CITATION: *R. v. Cameron Ortis*, 2024 ONSC 1860
COURT FILE NO.: 19-20044
DATE: 2024/03/28

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HIS MAJESTY THE KING	Judy Kliewer and John MacFarlane, for the Public Prosecution Service of Canada.
– and –	
CAMERON ORTIS	Mark Ertel and Jon Doody, for Cameron Ortis.
	HEARD: September 26, 2023

REASONS FOR DECISION ON CONSTITUTIONAL CHALLENGE TO S. 14 OF THE *SECURITY OF INFORMATION ACT*

MARANGER J.

Introduction:

[1] This was a defence application on behalf of Cameron Ortis for a declaration that s. 14 of the *Security of Information Act*, R.S.C. 1985, c. O-5 (the *SOIA*) violated s. 7 of the *Canadian*

Charter of Rights and Freedoms and was unconstitutional, and of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

[2] On September 28, 2023, an oral ruling was provided denying the application with the understanding that written reasons would be provided following the completion of the trial. These are those reasons.

[3] On November 22, 2023, following an eight-week jury trial, Cameron Ortis was found guilty of Counts one to four being offences contrary to s. 14(1) of the *SOIA*, namely that Cameron Ortis did on three separate occasions intentionally and without authority communicate special operational information and on one occasion attempted to do so, to four different individuals. He was also convicted of two *Criminal Code of Canada*, R.S.C. 1985, c. C-46, offences, namely on Count five (a breach of trust contrary to s. 122) and Count six (unauthorized use of a computer contrary to s. 342.1(1)).

[4] Section 14(1) of the *SOIA* provides as follows: "Every person permanently bound to secrecy commits an offence who, intentionally and without authority, communicates or confirms special operational information."

[5] The application centred around the proposition that the words "without authority" in s. 14(1) of the *SOIA* were too vague.

Factual background:

[6] At the time of the commission of the offences Cameron Ortis held a high position in the national security division of the RCMP. He was the Director of Operations Research, a unit or division of the RCMP that he in fact created. At the time of his arrest in September 2019 he held the position of the Director of the National Intelligence Coordination Centre.

[7] The Operations Research unit had unrestricted access to the most classified top-secret information available to the RCMP, information that was shared by other domestic and international agencies. The members of Operations Research would access very highly classified information from Canada's top-secret network, take this information, analyze it, and prepare

briefing materials. The briefs or materials would then be shared with senior decision makers in the RCMP with a view to addressing threats to Canada's national security.

[8] Part of the work of Operations Research included Transnational Organized Crime. In 2014-2015 the RCMP, as well as their counterparts in Australia and the United States, were investigating a company called Phantom Secure. This was because of the predominant use of encrypted cell phones or PGP devices by organized crime in their respective jurisdictions. Phantom Secure was supplying these devices on an international scale. Vincent Ramos was the head of Phantom Secure and one of his known associates was Kapil Judge.

[9] Count one specified that Cameron Ortis communicated special operational information intentionally and without authority to Vincent Ramos. Some of the information he communicated to Ramos included:

i. That Phantom Secure was the subject of international investigations.

ii. That a person who approached Kapil Judge at the Vancouver International Airport was an undercover operator.

iii. Information the RCMP had learned about Phantom Secure's technical infrastructure.

iv. That Ramos was going to be under surveillance by the RCMP out of British Columbia.

v. That law enforcement knew about his servers in Florida.

vi. That his financial transactions were being monitored by FINTRAC.

[10] Count two specified that Cameron Ortis communicated special operational information intentionally and without authority to Salim Henareh. Count three specified that he communicated special operational information to Muhammad Ashraf. Count four specified that he attempted to communicate special operational information to Farzam Mehdizadeh.

[11] Henareh, Ashraf, and Mehdizadeh were believed to be connected to a transnational criminal organization involved in large-scale money laundering controlled by Altaf Khanani.

[12] On Count two, some of the special operational information communicated to Salem Henareh included:

i. That FINTRAC had an ongoing probe targeting his business activities and partners.

ii. The RCMP was engaged in an intelligence operation (project Oryx) concerning his business activities, using FINTRAC data.

iii. He was provided a FINTRAC disclosure summary and over 300 pages of FINTRAC reporting.

[13] On Count three, some of the special operational information communicated to Muhammad Ashraf included:

i. An excerpt from a CIAG report disclosing that the Five Eyes were working together to target the Khanani money laundering network.

ii. That Ashraf and Mohammad Yousef were of particular interest to RCMP agents in Canada.

iii. An excerpt of a project Oryx investigation report disclosing that Khanani, Ashraf and his son were the subjects of an investigation.

iv. A covering letter advising Ashraf that the information Ortis had would be useful – to him and several others including Khanani and that he would like to get in touch with Khanani.

[14] Count four was an attempt to communicate special operational information to Farzam Mehdizadeh through his son Masih Mehdizadeh. Some of the information that Cameron Ortis proposed to communicate included:

i. That a named person in Montréal was working at the DEA as an informant.

ii. That the DEA and RCMP were targeting Mehdizadeh and his company with the goal of getting Khanani.

[15] At his trial Cameron Ortis testified over several days. The thrust of the defence was that he acted with authority when communicating the special operational information to the individuals

specified in Counts one to four. By virtue of his role in the RCMP he could do what he was doing as part of an elaborate undercover operation undertaken at the request of a foreign agency.

[16] In very broad terms, he testified that the actions he took were at the behest of a counterpart who worked for one of our partner countries in the Five Eyes. The stated goal of the operation was to entice specific targets onto an encrypted email platform where their communications could be intercepted as a means of collecting intelligence that would be fed back into the Five Eyes system including the RCMP. He also stipulated that he could not advise any of his superiors of the operation because of the existence of a suspected mole within the RCMP.

[17] The ultimate issue at trial on the s. 14 offences concerned whether Cameron Ortis acted without authority. The bulk of the evidence presented by both sides was directed at that very issue. To sustain a conviction the jury had to conclude, beyond a reasonable doubt, that he did not have the authority to do what he did.

Summary of the defence argument:

[18] Counsel on behalf of the Applicant argued that the term "authority" within s. 14 of the *SOIA* was too vague, as it failed to sufficiently delineate any area of risk and could not provide either fair notice to citizens, or a limitation to law enforcement regarding the exercise of their discretion. The term was thus unconstitutionally vague and therefore a breach of the Applicant's s. 7 *Charter* rights and should be found to be of no force and effect.

[19] The highlights of the defence submissions were as follows:

- That an accused acted "without authority" was an essential element of the offence under s. 14. It must be proven beyond a reasonable doubt. They further argued that the Crown would have to establish that the accused knew that he was acting without authority.

- The term "authority" was not defined anywhere in the Act. Section 14 must be interpreted within the context of the purpose of the *SOIA*. The fundamental purpose of the legislation was to address Canada's national security concerns.

- Section 14 served to criminalize a specific act, being the intentional unauthorized communication of special operational information by anyone permanently bound to secrecy. To satisfy the constitutional requirement for precision it must "delineate a risk zone for criminal sanction". This is to provide guidance to citizens and law enforcement officers.

- "Persons permanently bound to secrecy" covered a wide array of individuals. For example, it includes current and former members of both the National Security and Intelligence Review Agency and Committee of Parliamentarians. It could also apply to persons other than federal government employees.

- Given that the term "authority" was not defined in the legislation, statutory interpretation mandated that the goal was to determine the intention of Parliament by considering the words in context and in their grammatical and ordinary sense within the framework of the object of the Act.

- In *R. v. Audet*, [1996] 2 S.C.R. 171, the Supreme Court considered the term "position of authority" and provided the following possible meanings: a) the right to command power (recognized or unrecognized); b) superiority of merit or seductiveness that compels unconstrained obedience, respect, trust; c) the power or right to enforce obedience; and d) the power to influence the conduct and actions of others.

- The definitions in the *Audet* decision did not assist in determining who had the "authority" in s. 14 of the *SOIA*. The legislation did not specify who might have authority, or who might legally exercise authority; it left open-ended questions on assessing who had authority. This lack of clarity went to the *mens rea* of the offence, as it spoke to an accused's mental state at the time they would have communicated the special operational information.

- *O'Neill v. Canada (Attorney General)* (2006), 82 O.R. (3d) 241 (S.C.), was referenced for the proposition that stand-alone terms such as "secret official", "official" and "authorized" were undefined in the *SOIA*. The presiding judge in that case ruled that

the impugned sections were standardless with the result that they were facially meaningless. It was submitted that that finding was applicable to the case at bar; the term "authority" in the *SOIA* was also standardless and facially meaningless which supported the proposition that it was too vague.

- The *SOIA* used the term "without lawful authority" and "without authority" depending on the specific section being referenced. The presumption against tautology dictated that the terms "lawful authority" and "authority" as utilized in the Act must mean different things. The lack of a discernable difference between the two terms further buttressed the argument that the word "authority" was too vague in s. 14.

- Section 7 of the *Charter* provided that " everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The possibility of imprisonment (the deprivation of liberty) if convicted of the offence set out in s. 14 established the deprivation element of s. 7. The vagueness caused by the lack of a definition for the word "authority" was such that individuals, especially those not bound by government policy guidelines, were not able to determine, by reading s. 14, when they were approaching the boundaries of criminal sanction to properly evaluate whether conduct could constitute a criminal act.

- A reasonable hypothetical could include circumstances where an individual who was permanently bound to secrecy, and had sought and received authorization from a superior, could still be prosecuted if the Crown took the position that the superior was not allowed to grant such authority. This further demonstrated the vagueness of the section.

- This violation could not be saved by s. 1. The use of the undefined word "authority" in s. 14 failed to offer an intelligible standard for citizens and law enforcement officials regarding their risk zone for criminal sanctions so that the *Oakes* test need not be undertaken in respect of this s. 7 breach.

[20] The Applicant concluded his submissions by proposing that if the court were to find that s. 14 was not unconstitutionally vague then a definition or meaning would have to be attributed to "authority" for the purposes of instructing the jury and defending the charges.

Summary of the Crown's argument:

[21] The Crown in general terms submitted that the vagueness motion proceeded on an incorrect assumption, namely that the Crown was obligated to prove that the accused knew that his communication of special operational information was unauthorized.

[22] They submitted that the element of "without authority" was part of the *actus reus*, and not the *mens rea* of the offence. The mental element of the offence to be proven beyond a reasonable doubt was that a person permanently bound to secrecy communicated special operational information intentionally and nothing more.

[23] Section 14 was part of a comprehensive scheme to protect information. It was meant to safeguard information in the hands of persons permanently bound to secrecy, not its dissemination. The term "authority" in that context was derived from the duties and responsibilities attendant to that person's role as a person permanently bound to secrecy. It meant a state of being authorized – having official capacity, the power or right to act.

[24] The Crown, as a preliminary matter at the time of the hearing, argued that the application should only be heard following the completion of the trial. This argument was rejected given the detailed factual admissions offered by the Applicant. I concluded that given the admissions, a full evidentiary record was not required to adjudicate the issue. That said, the full evidentiary record following eight weeks of trial buttressed my conclusion that the application should be dismissed.

[25] The highlights of the Crown's argument on the issue of the constitutionality of the section were as follows:

- Section 14 was directed at a particular group of persons, not the public at large. Specifically, those persons who are permanently bound to secrecy. It applied to a particular type of information, being special operational information. The offence was

one of general intent. The *mens rea* was that it be communicated intentionally. The Crown need not prove an accused knew that his actions were illegal. A mistaken belief that one had authority was a mistake of law and not a defence.

- *R. v. Forster*, [1992] 1 S.C.R. 339, and *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, were provided as analogous cases standing for the proposition that ignorance of the law did not constitute a defence. In each of these decisions a mistaken belief by an accused person in respect of the legal consequences of one's deliberate actions did not furnish a defence to a criminal charge. A mistake of law did not furnish a defence. In the context of s. 14 of the *SOIA* a mistake as to the scope of one's authority was a mistake of law and did not provide a defence.

- Supreme Court of Canada jurisprudence including *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, and *R. v. Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204, were cited with respect to the concept of vagueness and a s. 7 challenge. The key principles stipulated included:

    a) A law must sufficiently delineate an area of risk. It will be found unconstitutionally vague if it lacked precision to the extent that it provided insufficient guidance for legal debate.

    b) An individual need not know with certainty whether a particular course of conduct can result in a conviction; only the essential elements of an offence must be ascertainable in advance.

    c) In deciding whether a statute provided sufficient guidance for legal debate, a law must be examined both in its text and context. A court must exhaust its interpretive function before concluding that a law is unconstitutionally vague.

    d) Courts must be permitted to interpret and apply the words of the statute giving "sensible meaning to the terms of the section."

    e) A deferential approach should be taken in relation to legislative enactments.

    f) Reasonable hypotheticals played no role in the vagueness analysis.

- The words of the statute must 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. The text should not be read in isolation but in light of the broader statutory scheme: *R. v. McColman*, 2023 SCC 8, 478 D.L.R. (4th) 577, at para. 35.

- The purpose of s. 14 of the *SOIA* was to provide those entrusted with the most vital special operational information with the tools they need to protect the information. It was also meant to provide assurances to intelligence partners with whom they share information that it would remain protected indefinitely, that the unauthorized sharing was criminalized and that those who undertook the operations were protected.

- When considering the term "authority" and s. 14, it must be understood that it fell under a discrete part of the *SOIA* and only applied to persons who were permanently bound to secrecy. It dealt with offences that could only be committed by government officials, and persons designated by government officials, who, by virtue of their duties, had access to special operational information, and for that reason they were permanently bound to secrecy. The wording of s. 14 was consistent with the legislative purpose, to permanently bind persons to secrecy who had access to highly sensitive operational information and criminalize the unauthorized disclosure thereof.

- The meaning of authority must be considered in its "grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". Implied in the definition was that persons permanently bound to secrecy are bound by rules, policies, and a command structure. "Without authority" would mean without the official capacity, power or right to act. The possible sources of authority would be the duties of the official position, the policies and rules (including statutory authority, judicial authority and guidelines) governing the position, and when it came from persons having authority (superiors).

- The Crown then provided examples of sources specific to the Applicant, including the duties of his official position as Director of Operations Research, the rules and policies

that governed that position, the Treasury Board of Canada Secretariat's policies on government security, the RCMP security manuals and guidelines for the security of information.

- It was also submitted that there was a clear distinction between the terms "without lawful authority" and "without authority" in the context of the *SOIA*. One definition applied specifically to persons permanently bound to secrecy, the other to persons outside the official realm with no official mandate and thus no functional authority.

- The Crown concluded by submitting that the duties of the Director of Operations Research, and policies applicable to the Applicant as a person permanently bound to secrecy defined the scope of authority the Applicant would have had to deal with special operational information. The evidence at trial would clearly demonstrate that he acted without authority, thus establishing that the term was not vague in the context of this section of the Act.

[26] The Crown proposed that an appropriate jury instruction as to the meaning of authority would be that the Crown must prove beyond a reasonable doubt that there was no authority for the Applicant to communicate special operational information as alleged in the indictment. Furthermore, authority meant that the accused needed to have some official capacity, power or right to disclose the information to the persons named in the indictment. The jury would further have to be instructed as to the possible sources for the authority to do so.

Conclusion:

[27] After considering the arguments of both the Crown and defence counsel I concluded that the application to declare s. 14 unconstitutional should be dismissed. I did so for the following reasons:

a) The section was examined in accordance with the principles of statutory interpretation mandated by the governing jurisprudence 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."

b) The *SOIA* came into force on December 24, 2001, as part of the omnibus *Anti-terrorism Act*, S.C. 2001, c. 41. It replaced the *Official Secrets Act*. The debates in Parliament at the time of the enactment of s. 14 of the *SOIA* support the proposition that its purpose was to provide those entrusted with special operational information with the tools required to protect the information, and to provide assurances to intelligence partners with whom we share information that it would remain protected indefinitely, that unauthorized sharing was criminalized and that those who undertake the operations would be protected.

c) Section 14 comes under the heading "Special Operational Information and Persons Permanently Bound to Secrecy" which covers ss. 8 to 15 of the *SOIA*. The section is directed at a specified class of people, those who are permanently bound to secrecy. The words "without authority" must be considered in that specific context and when doing so their meaning is implicit. The words taken contextually are not vague; they can only mean the power or right to act. You either have the authority to communicate the information or you do not.

d) I agree with the Crown that the "without authority" element of the offence goes to the *actus reus* and not the *mens rea*. For the section to have any value or meaning with regards to protecting special operational information this is the only interpretation plausible.

e) The terms "without authority" and "without lawful authority" in the *SOIA* are differentiated by who the sections are meant to capture. "Without authority" applies to persons permanently bound to secrecy specifically. "Without lawful authority" applies to persons who are not.

f) The sources of authority would come from the duties and responsibilities associated with the person who is permanently bound to secrecy's position, including the

nature of their work and job description. It could also come from a superior who has the power to grant the authority.

g) The implicit definition attributable to the term "authority" in the context of s. 14 is reasonably straightforward and it is the power or right to act.

[28] The evidence presented at the trial further assisted in arriving at this conclusion. The witnesses who stood in comparable positions to the Applicant were well-positioned to describe what authority they did and did not have, and from where those sources of authority originated.

[29] Finally, the instructions provided to the jury at the end of the trial on the issue of "without authority" were derived from the evidence, and from what I concluded to be the appropriate interpretation of s. 14 of the *SOIA*. The jury instructions were as follows:

a) The Crown must establish that Cameron Ortis communicated special operational information without authority beyond a reasonable doubt.

b) The definition of "without authority" or "authority" applicable to s. 14 of the *Security of Information Act* would be as follows: it is the power or right to act. In the context of this case it would be the power or right to communicate special operational information to the individuals set out in the indictment.

c) In this case the power or right to act would have to be derived from the accused's employment position while at the RCMP, at the time that the special operational information was communicated or disclosed.

d) In this case Cameron Ortis was the Director of Operations Research. Some of the matters that you would consider regarding the sources of authority would include: 1) the duties and responsibilities associated with his position including the nature of his work, the mission, and his job description; 2) the policies governing a civilian member of the RCMP, and the specific responsibilities of a person permanently bound to secrecy; and 3) the authority one could obtain from someone else, a superior for example or the originator of a document.

e) You should know that Cameron Ortis's belief that he had the authority is not relevant to your determination. He either had the authority or he did not.

[30] The words "without authority" in s. 14 were therefore found not to be vague and the application for a declaration that the section was unconstitutional and a breach of the Applicant's s. 7 *Charter* right was accordingly dismissed.

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Justice Robert Maranger

Released: March 28, 2024

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