Federal Court Cour fédérale

TOP SECRET

Date: [redacted]

Docket: CONF-1-18

Citation: 2018 FC 738

Ottawa, Ontario, [redacted]

PRESENT: The Honourable Mr. Justice S. Noël

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

AND IN THE MATTER OF [redacted]

JUDGMENT AND REASONS

I. GENERAL OVERVIEW

[1] Can this Court issue a warrant authorizing the Canadian Security Intelligence Service ("the Service or CSIS") to [redacted] pursuant to sections 16 and 21 of the *Canadian Security Intelligence Service Act* ("*the CSIS Act*")? The Service proposes to [redacted] The Attorney General of Canada ("the Attorney General") argues that the authority for such an operation is found in section 16 of the *CSIS Act* and is contemplated by the "within Canada" requirement in the section.

II. FACTS

[2] On [redacted] pursuant to the requirements of subsection 16(3)(a) of the *CSIS Act*, the Minister [redacted] ("the Minister") personally requested, by letter addressed to the Minister of Public Safety, assistance in the collection of information and intelligence with respect to the capabilities, intentions and activities of [redacted] ("the foreign state").

[3] On [redacted] pursuant to subsection 16(3)(b), the Minister of Public Safety provided personal consent to the Director of the Service to assist the Minister in the collection of information or intelligence relating to the capabilities, intentions and activities of the foreign state by the means described in the request from the Minister.

[4] On [redacted] the Service applied to the Federal Court for a warrant pursuant to sections 16 and 21 of the *CSIS Act*. At the time I issued the warrants on [redacted] I was satisfied that the legislative prerequisite for section 16 warrants were met. However, I was not prepared to authorize the Service to [redacted] The only issue remaining to be determined in this judgment is whether this Court has jurisdiction under sections 16 and 21 of the *CSIS Act*, to issue a warrant that has extraterritorial effect.

[5] The subjects of the warrant are [redacted]

[6] [redacted]

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

[8] [redacted]

[9] [redacted]

[10] [redacted]

[11] The warrant seeks to authorize the Service [redacted]

[12] To have a more in depth understanding of the facts, I reproduce the following exchange, in which the CSIS witness [redacted]

[redacted]

[redacted] (Transcript of file [redacted] at 16–18):

> **Juge Noël:** [redacted]
>
> **The witness:** That's right.
>
> […]
>
> **Juge Noël:** [redacted]
>
> **The witness:** That's right.
>
> **Juge Noël:** [redacted]
>
> **The witness:** Yes.
>
> **Juge Noël:** [redacted]
>
> **The witness:** Yes.
>
> […]
>
> **The witness:** [redacted]

[13] The Service advised that it may also seek technical and operational assistance from the Communication Security Establishment ("CSE") [redacted]

[14] Due to the important and novel legal issues brought forward in this warrant application, I appointed Mr. Gordon Cameron as *Amicus Curiae* ("the *amicus"*).

III. ISSUE

[15] The legal issue arising from the facts enumerated above require this Court to determine whether it has jurisdiction under section 16 of the *CSIS Act*, to issue a warrant that has extraterritorial effect. More specifically, the question at issue is whether the expression contained in section 16 of the *CSIS Act* "within Canada" or in French "dans les limites du Canada", prohibits the Service from obtaining a warrant for investigative activities that [redacted] Or put in another way, [redacted] contradict the express geographical limitation found in section 16 of the *CSIS Act*?

IV. A BRIEF OUTLINE OF THE SUBMISSIONS

[16] The Attorney General submits that the Court has the jurisdiction under sections 16 and 21 of the *CSIS Act* to issue the warrant because (1) [redacted] and (2) [redacted] The Attorney General argues that the Court must adopt a purposive interpretation of section 16 that supports the presence of an extraterritorial dimension when providing assistance from "within Canada." Accordingly, a strict and literal interpretation would lead to absurd results since it would prevent the collection of any information with a foreign dimension, such as in this case, where the Service seeks to [redacted] Moreover, (3) the "within Canada" restriction was intended by Parliament to restrict the Service [redacted]

[redacted]

[17] The *amicus* asked the Court to consider that the position of the Attorney General is not supported by the wording of section 16 of the *CSIS Act*, accordingly the Court does not have jurisdiction to issue the warrant. The *amicus* submits that the wording is clear, the phrase "within Canada" is an express restriction, and should be understood as [redacted]

[18] As it will be explained in more detail below, in order to answer the question we must rely on the modern approach to statutory interpretation to determine the proper scope of the expression or phrase "within Canada." We must first meticulously read the words of the statute to ascertain their ordinary and grammatical senses, and further interpret them in the context of the *CSIS Act* as a whole. Second, we must illuminate the ordinary sense of the words by ascertaining Parliament's intention by analyzing extrinsic sources such as parliamentary debates, commission reports, parliamentary committee reports, and oversight body recommendations as well as government responses to these aforementioned reports. Once the correct interpretation of the expression "within Canada" is determined, the facts shall be reviewed to address in greater depth the arguments submitted by counsel in light of the true meaning of the phrase.

V. PRINCIPLES OF STATUTORY INTERPRETATION

[19] In *Sullivan on the Construction of Statutes*, Professor Ruth Sullivan set forth a three-pronged method to interpret statutes. First, the ordinary meaning approach, which requires the interpreter to use the literal text of the statute as the primary source. Second, the contextual approach, originally defined by Elmer Driedger, redefined and endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re*), [1998] 1 SCR 27, requires the interpreter to look at the words of the statute in their entire context. Third, the purposive approach, which requires the interpreter to consider the practical idea behind the enactment of both the interpreted section and the statute as a whole while considering the real-world effects of the Court's interpretation (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: Lexis Nexis, 2014) at paras 2.1 - 2.5 ["Sullivan 2014"]).

[20] This Court has preferred the modern or contextual approach to statutory interpretation of the *CSIS Act* (see *X(Re),* 2017 FC 136; *X(Re),* 2016 FC 1105 ["*Associated Data*"]; *Reference re sections 16 and 21 of the Canadian security Intelligence Service Act (CA),* 2012 FC 1437; *Articles 12 & 21 de la Loi sur le Service canadien du renseignement de sécurité (Re),* 2008 FC 301 ["*CSIS (Re)* 2008"]). Particularly, in *X(Re),* 2014 FCA 249, Dawson JA thoroughly summarized the current state of the law concerning statutory interpretation:

> [68] The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

> See: *Rizzo& Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 (CanLII), [2001] 2 SCR 867 at paragraph 29.

[69] The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54 (CanLII), [2005] 2 SCR 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v Canada*, 1999 CanLII 639 (SCC), [1999] 3 SCR 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[70] This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v Canada (Attorney General)*, 2011 SCC 1 (CanLII), [2011] 1 SCR 3 at paragraph 21, and *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306 at paragraph 27.

[71] Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board*), 2006 SCC 4 (CanLII), [2006] 1 SCR 140 at paragraph 48). From the text and this wider context the interpreting

> court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v Monney*, 1999 CanLII 678 (SCC), [1999] 1 SCR 652 at paragraph 26).

[21] Furthermore, as expressed by the Federal Court of Appeal, both Professor Côté and Professor Sullivan asserted that the ordinary meaning approach by itself is no longer sufficient to adequately interpret statutes. Rather, the context is paramount and interpretation is legitimate even if the ordinary meaning appears to be clear. In his book, *The Interpretation of Legislation in Canada*, Professor Côté indicates:

> "[…] [W]e want to note our profound disagreement with the idea that interpretation is legitimate or appropriate only when the text is obscure. This idea is based on the view, incorrect, that the meaning of a legal rule is identical to its literal legislative wording. The role of the interpreter is to establish the meaning of rules, not texts, with textual meaning at most the starting point of a process which necessarily takes into account extra-textual elements. The *prima facie* meaning of a text must be construed in the light of the other indicia relevant to interpretation. A competent interpreter asks whether the rule so construed can be reconciled with the other rules and principles of the legal system: Is this meaning consistent with the history of the text? Do the consequences of construing the rule solely in terms of the literal rule justify revisiting the interpretation and so on?"
>
> (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 268–269 ["PA Côté 2011"].)

VI. PRINCIPLES OF STATUTORY INTERPRETATION SPECIFIC TO NATIONAL SECURITY LEGISLATION

[22] Legislation that infringes on civil liberties, such as the *CSIS Act* must be interpreted cautiously to ensure minimal infringement of our most fundamental liberties, while ensuring that the rule of law is upheld. Accordingly, this requires courts to cautiously scrutinize and interpret

the investigative powers that have been meticulously prescribed by Parliament with a view to ensure that security intelligence agencies are not authorized to overstep their mandate by Judges. The Supreme Court has recognized that strict controls have been put in place in the *CSIS Act* to limit the extraordinary powers of the Service. As I explained in the above cited *Associated Data*:

> [153] The Federal Court of Appeal's assessment of the purpose of the *CSIS Act* in *X(Re)*, 2014 FCA 249 at paragraph 86, provides a good starting point to support the idea that strict controls are built into the scheme of the *CSIS Act*:
>
> > [86] […] The need for strict controls on the operations of security intelligence agencies has long been recognized. In *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 (CanLII), [2008] 2 SCR 326 the Supreme Court considered the legislative purpose and guiding principles that attended the creation of CSIS. At paragraph 22 of the reasons the Court quoted from the report of the Special Committee of the Senate on the Canadian Security Intelligence Service to the effect that:
> >
> > > A credible and effective security intelligence agency does need to have some extraordinary powers, and does need to collect and analyze information in a way which may infringe on the civil liberties of some. But it must also be strictly controlled, and have no more power than is necessary to accomplish its objectives, which must in turn not exceed what is necessary for the protection of the security of Canada. (Report of the Special Senate Committee, at para. 25)

[23] In *Associated Data*, I also touched upon strict controls in the context of the primary mandate of CSIS, where I set out the legislative history of the *CSIS Act* and demonstrated that the primary mandate of CSIS, threat-related security intelligence collection (sections 2, 12 and

21 of the *CSIS Act*), which I will expand upon in detail below, was to be strictly and expressly defined in order to restrain and deter illegal activities by members of the Service (see *Associated Data* at paras 120–158). To support my conclusions, I cited the 1981 McDonald Commission, which was born out of an investigation into the illegal activities carried out by the former Intelligence Service of the RCMP. The McDonald Commission report recommended that the mandate of the Service be specific:

> **190.** […] But in the absence of a clearly defined mandate, there is a natural tendency for a security intelligence agency, no matter how good its analytical capabilities, to err on the side of excessive intelligence-gathering, lest it be faulted by government for not having intelligence when asked. Intelligence-gathering is not something that can be simply turned on and off like a tap. This is another reason for the importance of Parliament's establishing a coherent, comprehensive mandate for security intelligence activities in this country.
>
> (Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report: Freedom and Security Under the Law*, vol 1, Part V (Ottawa: Privy Council Office, 1981) at 499.)

[24] I continued my analysis in *Associated Data*, by highlighting the importance of legal parameters, which aim to prevent intelligence officers from acting illegally in the name of national security (see specifically paragraph 130 of my reasons). The McDonald Commission also cemented the importance of the rule of law in the sense that the mandate of the Service must not be interpreted broadly so as to include powers that are not found in the letter of the law.

> **21.** […] If those responsible for security believe that the law does not give them enough power to protect security effectively, they must try to persuade the law-makers, Parliament and the provincial legislatures, to change the law. They must not take the law into their own hands. This is a requirement of a liberal society. It is, therefore, unacceptable to adopt the view, which we have

> found expressed within the RCMP, that when the interests of national security are in conflict with the freedom of the individual, the balance to be struck is not for the court of law but for the executive. [Emphasis mine]
>
> (Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report: Freedom and Security Under the Law*, vol 1, Part II (Ottawa: Privy Council Office, 1981) at 45.)

[25] Even though my conclusions in *Associated Data* apply to the primary mandate and function of CSIS, that of security intelligence collection, my general finding concerning the importance of a circumscribed and strict mandate, is also pertinent to the secondary functions including section 16, which is at issue before us. Strict limitations and controls on intelligence gathering powers are guiding principles in the interpretation of national security legislation. This obliges the Court to interpret intrusive powers cautiously to avoid authorizing excessive intelligence gathering that is not prescribed by an act of Parliament. If the scope of the powers in the *CSIS Act* require expansion in order to provide assistance to the Minister of Foreign Affairs or National Defence, such change must be brought through legislative amendment, not by the Court broadly interpreting the *CSIS Act*.

[26] Some may assert that primary and secondary functions of CSIS should not be compared in the same light since they have two distinct policy objectives. However, I am inclined, subject to a more in-depth analysis, to view the totality of the functions given to the Service within the same interpretative parameters. After all, an Act must be interpreted by looking at it as a whole, rather than as individual distinct watertight compartments.

A. *The Canadian Security Intelligence Service's Mandate and Functions*

[27] I will first begin the discussion with a brief overview of the different mandates and functions granted to the Service by the *CSIS Act.* This will permit us to contextualize the foreign intelligence collection within the broader context of the Service's mandate and various functions. Understanding the larger context in which this foreign intelligence collection operates, will be vital throughout the interpretative exercise.

[28] The primary mandate of the Service found in section 12, is to collect, analyse and retain information and intelligence respecting "threats to the security of Canada" as defined in section 2. The Service also has secondary functions: section 13 enables it to provide security assessments to various departments of the Government of Canada; section 14 authorizes it to advise the Crown on matters related to the security of Canada; section 15 allows it to conduct investigations in the course of activities falling under sections 13 and 15; and, section 16, often called the foreign intelligence function, enables CSIS to collect foreign related information of a political, economic and commercial nature that could benefit Canada's interests.

[29] When the section 16 authority is coupled with a section 21 warrant obtained from this Court, CSIS may be authorized to use intrusive techniques to collect "within Canada", information concerning foreign states or persons for the benefit of the Minister of Foreign Affairs or the Minister of National Defence.

B. *Interpreting Section 16 of the CSIS Act*

[30] In order to properly interpret the expression "within Canada" found in section 16 of the *CSIS Act*, we will conduct our analysis in three parts: first, according to the textual meaning of the legislative text; second, through the contextual approach; and third, according to the purposive approach with a particular emphasis on the practical consequences of the said interpretation.

(1) The Textual Meaning

[31] I have reproduced below the pertinent sections of the *CSIS Act* to facilitate the interpretative exercise:

***Canadian Security Intelligence Service Act*, RSC 1985, c C-23**	***Loi sur le Service canadien du renseignement de sécurité*, LRC (1985), ch C-23**
Collection of information concerning foreign states and persons	**Assistance**
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	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) any foreign state or group of foreign states; or	a) d'un État étranger ou d'un groupe d'États étrangers;
(b) any person other than	b) d'une personne qui n'appartient à aucune des catégories suivantes :

(i) a Canadian citizen,	(i) les citoyens canadiens,
(ii) a permanent resident within the meaning of subsection 2 (1) of the *Immigration and Refugee Protection Act*, or	(ii) les résidents permanents au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*,
(iii) a corporation incorporated by or under an Act of Parliament or of the legislature of a province.	(iii) les personnes morales constituées sous le régime d'une loi fédérale ou provinciale.
Limitation	**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
(I have underlined the specific wording in section 16(1).)	(J'ai souligné spécifiquement les mots à l'article 16(1).)

[32] Although dictionary definitions should not be considered determinative of the plain meaning of the statute, they may permit a judge to consider the plausible breadth of available meanings. However, definitions are of little assistance if the words are removed from their context. As explained by Prof. Sullivan:

> Dictionaries also assist by suggesting the limits of plausible interpretation. Although it is permissible to reject the ordinary meaning of a provision in favour of an interpretation that promotes the purpose or avoids unacceptable consequences, under the

> plausible meaning rule the interpretation that is adopted must normally be one that the words are capable of bearing. By fixing the outer limits of meaning, dictionary definitions help to establish the range of plausible meanings a given word may bear.
>
> (Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 65–66 [“Sullivan 2016”].)

[33] Reproducing dictionary definitions of “within” and “dans les limites” in section 16, can only help us determine the scope of plausible interpretations related to these words.

[34] The *Canadian Oxford Dictionary* defines “within” as:

> A preposition (1) inside; enclosed or contained by. (2a) not beyond or exceeding [within one’s means]. (2b) not transgressing [within the law; within reason]. (3) Not further off than [within three miles of a station; within shouting distance] […] (5) Lying within an area implied “within the walls of London.” It is also defined as an adverb inside; to, at or on the inside;
>
> (*Canadian Oxford Dictionary*, 2nd ed, *sub verbo* “within”.)

[35] The French dictionary *Le petit Robert de la langue française* defines “dans” as a:

> “préposition indiquant la situation d’une personne, d’une chose par rapport à ce qui la contient. (1) Marque le lieu […]”.

[36] The same dictionary defines the noun “limite” as:

> Ligne qui sépare deux terrains ou territoires contigus. Bord, borne, confins, démarcations frontière, lisière. […] (2) Partie extrême où se termine une surface ou une étendue […] (4) Point que ne peut ou ne doit pas dépasser l’influence, l’action de quelque chose.
>
> (*Le petit Robert de la langue français*, 2006, *sub verbo* “dans” and “limite”.)

[37] The expression “within Canada” acts as both an adverb describing the action to assist, but also acts as a preposition that latches onto the noun “Canada.” The expression “within Canada” is an express geographical limitation of the Service’s assistance function. The preposition “within” refers to an action occurring inside a range or a boundary. The French version explicitly evokes the concept of a geographical limitation because of the use of the noun “les limites” (literally the limits or the limitations). Limits are understood as lines that circumscribe, designate or mark the start and the end of a space. The preposition “within” and the noun “les limites” both clearly put forward the notion of circumscribing the Service’s assistance function to Canada’s physical and geographical boundaries.

[38] Once the words of the said expression are interpreted, we must contemplate how this isolated interpretation interacts with the remainder of the words in the section. We must consider “within Canada” in relation to the broader statutory context of the foreign intelligence function. A literal analysis of the words of subsection 16(1) reveals six intelligible components that make up the foreign intelligence function of the Service which can be dissected as follows: the Service may, in relation to (1) the defence of Canada or the conduct of the international affairs of Canada (2) assist the Minister of National Defence or the Minister of Foreign Affairs, (3) within Canada, (4) in the collection of information or intelligence (5) relating to the capabilities, intentions or activities of (6) any foreign state or group of foreign states; or any person other than a Canadian citizen a permanent resident, or a corporation incorporated in Canada.

[39] First, the Service is authorized to collect information in relation to the “defence of Canada or the conduct of the international affairs of Canada” or in French “dans les domaines de

la défense et de la conduite des affaires internationales du Canada." These represent the respective portfolios of the Minister of National Defence and the Minister of Foreign Affairs.

[40] Second, the Service has the mandate "to assist" the Minister of National Defence or the Minister of Foreign Affairs in relation to the conduct of international affairs or the defence of Canada. The verb "to assist" or in French "prêter son assistance" refers to the action by the Service of lending assistance to the Ministers in relation to their respective portfolios, such as the conduct of international affairs or the defence of Canada.

[41] Third, as mentioned above "within Canada" or in French "dans les limites du Canada" is an express geographical limitation of the Service's assistance function.

[42] Fourth, the Service assists the Ministers "in the collection of information or intelligence" or in French "à la collecte d'informations ou de renseignements." The Service is thus mandated to acquire and gather information or intelligence.

[43] Fifth, the Service must collect information on "the capabilities, intentions or activities of" or "sur les moyens, les intentions ou les activités d'un." These nouns help qualify what type of information or intelligence that the Service collects within Canada when assisting the Ministers.

[44] Sixth, the Service can only collect information on any foreign state or group of foreign states; or any person other than a Canadian citizen, a permanent resident or a corporation incorporated in Canada. Importantly, this ensures that the information collected must have a

nexus with a foreign individual or entity, in the sense that the Service is barred from collecting foreign intelligence from Canadians, permanent residents or Canadian companies.

[45] Mactavish J interpreted subsection 16(2) in *Canadian Security Intelligence Service (Re)*, 2012 FC 1437, and concluded that section 16 was intended to prevent Canadian citizens, permanent residents or corporations being named as targets of interception in section 21 warrant applications:

> [84] Subsection 16(2) of the *Canadian Security Intelligence Services Act* clearly prohibits the provision of assistance by the Service in response to a ministerial request, where that request is directed at [a Canadian citizen, permanent resident or corporation]. A [Canadian citizen, permanent resident or corporation] is a target of the warrants sought here. As a consequence, I am satisfied that I do not have the jurisdiction to issue warrants authorizing the Service to intentionally intercept the communications of, or utilize other intrusive investigative techniques in relation to [a Canadian citizen, permanent resident or corporation] […].

[46] When guided by the dictionary definitions of the words “within” and “dans les limites”, the grammatical and ordinary meaning is clear and unambiguous in both official languages. First, Parliament’s choice of words explicitly limits the Service’s secondary function to the collection of information and intelligence to Canada. Second, the collection must assist the respective Ministers in accomplishing their duties in relation to the defence of Canada or the conduct of international affairs. Third, the type of information and intelligence collected must concern the capabilities, intentions or activities of foreign states or groups of foreign states or any person except Canadian citizens, permanent residents or corporations incorporated in Canada. The aforementioned conditions limit the foreign intelligence function within specific and strict statutory parameters.

[47] The grammatical or ordinary meaning of the text should be given significant weight especially when it is clear and unambiguous. However, even though the grammatical or ordinary meaning of “within Canada” speaks clearly and loudly, it is important for the Court to situate the foreign intelligence function within its entire context, more specifically within the Service’s primary and secondary functions.

(2) The Contextual Approach

[48] Even though the literal text may seem unambiguous, the literal meaning must not conflict with the larger statutory context (*Montreal (City) v 2952-1366 Québec*, 2005 SCC 62 at para 10). The contextual approach requires the interpreter to look at the grammatical and ordinary meaning of the words of the text harmoniously with the scheme of the act, the object of the act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27). As will be seen, recent legislative amendments can help illuminate the context of the statute in the sense that it can illustrate what Parliament intended presumptively to remain unchanged.

(a) *The Scheme of the CSIS Act*

[49] As discussed above, in order to comprehensively understand CSIS’ foreign intelligence function, it is important to look at the *CSIS Act* as a whole. To that effect, I have reproduced and emphasized in underline/soulignés, the sections constituting the Service’s Primary mandate, which includes the definition of “threats to the security of Canada” in section 2, as well as sections 12, 12.1 and 21:

***Canadian Security Intelligence Service Act*, RSC 1985, c C-23**	***Loi sur le Service canadien du renseignement de sécurité*, LRC (1985), ch C-23**
Definitions	**Définitions**
2 In this Act,	2 Les définitions qui suivent s'appliquent à la présente loi.
threats to the security of Canada means	***menaces envers la sécurité du Canada***
	Constituent des menaces envers la sécurité du Canada les activités suivantes :
(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,	a)l'espionnage ou le sabotage visant le Canada ou préjudiciables à ses intérêts, ainsi que les activités tendant à favoriser ce genre d'espionnage ou de sabotage;
(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,	b) les activités influencées par l'étranger qui touchent le Canada ou s'y déroulent et sont préjudiciables à ses intérêts, et qui sont d'une nature clandestine ou trompeuse ou comportent des menaces envers quiconque;
(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and	c) les activités qui touchent le Canada ou s'y déroulent et visent à favoriser l'usage de la violence grave ou de menaces de violence contre des personnes ou des biens dans le but d'atteindre un objectif politique, religieux ou idéologique au Canada ou dans un État étranger;
(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,	d) les activités qui, par des actions cachées et illicites, visent à saper le régime de gouvernement constitutionnellement établi au Canada ou dont le but immédiat ou ultime est sa destruction ou son renversement, par la violence.
but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d). (*menaces envers la sécurité du Canada*)	La présente définition ne vise toutefois pas les activités licites de défense d'une cause, de protestation ou de manifestation d'un désaccord qui n'ont aucun lien avec les activités mentionnées aux alinéas a) à d). (*threats to the security of Canada*)

Collection, analysis and retention

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

No territorial limit:

(2) For greater certainty, the Service may perform its duties and functions under subsection (1) within or outside Canada

Measures to reduce threats to the security of Canada

12.1 (1) If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat.

Judicial Control

Application for warrant

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. […]

Issuance of warrant

(3) […]

Informations et renseignements

12 (1) Le Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et analyse et conserve les informations et renseignements sur les activités dont il existe des motifs raisonnables de soupçonner qu'elles constituent des menaces envers la sécurité du Canada; il en fait rapport au gouvernement du Canada et le conseille à cet égard.

Aucune limite territoriale

(2) Il est entendu que le Service peut exercer les fonctions que le paragraphe (1) lui confère même à l'extérieur du Canada.

Mesures pour réduire les menaces envers la sécurité du Canada

12.1 (1) S'il existe des motifs raisonnables de croire qu'une activité donnée constitue une menace envers la sécurité du Canada, le Service peut prendre des mesures, même à l'extérieur du Canada, pour réduire la menace.

Contrôle judiciaire

Demande de mandat

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 permettre au Service de faire enquête, au Canada ou à l'extérieur 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.

Délivrance du mandat

(3) […]

Activities outside Canada	**Activités à l'extérieur du Canada**
(3.1) Without regard to any other law, including that of any foreign state, a judge may, in a warrant issued under subsection (3), authorize activities outside Canada to enable the Service to investigate a threat to the security of Canada.	(3.1) Sans égard à toute autre règle de droit, notamment le droit de tout État étranger, le juge peut autoriser l'exercice à l'extérieur du Canada des activités autorisées par le mandat décerné, en vertu du paragraphe (3), pour permettre au Service de faire enquête sur des menaces envers la sécurité du Canada.

[50] It is important to situate "within Canada" in the broader context of the *CSIS Act*. Section 12 sets out the Service's primary mandate and function, which is to investigate threats to the security of Canada, and section 2 complements section 12 by defining "threats to the security of Canada". Read together these two sections make up the primary mandate of the Service. It is noteworthy that sections 2, 12(2), 12.1(1) and 21(3.1), explicitly define and provide the Service with the ability to assume its primary mandate to investigate threats outside of Canada.

[51] In *Associated Data*, I detailed and distinguished the primary and secondary functions of the Service, I repeat my reasons here in the following paragraphs:

> [159] Part I of the Act addresses the normal administrative set-up of a civilian agency, and also establishes and qualifies the duties and functions of the Service. The "primary function", to investigate threats to the security of Canada, is defined as such in the Pitfield Report and is established at section 12(1) (section 12(1) was originally section 14(1) in its predecessor, Bill C-157, and then section 12 before recent amendments). The Pitfield Report refers to section 12(1) as the "principal activity of any security intelligence service agency […]", such principal activity being "[…] investigation, analysis and the retention of information and intelligence on security threats". (Senate of Canada, Special Committee of the Senate on the Canadian Security Intelligence Service, *Delicate Balance: A Security Intelligence Service in a Democratic Society*, (November 1983) (Chair: P.M Pitfield) at p 11, para 28.)

> [160] This "primary function" is complemented by the definition of "threats to the security of Canada" elaborated in section 2. Taken together, section 12(1) and section 2 form the core of the CSIS's essential function: investigate threats to the security of Canada.

[52] Section 21 provides CSIS with the possibility of advancing investigations through the issuance of warrants when intrusive methods are necessary. This Court has the authority to issue warrants when all the requirements of section 21 are fulfilled. As I stated in *Associated Data* at paras 161 -163:

> [161] When conventional means of investigation do not allow to meaningfully advance an investigation, sections 21(1), 21(2), and specifically 21(2)b) [further referred to simply as "section 21"] come into play to allow the CSIS to apply for warrants before the Court. The application must show, on reasonable grounds, that the information sought is factually related to a threat to the security of Canada as referred to in sections 21(1), 12(1), and as defined in section 2. The affidavit in support of the warrant application and the examination that follows at the hearing are determinative for the designated judge charged with deciding whether to issue the warrant or not. As the Pitfield Report rightly noted when discussing this primary function, the definition of the threats to the security of Canada at section 2 of the Act:
>
> > "[…] constitutes the basic limit on the agency's freedom of action. It will establish for the CSIS, its director, and employees the fundamental standard for their activities. It will enter crucially into judicial determination of whether a particular intrusive investigative technique can be used." [Emphasis added.]
> >
> > Senate of Canada, Special Committee of the Senate on the Canadian Security Intelligence Service, Delicate Balance: A Security Intelligence Service in a Democratic Society, (November 1983) (Chair: P.M Pitfield) at p 12, para 31.)
>
> [162] Section 21 supports advancing an investigation when conventional means are not sufficient and intrusive methods are

> necessary. The role of the Court, in such cases, is to ensure all requirements of the legislation are respected in the application for warrants and that the measures sought are justified in light of the facts put forward. Section 21 does not create a separate scheme wholly distinct from the primary function of CSIS as described in section 12(1); rather, section 21 complements the primary function of "investigating threats" by establishing procedural requirements when an application for warrants is sought.
>
> [163] As it can be read in section 21, an application for warrants must contain: the relevant facts; an explanation that other investigative methods were tried, but had either failed or are unlikely to succeed; the type of information to be intercepted; the identity of the target, if known, or classes of proposed targeted persons; a general description of the place where the warrant is to be executed; the proposed duration of the warrant; and any previous application for a warrant made by CSIS in relation to a person identified in the affidavit.

[53] In *Associated Data*, I further detailed the secondary functions of the Service:

> [164] […] The secondary functions of the CSIS are also detailed in Part I. They involve activities such as: providing security assessments to departments of the Government of Canada, to provinces, and to police forces (subsections 13(1) and 13(2) respectively); allowing the CSIS to enter into arrangements with foreign partners (section 13(3)); and providing advice to ministers of the Crown on matters related to the security of Canada (section 14).
>
> [165] Notably, section 16, also included in the secondary functions, allows the collection of information concerning foreign states or persons in relation to the defence of Canada or to the conduct of international affairs. Canadian citizens, permanent residents, and Canadian or provincial corporations are excluded from section 16's ambit. […]
>
> [166] As it can be read in section 21, intrusive warrants may be sought for the purposes of section 16. But, contrary to warrants sought for the purposes of section 12(1) (relating to threats to the security of Canada at section 2), warrants sought through the application of section 16 in conjunction with section 21 requirements do not have to show a nexus to threats to the security of Canada. Rather, the alternate safeguard in place is that

> section 16 warrants may only be sought after either the Minister of Defence or the Minister of Foreign Affairs personally requests permission to do so from the Minister of Public Safety and Emergency Preparedness; who must agree.

[54] A comparison of the Service's primary and secondary functions provides a couple of salient insights. Section 12 gives the Service a security intelligence mandate to collect information on threats to the security of Canada; and, investigations can be conducted in a defensive or an offensive way, which engages Canada's right to defend itself from threats from within and outside of Canada. Contrary to section 12, section 16 gives the Service a non-threat foreign intelligence collection mandate concerning the capabilities, intentions or activities of a foreign state, group of foreign states, persons other than Canadian citizens, permanent residents and corporations incorporated in Canada. Moreover, section 16 has an assistance or policy oriented goal, rather than a threat related one, in the sense that it looks to collect political, economic, commercial and military intelligence to assist the Ministers in making informed decisions in their respective portfolios (see paragraph 2 of these reasons above). We shall now review the relevance of the 2015 amendments to the *CSIS Act*.

(b) *The 2015 Amendments to the CSIS Act*

[55] The *CSIS Act* has rarely been amended since receiving Royal Assent in 1984. On April 23, 2015, Bill C-44, titled the *Protection of Canada from Terrorists Act* ["Bill C-44"] added extraterritorial powers in sections 12(2), 15(2), and 21(3.1) of the *CSIS Act*. Bill C-44 modified sections 12 and 21 to explicitly authorize the Service to "perform its duties and functions […] within or outside Canada", but no similar amendment was made for section 16. In addition, Bill

C-44 also modified section 21 to authorize the Court to issue warrants that could potentially violate the laws of foreign jurisdiction only in section 12-type investigations.

[56] I have reproduced and identified in underline/soulignés the amendments as between the pre- and post-2015 versions of sections 12 and 21 of the *CSIS Act*:

Pre-2015	**Post 2015**
Collection, analysis and retention	**Collection, analysis and retention**
12 The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.	**12 (1)** The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.
	No territorial limit:
	(2) For greater certainty, the Service may perform its duties and functions under subsection (1) <u>within or outside Canada</u>
	12.1 (1) If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, <u>within or outside Canada</u>, to reduce the threat.
[…]	[…]
Judicial control	**Judicial Control**
Application for warrant	**Application for warrant**
21 (1) Where the Director or any employee designated by the Minister for the purpose believes, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate a threat to the security of Canada or to perform its duties and functions under section 16, the Director or employee	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 <u>the Service to investigate, within or outside Canada, a threat to the security of Canada or to perform its duties and functions under</u>

may, after having obtained the approval of the Minister, make an application in accordance with subsection (2) to a judge for a warrant under this section.

[…]

Issuance of warrant

(3) […]

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.

[…]

Issuance of warrant

(3) […]

Activities outside Canada

(3.1) Without regard to any other law, including that of any foreign state, a judge may, in a warrant issued under subsection (3), authorize activities outside Canada to enable the Service to investigate a threat to the security of Canada.

Avant 2015

Informations et renseignements

12 Le Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et analyse et conserve les informations et renseignements sur les activités dont il existe des motifs raisonnables de soupçonner qu'elles constituent des menaces envers la sécurité du Canada; il en fait rapport au gouvernement du Canada et le conseille à cet égard.

Après 2015

Informations et renseignements

12 (1) Le Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et analyse et conserve les informations et renseignements sur les activités dont il existe des motifs raisonnables de soupçonner qu'elles constituent des menaces envers la sécurité du Canada; il en fait rapport au gouvernement du Canada et le conseille à cet égard.

Aucune limite territoriale

(2) Il est entendu que le Service peut exercer les fonctions que le paragraphe (1) lui confère même à l'extérieur du Canada.

Mesures pour réduire les menaces envers la sécurité du Canada

12.1 (1) S'il existe des motifs raisonnables de croire qu'une activité donnée constitue une menace envers la sécurité du Canada, le

	Service peut prendre des mesures, même à l'extérieur du Canada, pour réduire la menace.
[…]	[…]
Contrôle judiciaire	**Contrôle judiciaire**
Demande de mandate	**Demande de mandat**
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 permettre au Service de faire enquête sur des menaces envers la sécurité du Canada ou d'exercer les fonctions qui lui sont conférées en vertu de l'article 16.	**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 permettre au Service de faire enquête, au Canada ou à l'extérieur 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.
Délivrance du mandate	**Délivrance du mandat**
(3) […]	(3) […]
	Activités à l'extérieur du Canada
	(3.1) Sans égard à toute autre règle de droit, notamment le droit de tout État étranger, le juge peut autoriser l'exercice à l'extérieur du Canada des activités autorisées par le mandat décerné, en vertu du paragraphe (3), pour permettre au Service de faire enquête sur des menaces envers la sécurité du Canada.

[57] When interpreting statutory provisions, it is necessary to presume that every word in a statute is intended to have meaning and "a specific role to play in advancing the legislative purpose" (Sullivan 2014, above, at paragraph 8.23). Moreover, "when the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before" and that the phrase "add[s] something which would not be there if the words were left out" (*Hill v William Hill (Park Lane) Ltd*, [1949] AC 530 at 546, as cited in

Sullivan 2014, above, at paras 8.23). The principle of the consistent expression presumes that Parliament "uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings" (Sullivan 2014, above, at paras 8.32). Finally, it is presumed that Parliament knows all the circumstances surrounding the adoption of new legislation (*Atco Gas & Pipelines Ltd v Alberta* (*Energy & Utilities Board*), 2006 SCC 4 at para 59).

[58] As attested by the Honourable Minister Blaney, former Minister of Public Safety, when he appeared before the standing committee on Public Safety and National Security, Bill C-44 was in part a response to two Federal Court of Canada decisions: *Re CSIS Act*, 2008 (Blanchard J); and, *X (Re)*, 2013 FC 1275 (Mosley J) ["*X(Re) 2013*"], and the appeal in *X(Re)* 2014 (Dawson JA). The Bill aimed in part to clarify the extraterritorial powers of the Service. Minister Blaney explained:

> Turning to the second court decision affecting CSIS' mandate, the Federal Court of Appeal recently unsealed its July 2014 decision related to the government's appeal of Justice Mosley's decision that was issued by the Federal Court last year. The *Protection of Canada from Terrorists Act* confirms CSIS' authority to conduct investigations outside of Canada related to the threats, to the security of Canada, and security assessments. This is not a big thing. CSIS can operate within and outside Canada. That's fairly simple.
>
> CSIS has always had the power to undertake investigative activities abroad. The Federal Court of Appeal acknowledged this fact when it found that section 12 of the *Canadian Security Intelligence Service Act* in no way suggests geographic limitations for CSIS' activities.
>
> However, the power of CSIS to conduct activities abroad in order to investigate threats to Canada's security is not indicated as clearly as it should be in the *Canadian Security Intelligence Service Ac*t. It is therefore important that Parliament and that

> elected representatives of the people clarify this matter. (Emphasis mine)
>
> (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Public Safety and National Security*, 41st Parl, 2nd Sess, No 40 (24 November 2014) at 2 (Chairperson: Daryl Kramp).)

[59] As I stated earlier, there is an important distinction between the security intelligence function and the foreign intelligence function. When interpreting legislation, we are asked to look at the words of the statute in light of their entire context. When reading the foreign intelligence and security intelligence functions together, it is evident that both functions have different geographical parameters as to where the collection activities can occur. As the Minister explained, Bill C-44 sought to clarify the extraterritorial powers in the *CSIS Act*. Parliament had a clear opportunity to amend the territorial restriction in section 16 to provide an extraterritorial collection power, but did not to do so.

[60] Prior to the 2015 amendments, the wording of section 12 was silent as to the territorial scope of the security intelligence collection powers, while section 16 was explicit as to its territorial scope. In the post-2015 amendments, in subsections 12.1(1), 15(2), 21(1) and 21.1(1), Parliament explicitly gave the Service the power to perform its duties and functions "within or outside Canada" or "même à l'extérieur du Canada". While on the other hand, section 16 remained the same by restricting the collection of information and intelligence to "within Canada" or "dans les limites du Canada".

[61] As I emphasized earlier, section 12 must be read concurrently with section 2, which defines "threats to the security of Canada". Subsection (b) defines threats as foreign influenced

activities “within or relating to Canada” or “qui touchent le Canada où s’y déroulent”. Section (c) also defines threats as activities in support of violence to achieve a political, religious or ideological objective “within or relating to Canada” or — “qui touchent le Canada ou s’y déroulent”.

[62] When looking at the precise wording used in section 12 “within or outside Canada” and in section 2 “within or relating to Canada” in parallel with the wording used in section 16 “within Canada”, I cannot help but see Parliament’s clear intention to geographically limit the application or execution of section 16 to within Canadian borders. First, there is an express textual difference between the geographic scope of sections 12, 21 and 16. Therefore, Parliament clearly intended that there be a meaningful difference between “within or outside Canada” found in subsections 12(2) and 21(1) with “within Canada” found in section 16 or else it would have used a consistent expression. After all, when I am asked to interpret legislation, I presume that every word in a statute is intended to have meaning and purpose. I also assume that Parliament desires consistency when meticulously choosing words to express itself. When looking at the *CSIS Act* as a whole, I cannot ignore the significance of contradictory and opposing words in the same legislative scheme. I should also add that when Parliament amends existing legislation, it has the opportunity to clarify what it thinks is unclear and ambiguous. If Parliament clarifies and changes the text of a specific section, but omits to do the same in another — a judge can only presume that it did so having the full knowledge of the consequence of their omission.

[63] In the case before us, the 2015 amendments clearly give the Service the mandate to conduct its security intelligence activities within or outside Canada. The fact that the government

had the opportunity to consider such amendments to the *CSIS Act*, to extend the geographic scope to section 16 foreign intelligence "within or outside Canada", is a very telling indicator that Parliament did not intend to extend section 16 foreign intelligence collection to outside Canada. Not to repeat myself, but the fact that Parliament decided to enlarge and clarify the security intelligence powers, but did not do so for the foreign intelligence powers speaks volumes. Parliament speaks in one voice and writes with one pen — its volition cannot be understood to mean similar things when clearly choosing different words.

(c) *Conditions in the Applied-for-Warrant*

[64] The applied-for-warrant is subject to the following conditions:

> CONDITION 1
>
> Information about Canadians and any person referred to in paragraph 1 obtained pursuant to this warrant shall be destroyed unless the information
>
> a) relates to activities which would constitute a threat to the security of Canada as defined in section 2 of the *Act*;
>
> b) could be used in the prevention, investigation or prosecution of an alleged indictable offence; or
>
> […]
>
> (Emphasis mine)

[65] The importance of strict limitations is even more apparent when recognizing that section 16 provides the Service, depending on the warrant conditions, with the possibility to incidentally collect and retain as a result of Condition 1, information which could be used in the furtherance of its primary threat-related mandate without a new warrant. Therefore, the Court

must be cognizant that information obtained under the foreign intelligence function can subsequently be transferred internally to supplement a security intelligence investigation.

[66] Consequently, when conducting section 16 investigations, the Service can only collect on Canadian soil and cannot collect on a Canadian citizen, a permanent resident of Canada, or a corporation incorporated by or under an Act of Parliament or the legislature of a province. Parliament did not intend section 16 powers to be exercised without limits. Thus, critical restrictions placed by Parliament on CSIS must be respected and given deference during the interpretative exercise. Again, the Court's duty to uphold the rule of law calls for a cautious interpretation of internal legislative controls found in the *CSIS Act*, since these circumscribe the Service's power and are meant to bar the Service from excessive intelligence gathering. Having concluded our schematic overview of the *CSIS Act*, I find it appropriate to review the legislative history of the *CSIS Act* through extrinsic evidence, starting from its beginnings.

(d) *Legislative History and Extrinsic Evidence*

[67] To continue the contextual analysis, the plain meaning of the expression "within Canada" should also be interpreted in conjunction with the intention of Parliament. To find this intention both Professors Ruth Sullivan and Pierre-André Côté agree that extrinsic materials are useful. However, the Court must determine what weight and authority the interpreter should attribute to these various sources (Sullivan 2014, above, at paras 23.15-23.17; PA Côté 2011, above, at 47).

[68] In *Associated Data*, extrinsic evidence was a fundamental interpretative tool that helped me ascertain the legislative intent surrounding the primary mandate of CSIS. As I explained:

[115] It is well recognized that legislative histories are useful extrinsic aids to ascertain the legislator's intent and the purpose of an Act. When analysing legislative history materials, Prof. Sullivan specifies that, generally "[…] [i]n a Parliamentary system of government, there is likely to be a relatively small number of individuals whose intentions largely control the content of legislative initiatives. In the case of statutes, this would include the recommending Minister, who will reflect the views of Cabinet; it would also include the Parliamentarians who comprise a majority of the Committee that reviews the bill". Thus, the statements given by those relevant persons are much more useful than simple comments or debates from other Parliamentarians. The Supreme Court of Canada regularly relies on legislative history materials to ascertain the objectives of schemes created by statutes. (Sullivan 2014, above, at paras 23.67, 23.81, 23.83.) (PA Côté 2011, above, at 47.)

[116] Although commission reports do not represent the voice of sponsoring ministers or involved Parliamentarians directly, both Prof. Sullivan and Prof. Côté clearly opine that commission reports are useful and admissible. In fact, they regard commission reports as particularly helpful to the interpretation process and note that they were the first type of extrinsic supports to receive affirmation from the Courts. Prof. Sullivan explains:

> "Often legislation is preceded by the report of a law reform commission or similar body that has investigated a condition or problem and recommended a legislative response. Such reports typically review the research carried out by the commission, state its findings, describe the policy options explored and set out recommendations. The work is non-partisan and the conclusions are carefully reasoned. These features potentially make reports more reliable than the materials found in Hansard. In addition, commission reports often play a clear role in the preparation of legislation, in some cases a major role which potentially enhances their relevance and significance. Not surprisingly, then, commission reports were the first type of legislative history to be admitted by the courts in statutory interpretation cases. […]"
>
> (Sullivan 2014, above, at para 23.68.) (PA Côté 2011, above, at 455–456.)

[69] The Attorney General submits that parliamentary history shows firstly that the enactment of section 16 was sought to improve the Government's foreign intelligence capabilities within Canada's international boundaries. Secondly, the expression "within Canada" was intended to prevent officers from engaging in offensive or covert collection within the territory of another state; and, it cannot be discerned that section 16 was meant to prohibit the collection of intelligence outside Canada.

[70] The *amicus* tried but was unable to find a firm indication of parliamentary intent behind the "within Canada" restriction on either side of the argument, but was able to apprise the Court that there was a concern not to establish a controversially aggressive "CIA-like" agency with a mandate for surveillance abroad. Additionally, he could not find the express authority for the proposition put forward by the Attorney General, specifically that the wording of section 16 ensured "that in performing its duties and function under section 16, the Service was not engaged in offensive or covert collection activities directly within the territory of a foreign state". However, the *amicus* submits that this makes the point that Parliament would not, without express wording, have authorized the Service to [redacted] scandal-provoking and international-relation damaging behaviour the government intended to avoid.

[71] What the Attorney General is seeking, [redacted] The Attorney General is

asking the Court, in the context of a section 16 assistance request from the Minister [redacted] to issue a warrant permitting it to conduct [redacted]

[72] I will now examine the legislative history of section 16 with a specific emphasis on "within Canada" to illuminate the correct interpretation of this expression. Once a clear Parliamentary intent is ascertained, I will ensure that the expression "within Canada" does not conflict with the purpose of section 16 as enacted by Parliament.

(i) The McDonald Commission (1981)

[73] The 1981 McDonald Commission set the stage for a future national security agency completely separate from the RCMP. In its report, the McDonald Commission suggested further study was needed on the possible creation of a foreign intelligence agency, but refused to make any formal recommendations. It is pertinent, however, to underline that the creation of a security intelligence agency with extraterritorial powers was considered. The Commission unofficially endorsed the view that the operations of a security intelligence agency outside Canada could be permissible in rare circumstances mandated by the law.

> **14.** Now, turning to the third dimension—the geographic location of the security intelligence agency's activities—we do not think that the agency should be required to confine its intelligence collecting or countering activities to Canadian soil. If security intelligence investigations which begin in Canada must cease at the Canadian border, information and sources of information important to Canadian security will be lost. Thus a total ban on security intelligence operations outside Canada would be an unreasonable constraint. <u>If to operate abroad is "offensive", then Canada's security intelligence agency should be offensive in this sense, although we are cognizant of the very great risks—diplomatic, moral and practical—in carrying out security intelligence activities abroad. Because of these risks it is important to confine such</u>

> activities to those that are essential, to subject them to a clear and effective system of control, and to ensure that they are always within the mandate of the security intelligence agency […] (Emphasis mine)
>
> (Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report: Freedom and Security Under the Law*, vol 1, Part V (Ottawa: Privy Council Office, 1981) at 628).)

[74] Yet, the Commission warned of the severe diplomatic, moral and practical risk in carrying out security intelligence activities abroad and underlined the sensitivities that existed both in and outside government concerning foreign intelligence activities outside Canada. It also warned of the "serious moral issue" related to a government authorizing violations of foreign domestic laws.

> **73.** […] To begin with, there is a clear political risk in a government directing espionage activities against other states. The image of honesty and straight forwardness in the conduct of international affairs may produce benefits to this country, particularly within a Commonwealth setting, that cannot be readily measured. […]
>
> **75.** There is also a serious moral issue involved in a government employing a secret agency whose *modus operandi* requires it necessarily to break the laws of other nations. […] Lawbreaking can become contagious both within a country's "intelligence community" and amongst those senior officials of government and the national political leaders who are responsible for directing the intelligence community. Were this to happen in Canada it could seriously undermine reforms which we hope will be put in place to guard against illegality and impropriety in the activities of the security intelligence agency and the R.C.M.P. On the other hand, it may be argued that so long as this risk is recognized, and the proper controls are in effect; the risk of such influence and contagion can be minimized. (Emphasis mine)
>
> (Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report: Freedom and*

> *Security Under the Law*, vol 1, Part V (Ottawa: Privy Council Office, 1981) at 644).)

[75] The McDonald Commission report did not close the door to extraterritorial activities, but suggested further study on the establishment of covert intelligence gathering in order to influence the activities abroad. The Commission also voiced its concern on the illegality of such activities, and relayed the importance of an effective system of control to ensure that such activities remain within a clearly defined mandate.

(ii) The Pitfield Report (1983)

[76] The McDonald Commission triggered much political debate, which ultimately resulted in the introduction of Bill C-157. According to a publication of the Library of Parliament, Bill C-157 "[a]lmost immediately, it became the object of critical comment. It was alleged to be an attack on civil liberties, giving the proposed Service extremely wide powers, insulating the government from accountability, and failing to institute a precise mandate or a workable review system" (Library of Parliament, "*The Canadian Security Intelligence Service*", Current Issue Review 84-27E by Philip Rosen (Ottawa: Research Branch of the Library of Parliament, 18 September 1984, reviewed 24 January 2000) at 6).

[77] Of note, the foreign intelligence collection power was a particular target of criticism by opposition members, academics and the public. The Library of Parliament report also explains that because of the intensity of the opposition to Bill-157, the Government decided against sending the Bill for second reading, referring it instead to a Special Committee of the Senate chaired by the late Honourable Senator Michael Pitfield. In 1983, the Bill was studied and

reviewed by members of a *Special Committee of the Senate on the Canadian Security Intelligence Service*, which ultimately resulted in the recommendations of the Pitfield Report.

[78] Extracts from the testimony before the Senate Committee hearing on Bill C-157 assist in understanding the foreign intelligence function in section 16, clause 18 at the time. The testimony of the Honourable Robert Kaplan, then Solicitor General of Canada, highlights the Government's decision that CSIS not become an agency like the CIA, which can go abroad in a covert fashion to influence foreign events and activities:

> **Senator Nurgitz**: […] Clause 18 deals with the operations of the agency within Canada in respect of its cooperation with foreign states.
>
> Is it a correct understanding that the operation of the agency is totally within Canada?
>
> I can find nothing in the bill that says that, and I think the public concern is that we do not form another Central Intelligence Agency mucking around the world under the guise of advancing the interest of Canada or protecting Canada.
>
> […]
>
> **Hon. Mr. Kaplan**: Clause 18 says that, but that is only for the purpose, I think, of working out cooperative arrangements with foreign states. It does not say that, in terms of some interpretation of the threats, we could not have an agency office in London, Paris, Tokyo, Hong Kong, or wherever in the way that the CIA has such offices.
>
> Some have compared this agency to the CIA—and I know this has been done in headlines. I think it is important for me to remind members of the committee that this is not an agency which has the power to influence events abroad. That is not part of its functions, as it is with other agencies such as the CIA, which has a specific responsibility lying somewhere between diplomacy and other types of intervention to influence events in other countries.

> This is an intelligence-gathering agency and its mandate is different from the mandate of a pro-active arm of government, such as the CIA in relation to the American government.
>
> Another important difference is that this agency is to perform its functions within Canada. There is a foreign dimension to its activities like the one that exists now in the security service because it will be able to maintain, in any number of places in the world, liaison agents; but these liaison agents will be identified in the country where they are operating as members of the Canadian government. They will not pretend to be tourists, or heads of corporations, or journalists or any other guise that are taken by members of agencies that engage in influencing foreign activities. […]
>
> The way it was drafted, there has been the suggestion that this power to use the intrusive intelligence gathering function will be put at the service of other agencies of corporations, or foreign governments, or others. I want to assure you that the intention is that the assistance referred to in the third line of clause 18 is only assistance to the Secretary of State for External Affairs, to the Minister of National Defence, and to other Canadian ministers with legitimate interests in foreign intelligence. (Emphasis mine)
>
> (Senate of Canada, Proceedings of the Special Committee of the Senate on the Canadian Security Intelligence Service, *The subject-matter of Bill C-157: "Canadian Security Intelligence Act", 3rd Proceeding*, 32nd Parl, 1st Sess, No 3 (19 August 1983) at 55 (Chairperson: P.M Pitfield).)

[79] The testimony of the Solicitor General also further reiterated that the government rejected the McDonald Commission suggestion to establish a covert intelligence gathering agency that could have the mandate to influence activities abroad:

> **Hon. Mr. Kaplan**: I should add that the McDonald Commission did not recommend that we establish an agency with external capacity to influence events in other countries—but it did not recommend against it either. What it said was that the government should consider that. […] The McDonald Commission asked the government to consider whether it should establish that type of covert intelligence gathering for influencing of activities abroad.

> The government has considered that and the government has rejected that. (Emphasis mine)
>
> (Senate of Canada, Proceedings of the Special Committee of the Senate on the Canadian Security Intelligence Service, *The subject-matter of Bill C-157: "Canadian Security Intelligence Act", 3rd Proceeding*, 32nd Parl, 1st Sess, No 3 (19 August 1983) at 56 (Chairperson: P.M Pitfield).)

[80] The Honourable Jean-Luc Pepin, then Minister of State for External affairs, also testified for the Committee where he expanded on the secondary function of section 18:

> **Hon. Mr. Pépin:** […] There is a second role—the most obvious one—for the CSIS in the field of foreign intelligence. Clause 18 of the bill empowers the service, at the request of the government, to assist directly in the collection of information relating to foreign states or foreign powers in the interest of Canada's defence or international relations […]
>
> In other words, the bill provides the mandate for the CSIS to participate within Canada in the collection of foreign intelligence. The practice of linking security and foreign intelligence is followed by most western democracies, so we are not breaking new ground. That is the accepted approach to the subject. At present the government has inadequate means to collect foreign intelligence in Canada, and we believe that clause 18 will fill that gap. (Emphasis mine)
>
> (Senate of Canada, Proceedings of the Special Committee of the Senate on the Canadian Security Intelligence Service, *The subject-matter of Bill C-157: "Canadian Security Intelligence Act", 11th Proceeding*, 32nd Parl, 1st Sess, No 11 (22 September 1983) at 20 (Chairperson: P.M Pitfield).)

[81] The Senate Committee studying Bill C-157 produced the Pitfield Report and made recommendations concerning foreign intelligence collection within Canada. Of particular note, the Pitfield Report dispelled the concerns of Parliamentarians and the public, that section 16 would provide powers to conduct covert intelligence missions abroad, and reiterated that foreign

intelligence within Canada should be closely controlled and monitored by adding political oversight:

> **50** According to the Minister of State for External Relations, the collection of foreign intelligence is a well-established function of the Departments of National Defence and External Affairs. It includes such things as the collection of intelligence by the Defence department on the armed forces and war potential of foreign states, and "signals intelligence"—information gathered about foreign countries by intercepting and studying their radio, radar and other electronic transmissions—collected by the Communications Security Establishment. It also includes information gathered by the Bureau of Intelligence Analysis and Security, and the Bureau of Economic Intelligence of the Department of External Affairs which generally advise the government on economic, political, social, and military affairs relevant to Canada's multilateral and bilateral relations.
>
> **51** According to the Minister, section 18 is intended to provide necessary support for the collection of foreign intelligence in Canada. At present, the government has inadequate means in this area. Section 18 would fill that gap, allowing the CSIS to assist the relevant government departments. What would distinguish the agency's role in this area from that with respect to security intelligence would be the fact that only foreign nationals could be targeted, and the fact that the agency would only act at the request of a minister of the Crown.
>
> **52** The Committee acknowledges the continued need for foreign intelligence, and rejects any suggestion that its collection is not of importance to Canada's interests. It also cannot agree that section 18 is the first step in the creation of a security intelligence service that will act abroad. As noted above, this form of intelligence collection has been in existence for some time. In addition, section 18 specifically restricts the agency to collection of information "within Canada". […]
>
> **53** While the Committee is of the opinion that facilitating the collection of foreign intelligence by proper authorities is an appropriate function of the CSIS, it also believes that that function should be much more closely controlled and monitored. Further, political responsibility for the collection of foreign intelligence should be clear. (Emphasis mine)

> (Senate of Canada, Special Committee on the Canadian Security Intelligence Service, *Delicate Balance: A Security Intelligence Service in a Democratic Society* (3 November 1983) at 18-19 (Chairperson: P.M. Pitfield).)

[82] I also highlight the fact that the 1983 Pitfield Report was the last substantive consideration of the duties and functions of CSIS before its creation in 1984. I would also like to note that paragraph 52 of the Report acknowledged the continued need for foreign intelligence as long as it is restricted to Canada.

(iii) *Bill C-9: Act to establish the Canadian Security Intelligence Service Act (1984)*

[83] In response to the changes proposed by the Pitfield Report, the government introduced Bill C-9 in 1984, which later became the *CSIS Act* with minor amendments. The following excerpt from Hansard further illustrates Parliament's intention to fill the foreign intelligence gap in Canada with a warrant-based foreign intelligence collection function for the Service:

> **Mr. Kaplan:** […] The reason for clause 16 is because in foreign intelligence collection there is a gap. The gap is that no warranted activity can be done for foreign intelligence purposes. <u>This agency has the authority to seek warrants, and therefore Clause 16 is put in to fill a gap in the general foreign gathering picture of our country.</u> (Emphasis mine)
>
> (House of Commons, Minutes of Proceedings and Evidence of the Justice and Legal Affairs Committee, *The subject-matter of Bill C-9: "Canadian Security Intelligence Act"* 32nd Parl, 2nd Sess, Issue No. 29 (29 May 1984) at 48 (Chairperson: Claude-André Lachance).)

(iv) The Security Intelligence Review Committee Report (1989)

[84] In its 1989 Annual Report, the Security Intelligence Review Committee ("SIRC"), the independent external review body that has the authority to generally review the performance by CSIS of its duties and functions, recommended the elimination of the "within Canada" restriction in section 16 because it unduly limited CSIS foreign intelligence collection:

> The obvious usefulness of intelligence on other nations in defence planning and the conduct of international relations make a striking contrast with the failure to make use of CSIS in this area. It suggests to us that section 16 is too restrictive. […]
>
> There does not appear to be any comparable need in Canada for an "offensive" foreign intelligence agency. However, the case may be more compelling for security intelligence and perhaps criminal intelligence relevant to Canada that is collected abroad.
>
> The Committee is opposed to the establishment of a separate, offensive foreign intelligence agency for Canada. We simply do not believe that the case has been made for such an agency. However, we believe that the *CSIS Act* could provide at least the possibility of the collection of foreign intelligence by CSIS, should the need arise. (Emphasis mine)
>
> (Security Intelligence Review Committee, *SIRC Annual Report of 1988–1989* (Ottawa: Minister of Supply and Services, September 30, 1989) at 13 and 73 (Chairperson: Ron Atkey).)

[85] Although SIRC didn't recommend that the CSIS become a Canadian CIA-like foreign intelligence agency, it recommended that the Service acquire new powers to collect foreign intelligence outside Canada by simply removing the "within Canada". As will be seen below, this idea was flatly rejected by stakeholders and by the Government at the time.

(v) The 5-year Parliamentary Review following the enactment of the *CSIS Act* (1990)

[86] Section 56 of the *CSIS Act* mandates that after July 16, 1989, 5 years after its original adoption, a parliamentary review of the *CSIS Act* be conducted. The review report issued in 1990 titled "*In Flux but not in Crisis*"*—Report of the Special Committee on the Review of the CSIS Act and Security Offences Act*, provided an opportunity for the Parliamentary Committee to study the removal of the "within Canada" recommendation from SIRC.

[87] In the context of the five-year review, SIRC, chaired then by the late Honourable Ronald G. Atkey repeated its recommendation to remove the "within Canada" restriction:

> **26.** Therefore, we recommend that section 16 of the Act be amended to remove the words "within Canada".
>
> This amendment would enable CSIS to assist the Minister of National Defense or the Secretary of State for External Affairs in collecting intelligence relating to the capabilities, intentions or activities of foreign states or persons from any source whatsoever. Under the section, CSIS would only be able to assist outside Canada if it received a "personal request in writing" from either Minister and obtained the written consent of the Solicitor General as well. Such an amendment should not impair the ability of SIRC to review the operations of the Service, either at home or abroad. (Emphasis mine)
>
> (Security Intelligence Review Committee, *Amending the CSIS Act: Proposals for the Committee of the House of Commons* (Ottawa: Minister of Supply and Services, 1989 at 18–19).)

[88] During the Special Committee on the Review of the *CSIS Act* hearings, Senator Michael Pitfield opposed the SIRC recommendation:

> **Hon. Mr. Pitfield:** Finally, there are in SIRC recommendations some issues of grand policy, and this has to do with foreign activities. […] On those issues I would really argue, and try to argue as strongly as I could, that the case is not proven. I would come back to the healthy skepticism argument I tried to put up earlier and say that until it is proven I would be loath to see us adding a dimension to our security and intelligence establishment that will have our agents running abroad under God knows what circumstances for God knows what purposes. (Emphasis mine)
>
> (House of Commons, *Minutes of Proceedings and Evidence of the Special Committee on The Review of the CSIS Act and the Security Offences Act, Respecting: Future Business*, 34th Parl, 2nd Sess, No 9 (16 January 1990) at 8-9 (Chairperson: Blaine Thacker).)

[89] The Special Parliamentary Committee acknowledged the general consensus that Canada did not need a foreign intelligence agency that collects intelligence abroad by covert means, and that these types of activities abroad would have consequences for Canada's diplomatic relations. The Committee recommended the *status quo* in relation to section 16:

> The Committee believes that it is inappropriate for the Service, or any other department or agency of the Government of Canada, to engage in covert unlawful acts abroad—that is, action that is above and beyond the collection of foreign intelligence—that is clearly in breach of international law or foreign domestic law. This view was supported by Ron Atkey, the former Chairperson of SIRC, when he appeared before the Committee. The Committee is nevertheless of the view that the question of whether Canada should have an agency engaged in the collection of foreign intelligence and information abroad through the means that are not unlawful, and whether CSIS should be that agency, requires further examination.
>
> If implemented, the SIRC proposal might have significant consequences for Canada, particularly with respect to the conduct of its foreign affairs and defence policies. (Emphasis mine)
>
> (House of Commons, Special Committee on the Review of the *Canadian Security Intelligence Service Act and Security Offences Act, In Flux But Not In Crisis"—Report of the Special Committee on the Review of the CSIS Act and Security Offences Ac*t, (September 1990) at 41–42 (Chairperson: Blaine Thacker).)

[90] The SIRC recommendation to eliminate "within Canada" from section 16 was not adopted by the Special Parliamentary Committee reviewing the *CSIS Act* and *Security Offences Act*.

(vi) The Government Response to the 5-year review Report (1991)

[91] The government response to the 5-year review report titled *On Course: National Security for the 1990s—The Government's Response to the Report of the House of Commons Special Committee on the Review of the Canadian Security Intelligence Act and the Security Offences Act*, highlights the limited CSIS mandate to collect foreign intelligence as a result of the CSE mandate to collect foreign intelligence abroad:

> Since World War II, the main departments of the Government of Canada active in the foreign intelligence sector have been the Department of External Affairs and the Department of National Defence. These two departments gather information from open source and through exchanges with allied countries. In addition, the Communications Security Establishment (CSE) intercepts foreign radio, radar and other electronic emissions, and CSIS assists in the collection of foreign intelligence in Canada in accordance with section 16 of the *CSIS Act*.
>
> […]
>
> CSIS has a limited mandate to assist in the collection of foreign intelligence. The Service's foreign intelligence mandate is outlined in section 16 of the *CSIS Act*. In recognition of the inherent unsuitability of combining in one agency both security intelligence and foreign intelligence functions, section 16 of the *CSIS Act* provides strict limitations on the Service's foreign intelligence role.
>
> […]
>
> The removal of the prohibition against CSIS operating abroad […] would impinge on the Service's primary mandate for security

> intelligence. It is also worth noting that the objectives of a foreign intelligence service are fundamentally different from those of a domestic security service. While the former seeks to learn of the capabilities and intentions of foreign states, and must conduct its intelligence-gathering activities on the territory of a foreign state, the latter is more narrowly focussed on domestic counter-intelligence and counter-terrorism objectives. Different controls are therefore required for the different services. For this reason, the collection of foreign and security intelligence are separate functions in other Western democracies. (Emphasis mine)
>
> (Solicitor General of Canada, *On Course: National Security for the 1990s—The Government's Response to the Report of the House of Commons Special Committee on the Review of the Canadian Security Intelligence Act and the Security Offences Act* (February 1991) at 51-57 (Pierre H. Cadieux – Solicitor General).)

[92] Of further particular note, the Government's Response acknowledges that the role of CSIS is limited in the context of the collection of foreign intelligence; and, that expanding CSIS foreign intelligence collection function by removing the "within Canada" restriction, would be "inherently unsuitable" since this would house together both security intelligence and foreign intelligence.

[93] While recognizing changes in the diplomatic and technological world, the Government response also recognized and asserted the important jurisdiction of Parliament to legislate on important policy questions of national security:

> Canada's own foreign intelligence collection resources, coupled with existing intelligence-sharing arrangements with allies, meet national foreign intelligence requirements. But if the international environment evolves to the point where existing arrangements can no longer fully meet national requirements, the Government will have to assess carefully what alternative arrangements might be needed.

> (Solicitor General of Canada, *On Course: National Security for the 1990s—The Government's Response to the Report of the House of Commons Special Committee on the Review of the Canadian Security Intelligence Act and the Security Offences Act* (February 1991) at 57 (Pierre H. Cadieux – Solicitor General).)

(vii) The Government's Interest in a Foreign Intelligence Agency (2006–2007)

[94] Starting in 2006, the Government entertained the possibility of creating a foreign intelligence agency tasked with collecting political, military and economic intelligence abroad. The Proceedings of the Standing Senate Committee on National Security and Defence, Chaired by Senator Colin Kenny, was tasked with examining intelligence issues and specifically foreign intelligence. As a witness before the Committee, Mr. Reid Morden, a former Director of the Canadian Security Intelligence Service and Deputy Minister of Foreign Affairs, discouraged the creation of a stand-alone foreign intelligence agency, but recommended instead the removal of the "within Canada" limitation in section 16:

> **Mr. Reid Morden:** A fairly simple model would be to establish a separate and self-contained branch within CSIS, which would be able to utilize its existing personnel training and administrative infrastructure and would then reap efficiency and cost benefits and speed the coming on stream of the responsibilities, while at the same time not foreclosing any ultimate options or independence of a dedicated foreign intelligence collection organism.
>
> Last, any new body will require a legislative base. Section 16 of the CSIS Act permits that service to collect intelligence within Canada, specifically requested by the Ministers of National Defence and Foreign Affairs. CSIS officers have therefore developed over the past 20-plus years considerable expertise in foreign and defence-related intelligence. Simple removal of the words "within Canada" from section 16 of the *CSIS Act* would transform that mandate to one fully responds to Canada's foreign intelligence collection needs. (Emphasis mine)

> (Senate of Canada, *Minutes of Proceedings and Evidence of the Standing Senate Committee on National Security and Defence*, 39th Parl, 1st Sess, No 13 (March 26 2007) at 42 (Chairperson: Colin Kenny).)

[95] As discussed earlier, the Government, however, did not create a stand-alone foreign intelligence agency, and preferred to eventually vest the Service with more powers to operate abroad at a later date. This is further exemplified by the exchange between the Member of Parliament Laurie Hawn and the Minister of Public Safety, the Honourable Stockwell Day:

> **Mr. Laurie Hawn:** […] In my view, one of the limitations we have in Canada in terms of national security is the lack of foreign intelligence-gathering capability that we used to have and we don't anymore. I know the government has talked about establishing a Canadian foreign intelligence agency of some sort. I'm wondering if that's still in the books.
>
> In hopes that the answer is yes, will it be part of a CSIS mandate, or are we looking at a separate organization?
>
> **Hon. Stockwell Day:** We looked at it, and we were public about the fact, even in the last federal campaign, that there needed to be increased capacity for Canada to be protected by acquiring foreign intelligence. The two approaches to that were, one, to set up a separate agency; and two, to make some changes to the CSIS Act, to enhance their ability to collect information in certain situations, all according to the law, of course, in foreign fields.
>
> The research we've done, the discussions we've had with a variety of groups, lead us to think that starting a separate agency would not be in our best interests. […]
>
> So what you're going to see, in our discussions with CSIS and with other of our partners on foreign fields, we will have the ability to change legislation, subject to obviously what this committee and Parliament says, that will enhance the ability for CSIS to gather information without having to create a separate silo and a separate agency. After some months of looking at, this is a direction that we believe is the best way to go, and having determined that, we'll be presenting for consideration at some point, whether it's spring or

> fall, our approach to that, and hopefully get some good advice from this committee on what they think of that. (Emphasis mine)
>
> (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Public Safety and National Security,* 39th Parl, 1st Sess, No 44 (May 15 2007) at 11 (Chairperson: Garry Breitkreuz).

[96] As mentioned above, legislative amendments to the *CSIS Act* were only passed in a subsequent Parliament. As seen earlier, when Bill C-44 was enacted in 2015, it made changes to sections 12, 15(1), and 21 of the *CSIS Act* to explicitly authorize the Service to "perform its duties and functions […] within or outside Canada." As noted before, what is crucial to this historical analysis of the foreign intelligence function is that no similar extraterritorial powers were extended to section 16 collection.

(viii) The SIRC Annual Report *2012–2013:* Bridging the Gap

[97] In the 2012–2013 SIRC Annual Report, SIRC cautioned the Service's use of CSE foreign intelligence collection authority in the context of section 16 investigations, echoing the 1990 Government Response to the Report of the House of Commons Special Committee on the Review of the *CSIS Act*, which recognized the inherent unsuitability of combining in one agency both security intelligence and foreign intelligence functions:

> Section 16 of the *CSIS Act* defines foreign intelligence as any information about the capabilities, intentions or activities of a foreign state, foreign national or foreign organization (i.e. non-threat-related information). By contrast, section 12 of the *CSIS Act* defines security intelligence as information and intelligence related to "threats to the security of Canada." Despite considerable cooperation with CSEC on foreign intelligence collection activities within Canada, there remained some internal debate within the Service about the extent to which these activities negatively impact

> CSIS's primary mandate to collect security intelligence. As a result of the varying accounts provided by CSIS on this issue, SIRC cautioned the Service to be prudent when deciding the extent to which it continues to seek CSEC's assistance in the Section 16 process. Unless changes to the *CSIS Act* are made, CSEC, not CSIS, remains the organization primarily mandated with providing the Government of Canada with foreign intelligence information.
>
> (Security Intelligence Review Committee, *SIRC Annual Report of 2012–2013*, (Ottawa: Public Works and Government Services Canada: 30 September 2013) at 16.)

(ix) Bill C-44: *Protection of Canada from Terrorists Act*

[98] As mentioned above, Bill C-44 was adopted in 2015 to clarify in part the extraterritorial powers of the Service. Michel Coulombe, the former CSIS Director, stated in answer to a question from a member of the Standing Committee on Public Safety and National Security:

> **Hon. Wayne Easter:** […] I think probably the nub of the issue, in terms of this bill, is the substantive changes to CSIS on its extraterritorial activities, if I could call it that. The deputy or head of CSIS can correct me if I'm wrong, but I think originally when CSIS came in it was envisioned that we'd depend on our foreign relations or liaisons relations with other countries to provide us information, and that's how we'd operate, rather than having agents abroad. In today's reality the world has changed. We're dealing with a stateless world to some regard.
>
> Doesn't this bill, in terms of CSIS now give wide extraterritorial applications for Canadian judicial decisions abroad in how we operate? […]
>
> In this bill, if I can put it this way, with judicial decisions, judges authorizing certain activities for CSIS abroad aren't we now getting into extraterritorial application what CSIS does from where we were.
>
> **Mr. Michel Coulombe:** First of all, in terms of CSIS conducting activities outside Canada — and you talked about the McDonald commission but I'm not going to quote it — I'm pretty sure the report does talk about the creation of CSIS and that you would

> have to be very careful, but they were already seeing the possibility that we would have to do this. It has always been our understanding that we have that authority. That's why this is just clarification, making it explicit in the act that we can do what we've been doing for 30 years, because that was the interpretation of… If you look at section 16, there's a clear restriction: it's within Canada, which you do not find in section 12. (Emphasis mine)
>
> (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Public Safety and National Security*, 41st Parl, 2nd Sess, No 40 (24 November 2014) at 13 (Chairperson: Daryl Kramp).)

[99] As can be seen by this historical overview of the extrinsic sources, offered in paragraphs 73 to 99 above, Canadian policy makers have waffled throughout the years between permitting and restricting the extraterritoriality of section 16. However, the evidence reveals through the years a consistent line of thought concerning Parliament's intention regarding the territorial scope of section 16. By way of summary, in 1981, the McDonald Commission opened the door to the idea of a security intelligence agency with extraterritorial powers. However, in 1983, the extraterritoriality of foreign intelligence collection was completely rejected by the *Pitfield Report*, which explicitly stated that the collection should be restricted to within Canada. Consequently, in 1984, Bill C-9 established the *CSIS Act* and section 16, as we know it now. In 1989, when SIRC recommended removing the extraterritorial restriction for supposedly unduly restricting the foreign intelligence function of the Service, the Government responded in 1991 that the removal of the restriction would be inherently unsuitable since it combined under the same roof security intelligence and foreign intelligence. In 2007, the Minister of Public Safety, indicated before the Standing Committee on Public Safety and National Security, the idea of introducing or at least studying legislation that would enhance the Service's ability to gather foreign intelligence abroad. No such legislative amendments were made. In 2015, Bill C-44

amended the territorial scope of sections 12, 15, and 21 of the *CSIS Act* to explicitly authorize the Service to perform its duties and functions "within or outside Canada" while leaving section 16 untouched.

[100] The words and actions of government representatives, important actors in the national security community and oversight bodies demonstrate that Parliament preserved a steady and constant line of thought on the territorial scope of section 16. Throughout the years, even though serious and credible voices recommended the removal of "within Canada" from section 16, Parliament consistently and steadily reconfirmed its intention to restrict foreign collection to within Canada. Based on the foregoing, I conclude that the "within Canada" limitation in section 16 reflects the clear intention of Parliament to ensure that the collection of foreign information and intelligence occurs solely in Canada.

(3) The Purposive Approach

[101] The textual meaning and the contextual analysis have already given us valuable insight that I shall refer to during the following analysis. The purposive approach requires the interpreter to consider the interaction between the language of the interpreted section and of the statute as a whole with the purpose of its enactment by Parliament. In other words, this requires the interpreter to look at what Parliament was trying to achieve when enacting the statute. Ultimately, any proposed interpretation must be within the ambit of what Parliament had intended the legislation to achieve.

[102] Through section 16, the Service has been clearly given the power to collect information on foreign states in assistance to ministers of the Crown. To better understand the purpose of foreign intelligence, I thought it pertinent to reproduce the following general definition:

> In relation to the defence of Canada or the conduct of the foreign affairs of Canada, foreign intelligence is information and analysis relating to the capabilities, intentions, or activities of a foreign state, person, or organization. It includes data of a political, economic, military, security, technological or social nature, obtained from overt as well as covert sources. Its purposes are to protect Canada's interests, to facilitate the foreign and defence policy process, and to provide advantage in the pursuit of overall foreign and defence policy objectives.
>
> (Canadian Security Intelligence Service Publication, *Intelligence and Policy: What Is Constant? What Is Changing?*, by Blair Seaborn, Commentary no 45 (Ottawa: Public Safety and Emergency Preparedness, June 1994).)

[103] To fully understand if the Service's proposed [redacted] is supported by a purposive interpretation of section 16, it will be first necessary to clearly articulate factually the impugned activity in the applied-for warrant. The Service proposes to

[redacted]

[redacted]

[104] The Attorney General argues that a strict and literal interpretation of "within Canada" would prevent the collection of any information with a foreign dimension. She argues that the Court should adopt a purposive interpretation of section 16 that supports the presence of an extraterritorial dimension when providing assistance "within Canada." She contends that this purposive interpretation supports [redacted] She then submits four arguments to support this claim, first that Canada has a material interest in the activity. Second that Parliament would have not intended to create such a foreign intelligence gap. Third that advances in technology have made section 16 obsolete or inoperable; and, finally that [redacted] has evolved since the enactment of section 16.

[105] The *amicus* rejects the Attorney General's purposive interpretation by arguing that it amounts to legislative rewriting, especially considering Parliament's recent amendments to the territorial scope of the *CSIS Act*. The *amicus* argues that the Attorney General is requesting the Court to read-in at section 16, what Parliament has recently clarified statutorily in other sections of the *CSIS Act*.

[106] I will first address the Attorney General's argument that a strict and literal interpretation of "within Canada" would prevent the collection of any information with a foreign dimension.

I agree with the Attorney General that Parliament did not intend to rid section 16 of the power to collect information with a foreign dimension considering this section gives the Service the mandate to collect foreign intelligence. However, I disagree with the framing of the problem by the Attorney General. The issue at hand is not the fact that [redacted] with a foreign dimension, they clearly are. Rather, it is [redacted]

(a) *Canada's Material Interest in the Information to be* [redacted]

[107] The Attorney General argues that Canada has a material interest in the activity, which supports a purposive interpretation of section 16. Specifically, that the targets of the warrant are [redacted] While the *amicus* does not deny Canada's material interest in the activity, he argues that it is not relevant to the interpretation of the geographical limitation "within Canada."

[108] I agree with the Attorney General that Canada has a material interest in the information to be [redacted] However, the fact that Canada has a material interest in the activity is not the sole factor to consider in determining if the geographical expression "within Canada" restricts totally or permits some extraterritorial action. As a hypothetical example, [redacted]

[redacted]

[109] The Attorney General argues that technological developments have made section 16 obsolete or inoperable [redacted] The interpretation put forward by the Attorney General seems to indicate that because Canada has a material interest in the information [redacted] This interpretation seems completely contrary to the intention of Parliament that the collection occur "within Canada" and thus not on foreign soil. [redacted]

[110] [redacted] I will fully elaborate below on this point, but for the moment I will reiterate the evidence outlined in paragraph 12 above, which implies that [redacted]

[111] Can statutory interpretation bring me to overlook the fact that [redacted] Even in a purposive interpretative analysis, Canada's material interest in [redacted] cannot eclipse the clear and intentional wording of section 16. I cannot ignore the fact that [redacted] I must interpret the words of a statute realistically; the material interest argument in itself cannot through a legal fiction permit me to adhere to the theory that [redacted]

(b) *The Perceived Foreign Intelligence Gap*

[112] The Attorney General submits that Parliament could not have intended a foreign intelligence gap to exist as section 16 was enacted to fill such a gap. [redacted] is created. She supports her argument by stating that CSE, which also has a foreign intelligence function, is statutorily prohibited from collecting intelligence from any person in Canada and that CSE can only collect foreign intelligence if the target is located outside Canada. [redacted]

[redacted]

[113] To correctly address this argument it is necessary to lay out the Communication Security Establishment's ("CSE") mandate in relation to section 16 of the *CSIS Act*. The CSE also like the Service has a foreign intelligence mandate. CSE acquires and uses information from the global information infrastructure for the purpose of providing foreign intelligence to the Government of Canada. However, CSE is restricted from directing its collection activities at Canadians or individuals in Canada or at entities located in Canada.

Mandate	**Mandat**
273.64 (1) The mandate of the Communications Security	273.64 (1) Le mandat du Centre de la sécurité des télécommunications est le suivant :
(a) to acquire and use information from the global information infrastructure for the purpose of providing foreign intelligence, in accordance with Government of Canada intelligence priorities;	a) acquérir et utiliser l'information provenant de l'infrastructure mondiale d'information dans le but de fournir des renseignements étrangers, en conformité avec les priorités du gouvernement du Canada en matière de renseignement;
(b) to provide advice, guidance and services to help ensure the protection of electronic information and of information infrastructures of importance to the Government of Canada; and	b) fournir des avis, des conseils et des services pour aider à protéger les renseignements électroniques et les infrastructures d'information importantes pour le gouvernement du Canada;
(c) to provide technical and operational assistance to federal law enforcement and security agencies in the performance of their lawful duties.	c) fournir une assistance technique et opérationnelle aux organismes fédéraux chargés de l'application de la loi et de la sécurité, dans l'exercice des fonctions que la loi leur confère.
Protection of Canadians	**Protection des Canadiens**
(2) Activities carried out under paragraphs (1)(a) and (b)	(2) Les activités mentionnées aux alinéas (1)a) ou b) :

(a) shall not be directed at Canadians or any person in Canada; and

[…]

Limitations Imposed by Law

(3) Activities carried out under paragraph (1)(c) are subject

to any limitations imposed by law on federal law enforcement and security agencies in the performance of their duties.

Ministerial Authorization

273.65 (1) The Minister may, for the sole purpose of obtaining foreign intelligence, authorize the Communications Security Establishment in writing to intercept private communications in relation to an activity or class of activities specified in the authorization.

Conditions for authorization

(2) The Minister may only issue an authorization under subsection (1) if satisfied that

(a) the interception will be directed at foreign entities located outside Canada

[…]

(c) the expected foreign intelligence value of the information that would be derived from the interception justifies it; and

d) satisfactory measures are in place to protect the privacy of Canadians and to ensure that private communications will only be used or retained if they are essential to international affairs, defence or security.

a) ne peuvent viser des Canadiens ou toute personne au Canada;

[…]

Limites

3) Les activités mentionnées à l'alinéa (1)c) sont assujetties

aux limites que la loi impose à l'exercice des fonctions des organismes fédéraux en question.

Autorisation ministérielle

273.65 (1) Le ministre peut, dans le seul but d'obtenir des renseignements étrangers, autoriser par écrit le Centre de la sécurité des télécommunications à intercepter des communications privées liées à une activité ou une catégorie d'activités qu'il mentionne expressément.

Conditions

(2) Le ministre ne peut donner une autorisation que s'il est convaincu que les conditions suivantes sont réunies :

a) l'interception vise des entités étrangères situées à l'extérieur du Canada;

[…]

c) la valeur des renseignements étrangers que l'on espère obtenir grâce à l'interception justifie l'interception envisagée;

d) il existe des mesures satisfaisantes pour protéger la vie privée des Canadiens et pour faire en sorte que les communications privées ne seront utilisées ou conservées que si elles sont essentielles aux affaires internationales, à la défense ou à la sécurité.

(Emphasis mine) (Mes soulignés)

[114] By creating CSE as having a primary jurisdiction to collect foreign signals intelligence abroad, Parliament could not have intended the Service to have the same wide powers at section 16. This is further supported by the 1991 Parliamentary Review of the *CSIS Act* cited above, where the inherent unsuitability of housing both security intelligence and foreign intelligence collection powers together was acknowledged. Moreover, the fact that CSE and CSIS are two separate organizations reinforces the need for separate and not overlapping mandates. In other words, Parliament could not have intended section 16 to be interpreted largely to include activities that require [redacted] which clearly falls under CSE's mandate.

[115] The "within Canada" restriction found at section 16 has always created a foreign intelligence gap, in the sense that the Service was always barred from collecting information not in Canada. [redacted] The geographical limitation has always created a gap in the collection powers, which I acknowledge has been exacerbated by technological advances [redacted]

[116] I conclude that, although this is far from an ideal situation for the Service, the foreign intelligence gap is not apparent enough for me to adhere to the purposive interpretation proposed

by the Attorney General. I cannot depart from Parliament's clear intention to limit section 16 collection activities to within Canada.

(c) *The Changing Nature of* [redacted]

[117] The Attorney General submits that technology has developed since the adoption of section 16 [redacted]

[118] Given the historical observations laid out above, what is clear is that Parliament intended to grant the Service, through section 16, a limited secondary mandate to collect foreign intelligence to assist the respective Ministers. The geographical limitation's purpose was to bar the Service from conducting CIA-like controversially aggressive "covert" and "offensive" activities abroad. Enabled under the *National Security Act of 1947*, the CIA is a civilian agency of the American Federal Government which is tasked with gathering and analyzing overseas national security information. The CIA is authorized by law to carry out covert action abroad on foreign soil. Alluding to the Canadian Parliamentarians' concerns about a CIA-like agency, the Pitfield Report clearly stated that CSIS's foreign intelligence function was not the first step in the

creation of a security intelligence service that would act abroad. What is absolutely clear is that Parliament did not intend section 16 to open the door to interpretations permitting covert foreign intelligence operations abroad.

[119] Furthermore, the historical observations also revealed that the inclusion of a geographical limitation was aimed to mitigate the political, diplomatic and moral risk of conducting foreign intelligence collection, which had the potential to breach international law, foreign domestic law and bring disrepute to Canada's international reputation and defence policies (House of Commons, Special Committee on the Review of the Canadian *Security Intelligence Service Act and Security Offences Act, "In Flux But Not In Crisis"—Report of the Special Committee on the Review of the CSIS Act and Security Offences Act*, (September 1990) at 41–42 (Chairperson: Blaine Thacker).

[120] Protecting Canada's reputation and diplomatic relationships have always been an important consideration in the context of national security legislation. In the context of security intelligence, the Supreme Court of Canada has noted the importance of maintaining good foreign relations. In *Ruby* and *Charkaoui I*, the Court stated that the non-disclosure of sensitive information obtained in confidence from foreign governments and institutions constitutes a pressing and legitimate objective to preserve Canada's supply of security information. Confidentiality is therefore necessary to protect information critical to diplomacy, intelligence, and security (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 68; *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at para 44). The Supreme Court in *Ruby* explained the following:

> **44** The mandatory *ex-parte in camera* provision is designed to avoid the perception by Canada's allies and intelligence sources that an inadvertent disclosure of information might occur, which would in turn jeopardize the level of access to information that foreign sources would be willing to provide. In her reasons, Simpson J, reviewed five affidavits filed by the respondent from CSIS, the RCMP and the Department of National Defence ("DND"), and two from the Department of External Affairs ("DEA"). These affidavits emphasize that Canada is a net importer of information and the information received is necessary for the security and defence of Canada and its allies. […]
>
> > Canada is not a great power. It does not have the information gathering and assessment capabilities of, for instance, the United States, the United Kingdom or France. Canada does not have the same quantity of quality of information to offer in exchange for the information received from the countries which are our most important sources. If the confidence of these partners in our ability to protect information is diminished, the fact that we are a relatively less importance source of information increases our vulnerability to having access to information cut off.

[121] Moreover, section 17(1)(b) of the *CSIS Act* permits the Service with the approval of the Minister of Foreign Affairs to enter into an arrangement or otherwise cooperate with the government of a foreign state to share or receive security and foreign intelligence. Preserving Canada's international reputation does not only aim to ensure good diplomatic relations with foreign states, but helps build confidence that Canada can protect sensitive information that it receives from international partners.

[122] By explicitly restricting foreign intelligence collection to Canada, Parliament confirmed its intention to limit the risk of damaging diplomatic and political relationships with foreign states. Put differently, collecting foreign intelligence outside Canada was deemed to be too high

of a risk to our diplomatic relations by Parliament to be permitted in law. The geographical restriction represents Parliament's intention to find middle ground between Canada's interest in obtaining high-quality foreign intelligence at home and abroad with Canada's interest in protecting our diplomatic relations and international reputation. In light of this, I agree with the *amicus* that technological advances [redacted] which could in turn damage our diplomatic relations, run contrary to Parliament's intention to limit the collection to "within Canada" which aimed to limit the risk of a diplomatic fallout.

[123] The actions proposed within the applied-for warrant amount to [redacted] I have trouble believing that if [redacted] this would somehow not damage Canada's political or diplomatic reputation internationally.

[124] As mentioned earlier, Canada receives security and foreign intelligence provided by allied nations. Protecting Canada's foreign relations ensures the uninterrupted flow of such intelligence and information. These important policy considerations to protect Canada's international reputation remain rooted in the purpose of the *CSIS Act*.

(d) *Technological Advances:* [redacted]

[125] The Attorney General also contends that [redacted]

[redacted] The *amicus* responds that the Attorney General's arguments on section 16's inoperability would be better directed at Parliament to amend the *CSIS Act.*

[126] The Attorney General argues that legislation must be interpreted in light of contemporary technology while transposing these legislative terms to give them a modern-day sense, which takes into account changes in the technological environment [redacted]

[127] I do not deny the importance of interpreting a statute in light of contemporary technology and transposing legislative terms to give them a modern-day sense. Nor do I think it is realistic for Parliament to enact legislation every time there is a technological change. In my opinion, this would run against the interest of Canadians and the good administration of justice. However, it is important to understand the context in which warrants are granted under the *CSIS Act*. The execution or existence of the warrant does not come to the attention of the person or organization who is the subject of interception. Unlike warrants under the *Criminal Code*, the *CSIS Act* does not require the subject of the warrant to be notified. Furthermore, in the larger context of national security where *ex-parte* proceedings are not unusual, Canadians may only rely on the words of statutes and redacted jurisprudence to get a glimpse into this area of the law. In light of

transparency, the textual meaning of words thereby acquire a whole new level of importance in this context. Canadians should be able to understand the scope of the Service's power through a reading of the *Act*.

[128] Ultimately, the real-world effects of the Attorney General's purposive interpretation could open the door to [redacted] which was clearly not the purpose Parliament had anticipated for section 16. I reject the Attorney General's purposive interpretation and I agree with the *amicus* that Parliament would not, without express wording, have authorized the Service to [redacted]

[129] I must also flatly reject the Attorney General's argument that Parliament could not have anticipated the changing nature of [redacted] and how modern technology is used [redacted] As mentioned above, in 2015 Bill C-44 added extraterritorial powers to sections 12, 15, and 21 of the *CSIS Act*. In 2015, I can only presume that Parliament was aware that technological advances and the way [redacted] had evolved since the *CSIS Act's* enactment in 1984, when it decided to leave section 16 unchanged.

[130] That is to say, the purposive interpretation suggested by the Attorney General is not supported by the clear intent of Parliament demonstrated by the historical observations. [redacted] Canada's material interest in the information sought, and the perceived gap in foreign intelligence collection cannot compel

me in my judicial function to ignore the clear words of the statute. These arguments may provide compelling reasons to amend the *CSIS Act*, but do not persuade me to adopt the interpretation advanced by the Attorney General.

[131] The purpose of section 16's enactment in 1984 does not support "within Canada" [redacted] As mentioned above, when interpreting the *CSIS Act*, a judge must be deferential to its strict limitations. The wording of section 16 is clear; the expression "within Canada" is restrictive and does not permit [redacted] The Service's assistance must be conducted within Canada.

(4) The Presumption of Conformity with International Law

[132] Although not addressed directly or discussed substantively by the Attorney General, and even though the principles of international law are not determinative in this case, I find it important to nonetheless discuss them below. In *R v Hape*, 2007 SCC 26 ["*Hape*"], writing for the majority, LeBel J. canvassed the principles of customary international law, and how these principles can restrict the actions states may legitimately take outside their borders when relying on parliamentary mandated activities.

[133] First, LeBel J begins his reasoning by stating that unless Parliament clearly indicated otherwise, customary international law is adopted directly into Canadian domestic law through the common law without any need for legislative action (*Hape* at paras 35 – 39):

> **39** […] In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law. (Emphasis mine)

[134] Second, LeBel J stated that the principle of respect for sovereignty and equality of foreign states are foundational parts of customary international law. Sovereignty refers to the powers, rights and duties that accompany statehood, such as the notion of jurisdiction to exercise authority over people's conduct and events, and to use and depose of the state's territory (*Hape* at paras 40 – 46). LeBel J went on to explain that sovereignty and equality mandate the non-intervention and the respect for the territorial sovereignty of all foreign states:

> **45** In order to preserve sovereignty and equality, the rights and powers of all states carry correlative duties, at the apex of which sits the principle of non-intervention. Each state's exercise of sovereignty within its territory is dependent on the right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference. This principle of non-intervention is inseparable from the concept of sovereign equality and from the right of each state to operate in its territory with no restrictions other than those existing under international law. […]

[135] Third, LeBel J went on to explain that international comity, although not a legal obligation, can serve as an interpretive principle. Comity is a combination of "informal acts performed and rules observed by states in their mutual relations out of politeness, convenience

and goodwill" (*Hape* at paras 47 – 52). By adhering to this principle, the interpreter should avoid interpretations that could impact or infringe the sovereignty of a foreign state out of deference and respect for a state's action legitimately taken within its borders. LeBel J explains the following:

> **50** […] International law is a positive legal order, whereas comity, which is of the nature of a principle of interpretation, is based on a desire for states to act courteously towards one another. Nonetheless, many rules of international law promote mutual respect and, conversely, courtesy among states requires that certain legal rules be followed. In this way, "courtesy and international law lend reciprocal support to one another": M. Akehurst, "Jurisdiction in International Law" (1972–1973), 46 Brit. Y.B. Int'l L. 145, at p. 215. The principle of comity reinforces sovereign equality and contributes to the functioning of the international legal system. Acts of comity are justified on the basis that they facilitate interstate relations and global co-operation; however, comity ceases to be appropriate where it would undermine peaceable interstate relations and the international order.

[136] Fourth, LeBel J reaffirmed the well-established principle of statutory interpretation that legislation is presumed to conform to international law, unless clearly contradicted by an Act of Parliament. In the Supreme Court's words:

> **53** […] The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and

> principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation. (Emphasis mine)

[137] Similar to the presumption of conformity, the presumption against the extraterritoriality is a rebuttable common law presumption, which is grounded in the respect of a foreign state's jurisdiction over its territory (see *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077). The presumption stands for the notion that "[t]he legislature is presumed to intend the territorial limits of its jurisdiction to coincide with that of the statute's operation" (PA Côté 2011, above, at 212).

[138] *In Society of Composers, Authors and Music Publishers in Canada v Canada Association of Internet Providers*, 2004 SCC 45 ["*SOCAN"*], the Supreme Court reiterated the importance of the presumption, but emphasized its rebuttable nature in the presence of clear wording to the contrary:

> **54** While the Parliament of Canada, unlike the legislatures of the Provinces, has the legislative competence to enact laws having extraterritorial effect, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary. This is because "[i]n our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected"; see *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1051, per La Forest J.
>
> **55** While the notion of comity among independent nation States lacks the constitutional status it enjoys among the provinces of the Canadian federation (*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1098), and does not operate as

> a limitation on Parliament's legislative competence, the courts nevertheless presume, in the absence of clear words to the contrary, that Parliament did not intend its legislation to receive extraterritorial application. (Emphasis Mine)

[139] Lastly, in *Hape*, LeBel J set out the different types of jurisdiction applicable to the question of extraterritoriality of laws. Particularly important to the case at hand, is the concept of enforcement jurisdiction, which is described as the State's power to use coercive means to uphold and give effect to its domestic laws. Under the umbrella of enforcement jurisdiction, is found the investigative jurisdiction, which refers to the power of law enforcement to investigate matters as to give effect and uphold a state's domestic law (*Hape* at para 58). In customary international law states may not exercise their enforcement jurisdiction in any form on the territory of another state unless based on an international custom or convention. If a state does not obtain consent for exercising its powers on a foreign states territory, such an act would constitute a violation of territorial sovereignty and international law. Therefore, any extraterritorial application of a domestic law in a foreign country, without permission or without ground in international law, can be seen as a violation of territorial sovereignty. As stated by LeBel J in *Hape*:

> **65** The Permanent Court of International Justice stated in the Lotus case, at pp. 18–19, that jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention". See also Cook, at para. 131. According to the decision in the Lotus case, extraterritorial jurisdiction is governed by international law rather than being at the absolute discretion of individual states. While extraterritorial jurisdiction […] exists under international law, it is subject to strict limits under international law that are based on sovereign equality, non-intervention and the territoriality principle. According to the principle of non-intervention, states must refrain from exercising extraterritorial enforcement jurisdiction over matters in respect of which another state has, by virtue of territorial

> sovereignty, the authority to decide freely and autonomously (see the opinion of the International Court of Justice in the Case concerning Military and Paramilitary Activities In and Against Nicaragua, at p. 108). Consequently, it is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law. See Brownlie, at p. 306; Oppenheim's International Law, at p. 463. This principle of consent is central to assertions of extraterritorial enforcement jurisdiction.

[140] In interpreting the territorial scope of section 12, Blanchard J, in the above cited *CSIS (Re) 2008*, canvassed the issue of enforcement or investigative jurisdiction in the context of security intelligence collection by the Service. The requested warrant powers at issue in that case concerned extraterritorial activities directed at the collection of information by CSIS in a foreign state. Applying the Supreme Court's reasoning in *Hape,* Blanchard J ruled that the Court could not issue a warrant because Parliament had not given the Service the extraterritorial power to conduct activities abroad. As explained, such a warrant would breach international law since the intrusive intelligence collection activities contemplated in the warrant would clearly infringe the domestic laws of the foreign country. Moreover, without explicit permission from the host country, the investigative activities would likely violate the principles of territorial sovereign equality, non-intervention and the comity of nations, which have evolved to protect states from interference from other states (*CSIS (Re) 2008* at paras 42 – 53). In refusing the warrant, Blanchard J stated: "[t]o do so would require that I read into the applicable provisions of the Act, a jurisdiction for the Court to authorize activities that violate the above stated principles of customary international law. As stated earlier in these reasons, such a mandate must be expressly provided for in the Act" (*CSIS (Re) 2008* at para 55).

[141] [redacted] What is necessary to determine in the case before us, is whether this Court has the statutory authority given by Parliament to issue a warrant that could [redacted]

[142] Although not determinative to the present issues, the above mentioned principles of customary international law must be drawn upon to inform my analysis of the territorial scope of section 16. As mentioned above, the principle of comity of nations is grounded in the respect for every state's dignity. The principle also facilitates interstate relations and global co-operation. Yet, Parliament can legislate to violate international law and purposively offend the comity of nations, but must do so clearly. Therefore, unless clearly stated, Canadian legislation is presumed to conform with international law. The interpretation presented by the Attorney General of "within Canada" undermines interstate relationships and cannot be said to conform with the principle of comity of nations. This is especially important considering our finding that the expression "within Canada" was added to mitigate the risk of damaging Canada's international relationships.

[143] It would also be safe to assume that a foreign state's domestic legislation would not permit [redacted] I can also assume that a foreign state's domestic legislation would clearly not permit [redacted] However, what is unclear in international law is the legality of [redacted] Would this

constitute an extraterritorial application of jurisdiction to enforce and consequently breach a state's territorial sovereignty?

[144] [redacted] To answer this question, it will be necessary to consider the above mentioned principles of the territorial sovereignty to determine if [redacted] would breach another nation's sovereignty.

[145] [redacted]

[146] Furthermore, it would be antithetical to section 16's purpose of providing [redacted] to the Minister if the Service was required to [redacted] Parliament could not have intended "within Canada" to silently open the door to the violation of the territorial sovereignty of another state.

[147] Absent express statutory authority which displaces or creates an exception to the existing "within Canada" requirements in section 16, the presumption of conformity to customary international law, must inform my interpretation of section 16. By adhering to the Attorney General's argument that "within Canada" has an extraterritorial dimension I would need to turn a blind eye to settled principles of international law. Considering these above mentioned principles [redacted] As is the case for the issuance of threat related warrants at section 21(3.1), Parliament has not given judges the authority to authorize CSIS to violate the laws of a foreign state at section 16.

[148] I agree with the *amicus* that the evidence reproduced above at paragraph 12 supports the conclusion that [redacted]

[149] Lastly, the explicitness of "within Canada" does not, in my opinion, rebut the presumption against extraterritoriality. This finding is reinforced by the 2015 amendments to the *CSIS Act.* There is an express textual difference between the geographical scope of the expression "within Canada" and "within or outside Canada." I agree with the *amicus* that the express extraterritorial permission in section 12 and the express territorial restriction in section 16 were intended by Parliament to mark a meaningful distinction between the geographic scopes of the Service's different mandates. I cannot find support for the contention that "within Canada" was meant to rebut the presumption against extraterritoriality.

VII. [redacted]

[150] The Attorney General argues that [redacted] The *amicus* counters by arguing that [redacted] and thus, the *CSIS Act* does not give jurisdiction to the Court to authorize the warrant. He highlights that [redacted] He also highlights the affiant [redacted] testimony (see paragraph 12 of these reasons), where she attests to the fact that [redacted] This supports the

conclusion that, [redacted]

[151] The fundamental question before the Court is one of jurisdiction. Does the *CSIS Act* give the Court jurisdiction to authorize such activities in a warrant? [redacted] With the clear wording of section 16 as seen above, can this Court assume jurisdiction [redacted]

A. [redacted] *interpreting section 16 of the CSIS Act?*

[152] [redacted]

[redacted]

[153] [redacted] Importantly, the Act defines at section 2 a threat as "within or relating to Canada". Furthermore, he argues that section 12 is inherently defensive; it engages Canada's right to defend itself from threat from within and from outside of Canada. [redacted] (1) Canada cannot rely on the concept of self-defence in section 16 collection, (2) there is no need to resort to the implied doctrine of international law because Parliament has been express and (3) as mentioned above Parliament intended to draw a distinction in the geographic scope between section 12 and section 16.

[154] I agree with the *amicus*, firstly, that the statutory mandates set out in sections 12 and 16 are dramatically different, section 12 is inherently offensive and defensive; it engages Canada's right to defend itself from threats from within and outside of Canada. Secondly, the Act defines section 12 threats as "within or relating to Canada", which certainly opens the door to a possible extraterritorial intent. Thirdly, as seen above, the previous version of section 12 was silent as to geographical limitations; the express extraterritorial permission now found in section 12 and the express territorial restriction in section 16 were intended, by Parliament, to mark a meaningful distinction between their respective geographic scopes. Section 12's prior ambiguity as to its geographic restriction does not amount to express restriction, such as is found expressly in

section 16. [redacted]

B. *Should the Court consider* [redacted]

[155] [redacted]

[156] [redacted]

[157]

[158]

[159] [redacted]

[160] [redacted]

[161] [redacted] Nor do these aforementioned cases' legislative and jurisprudential histories dictate a restrictive interpretation such as required by the *CSIS Act*. Interpretative principles specific to each statutory regime are fundamental considerations to a proper contextual analysis. Take for example, Canadian copyright jurisprudence, which has recognized balance between creators and users of copyrighted material as a guiding principle when interpreting words of the *Copyright Act* (*Théberge v Galerie d'art du Petit-Champlain Inc*, [2002] 2 SCR 336). Or for example, the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness for all taxpayers (*Canada Trustco Mortgage Co v R*, 2005 SCC 54; [redacted]

[162] [redacted]

[redacted]

[163] [redacted]

[164] [redacted]

[165]

[166]

[167] The express restriction found in section 16 cannot possibly permit a judge to authorize the same result as had occurred in relation to section 12.

C. *Would the Service, be acting "within Canada"?*

[redacted]

[170] [redacted]

[171] [redacted]

would certainly be inconsistent with the purpose anticipated by Parliament when enacting section 16. [redacted]

[redacted]

VIII. CONCLUSION

[172] As mentioned above, the correct interpretation of the expression "within Canada" is "only in Canada"; anything else would amount to the Court legislatively rewriting this section. I conclude that [redacted] Thus, the Court does not have jurisdiction to issue the applied-for warrant to authorize [redacted]

[173] I am cognizant of the fact that technology and the way [redacted] evolved dramatically since the adoption of section 16 in 1984. [redacted]

[174] We are not interpreting individual *Charter* rights in this application. We are interpreting intrusive state powers that have been carefully calibrated by Parliament with guidance from the judiciary to be constitutionally compliant. As mentioned above, if section 16 needs a broader scope to effectively assist the Ministers, the Service should turn its eyes to Parliament, which is the appropriate forum to address the "gap" identified by the Attorney General.

[175] I am not permitted to grant warrants for extraterritorial activities when Parliament has clearly not given me the power under my warrant jurisdiction to do so. I am very concerned that the interpretation put forward by the Attorney General could open the door to other activities not intended by Parliament. Permitting such activities that have not been publicly debated in Parliament and without strict judicial and legislative controls would not be consistent with Parliament's past approach to the *CSIS Act*.

[176] It is Parliament, not a court of law, that should be tasked with determining these multifaceted policy questions that have an impact far beyond our borders. Parliament has the proper authority to balance competing interest such as effective law enforcement and national security powers, questions of national sovereignty and comity of nations, as well as policy issues related to internet commerce and the privacy rights. With the fast pace of digitization, legal issues that intersect with questions of jurisdiction are becoming more and more complicated by the day. Parliament should seek to clarify these important questions of jurisdiction within the larger context of federal law.

[177] [redacted] However, this could easily be addressed by parliament if it considered it appropriate to do so. For example, adding "within or outside Canada" to section 16 would give the Court power to authorize [redacted] Alternatively, if Parliament still intends to bar the Service from [redacted] may permit a judge of this court to grant such warrants.

[178] [redacted] should be addressed promptly by Parliament. However, as much as I wish I could, I cannot stretch the words of the Act as they are currently written to remedy this worrisome situation.

[179] In order to adopt the purposive approach suggested by the Attorney General, [redacted] this Court would need to leave aside the plain meaning of the expression "within Canada", the constant unwavering legislative history barring the Service from executing intrusive activities abroad, and the clear evidence demonstrating that [redacted]

[redacted] The Attorney General is in effect asking the Court to read into "within Canada" [redacted] The Attorney General's argument would place the undersigned in a legislative seat which does not belong, in the present circumstances, to the judiciary.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for a warrant to [redacted] the foreign state for the purpose of providing assistance to the Minister [redacted] pursuant to section 16 of the *CSIS Act*, is dismissed;

2. Once a translation is completed, Counsel for the Attorney General and the *amicus* will be asked to review and redact the reasons for judgment having as their objective to issue an understandable redacted version; and

3. CSIS and the *amicus* will have 15 days to complete the review and report back to the Court.

"Simon Noël"
Judge

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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 SERVICE ACT*, RSC 1985, c C-23 AND IN THE MATTER OF [redacted]
PLACE OF CLOSED HEARING:	OTTAWA, ONTARIO
DATES OF CLOSED HEARING:	[redacted]
JUDGMENT AND REASONS:	NOËL S. J.
DATED:	[redacted]

APPEARANCES:

[redacted]	FOR THE APPLICANT DEPUTY ATTORNEY GENERAL OF CANADA
[redacted]	FOR THE APPLICANT DEPUTY ATTORNEY GENERAL OF CANADA
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