Federal Court Cour fédérale

Ottawa, August 31, 2021 – A public version of the confidential decision in file 2020 FC 1190 was issued today by the Honourable Justice Henry S. Brown of the Federal Court:

IN THE MATTER OF AN APPLICATION BY XXX 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 XXX

Summary: The Canadian Security Intelligence Service (CSIS) had obtained warrants from the Federal Court pursuant to the *Canadian Security Intelligence Act* (*CSIS Act*) in October 2018. In 2019, pursuant to its duty of candour, the Service revealed to the Court information that it uncovered which had been available to the Service at the time of the original application for warrants, but had not been presented to the Court at that time. The newly disclosed information fell into two categories: i) human source information relied upon in the warrant application that might have been derived from activities that potentially contravened the *Criminal Code*, and ii) information that may potentially have affected the Court's assessment of the credibility and reliability of information CSIS relied on in its application for warrants. Justice Brown proceeded to determine what effects, if any, this newly disclosed information would have on issued warrants.

The Court adopted the analytical framework previously outlined by Justice Gleeson in *Sections 12 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23 (Re)*, 2020 FC 616, namely that when faced with the review of a previously issued warrant, a designated judge may commence with a sufficiency assessment after automatically excluding the impugned information as an initial procedural step. If automatic excision leads to the conclusion that the warrant could not have issued, then the designated judge must engage in a full balancing analysis prior to reaching a final conclusion on the question of whether the warrant could have issued. This balancing exercise should take into account the (1) seriousness of the illegal activity, (2) fairness, and (3) societal interest.

The Court found that if the human source conduct contravened the *Criminal Code*, the contraventions were minor and technical in nature, and therefore concluded that the potentially illegal conduct could not have affected the issuance of the 2018 warrants. The Court similarly concluded that looking at the totality of the evidence, the newly disclosed information related to the reliability and credibility of information relied on in the warrant application should not be excised from the record and that had this information been presented to the Court in 2018, the warrants could have issued.

CSIS conceded, and the Court agreed, that the non-disclosures breached its duty of candour by failing to provide the Court with information that should have been disclosed during the

application for warrants. However, the Court was satisfied that the breach of the duty of candour was not the result of any intention to mislead or deceive the Court. It ordered CSIS and the Attorney General of Canada to keep the Court apprised of progress and findings including recommendations and follow-up related to the external independent reviews undertaken in response to Justice Gleeson's decision in 2020 FC 616.

The Court also outlined the process it undertook to protect any potentially solicitor-client privilege in the context of judicially warranted intercepted communications under the *CSIS Act*. In its process, the Court emphasized the necessity to implement conditions to minimize access by CSIS and the Attorney General to intercepted communications potentially covered by solicitor-client privilege.

A copy of the decision can be obtained via the website of the Federal Court:

https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/512277/index.do.