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LEGISLATIVE SUMMARY

Bill C-44*:*
An Act to amend the Canadian Security Intelligence Service Act and other Acts

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-44
(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-44: AN ACT TO AMEND THE CANADIAN SECURITY INTELLIGENCE SERVICE ACT AND OTHER ACTS

1 BACKGROUND

On 27 October 2014, the Minister of Public Safety and Emergency Preparedness introduced Bill C-44, An Act to amend the Canadian Security Intelligence Service Act and other Acts (short title: Protection of Canada from Terrorists Act) in the House of Commons.

Bill C-44 amends the *Canadian Security Intelligence Service Act*[1] (CSIS Act) to give greater protection to individuals, referred to as "human sources," who provide information to the Canadian Security Intelligence Service (CSIS). The proposed legislation reasserts the unlimited geographic scope of the Service's mandate and confirms the jurisdiction of the Federal Court – notwithstanding any other domestic or foreign state law – to issue warrants that have effect outside Canada. In addition, it makes a consequential amendment to the *Access to Information Act*.[2]

Bill C-44 also amends the *Strengthening Canadian Citizenship Act*[3] to enable provisions relating to the revocation of Canadian citizenship to come into force on a different day than the day on which certain other provisions of that Act come into force.

1.1 Canadian Security Intelligence Service Human Sources

Bill C-44's provisions relating to increased protections for CSIS human sources are a response to *Canada (Citizenship and Immigration) v. Harkat*,[4] in which the Supreme Court of Canada ruled that such individuals are not protected by a class privilege.

Class privilege is a long-standing concept in Canadian common law that protects certain types of relationships by extending a guarantee of confidentiality. Police informer privilege is one such class privilege. It provides police with the authority to make enforceable promises of anonymity to informers and eliminates the need for a court to later weigh the competing interests of disclosure versus non-disclosure. As such, it offers "maximum advance certainty" that the identity and information of an informant will not be disclosed.[5] The notion of class privilege being extended to police informants is well established in Canadian jurisprudence.[6]

Informants, also referred to in the intelligence context as "human sources," are equally important to "HUMINT" ("human intelligence") agencies – that is, intelligence-gathering agencies that rely primarily on human sources. As a HUMINT agency, therefore, CSIS could not function if it were unable to recruit informants. Given the potential risks to their own lives and the lives of family members, few people would be willing to serve as CSIS informants if the Service was unable to offer solid guarantees that their identities would be shielded from public disclosure.

Although the Supreme Court ruling in *Harkat* recognizes the importance of human sources to CSIS, it does not interpret existing common law on class privilege as applicable to CSIS. In other words, what is accepted for police informants in common law must be enacted in statutory law for CSIS human sources to be protected by class privilege.

The Court set out the reasons for the distinction it draws between law enforcement agencies and CSIS as follows:

> Police have an incentive not to promise confidentiality except where truly necessary, because doing so can make it harder to use an informer as a witness. CSIS, on the other hand, is not so constrained. It is concerned primarily with obtaining security intelligence, rather than finding evidence for use in court. While evidence gathered by the police was traditionally used in criminal trials that provide the accused with significant evidentiary safeguards, the intelligence gathered by CSIS may be used to establish criminal conduct in proceedings that – as is the case here – have relaxed rules of evidence and allow for the admission of hearsay evidence. The differences between traditional policing and modern intelligence gathering preclude automatically applying traditional police informer privilege to CSIS human sources.[7]

In this decision, the plaintiff, Mohamed Harkat, had challenged the constitutionality of a Federal Court judge not permitting his legal counsel to know the identity of, interview and cross-examine CSIS human sources who provided information about him. The Court noted that the existing *Immigration and Refugee Protection Act* (IRPA) scheme with respect to security certificate cases, whereby special advocates are granted access to summaries of secret evidence presented against a defendant and can challenge the validity of that evidence in a closed court but cannot communicate with the client after having seen the evidence summaries, is imperfect. However, it held that if presiding judges undertake a case-specific approach and exercise sufficient skepticism and vigilance in the face of national security claims, the scheme can be considered as providing an adequate protection of an individual's right to know the case against him or her.

1.2 Canadian Security Intelligence Service Activities Outside Canada

Bill C-44's provisions relating to the issuing of warrants with extraterritorial reach are a response to a long line of court decisions that began with *R. v. Hape* in 2007 and culminated in *X (Re)* in 2013.[8]

Under section 12 of the existing CSIS Act, the Service has lawful authority to investigate national security threats regardless of whether they are inside or outside of Canada. Similarly, section 21 of the CSIS Act, under which CSIS must obtain a court warrant to investigate national security threats using intrusive means, has no express geographic limits.

Until June 2005, when it applied for an extraterritorial warrant (identified as application CSIS-18-05), the Service had never attempted to obtain a warrant under section 21 to use intrusive means in its overseas investigations.

However, other than rendering a decision on whether to hold hearings in private, the Federal Court had no opportunity to address the extraterritoriality issue raised in application CSIS-18-05, as the case was discontinued before a determination was made concerning the warrant application's merits and other legal issues.[9]

In 2007, CSIS again applied for a warrant with an extraterritorial dimension under sections 12 and 21 (application CSIS-10-07). The warrant it sought would be executed in Canada and abroad to investigate one foreign and nine Canadian subjects.

The *Hape* decision loomed large over the consideration of application CSIS-10-07. *Hape* addressed a *Canadian Charter of Rights and Freedoms* (Charter) challenge of an instance where the Royal Canadian Mounted Police (RCMP) had collected evidence abroad without a warrant but with the apparent consent of local authorities. The constitutional challenge was dismissed, but only because the RCMP activities had implicit support from local authorities. This case raised questions about CSIS overseas investigations of Canadian national security threats using intrusive methods *without* the sanction of local authorities.

Before considering situations where local sanction is not available, however, it is necessary to understand what CSIS had believed it could do overseas without a warrant and without undue concern about Charter challenge.

Under section 17 of the CSIS Act, with the approval of the Minister of Public Safety and after consultation with the Minister of Foreign Affairs, CSIS can enter into cooperative arrangements with foreign intelligence agencies. Depending on the specifics of the arrangement, it would be entirely lawful for CSIS to request that a foreign intelligence agency share information or even undertake operations on the Service's behalf.

The nature and scope of each CSIS arrangement varies, and the Minister of Public Safety establishes boundaries on the basis of consultation with the Minister of Foreign Affairs. One would expect information sharing and cooperation to be quite extensive when the partner country's legal system and democratic values closely approximate those of Canada. In a country where human rights practices are questionable, however, cooperation might not even extend to simple trace-check requests to see whether a Canadian target's name appears in any of its intelligence and criminal records databases. Cooperation in these cases would certainly not extend to placing a target under round-the-clock surveillance and intercepting his or her communications.

Thus, in situations where individuals who pose a threat to Canadian security travel to places of the world where CSIS's arrangements are either lacking or prohibitively circumscribed, and where alternative means to intelligence cooperation such as mutual legal assistance treaties are non-existent, CSIS would seek to find a way to track those individuals abroad using intrusive methods without the sanction of local authorities. This, coupled with Charter challenge concerns raised by *Hape*, may or may not explain why CSIS chose in 2005 and then again in 2007 to bring the extraterritorial warrant issue before the court.

Another factor to note is that, in investigating these Canadian targets, CSIS intended to seek the operational and technical assistance of the Communications Security Establishment (CSE). Under section 273.64(1)(*c*) of the *National Defence Act*, CSE is permitted to provide such assistance but may do so only under CSIS's lawful authorities. In other words, to avoid liability under section 184 of Part VI of the *Criminal Code*, which prohibits the unlawful interception of private communications, CSE needs to have firm assurance that CSIS has the legal authority to engage in the activities for which it is seeking help. Given the questions raised in *Hape*, there was reason to expect that a judicial warrant would provide CSE tangible assurance of lawfulness.

In his 22 October 2007 decision to turn down CSIS's 10-07 warrant application, redacted and made public in *Canadian Security Intelligence Service Act (Re)*, 2008 FC 301,[10] Justice Edmond Blanchard indicated that the court lacked jurisdiction under the CSIS Act to authorize CSIS employees to engage in intrusive investigative activities outside of Canada. At issue was that the proposed intrusive investigative activities would be considered illegal in the country where they would be undertaken. Barring any explicit statutory indication that the court's jurisdiction extended to such situations, Blanchard found that the court had no choice but to look to common law for guidance. In this case, the applicable Canadian common law follows the "comity of nations" principle,[11] under which nations refrain from interfering in the sovereignty[12] of other nations by attempting to enforce their laws extraterritorially. *Hape* reconfirmed this principle.

In January 2009, CSIS returned to the Court with a new warrant application seeking to maintain surveillance abroad of two Canadians already under surveillance within Canada. The proposed formulation of the activities proposed under this warrant, argued CSIS, addressed Justice Blanchard's concerns. Specifically, the actual interception of telecommunications and seizure of the private communications of the targeted Canadians would take place *from and within* Canada, thus placing the activities within the court's jurisdiction. Satisfied that these circumstances differed materially from those put before Justice Blanchard, Federal Court Justice Richard Mosley issued a warrant under CSIS Docket 30-08.[13]

The series of renewals and additional warrants issued on the basis of this ruling came to be known as "30-08" warrants. More formally, they are referred to as "Domestic Interception of Foreign Telecommunications and Search (DIFTS) warrants."

However, Justice Mosley later learned through reading the CSE Commissioner's 2012–2013 annual public report that he had not been informed about key aspects of the activities authorized under warrant. Specifically, when he issued the original 30-08 warrant under *X (Re)*, Justice Mosley was unaware that some of the intelligence collection against the Canadian targets was being outsourced to other members of the Five Eyes signals intelligence alliance,[14] to which CSE belongs. This outsourcing raised sufficient concern in the CSE Commissioner's mind to prompt him to recommend that the Federal Court be informed that this was happening.

On 20 December 2013, Justice Mosley issued a redacted and amended[15] version of his 22 November 2013 Further Reasons for Order.[16] Having concluded that CSIS had failed in its duty of candour to the court, a failure which meant the court was unable to assess the potential risk to the Canadians whose identities were shared with foreign intelligence agencies,[17] Justice Mosley concluded that Justice Blanchard's findings on the court's lack of jurisdiction to issue extraterritorial warrants to CSIS still held. This situation would change, he said, only if Parliament expressly authorized the court to issue warrants that violate international law.

In any future 30-08 warrant applications, the court must be informed whether there has been any request for foreign assistance and, if so, what the outcomes of those requests were with respect to the subject of the application. Justice Mosley indicated that the court would pay attention to the investigative necessity for the issuance of such warrants, noting that the Security Intelligence Review Committee (SIRC), which is mandated to conduct an independent examination of past CSIS operations, has questioned the effectiveness of 30-08 warrant collection activities in its classified annual report to the Minister of Public Safety.

Although Justice Mosley had issued no order, the Attorney General sought an appeal of the *X (Re)* decision. While the Federal Court of Appeal dismissed the appeal, it also concluded that Justice Blanchard's reasoning on the extraterritorial reach of the court's jurisdiction was based on incomplete information. Two interrelated legal doctrines were not presented to the judge: (1) the idea presented in *R. v. Libman*[18] that a "real and substantial link" between an extraterritorial activity and Canada makes the activity subject to the Canadian court's jurisdiction and (2) the argument put forward by the Chief Justice in *Charkaoui v. Canada (Citizenship and Immigration)*[19] that one of the most fundamental responsibilities of a government is to ensure the national security of its citizens.[20]

Finally, and most significantly with respect to the tabling of Bill C-44, the Court of Appeal found that CSIS would require a warrant "when the Service either directly, or through the auspices of a foreign intelligence service, engages in intrusive investigative methods such as the interception of telecommunications."[21]

"In our view," the Court said:

> the Federal Court has jurisdiction to issue such a warrant when the interception is lawful where it occurs. In our further view, it remains an open question as to whether the Federal Court possesses such jurisdiction when the interception is not legal in the country where it takes place.[22]

In other words, the Federal Court of Appeal determined that CSIS must always apply for a warrant when using intrusive methods, regardless of where the warrant is to be executed, but it should do so only in instances where use of such methods would be considered legal. For CSIS, this decision effectively removed even the possibility of making use of section 17 foreign arrangements to engage in intrusive surveillance abroad and provides the rationale for Bill C-44. That said, it should be noted that an application for leave for appeal has been submitted to the Supreme Court.[23]

2 DESCRIPTION AND ANALYSIS

2.1 AMENDMENTS TO THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT*

2.1.1 CANADIAN SECURITY INTELLIGENCE SERVICE HUMAN SOURCES

2.1.1.1 CLASS PRIVILEGE FOR A SOURCE (CLAUSES 2 AND 7)

Bill C-44 stipulates the degree of confidentiality given to CSIS's human sources. Clause 2 of the Bill adds the definition of "human source" to the CSIS Act: "an individual who, after having received a promise of confidentiality, has provided, provides or is likely to provide information to the Service."

In *Canada (Citizenship and Immigration) v. Harkat*, the majority of the Supreme Court of Canada had ruled that, unlike police informer privilege, "CSIS human sources are not protected by a class privilege."[24] Class privilege systematically protects information that could identify an individual.

Clause 7 of Bill C-44 amends the CSIS Act to provide for a class privilege that would protect the anonymity of CSIS's human sources in any judicial or quasi-judicial proceeding, such as the evaluation of a security certificate (new sections 18.1(1) and 18.1(2) of the CSIS Act).[25] This new class privilege is similar to the police informer privilege.

The identity of a human source (or any information from which the source's identity could be inferred) cannot be disclosed without the consent of the human source and the Director of CSIS (new section 18.1(3) of the CSIS Act). As in the case of the police informer privilege, there is one exception to the human source privilege: if the proceeding is a prosecution of an offence, a Federal Court judge can order, on application, that the disclosure of the identity of a human source or information from which the source's identity could be inferred is "essential to establish the accused's innocence and that it may be disclosed in the proceeding" (new section 18.1(4)(*b*) of the CSIS Act).

The hearing of the application for disclosure will be held in private and in the presence of a representative of the Attorney General of Canada, but not in the presence of the applicant and his or her counsel unless the judge orders otherwise (new sections 18.1(6), 18.1(7) of the CSIS Act). If the judge orders the disclosure, it can be made subject to any conditions that the judge deems necessary (new section 18.1(8) of the CSIS Act).

A party to a judicial or quasi-judicial proceeding, as well as a court-appointed counsel (an amicus curiae, literally "friend of the court") or a special advocate appointed to protect the interests of the person who is the subject of a security certificate, can apply to a Federal Court judge to declare that an individual is not a human source or

that the information is not information from which the identity of a human source could be inferred (new section 18.1(4)(*a*) of the CSIS Act).

2.1.1.2 Offence to Disclose Identity (Clause 6)

Section 18 of the CSIS Act currently stipulates that it is an offence to disclose any information from which the identity of a human source or a CSIS employee engaged in covert operational activities could be inferred.

Clause 6 of Bill C-44 maintains the offence of disclosing information about a CSIS employee (with a few changes) and removes the offence of disclosing information about a CSIS source (new section 18(1) of the CSIS Act). While it is not immediately clear why this offence was eliminated, it is possibly a consequential amendment resulting from the establishment of a class privilege for a source, provided for in new section 18.1(2) of the CSIS Act. Table 1 shows the amendment that Bill C-44 makes to section 18 of the CSIS Act.

Table 1 – Bill C-44 Amendments to Section 18 of the *Canadian Security Intelligence Service Act*

Current Section 18 of the CSIS Act	Bill C-44
18(1) Subject to subsection (2), no person shall disclose any information that the person obtained or to which the person had access in the course of the performance by that person of duties and functions under this Act or the participation by that person in the administration or enforcement of this Act and from which the identity of: • any other person who is or was a confidential source of information or assistance to the Service, or; • any person who is or was an employee engaged in covert operational activities of the Service can be inferred;	18(1) Subject to subsection (2), no person shall knowingly disclose any information that they obtained or to which they had access in the course of the performance of their duties and functions under this Act or their participation in the administration or enforcement of this Act and from which could be inferred the identity of: • an employee who was, is or is likely to become engaged in covert operational activities of the Service or the identity of a person who was an employee engaged in such activities.
(2) A person may disclose information referred to in subsection (1) for the purposes of the performance of duties and functions under this Act or any other Act of Parliament or the administration or enforcement of this Act or as required by any other law or in the circumstances described in any of paragraphs 19(2)(*a*) to (*d*).	(2) A person may disclose information referred to in subsection (1) for the purposes of the performance of duties and functions under this Act or any other Act of Parliament or the administration or enforcement of this Act or as required by any other law or in the circumstances described in any of paragraphs 19(2)(*a*) to (*d*).
(3) Every one who contravenes subsection (1): • is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or • is guilty of an offence punishable on summary conviction.	(3) Every one who contravenes subsection (1): • is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or • is guilty of an offence punishable on summary conviction.

2.1.1.3 Access to Information (Clauses 9 and 13)

Clause 9 of Bill C-44 stipulates that the Security Intelligence Review Committee shall have access to information covered by the class privilege granted to human sources.[26]

However, this information cannot be disclosed through an access to information request (clause 13).

2.1.2 Canadian Security Intelligence Service Activities Outside Canada (Clauses 3, 4 and 8)

Clause 3 of Bill C-44 stipulates that CSIS can investigate threats to the security of Canada "within or outside Canada" (new section 12(2) of the CSIS Act).[27]

Clause 8 specifically establishes the Federal Court's jurisdiction to issue a warrant authorizing CSIS to conduct an investigation outside Canada, potentially to intercept private communication, or to call on a foreign intelligence service to use intrusive methods of investigation (new section 21(1) of the CSIS Act).[28] New section 21(3.1) of the CSIS Act stipulates that the warrant can authorize CSIS to undertake activities outside Canada "[w]ithout regard to any other law, including that of any foreign state."[29]

Clause 4 stipulates that CSIS can conduct investigations both "within or outside Canada" in order to advise a minister on a security issue or provide security assessments to the federal government, a provincial government or police force and the government of a foreign state (new section 15(2) of the CSIS Act).

2.2 *Strengthening Canadian Citizenship Act*

The *Strengthening Canadian Citizenship Act*[30] received Royal Assent on 19 June 2014. It introduced significant changes to the *Citizenship Act*,[31] including a new citizenship revocation regime based on national security. The amendments proposed in Bill C-44 are technical and will modify the coming into force of certain sections of this new revocation regime.

2.2.1 Factors to Determine whether a Hearing Must Be Held (Clause 10)

Clause 10 of Bill C-44 divides section 24(5) of the *Strengthening Canadian Citizenship Act* into three parts. In addition to section 24(5), there will be two new subsections, 5.1 and 5.2. New section 24(5.1) of the *Strengthening Canadian Citizenship Act* sets out new section 27(*j.2*) of the *Citizenship Act*, which empowers the Minister of Citizenship and Immigration to make regulations prescribing the factors that must be considered in deciding whether to hold a hearing regarding the revocation of a Canadian citizen's citizenship (new section 10(4) of the *Citizenship Act*). Separating the list of factors from the other regulatory powers

related to the administration of the *Citizenship Act* created by the *Strengthening Canadian Citizenship Act*, this provision allows new section 27(*j.2*) to come into force earlier.

2.2.2 Amendment to the Transitional Provisions of the *Strengthening Canadian Citizenship Act* (Clause 11)

Clause 11 of Bill C-44 modifies the transitional provisions set to deal with applications for the grant, renunciation or resumption of citizenship that were not completely processed when the *Strengthening Canadian Citizenship Act* received Royal Assent. The transitional provisions already contained two modifications that were to occur: when section 11 came into force by Order in Council – an event that took place on 1 August 2014 – and when section 2(2) in relation to "lost Canadians" came into force.

Under Bill C-44, any citizenship file that has not been processed will be reviewed under new criteria, including that of the new revocation regime and the new prohibitions created by the *Strengthening Canadian Citizenship Act*, when these come into force.

2.2.3 Amendment to the Coming into Force Provisions of the *Strengthening Canadian Citizenship Act* (Clause 12)

Clause 12 of Bill C-44 amends section 46(2) of the *Strengthening Canadian Citizenship Act*, a provision governing the timing of the coming into force of various provisions of that Act, including provisions related to citizenship revocation and prohibitions on granting citizenship. These include new grounds for citizenship revocation and prohibition related to national security, a new administrative process for revocation for certain situations and a Federal Court process for others, and more significant consequences for revocation, including concurrent revocation and removal decisions.

2.3 Coming into Force

Because no date of coming into force is provided in the bill, it will come into force on the day Royal Asset is given.[32]

NOTES

1. *Canadian Security and Intelligence Act*, RSC 1985, C-23.
2. *Access to Information Act*, RSC 1985, c A-1.
3. *An Act to amend the Citizenship Act and to make consequential amendments to other Acts* (*Strengthening Canadian Citizenship Act)*, SC 2014, c. 22.
4. *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37.

5. "The role of privileges in preventing the disclosure of intelligence," Chapter VI in *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182*, Vol. 3, *The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions*, June 2010, p. 127.

6. The Supreme Court of Canada summarized police informer privilege in *Named Person v. Vancouver Sun*, [2007] 3 SCR 253, para. 16: "The law's protection has been provided in the form of the informer privilege rule, which protects from revelation in public or in court of the identity of those who give information related to criminal matters in confidence. This protection in turn encourages cooperation with the criminal justice system for future potential informers." Only one, very limited, exception is placed on the class privilege for police informers: "there must be a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused." (*R. v. Leipert*, [1997] 1 S.C.R. 281, para. 21.) See also *R. v. Barros*, [2011] 3 S.C.R. 368.

7. *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, para. 85.

8. See *R. v. Hape*, 2007 SCC 26; and *X (Re)*, 2013 FC 1275.

9. See *Canadian Security Intelligence Service Act (Re)*, 2008 FC 300.

10. *Canadian Security Intelligence Service Act (Re)*, 2008 FC 301.

11. *R. v. Hape*, [2007] 2 S.C.R. 292, cites the following definition of Comity of Nations: "Comity refers to informal acts performed and rules observed by states in their mutual relations out of politeness, convenience and goodwill, rather than strict legal obligation" (para. 47).

12. According to the *Canadian Abridgment Words & Phrases*:

> "Sovereignty" refers to the various powers, rights and duties that accompany statehood under international law. Jurisdiction – the power to exercise authority over persons, conduct and events – is one aspect of state sovereignty. Although the two are not coterminous, jurisdiction may be seen as the quintessential feature of sovereignty. Other powers and rights that fall under the umbrella of sovereignty include the power to use and dispose of the state's territory, the right to state immunity from the jurisdiction of foreign courts and the right to diplomatic immunity … [I]n *Customs Régime between Germany and Austria, Re*, [1931] P.C.I.J. Ser. A/B 41, at p. 57, Judge Anzilotti defined sovereignty as follows: "Independence … is really no more than the normal condition of States according to international law; it may also be described as *sovereignty (suprema potestas)*, or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law" (*R. v. Hape*, [2007] 2 S.C.R. 292, para. 41).

13. *X (Re)*, 2009 FC 1058.

14. The Five Eyes signals intelligence alliance, to which Canada, the United States, the United Kingdom, Australia and New Zealand belong, has been in existence for almost 70 years. The purpose of the alliance is to share the burden of collection and analysis of foreign signals intelligence. Under the terms of the UKUSA Agreement, the original members of the alliance, referred to as "Second Parties," are permitted to negotiate collaborative arrangements with other nations, referred to as "Third Parties."

15. The "Further Reasons for Order" document was amended to correct four clerical errors.

16. *X (Re)*, 2013 FC 1275.

17. Whereas *Hape* reconfirmed that Canada would respect the comity of nations principle by refraining from extraterritorial enforcement of its laws and adherence to the local laws of the countries within which its representatives are operating, *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, which dealt with Omar Khadr's treatment by Canadian authorities as a detainee at Guantanamo Bay, established that the Canadian courts would treat local laws as unlawful if they violate international human rights laws.

18. *Libman v. The Queen*, [1985] 2 S.C.R. 178.

19. *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.

20. *X (Re)*, 2014 FCA 249, paras. 92–100.

21. Ibid., para. 103.

22. Ibid.

23. Supreme Court of Canada, *In the Matter of an Application for Warrants Pursuant to Sections 12 and 21 of the Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23*, Docket 36107.

24. *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, para. 80.

25. The Air India Commission of Inquiry made the following statement on this subject:

> [I]f police informer privilege is extended by statute or by the common law to CSIS informers, there must be even greater integration of CSIS and RCMP counterterrorism investigations, and the proposed Director of Terrorism Prosecutions must advise both agencies about the impact of promises of anonymity on subsequent terrorism prosecutions. (*Report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182*, *Volume Three: The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions*, p. 139.)

26. The Security Intelligence Review Committee is authorized to examine any information relating to CSIS activities, except for Cabinet confidences. (CSIS Act, s. 39.)

27. The term "threats to the security of Canada" is defined in s. 2 of the CSIS Act and includes such threats as espionage, terrorism and foreign activities detrimental to the interests of Canada.

28. The new s. 21(1) of the CSIS Act does not authorize the Federal Court to issue a warrant allowing CSIS to carry out the duties stipulated in s. 16 of the CSIS Act "outside Canada," namely, to assist the Minister of National Defence or the Minister of Foreign Affairs. S. 16(1) of the CSIS Act restricts the assistance of CSIS to "within Canada."

29. Similar wording is not found in the legislation of countries participating in the Five Eyes community. However, according to the Federal Court of Canada, the U.S. *Foreign Intelligence Surveillance Act of 1978* (FISA):

> permits warrantless searches for foreign intelligence collection as authorized by the President and the surveillance of foreign subjects under court order. *FISA* thus authorizes the violation of foreign sovereignty in the manner which the Supreme Court of Canada in *Hape* recognized as contrary to the principles of customary international law but permissible under domestic law – express legislative authority." (*X (Re)*, 2013 FC 1275, para. 102.)

With regard to the extraterritorial application of Canadian law, see the Supreme Court of Canada ruling in *R. v. Hape*, [2007] 2 S.C.R. 292, paras. 68, 69, 87, 90, 96 and 104. The Court states that "[p]arliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly" (para. 39). However, the Court also notes that "[international] comity cannot be invoked to allow Canadian authorities to participate in activities that violate Canada's international obligations [in respect of human rights, for example]" (para. 101). According to the Federal Court of Appeal, it remains an open question as to whether the Federal Court has jurisdiction to issue an extraterritorial warrant authorizing an interception that is not legal in the country where it takes place. (*X (Re)*, 2014 FCA 249, paras. 96 and 103.)

30. *Strengthening Canadian Citizenship Act*, S.C. 2014, c. 22. For more information, see Julie Béchard, Penny Becklumb and Sandra Elgersma, *Legislative Summary of Bill C-24: An Act to amend the Citizenship Act and to make consequential amendments to other Acts*, Publication no. 41-2-C24-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 8 July 2014.

31. *Citizenship Act*, RSC 1985, c. C-29)

32. *Interpretation Act*, RSC1985, c. I-21, s. 5(2).