

Federal Court



Cour fédérale

Ottawa, July 16, 2020 – A public version of the confidential Judgment and Reasons in file CONF-1-20 was issued today by the Honourable Patrick Gleeson of the Federal Court:

**IN THE MATTER OF AN APPLICATION BY ██████████ FOR WARRANTS
PURSUANT TO SECTIONS 12 AND 21 OF THE *CANADIAN SECURITY
INTELLIGENCE SERVICE ACT*, RSC 1985, C C-23 AND IN THE MATTER OF
ISLAMIST TERRORISM, ██████████
██████████**

Summary: In performing its mandated functions, the Canadian Security Intelligence Service [Service] is limited by a foundational commitment requiring it to collect intelligence within the bounds of the law. In this matter, and others, the Service has admittedly collected information in a manner that is contrary to this foundational commitment and then relied on that information in applying for warrants under the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*]. The Service and the Attorney General also admittedly failed to disclose to the Court the Service’s reliance on information that was likely collected unlawfully when seeking warrants, thereby breaching the duty of candour owed to the Court.

In the unique context of national security the Court is required to assess warrant applications without the benefit of the adversarial process and in this role it acts as the gatekeeper charged with striking the appropriate balance between private interests and Canada’s security needs. To fulfil this role, the Court relies on compliance with the duty of candour. This requires the Court to trust that institutional structures, processes and culture have provided individuals the tools and instilled the values necessary to allow them to fulfill their candour obligations.

This is not the first time this Court has been faced with a breach of candour involving the Service. The events underpinning this most recent breach were unfolding as recommendations were being implemented by the Service and the Attorney General to address previously identified candour concerns.

The Court concludes, and the Service and the Attorney General acknowledged, that a breach of candour occurred in this matter. The Court further concludes that mere identification of the issue of illegality subsequent to the issue being earlier raised by the Court did not, in these unique circumstances, cure the candour breach.

The Court attributes the breach of the duty of candour to a series of institutional failings within the Service and the Department of Justice [DOJ]. These include: knowledge management and information sharing practices; legal risk assessment framework that characterises likely unlawful activities as posing a “high legal risk”; the absence of guidance on the role of the legal advisor in the face of actions that may be inconsistent with the rule of law; inadequacies in the warrant

application process, such as information silos and compartmentalization; and poor communication among senior Service and DOJ officials.

The Court finds this most recent breach of candour is symptomatic of broader, ongoing issues relating to the Service's organizational and governance structure and perhaps institutional culture. The circumstances disclosed suggest a degree of institutional disregard for—or, at the very least, a cavalier institutional approach to—the duty of candour and, regrettably, the rule of law. The Court further notes that the evidence raises questions relating to the manner in which legal services are structured and delivered to the Service, and the roles and responsibilities of DOJ counsel.

In response to the candour breach and the broad institutional and systemic concerns identified, the Court recommends a comprehensive external review be undertaken to fully identify systemic, governance and cultural shortcomings that resulted in the Service engaging in operational activity that was unlawful. The Court outlines a non-exhaustive list of areas of inquiry.

Having considered the issue of candour, the Court addresses a series of substantive legal issues. These issues include: (1) the Court's authority, when considering an application for warrants under the *CSIS Act*, to rely on information that was likely collected in contravention of the law; and (2) the Court's ability to review previously authorized warrants where new facts are brought to the Court's attention. The Court concludes that:

- i. Information that was likely collected in contravention of the law may be relied upon when considering an application for warrants under the *CSIS Act*, but only after a weighing and consideration of identified factors;
- ii. Where new facts come to light that could have impacted upon the exercise of judicial discretion, the Court has the inherent right to review a previously issued *ex parte* warrant; and
- iii. Should the Court invalidate or otherwise vary a previously issued warrant, the Court may also consider remedial measures that would impact on information previously collected pursuant to the invalidated or varied warrant.

A copy of the decision can be obtained via the [Web site](https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/482466/index.do) of the Federal Court:
<https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/482466/index.do>