Date: 20121206

Docket: […]

Citation: 2012 FC 1437

Ottawa, Ontario, December 6, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

IN THE MATTER OF an application by
[…] for warrants pursuant to sections 16 and 21
of the *Canadian Security Intelligence Service Act*,
R.S.C. 1985, c. C-23

AND IN THE MATTER OF […]

PUBLIC REASONS FOR ORDER

[1] These reasons relate to an application for […][1] warrants brought by the Canadian Security Intelligence Service (the Service or CSIS) pursuant to sections 16 and 21 of the *Canadian Security Intelligence Services Act*, R. S 1985, c. C-25.

[2] The novel issue raised by this application is whether the Federal Court has the power to issue warrants authorizing the Service to intercept the communications of or utilize other

[1] Words or ellipses found in square brackets were inserted by the Court and represent either redactions from the Top Secret Reasons for Order and Order, or are summaries of redacted portions of the Top Secret Reasons for Order and Order or substitutes for words in the Top Secret Reasons for Order and Order that would be injurious to Canada's national security and international relations if disclosed. The length of the redactions does not reflect the actual length of the redacted portions of the Top Secret Reasons for Order and Order.

intrusive investigative techniques in relation to [a Canadian citizen, a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, or a corporation incorporated by or under an Act of Parliament or of the legislature of a province].

[3] The Service contends that subsection 16(2) of the Act does not preclude the naming of [a Canadian citizen, permanent resident or corporation] as […] whose communications may be intercepted in a warrant issued under sections 16 and 21 of the Act. It says that subsection 16(2) of the Act prohibits it from directing the foreign intelligence assistance provided to a Minister at [a Canadian citizen, permanent resident or corporation]. According to the Service, the request for assistance in this case is directed at [a foreign state or group of foreign states, corporation or person], with the result that the prohibition contained in subsection 16(2) does not apply.

[4] […] I dealt with the matter by Order issued on […]. I dismissed the Service's application insofar as it related to [a Canadian citizen, permanent resident or corporation]. These are my reasons for that decision.

[5] As will be explained below, I have concluded that, properly interpreted, subsection 16(2) prohibits the interception of the communications of […] in question in this case, except insofar as those communications may be incidentally intercepted through the exercise

of warrant powers in relation to the communications of [a foreign state or group of foreign states, corporation or person].

Background

[6] […]

[7] […]

[8] […]

[9] […]

[10] […]

[11] […]

[12] […]

The Application for Warrants

[13] On […], the Service applied for […] warrants under section 16 of the Act, […].

[14] Section 16 of the *Canadian Security Intelligence Services Act* provides that:

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

(i) a Canadian citizen,

(ii) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, or

(iii) a corporation incorporated by or under an Act of Parliament or of the legislature of a province.

b) d'une personne qui n'est ni un citoyen canadien, ni un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*, ni une personne morale constituée en vertu d'une loi fédérale ou provinciale.

(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 aux sous-alinéas (1)*b*)(i), (ii) ou (iii).
Consentement personnel des ministres

(3) The Service shall not

(3) L'exercice par le Service

perform its duties and functions under subsection (1) unless it does so	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. (Emphasis added)	*b*) au consentement personnel du ministre. (je souligne)

[15] In accordance with the requirements of subsection 16(1) of the Act, the application included a request for assistance in the collection of information and intelligence with respect to the capabilities, intentions and activities of [a foreign state or group of foreign states, corporation or person]. This request came from the Minister of […] and was addressed to the Minister of Public Safety.

[16] Also included with the application was the personal consent of the Minister of Public Safety to having CSIS assist in the collection of information and intelligence with respect to the capabilities, intentions or activities of [a foreign state or group of foreign states, corporation or person].

[17] The application and the draft warrants were styled as being “In the Matter of [a foreign state or group of foreign states, corporation or person]”. However, the operative portions of the warrants referred specifically to the interception of the communications of certain named […].

[18] By way of example, Part III, Section 1 of the General Intercept and Search Warrant states "I authorize the Director and any employee of the Service acting under this authority to intercept any oral and telecommunications destined to, received by or originating from …". […]

[19] Provision is also made in the warrants for the interception of the communications of […].

[20] The warrants also contain a list of […] whose communications may be incidentally intercepted in the exercise of the powers granted by the warrants. […]

The Warrant Hearings

[21] An *ex parte* hearing was held in relation to the warrant application on the morning of […]. At the request of the Court, the deponent of the affidavit filed in support of the application took the stand and was examined by the Court under oath. Written and oral submissions were also received from counsel for the Service.

[22] At the conclusion of the hearing, I advised counsel that I was prepared to sign the warrants, as they related to […], but that I was not prepared to sign the warrants in relation to […] without further consideration and without the benefit of submissions from an *amicus curiae*.

[23] […] The […] warrants were then signed in their amended form.

[24] Following discussions at the hearing with counsel for the Service, Mr. Colin Baxter was appointed to act as an *amicus*. A case management meeting was then held with CSIS counsel and Mr. Baxter during the afternoon of […].

[25] A timetable was established at the case management meeting for the procedural steps to be followed in relation to this matter, […]. The case was then put over to […] for a further hearing on the jurisdictional question. The hearing was completed on […], in the presence of CSIS counsel and the *amicus*.

The Consequences of Naming [a Natural or Corporate Person] in Part III of a Warrant

[26] Paragraph 21(2)(d) of the *CSIS Act* specifies that an application to a judge for a warrant shall be made in writing and shall identify the person, if known, whose communication is proposed to be intercepted or who has possession of the information, record, document or thing proposed to be obtained.

[27] The intrusive nature of wiretapping and other investigative techniques means that the communications of innocent third parties may be incidentally intercepted along with the communications of the individual or entity named as the target of the investigation. This is because of the association of the innocent third party with the [natural or corporate person] named in the warrant, or because of the nature and location of the interception […].

[28] Consequently, a warrant application must set out the [natural or corporate person] whose communication are proposed to be intercepted, and must also carefully describe the place or places at which the interception will take place so as to restrict, to the extent possible, the privacy infringement. To the extent possible, the authorization must attempt to minimize intrusions into the privacy of innocent third parties.

[29] The practice of this Court has been to require the Service to include in warrant applications a list of all of those […] known to the Service whose communications may be incidentally intercepted in the exercise of the powers granted by the warrant. These […] are known colloquially as "*Vanweenans*", from the decision of the Supreme Court of Canada in ***Lorelei Vanweenan and John Chesson*, appellants *v. Her Majesty The Queen*, respondent indexed as** *R. v. Chesson*, (1988) 2 S.C.R. 148.

[30] Before addressing the jurisdictional issue, it is helpful to start by identifying the practical consequences that flow from […] being named in Part III of a warrant as […] whose communications may be intentionally intercepted. It is instructive to then contrast these consequences with the degree of intrusion on the privacy of […] that can flow from […] being named as […] whose communications may only be incidentally intercepted in the exercise of the powers granted by the warrants.

[31] As will be seen from the discussion that follows, the degree of the potential intrusion on the privacy interests of […] named in Part III of a warrant is significantly greater than the

potential intrusion on the rights of […] whose communications may only be incidentally intercepted.

[32] Where a designated judge authorizes the interception of the communications of […] specifically named in Part III of a warrant, those communications can then be intentionally intercepted. Depending on the powers granted by the Court, this may include communications emanating from [various locations]. Warrants may also authorize [the person to whom it is directed to intercept any communication or obtain any information, record, document or thing.]

[33] In contrast, where […] is identified in a warrant as a *Vanweenan*, the degree of possible intrusion on the privacy of […] is greatly restricted.

[34] For example, the communications of the […] named as a *Vanweenan* cannot be intentionally intercepted. These […] communications can only be intercepted [in certain limited circumstances.]

[35] […]

[36] As a result, it is clear that the potential intrusion on the privacy interests of […] named in Part III of a warrant is significantly greater than the degree of potential intrusion

that can occur with respect to those […] whose communications may only be incidentally intercepted in the exercise of the powers granted by the warrants.

[37] […]

[38] […]

[39] […]

[40] […]

[41] More fundamentally, […] cannot confer jurisdiction on the Court to authorize the warrant where that jurisdiction cannot otherwise be found in the enabling legislation.

[42] Before leaving this issue, it should be noted that while there is a question as to whether [a Canadian citizen, permanent resident or corporation] can be named in Part III of a warrant authorized under sections 16 and 21 of the *CSIS Act* as a [natural or corporate person] whose communications are proposed to be intercepted, there is no dispute that the private communications of [Canadian citizens, permanent residents or corporations] can be incidentally intercepted as a result of the duly-authorized interception of the communications of [a foreign state or group of foreign states, corporation or person].

[43] Nor is there any dispute that the private communications of [Canadian citizens, permanent residents or corporations] can lawfully be intercepted where a warrant has been obtained under section 12 of the Act because there are reasonable grounds for suspecting that those communications relate to a threat to the security of Canada.

[44] With this understanding of the consequences that flow from the naming of [a natural or corporate person] in Part III of a warrant, I turn now to consider the jurisdictional question raised by this application. This requires a close examination of the wording and legislative history of section 16 of the *Canadian Security Intelligence Services Act*, and the application of accepted principles of statutory interpretation to the provision in question.

Principles of Statutory Interpretation

[45] In interpreting section 16 of the Act, the Court must have regard to accepted principles of statutory interpretation.

[46] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, the Supreme Court of Canada described the preferred approach to statutory interpretation, stating that "[t]oday 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": at para. 21. See also *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 at paragraph 27.

[47] In *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, the Supreme Court noted that "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": at para. 10.

[48] The Court went on in the same paragraph in *Canada Trustco* to note that "when the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process". However, the Court also noted that "where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role". In such cases, "[t]he 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".

[49] In *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, the Supreme Court observed that "the more general the wording adopted by the lawmakers, the more important the context becomes". The Court went on to caution that the contextual approach to statutory interpretation has its limits, noting that "Courts perform their interpretative role only when the two components of communication converge toward the same point: the text must lend itself to interpretation, and the lawmakers' intention must be clear from the context: both quotes from para. 15.

[50] The Federal Court of Appeal recently provided a helpful summary of the principles of statutory interpretation in *Felipa v. Canada (Minister of Citizenship and Immigration)*, [2011] F.C.J. No. 1355. There, the majority observed that in determining what Parliament mean by certain words, consideration must be given to the entire context of the provision in question in order to ascertain Parliament's intent, noting that this intent is "[t]he most significant element of this analysis": citing *R. v. Monney*, [1999] 1 S.C.R. 652 at para. 26.

[51] Finally, in *Rizzo & Rizzo Shoes Ltd. (Re)*, above, the Supreme Court made it clear that although Courts must be alive to the frailties associated with its use, legislative history is nevertheless a legitimate source of assistance in statutory interpretation cases: see para.35.

Does Section 16 Prohibit the Naming of [a Canadian citizen, permanent resident or corporation] in Part III of a Warrant?

[52] This takes us to the heart of the matter, which is whether section 16 of the *Canadian Security Intelligence Services Act* prohibits the naming of [a Canadian citizen, permanent resident or corporation] in a warrant as [a natural or corporate person] whose communications are proposed to be intercepted, when the warrant is issued in relation to a request for assistance in the collection of information or intelligence from the Minister of National Defence or the Minister of Foreign Affairs relating to the capabilities, intentions or activities of [a foreign state or group of foreign states, corporation or person].

[53] CSIS submits that subsection 16(2) of the Act does not prohibit the naming of [a Canadian citizen, permanent resident or corporation] in such circumstances. CSIS says that subsection 16(2) of the Act prohibits it from directing foreign intelligence assistance at [Canadian citizens, permanent residents or corporations]. According to the Service, the request for assistance in this case is directed at [a foreign state or group of foreign states, corporation or person], and not at [a Canadian citizen, permanent resident or corporation]. As a consequence, the prohibition contained in subsection 16(2) does not apply.

[54] The Service argues that if subsection 16(2) is interpreted to prohibit the foreign intelligence assistance contemplated by this application, then the intent of the foreign intelligence regime in the *CSIS Act* would be frustrated. It could not have been Parliament's intention that […]. Rather, CSIS says, Parliament's intent was that it not be able to carry out foreign intelligence investigation on [Canadian citizens, permanent residents or corporations].

[55] The Service further submits that if Parliament had intended to place an absolute bar on the interception of the communications of [Canadian citizens, permanent residents or corporations] under section 16, it would have done so. Instead, it took a more "nuanced" approach, merely prohibiting the directing of assistance at [Canadian citizens, permanent residents or corporations]. According to CSIS, this recognized the "practical reality" of intelligence gathering, while protecting Canadians such as professors and journalists from becoming targets of foreign intelligence collection.

[56] CSIS contends that representations made by the Government of Canada during Senate hearings that preceded the enactment of the *Canadian Security Intelligence Services Act* demonstrate that the prohibition in section 16(2) was not intended to apply in a situation such as this.

[57] […]

[58] […]

[59] Put another way, the Service submits that a section 16 warrant is directed at [a foreign state or group of foreign states, corporation or person and] does not amount to "directing assistance" at [a Canadian citizen, permanent resident or corporation] in a way that is prohibited by subsection 16(2) of the Act.

[60] In support of its position, CSIS points to comments made by the Honourable Jean-Luc Pepin, the then-Minister of State (External Relations) in 1983 when he was appearing before the Special Committee of the Senate on the Canadian Security Intelligence Service.

[61] In explaining the intent of the prohibition against collecting foreign intelligence from [Canadians] under the proposed Service's foreign intelligence mandate, the Minister stated:

> (…) this agency will not be able to take action
> or carry out investigation on Canadians.

> (…) it will not be able to "target" Canadians. It will only be able to investigate foreign governments and individuals. (at p. 11:23)

[62] […]

[63] […] Minister Pepin stated that:

> I think you are overlapping. Let us take Carghill as an example. The information on Carghill is corporate information: it is not personal information. The fact that there is an exclusion – and I said so in my paper – and I repeat, "Canadians, both individual and corporate, could only be the subject of an investigation under the primary [threat-related][2] mandate of the agency. So, we have not tried to extract directly foreign information from Canadian citizens or Canadian corporate bodies. (at p. 11:31)

[64] The Service argues that […] is legitimate foreign intelligence for the purposes of the Act.

[65] However, it is necessary to have an understanding of the legislative history of section 16 of the Act in order to put Minister Pepin's comments into their proper context.

[66] In the wake of the Report of the McDonald Commission, the Canadian government decided to create a civilian security service. To this end, Bill C-157 was introduced in the

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[2] Text in square bracket appears in unredacted decision

House of Commons in May of 1983. Bill C-157 would have created the Canadian Security Intelligence Service.

[67] Amongst other things, Bill C-157 contained a provision that was similar, although not identical to what became subsection 16(1) in the 1985 *CSIS Act*. However, it is important to note that there was no provision comparable to subsection 16(2) in Bill C-157.

[68] According to a 1984 publication of the Library of Parliament, "[a]lmost immediately [Bill C-157][3] became the cynosure of negative 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": *The Canadian Security Intelligence Service*: Library of Parliament, 18 September 1984, at p. 8.

[69] The predecessor to what is now subsection 16(1) of the *CSIS Act* was a particular target of criticism.

[70] The Library of Parliament report goes on to note that because of the vehemence 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. Hearings of the Special Senate Committee were held during the summer of 1983. In the course of these hearings, the

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3 Text in square bracket appears in unredacted decision

concern was expressed that the Service's foreign intelligence gathering mandate could be used to investigate [Canadian citizens, permanent residents or corporations].

[71] A report was subsequently issued by the Special Senate Committee recommending substantial changes to the legislation so that there could be "a more appropriate balance between collective and individual security": *The Canadian Security Intelligence Service*, at para. 26.

[72] Bill-157 was subsequently allowed to die on the Order Paper. In the next session of Parliament, a new Bill - Bill C-9 - was introduced. Bill C-9 incorporated almost all of the changes that had been recommended by the Report of the Special Senate Committee. After proceeding virtually unchanged through the legislative process, Bill C-9 was proclaimed in force in 1984.

[73] As noted, the Service relies upon statements made by Minister Pepin [...]. It is important to understand, however, that these statements were made in the context of the Special Senate Committee hearings on Bill C-157, and did not relate to the legislation as it appear in its amended form in Bill C-9.

[74] While section 18 of C-157 was similar to section 16(1) of current Act, C-157 did *not* contain provision similar to subsection 16(2) of the *Canadian Security Intelligence Services Act*. It will be recalled that subsection 16(2) states that "[t]he assistance provided pursuant to

subsection (1) shall not be directed at any person referred to in subparagraph (1)(b)(i), (ii) or (iii)". [...] The comments of Minister Pepin relied upon by the Service must thus be considered with this in mind.

[75] As the Service points out, the Report of the Special Senate Committee was alive to the concern that Canadians such as university professors with knowledge of a foreign state could become the targets of Service foreign intelligence gathering. Noting that this concern "may have substance", the Report recommended that the predecessor provision to what is now section 16 be amended "*to make it completely clear that the targeting of Canadians or permanent residents is forbidden*": at para. 52.

[76] According to the Service, in adopting the language of "directing assistance" in subsection 16(2) of the Act, Parliament gave effect to the substance of this concern, without compromising the legitimate collection of foreign intelligence against [a foreign state or group of foreign states, corporation or person] within Canada.

[77] It is, however, important to note that in the paragraph immediately preceding the one relied upon by the Service, the Report of the Special Senate Committee stated that:

> According to the Minister, section 18 [the predecessor to what is now section 16(1) of the Act][4] is intended to provide necessary support for the collection of foreign intelligence in Canada. At present, the government has inadequate means in this

[4] Text in square bracket appears in unredacted decision

> area. Section 18 would fill that gap, allowing 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. (at para. 51, emphasis added)

[78] […] As is apparent from paragraph 51 of the Report of the Special Senate Committee, it was clearly the understanding of the Senate Committee that while requests for assistance could be made to obtain foreign intelligence with respect to [a foreign state or group of foreign states, corporation or person], "*only foreign nationals could be targeted*" when the Service was exercising warrant powers in relation to a section 16 request.

[79] There does not appear to be any contemplation by the Senate Committee that [Canadian citizens, permanent residents or corporations] could be "targeted" by a warrant obtained under what is now section 16 of the Act.

[80] I note that the Service is now taking the position that [a Canadian citizen, permanent resident or corporation] would not be "targeted" by the warrants sought in this case, and that the "target" of the warrants is […].

[81] Similarly, in paragraph 18 of the Service's written submissions, there is a discussion of […]

[82] The Service now says that "targeting" is a term of art in the intelligence world, and that its choice of language in its written submissions was "unfortunate". I do not agree that it was an unfortunate choice of language. It seems to me that paragraph seven of the Service's written submissions accurately describes what happens when [a natural or corporate person] is named in Part III of a warrant.

[83] While a request for assistance may be made in relation to the capabilities, intentions or activities of [a foreign state or group of foreign states, corporation or person], the assistance is obtained by directing or targeting the intrusive investigative techniques at […]. When […] are [Canadian citizens, permanent residents or corporations], that is precisely [what] subsection 16(2) seeks to prohibit.

[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], including […].

[85] My interpretation of subsection 16(2) is confirmed when regard is had to the French version of the provision which states that "[l]'assistance autorisée au paragraphe (1) est subordonnée au fait *qu'elle ne vise pas des personnes mentionnées aux sous-alinéas (1)b)(i)*, (ii) ou (iii). (my emphasis)

[86] The English and the French version of legislation have equal authenticity, and neither is to be preferred over the other: see the *Official Languages Act*, 1985, c.31 (4th Supp.), s. 13 and *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at para. 125. As the two versions are equally authoritative, both must be examined in order to identify the intent of Parliament: see *New Brunswick v. Estabrooks Pontiac Buick Ltd.*, [1982] N.B.J. No. 397, per La Forest J.A.

[87] I agree with the *amicus* that the use of the verb "viser" in the French version of subsection 16(2) is instructive, and that it supports the view that the direct interception of [a Canadian citizen's, permanent resident's or corporation's] communications is prohibited by the Act.

[88] According to *Harrap's New Standard French and English Dictionary*, "viser" means "with a view to", "relative to", "alluding to" or "affected by". It also includes the notions of "regarder attentivement", "s'appliquer à", and "diriger attentivement son regard vers le but, la cible à atteindre": *Le Petit Robert – Nouvelle Édition du Petit Robert de Paul Robert*.

[89] In my view, the activities contemplated by the […] warrants relative to [a Canadian citizen, permanent resident or corporation] are investigative activities *vis à vis* [a Canadian citizen, permanent resident or corporation] that correspond to these meanings.

[90] I am further satisfied that the interpretation of subsection 16(2) suggested by the Service must be rejected as it would effectively render the provision devoid of any real meaning insofar as the protection afforded to [Canadian citizens, permanent residents or corporations] is concerned.

[91] It will be recalled that CSIS's argument is that subsection 16(2) of the Act only prohibits it from *directing* foreign intelligence assistance *at* [a Canadian citizen, permanent resident or corporation], but does not prohibit the naming of [a Canadian citizen, permanent resident or corporation] in a warrant as […] whose communications are proposed to be intercepted where the request for assistance is directed at [a foreign state or group of foreign states, corporation or person] in accordance with subsection 16(1) of the Act.

[92] However, subsection 16(1) already limits the ability of the Service to provide assistance to Ministers with respect to the collection of foreign intelligence. Information or intelligence may be sought with respect to the capabilities, intentions or activities of [a foreign state or group of foreign states, corporation or person], as long as […] is not a Canadian citizen, a permanent resident or a Canadian company. Thus *all* assistance provided

to Ministers under subsection 16(1) is, by definition, "directed at" foreign states, companies or individuals.

[93] Subsection 16(2) then contains a further prohibition on the provision of assistance, stating that "[t]he assistance provided pursuant to subsection (1) shall not be directed at … [a Canadian citizen, a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, or a corporation incorporated by or under an Act of Parliament or of the legislature of a province]". If the Service's interpretation of subsection 16(2) is accepted, then this provision would be superfluous, as the assistance provided under subsection 16(1) would always be exclusively "directed at" foreign states, companies or individuals.

[94] In other words, subsection 16(2) would never have any practical application. […] named in warrants as […] whose communications are proposed to be intercepted could never be the person or entity at whom the request for assistance was directed as a result of the limitation contained in subsection 16(1). Such an interpretation must clearly be rejected.

[95] In interpreting statutory provisions, it is presumed that every word in a statute is intended "to have a specific role to play in advancing the legislative purpose": see Ruth Sullivan, *Sullivan on the Construction of Statutes*, (5th Ed.) at p. 210. 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] A.C. 530 (H.L.) at 546, as cited in *Sullivan*, above.

[96] My conclusion that subsection 16(2) was intended to prevent [a Canadian citizen, permanent resident or corporation] being named as [...] whose communications are proposed to be intercepted under warrants obtained pursuant to section 16 of the *CSIS Act* is further borne out when regard is had to the legislative history of Bill C-9.

[97] As was noted earlier, as a result of the serious concerns voiced with respect to Bill C-157, the Bill was allowed to die on the Order paper. In 1984, Bill C-9 was introduced, incorporating almost all of the changes that had been recommended by the Report of the Special Senate Committee. One of these changes was the addition of the prohibition contained in what is now subsection 16(2).

[98] The Minister's "Black Book" explains the rationale for the addition of subsection 16(2) in Bill C-9, stating that the predecessor to section 16(1) "was seen by many critics as a 'hidden agenda' enabling the Service to go far beyond the bounds of security intelligence. It was seen as justifying virtually unlimited collection and permitting the Service to do indirectly what it could not do directly..." The document goes on to note that the additions to the legislation were intended "to more expressly prohibit the targeting of Canadians".

[99] The effect of this amendment was also discussed in the Proceedings of the House of Commons' Standing Committee on Justice and Legal Affairs. In the course of the Committee hearings, there was a discussion as to how section 16 would work in relation to companies, and the following question was put to the Minister of Justice:

> First of all, when we were going through this before, I mentioned the point about the corporation, because what you are trying to exclude is a Canadian citizen, a permanent resident, and a Canadian corporation. But I raised the point that foreigners can come in and incorporate a Canadian company as long as they met the requirement of certain Canadian directors and that type of thing. Therefore, it struck me that there was a loophole in terms of legal drafting. I am wondering if you agree of disagree with that?

[100] The then-Solicitor General of Canada, the Honourable Robert Kaplan, responded by stating:

> On point one, you wonder whether foreigners can get a corporation exempted by making it a Canadian corporation. I agree with you that is possible, but we wanted to ensure that Canadian corporations were protected and have given a wider net, and what we would do in the event of proper authorization for targeting of a foreigner is to go behind the corporation *to the individuals who could be targeted pursuant to this clause*. (Emphasis added)

[101] Thus it is clear that for Minister Kaplan, it might be possible to circumvent the prohibition on targeting Canadian companies contained in section 16 of the Act by

intercepting the communications of the company's directors, officers and employees, *provided, however, that these individuals were individuals who could be targeted under section 16*. Implicit in this statement is the understanding that there may be individuals who could *not* be targeted pursuant to section 16. Who are these individuals? Subsection 16(2) tells us that they are Canadian citizens, permanent residents and Canadian corporations.

[102] In other words, it was the view of the Solicitor General of the day that authorization could be granted by the Court under section 16 of the Act to intercept the communications of representatives of a Canadian company, provided that these individuals were foreigners, and not Canadians.

[103] The example discussed by the Minister involved the obtaining of information regarding a Canadian entity (which could not itself be the subject of a section 16 warrant), through the interception of the communications of its employees. According to the Minister, this would be permissible, as long as the employee is not a Canadian.

[104] […]

[105] […]

Conclusion

[106] As I have explained in the above analysis, I have concluded that, properly interpreted, subsection 16(2) prohibits the interception of the communications of [a Canadian citizen, permanent resident or corporation], including […], except insofar as those communications may be incidentally intercepted through the exercise of warrant powers in relation to the communications of [a foreign state or group of foreign states, corporation or person]. As a result, I have dismissed the Service's application for […] warrants, insofar as it relates to [a Canadian citizen, permanent resident or corporation].

[107] I would like to thank both counsel for their courteous and helpful submissions which were ably put together under significant time constraints.

"Anne Mactavish"
Judge