section 16 (assistance within Canada) and section 21’s silence on the issue of extraterritorial judicial authority where a warrant is sought to assist in section 16 collection. This distinctly different approach to the definition of the geographic scope of the Service’s separate mandates and the authority of this Court to authorize extraterritorial action must be considered in interpreting the meaning of section 16.

(2) The meaning of "within Canada"

[95] Turning then to section 16, the Attorney General submits that the grammatical and ordinary meaning of the words "within Canada" must be considered within the context of the surrounding words within section 16 and, as noted above, in relation to other sections of the *CSIS Act*.

[96] Section 16 permits the Service to assist in the "collection of information or intelligence relating to" foreign states or persons. Those words, the Attorney General submits, must be properly interpreted as requiring that information or intelligence collection be undertaken "from within Canada" rather than abroad.

[97] The Attorney General argues that Section 16 does not seek to limit collection on the basis of [the location of the information sought]. Rather section 16, when properly interpreted, seeks to limit "from" where the collection activity is undertaken. On the basis of this interpretation the [proposed collection method] fully respects the Section 16 geographic limitation - the collection occurs from within Canada.

[98] Section 16 of the *CSIS Act* states:

***Canadian Security Intelligence Service Act*, RSC 1985, c C-23**

Collection of information concerning foreign states and persons

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 states; 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.

Limitation

***Loi sur le Service canadien du renseignement de sécurité*, LRC (1985), c C-23**

Assistance

16 (1) Sous réserve des autres dispositions du présent article, le Service peut, dans les domaines de la défense et de la conduite des affaires internationales du Canada, prêter son assistance au ministre de la Défense nationale ou au ministre des Affaires étrangères, dans les limites du Canada, à la collecte d’informations ou de renseignements sur les moyens, les intentions ou les activités :

a) d’un État étranger ou d’un groupe d’États étrangers;

b) d’une personne qui n’appartient à aucune des catégories suivantes :

(i) les citoyens canadiens,

(ii) les résidents permanents au sens du paragraphe 2(1) de la *Loi sur l’immigration et la protection des réfugiés*,

(iii) les personnes morales constituées sous le régime d’une loi fédérale ou provinciale

Restriction

(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).	(2) L'assistance autorisée au paragraphe (1) est subordonnée au fait qu'elle ne vise pas des personnes mentionnées à l'alinéa (1)b).
Personal consent of Ministers required	**Consentement personnel des ministres**
(3) The Service shall not perform its duties and functions under subsection (1) unless it does so	(3) L'exercice par le Service des fonctions visées au paragraphe (1) est subordonné :
(a) on the personal request in writing of the Minister of National Defence or the Minister of Foreign Affairs; and	a) à une demande personnelle écrite du ministre de la Défense nationale ou du ministre des Affaires étrangères;
(b) with the personal consent in writing of the Minister.	b) au consentement personnel écrit du ministre
[Emphasis added.]	[Non souligné dans l'original.]

[99] The authority Parliament has granted the Service to engage in intrusive activity in furtherance of its duties is limited and controlled. These limitations are reflected in section 16, which provides for and identifies the scope of the Service's foreign intelligence collection mandate (*Within Canada FC* at para 38-44). In interpreting legislation that authorizes intrusive activity in furtherance of State interests the Court must be guided by the principles reflected in the legislation itself; the exercise of intrusive powers is to be limited and controlled (*Within Canada FC* at para 25).

[100] The legislative principle of limits and controls is evident in section 16. The Service may only collect foreign intelligence upon the personal request in writing of the Minister of National Defence or the Minister of Foreign Affairs. The assistance is limited to the collection of information or intelligence relating to capabilities, intentions or activities of foreign states or persons, and that assistance is to be provided "within Canada". The literal meaning of the words "within Canada" is clear and unambiguous - the assistance must occur within the geographic boundaries of Canada (*Within Canada FC* at para 47).

[101] Despite the Attorney General's assertion that the surrounding words require that "within Canada" be interpreted as "from within Canada", no persuasive interpretative argument has been advanced to support this assertion. The Attorney General does rely on the decision of the Federal Court of Appeal in ██████████ That decision is distinguishable and I address it below.

[102] The literal interpretation of the words "within Canada" is not displaced when considered within the context of the surrounding words at section 16 or other provisions of the *Act*. I have addressed the extraterritorial authorities provided for in sections 12 and 12.1, 21 and 21.1 and contrasted that authority to the express geographic limitation within section 16 above. I also note that the section 12 mandate is complemented by a definition of "threats to the security of Canada" at section 2 that contemplate activities "within or related to Canada". In addition, section 15 authorizes the Service to engage in investigations for the purposes of conducting

security assessments. In enacting Bill C-44, Parliament also clarified that this mandate may be conducted “within or outside Canada” (Bill C-44, c 9, s 4).

[103] It is clear that Parliament has given significant consideration to the geographic scope of the Service’s various mandates. Geographic reach is not a question that arises in respect of a single section of the Act. Instead geographic scope and reach has been considered by Parliament in addressing most, if not all of the Service’s mandated activities when one considers sections 12, 12.1, 15 and 16. Parliament has also considered the question of extraterritorial effect in the context of judicial authorizations at both sections 21 and 21.1. In doing so, Parliament has adopted geographically limiting words in section 16, words that are unique within the context of the *CSIS Act*.

[104] I, as was Justice Noël, am left to conclude that Parliament intended there to be a meaningful difference between the “within or outside Canada” mandates found in section 12, 12.1 and 15, and the “within Canada” mandate found in section 16. Nothing arising from a contextual consideration of the words “within Canada” leads me to conclude Parliament intended a broader meaning of the words than their plain meaning will sustain – within the geographic boundaries of Canada.

[105] A purposive approach to the interpretation of the words, requiring a consideration of both the objective of the legislation as a whole and the specific section in issue, does not lead me to conclude otherwise.

[106] The Attorney General has not taken issue with the comprehensive purposive analysis undertaken by Justice Noël in *Within Canada FC*. Having conducted the analysis Justice Noël concludes that Parliament recognized Canada's need for, and interest in high quality foreign intelligence at home and abroad. However, Parliament was also sensitive to the importance of protecting Canada's diplomatic relations and its international reputation as doing so was essential to ensuring Canada continues to receive, from foreign governments, sensitive security information that it lacks the capabilities to gather and assess itself.

[107] Section 16 and its geographic limitation represent Parliament's balancing of these competing interests. That balance has resulted in the inclusion of a limited foreign intelligence collection capability within the *CSIS Act* that excludes "aggressive 'covert' and 'offensive' activities abroad" (*Within Canada FC* at para 118). Parliament did not intend the limited foreign intelligence collection mandate to "open the door to interpretations permitting covert intelligence operations abroad". The geographic limitation in section 16 was "aimed to mitigate the political, diplomatic and moral risk of conducting foreign intelligence collection, which had the potential to breach foreign international law, foreign domestic law and bring disrepute to Canada's international reputation and defence policies." (*Within Canada FC* at para 118, 119).

[108] A purposive approach to the interpretation of section 16, and in particular the words "within Canada", does not support the Attorney General's position that those words are to be given a broader meaning in furtherance of the purposes of the legislation.

[109] The suggestion that section 16 should be interpreted to authorize the [proposed collection method] due to the conduct of [redacted] is not persuasive. The Attorney General has not identified any principle of interpretation or law that supports this view.

(3) Concluding remarks

[110] Reading the words of section 16 in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament, I am unable to conclude that assistance "within Canada… in the collection of information or intelligence" can be interpreted as meaning that the assistance [redacted] need only occur "from" within Canada. The words in context require the assistance [redacted] occur within Canada.

[111] Justice Noël concluded that the correct interpretation of the words "within Canada" means "only in Canada". I agree with that conclusion.

[112] However, "only in Canada" does not, in my view, require that every step, action or element of the proposed collection activity occur within Canada. Having concluded that the geographic limitation imposed by Parliament is intended to avoid "aggressive 'covert' and 'offensive' activities abroad" in the collection of foreign intelligence, section 16, properly

interpreted, prohibits collection activities that involve extraterritorial actions that run contrary to Parliament's intent or attracts the risks that Parliament sought to mitigate. This must be determined on a case by case basis. At a minimum, a proposed collection activity involving legally significant extraterritorial activity and/or proposed extraterritorial activity that will attract the very risks Parliament has sought to mitigate will not be consistent with section 16.

[113] The evidence demonstrates that in this instance, the [proposed collection method] would be employed to access information that [is outside Canada]. The facts do not disclose a situation where [the information is known to be outside of any state] . My conclusions are limited to the findings of fact above at paragraph 75. I acknowledge that other circumstances might allow one to conclude the employment of [the proposed collection method] would be consistent with the "within Canada" requirement at section 16 but express no opinion in this regard.

[114] My conclusion that section 16, properly interpreted, does not prohibit all collection activities that involve some extraterritorial action is not inconsistent with Justice Noël's conclusion that "within Canada" means "only in Canada". Justice Noël reached that conclusion in the context of a detailed analysis where, at least in part, he found the [collection] to be contrary to section 16 because

[substantial elements of the collection occur outside Canada]

(*Within Canada FC* at para 169).

D. *The* [jurisprudence relating to information accessible through the Internet]

[Note: Paragraphs 115-125 are a discussion of jurisprudence relating to information accessible through the Internet]

[115] The Attorney General submits that characterizing as being unique would allow the Court to authorize However, he submits that the jurisprudence provides a better approach to this issue. The jurisprudence recognizes it reflects the fact that

(1)

[116]

[117]

[118]

[119]

[120] [redacted]

[121] The Attorney General has also relied heavily on the Federal Court of Appeal decision in [redacted] taking the position that it is both dispositive and binding upon me.

[122] [redacted]

[123] [redacted]

[124]

[125]

(3) The jurisprudence does not assist

[126] Whether a real and substantial connection exists between Canada and the [collection or the information sought] involves the consideration of the "within Canada" connection, but as only one of a number of factors. Parliament's intent, international practice and the principle of

international comity also must be considered and weighed. Doing so, at least in this instance, again requires a proper characterization of [the proposed collection method].

[127] [The proposed method involves elements that are not present in the jurisprudence discussed, including violations of foreign domestic and/or international law and/or international law principle of non-intervention in a manner that could harm Canada's interests].

[128] These circumstances do not evidence the type of international practice relied upon to conclude that Further, [the proposed collection method, in violating foreign domestic and/or international law and/or the international law principle of non-intervention] cannot be characterized as according with the principle of international comity and being consistent with objectives of order and fairness. The real and substantial connection test is intended to prevent overreach in the exercise of extraterritorial jurisdiction not to promote overreach. Finally, the *CSIS Act* itself expressly limits extraterritorial activity in the provision of assistance by the Service, a fact that distinguishes these circumstances

[129] I recognize that elements of the [proposed collection method] will, on these facts, occur within Canada, and that the [redacted] in question are present in Canada and [redacted] from within Canada. However, these elements are simply not sufficient in the face of the factors and circumstances described above to allow me to conclude a real and substantial connection has been established in this instance. In the absence of that connection the Attorney General cannot rely upon the [redacted] jurisprudence (in addition to [redacted] the Attorney General has also relied on [redacted] both of which were distinguished in *Within Canada FC* at paras 150-167).

[130] In reaching this conclusion I take no issue with the need for courts to recognize technological change and interpret legislation in a manner that reflects current day technological reality. However, [redacted] does not teach that advancements in technology are a basis upon which a court may adopt an interpretation that is contrary to the plain meaning, the underlying intent or purpose of the legislation. In this respect I agree with the *amici.* New technological capabilities must be considered in the interpretation of legislation. Doing so, however, does not allow a court to vitiate the clear intent of Parliament where that new technology results in the very activity Parliament sought to limit and, in turn, attracts the very risks and consequences Parliament sought to avoid.

VI. Conclusion

[131] Section 16 limits assistance to that which occurs within Canada. Neither the words, the context in which the words are used or the purpose underlying the *CSIS Act* and section 16 allow for a meaning to be given to the phrase "within Canada" that is broader than the words suggest: assistance within the geographic limits of Canada.

[132] Assistance occurs within Canada where all "significant assistance or collection activity occurs only" within Canada. What is significant assistance or collection activity is to be assessed on a case by case basis. However, activity that is significant to the provision of assistance or the collection activity will minimally include (1) all legally relevant and consequential activity; and (2) all activity that attracts the very risks Parliament has sought to mitigate in adopting the geographic limitation found at section 16 of the *Act*. Activity that is contrary to principles of international law will generally attract those risks absent Parliament's expressed or implied intent not to be limited by foreign or international law.

[133] In this instance legally relevant and consequential activity will occur outside Canada if the [proposed collection method] were pursued. This would include [collection activity that is contrary to foreign domestic and/or international law and/or the international law principle of non-intervention]

Undertaking [the proposed collection method] in these circumstances would also be inconsistent with the principle of international comity. The risks to Canada are not theoretical; The [proposed collection method] involves significant activity outside of Canada, activity that is both legally relevant and that invites the risks Parliament has sought to mitigate.

[134] To respond to the questions as framed by the *amici*, [the collection of information] without regard to whether [the information is outside Canada, using the proposed collection method] does not, on these facts, satisfy the "within Canada" limitation as prescribed at section 16 of the *CSIS Act*. In addition, section 21 of the *CSIS Act* does not provide this Court with the authority to approve Service activity [outside Canada] that would breach [foreign domestic and/or international law and/or the international law principle of non-intervention] where warrants are sought pursuant to section 16.

[135] The Attorney General has brought the recent decision of Justice James O'Reilly in CSIS to my attention on the basis that it addresses, in part, an issue that relates to the "within Canada" limitation at section 16. In that decision Justice O'Reilly concludes that the activity under review is consistent with the geographic limitations imposed by section 16 despite a potential extraterritorial element. The circumstances in CSIS appear significantly different from those before me, and based on the description of the activities set out in that decision, it is not evident that any extraterritorial actions would be characterized as being significant to the assistance or collection activity.

[136] Although my conclusion will [redacted] that outcome is unavoidable in the face of the section 16 limitation. I agree with Justice Noël's view that to conclude otherwise is to usurp the role of Parliament.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for a warrant to [collect information by the proposed collection method] ▇▇▇▇▇ for the purpose of providing assistance to the Minister ▇▇▇▇ ▇▇▇ pursuant to section 16 of the *CSIS Act*, is dismissed;

2. A copy of this Judgment and Reasons shall be placed on Court file [the contemporaneous case]; and

3. These reasons shall, within twenty (20) days of the date of this judgment and reasons, be reviewed by counsel for the Attorney General and the Canadian Security Intelligence Service for the purposes of identifying what parts of the judgment and reasons can be made public. After those twenty (20) days, and within the following twenty (20) days, the *amici* shall review the suggested redactions. Both are to be guided by the open court principle and shall work cooperatively in conducting this review. Any contentious issues shall be referred to the undersigned within the following five (5) days for determination.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	[redacted]
STYLE OF CAUSE:	IN THE MATTER OF AN APPLICATION BY [redacted] FOR WARRANTS PURSUANT TO SECTIONS 16 AND 21 OF THE *CANADIAN SECURITY INTELLIGENCE SERVICES ACT*, RSC 1985 C C-23 AND IN THE MATTER OF [A FOREIGN STATE, GROUP OF STATES, CORPORATION OR PERSON]
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 12, 2018 OCTOBER 22, 2018 DECEMBER 14, 2018
JUDGMENT AND REASONS:	GLEESON J.
DATED:	July 27, 2020

APPEARANCES:

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