Federal Court Cour fédérale

~~**TOP SECRET**~~

Date: 20201231

Docket: [redacted]

Citation: 2020 FC 1190

Ottawa, Ontario, December 31, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

IN THE MATTER OF AN APPLICATION BY [redacted] **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 [redacted]

ORDER AND REASONS

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I. Introduction and summary

[1] These reasons are divided into four parts: introduction and summary, background, solicitor-client privilege, and duty of candour and full disclosure. They are issued as part of the Court's ongoing effort to shed public light where appropriate on the Court's role in relation to

the Canadian Security Intelligence Service ["CSIS" or "the Service"] and its counsel, the Attorney General of Canada [AG Canada], in relation to warranted activities involving suspected threats to the security of Canada. These Reasons deal with a number of determinations in relation to two issues which arose in connection to warrants issued by me in October 2018 [2018 Warrants].

[2] The first issue concerns how best to protect solicitor-client privilege in the context of judicially warranted intercepted communications under the *Canadian Security and Intelligence Act*, RSC 1985, c C-23, as amended [*CSIS Act*]. This issue arises because [redacted] I dealt with the solicitor-client issues both when the 2018 Warrants issued in October 2018 and in a number of subsequent Orders and Directions, some but not all of which are discussed below.

[3] The second issue relates to the duties of candour and full disclosure. I consider this one duty and will henceforth refer to it as the duty of candour. The duty of candour was first drawn to the Court's attention by the Service in January and early 2019 with disclosure of information that was available to the Service, but which the Service did not present to the Court when the Service requested the 2018 Warrants. In early October 2019, almost a year after the 2018 Warrants were issued, the Service revealed additional previously undisclosed information not revealed in

January 2019. Once again, almost all this additional information was available to the Service in October 2018, but was not presented to the Court at that time.

[4] These instances of non-disclosure squarely raise the duty of candour resting on the Service, which requires the Service to make full disclosure when seeking national security warrants under the *CSIS Act*. This duty arises because Service applications for national security warrants are of necessity and by statute, conducted in secret. In addition, the Court does not generally hear from anyone except the Service; that is, warrant applications are made in private, *in camera* and *ex parte*.

[5] The Service frankly concedes, and I agree, that the non-disclosures reported in January and early 2019 and in October 2019 breached its duty of candour by failing to disclose information that should have been disclosed when it applied for the 2018 Warrants in October 2018. The information belatedly disclosed in January and early 2019 concerned potentially unlawful conduct on the part of confidential informants, or 'human sources' relied upon by the Service. The information belatedly brought to the attention of the Court in October 2019 concerned matters that may have affected the Court's assessment of the credibility and reliability of information [redacted] relied on by the Service to obtain the 2018 Warrants. The October 2019 disclosures provided additional information concerning potentially unlawful human source conduct.

[6] In summary, with respect to the issue of solicitor-client privilege, the Court will outline the required balancing exercise and the mechanisms the Court put in place to ensure that the Service did not gain impermissible access to intercepted communications that might contain solicitor-client communications, while also ensuring, to the extent possible, that the Service is able to investigate threats to the security of Canada in a timely manner where authorized to do so under *CSIS Act* warrants issued by this Court.

[7] On the issue of non-disclosure, there is no doubt, it is admitted and I find that the Service failed in its duty of candour by not disclosing that human source information relied upon in the warrant application might have been derived from activities that potentially contravened the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], and in particular, that might have breached the anti-terrorism provisions in sections 83.01 and following thereof.

[8] The Court also finds that the Service breached its duty of candour in failing to disclose information that had the potential to reflect adversely on the reliability and credibility of the human source information the Service presented to and the Court relied upon in the 2018 Warrant application.

[9] Both breaches occurred through a combination of institutional and systemic negligence. Nevertheless, I am unable to find any intention to mislead or deceive the Court. The Court does not find personal culpability on the part of either the lawyers or Service witnesses who appeared before it. The breach of candour resulted from numerous factors discussed below, and in far

more detail by my colleague Justice Gleeson in *Sections 12 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23 (Re)*, 2020 FC 616, [2020 FC 616]. I should note that I sat with Justice Gleeson (and Justice Kane) in a mini *en banc*, when much of the evidence in his case of a general nature was presented. The three of us were also part of a full Court *en banc* hearing in 2019. I have read the decision of Justice Gleeson, and concur with his findings, analysis and conclusions on the general.

[10] In particular, some matters addressed by Justice Gleeson are mirrored in the matter before me now, in particular the question of whether the Court may invalidate the warrant or take other action after it has issued, if the Court becomes aware that information placed before it was likely collected in contravention of the law.

[11] I fully agree with and adopt the analytical framework outlined by Justice Gleeson in his decision: a judge of the Federal Court may review a prior decision to issue a warrant. As outlined by Justice Gleeson at paragraph 223 of his decision:

> As a matter of practicality and in furtherance of the efficient use of judicial resources, when faced with the review of a previously issued warrant for reasons of candour, a designated judge may commence with a sufficiency assessment after automatically excluding the impugned information as an initial procedural step […] However, if automatic excision leads to the conclusion that the warrant could not have issued then I am of the view that the designated judge would be required to engage in a full balancing analysis prior to reaching a final conclusion on the question of whether the warrant could have issued.

[12] Justice Gleeson explains that the balancing analysis to determine what information on the record is to be excised, if any, in an *ex post facto* review where the validity of a warrant is called into question for reasons relating to a breach of candour should take into account the following factors: (1) seriousness of the illegal activity; (2) fairness; and (3) societal interest.

[13] In this case, I have opted in my discretion, as allowed by Justice Gleeson's framework, not to first assess the validity of the warrant after automatically excluding the impugned information. Instead I will proceed directly with the full balancing analysis.

[14] I have weighed the above-mentioned factors in reviewing the information relating to human source activities provided after the fact. I am not required to determine if the conduct belatedly identified breached the *Criminal Code*. In this case I am required to determine if the human source information obtained through potentially illegal activity could have been relied on in issuing the warrants and whether the potential illegality and other information brought to the Court's attention after the 2018 Warrants were issued sufficiently affects the credibility of human source information such that the warrant could not have issued.

[15] Let me be clear: the Service should have disclosed the undisclosed human source related information to the Court when it applied for the 2018 Warrants. That was required as part of the duty of candour resting on the Service. However, in my respectful view and on a balance of probabilities, much if not all of the human source conduct in question would be entitled to the defence of *de minimis*: if the conduct contravened the *Criminal Code*, the contraventions were

minor and technical in nature, and in some cases lacked a causal connection to the information relied upon to issue the warrants. I have concluded that the potentially illegal conduct could not have affected the issuance of the 2018 Warrants; they could have issued even if this information had been disclosed.

[16] I have reached the same conclusion with respect to the information potentially reflecting adversely on the reliability [redacted] I am far from persuaded on a balance of probabilities that the 2018 Warrants could not have issued if the information reported in October 2019 was disclosed when the 2018 Warrants were issued in October 2018. In my respectful view, in my *ex post facto* review, the human source related information should not be excised, and consequently, the 2018 Warrants could have issued even if this information had been disclosed.

II. Background

[17] The Federal Court is authorized by section 12 and Part II of the *CSIS Act* to issue warrants authorizing CSIS to intercept communications if this Court is satisfied there are reasonable grounds to believe such a warrant is required to enable the Service to investigate a threat to the security of Canada, and where other investigative procedures have been tried and failed or are unlikely to succeed. These powers are set out in subsections and paragraphs 21(1), 21(2)(a), (b) and (c) and (3) (a), (b), and (c), of the *CSIS Act* and the definition of what constitutes a threat to the security of Canada is found in section 2:

Definitions **Définitions**

2 In this Act,

[…]

threats to the security of Canada means

(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective

2 Les définitions qui suivent s'appliquent à la présente loi.

[…]

menaces envers la sécurité du Canada Constituent des menaces envers la sécurité du Canada les activités suivantes :

a) l'espionnage ou le sabotage visant le Canada ou préjudiciables à ses intérêts, ainsi que les activités tendant à favoriser ce genre d'espionnage ou de sabotage;

b) les activités influencées par l'étranger qui touchent le Canada ou s'y déroulent et sont préjudiciables à ses intérêts, et qui sont d'une nature clandestine ou trompeuse ou comportent des menaces envers quiconque;

c) les activités qui touchent le Canada ou s'y déroulent et visent à favoriser l'usage de la violence grave ou de menaces de violence contre des personnes ou des biens dans le but d'atteindre un objectif politique, religieux ou idéologique au Canada

within Canada or a foreign state, and

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,

but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d). (*menaces envers la sécurité du Canada*)

ou dans un État étranger;

d) les activités qui, par des actions cachées et illicites, visent à saper le régime de gouvernement constitutionnellement établi au Canada ou dont le but immédiat ou ultime est sa destruction ou son renversement, par la violence.

La présente définition ne vise toutefois pas les activités licites de défense d'une cause, de protestation ou de manifestation d'un désaccord qui n'ont aucun lien avec les activités mentionnées aux alinéas a) à d). (*threats to the security of Canada*)

[…]

[…]

Collection, analysis and retention

12 (1) The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.

Informations et renseignements

12 (1) Le Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et analyse et conserve les informations et renseignements sur les activités dont il existe des motifs raisonnables de soupçonner qu'elles constituent des menaces envers la sécurité du Canada; il en fait rapport au

gouvernement du Canada et le conseille à cet égard.

[…]

[…]

Application for warrant

21 (1) If the Director or any employee designated by the Minister for the purpose believes, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate, within or outside Canada, a threat to the security of Canada or to perform its duties and functions under section 16, the Director or employee may, after having obtained the Minister's approval, make an application in accordance with subsection (2) to a judge for a warrant under this section.

Demande de mandat

21 (1) Le directeur ou un employé désigné à cette fin par le ministre peut, après avoir obtenu l'approbation du ministre, demander à un juge de décerner un mandat en conformité avec le présent article s'il a des motifs raisonnables de croire que le mandat est nécessaire pour permettre au Service de faire enquête, au Canada ou à l'extérieur du Canada, sur des menaces envers la sécurité du Canada ou d'exercer les fonctions qui lui sont conférées en vertu de l'article 16.

Matters to be specified in application for warrant

(2) An application to a judge under subsection (1) shall be made in writing and be accompanied by an affidavit of the applicant deposing to the following matters, namely,

(a) the facts relied on to justify the belief, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate a threat to the security of Canada or to perform its duties

Contenu de la demande

(2) La demande visée au paragraphe (1) est présentée par écrit et accompagnée de l'affidavit du demandeur portant sur les points suivants :

a) les faits sur lesquels le demandeur s'appuie pour avoir des motifs raisonnables de croire que le mandat est nécessaire aux fins visées au paragraphe (1);

and functions under section 16;

(b) that other investigative procedures have been tried and have failed or why it appears that they are unlikely to succeed, that the urgency of the matter is such that it would be impractical to carry out the investigation using only other investigative procedures or that without a warrant under this section it is likely that information of importance with respect to the threat to the security of Canada or the performance of the duties and functions under section 16 referred to in paragraph (a) would not be obtained;

b) le fait que d'autres méthodes d'enquête ont été essayées en vain, ou la raison pour laquelle elles semblent avoir peu de chances de succès, le fait que l'urgence de l'affaire est telle qu'il serait très difficile de mener l'enquête sans mandat ou le fait que, sans mandat, il est probable que des informations importantes concernant les menaces ou les fonctions visées au paragraphe (1) ne pourraient être acquises;

[…]

[…]

Issuance of warrant

(3) Notwithstanding any other law but subject to the Statistics Act, where the judge to whom an application under subsection (1) is made is satisfied of the matters referred to in paragraphs (2)(a) and (b) set out in the affidavit accompanying the application, the judge may issue a warrant authorizing the persons to whom it is directed

Délivrance du mandat

(3) Par dérogation à toute autre règle de droit mais sous réserve de la Loi sur la statistique, le juge à qui est présentée la demande visée au paragraphe (1) peut décerner le mandat s'il est convaincu de l'existence des faits mentionnés aux alinéas (2)a) et b) et dans l'affidavit qui accompagne la demande; le mandat autorise ses

to intercept any communication or obtain any information, record, document or thing and, for that purpose,

destinataires à intercepter des communications ou à acquérir des informations, documents ou objets. À cette fin, il peut autoriser aussi, de leur part :

(a) to enter any place or open or obtain access to any thing;

a) l'accès à un lieu ou un objet ou l'ouverture d'un objet;

(b) to search for, remove or return, or examine, take extracts from or make copies of or record in any other manner the information, record, document or thing; or

b) la recherche, l'enlèvement ou la remise en place de tout document ou objet, leur examen, le prélèvement des informations qui s'y trouvent, ainsi que leur enregistrement et l'établissement de copies ou d'extraits par tout procédé;

(c) to install, maintain or remove any thing.

c) l'installation, l'entretien et l'enlèvement d'objets.

[…]

[…]

Matters to be specified in warrant

Contenu du mandat

(4) There shall be specified in a warrant issued under subsection (3)

(4) Le mandat décerné en vertu du paragraphe (3) porte les indications suivantes :

(a) the type of communication authorized to be intercepted, the type of information, records, documents or things authorized to be obtained and the powers referred to in paragraphs (3)(a) to (c)

a) les catégories de communications dont l'interception, les catégories d'informations, de documents ou d'objets dont l'acquisition, ou les pouvoirs visés aux alinéas (3)a) à c) dont

authorized to be exercised for that purpose;	l'exercice, sont autorisés;
(b) the identity of the person, if known, whose communication is to be intercepted or who has possession of the information, record, document or thing to be obtained;	**b)** l'identité de la personne, si elle est connue, dont les communications sont à intercepter ou qui est en possession des informations, documents ou objets à acquérir;
(c) the persons or classes of persons to whom the warrant is directed;	**c)** les personnes ou catégories de personnes destinataires du mandat;
(d) a general description of the place where the warrant may be executed, if a general description of that place can be given;	**d)** si possible, une description générale du lieu où le mandat peut être exécuté;
(e) the period for which the warrant is in force; and	**e)** la durée de validité du mandat;
(f) such terms and conditions as the judge considers advisable in the public interest.	**f)** les conditions que le juge estime indiquées dans l'intérêt public.
[Emphasis added.]	[Non souligné dans l'original.]

[18] In this case, CSIS applied to the Federal Court for a number of national security warrants in October 2018. I say a number because several different warrants were requested *albeit* in

respect of the same targets. These requests were made under section 12 and sought the warrant powers set out in Part II of the *CSIS Act*.

[19] The application was based on an alleged threat to the security of Canada posed by what were described as [redacted] a group of individuals whose members are known or suspected to have [redacted]

[20] [redacted]

[21] I should say that the explanation for my issuing the 2018 Warrants appear in brief compass in "Part I – Recitals" as set out on the face of the 2018 Warrants themselves. At that

time, the Court had considerable evidence, including human source evidence, relating to the threat posed [redacted] Previous warrants relating to the same threat had been issued by this Court. The threat posed [redacted] was outlined, and the individuals whose communications were targeted by the 2018 Warrants were identified along with their activities.

[22] In addition, among other things, the application for the 2018 Warrants identified individuals whose communications might incidentally be intercepted.

[23] [redacted]

[24] I granted the requested warrants on the basis of written evidence supplemented by oral testimony presented at an *ex parte, in camera* hearing held on October [redacted] 2018. As noted, the evidence before the Court included human source information. "Human source" is a term used by the Service and by Parliament in the *CSIS Act* to describe confidential informants. Human sources are individuals directed and relied upon by the Service who provide relevant information to the Service. The Service in turn presented the information to the Court in support of its application. The *CSIS Act* describes human source as follows:

Definitions	**Définitions**
2 In this Act,	**2** Les définitions qui suivent s'appliquent à la présente loi.
[…]	**[…]**

human source means an individual who, after having received a promise of confidentiality, has provided, provides or is likely to provide information to the Service; (*source humaine*)	***source humaine*** Personne physique qui a reçu une promesse d'anonymat et qui, par la suite, a fourni, fournit ou pourrait vraisemblablement fournir des informations au Service. (*human source*):

[25] At the time of the October 2018 hearing, the Court was required to satisfy itself that the conditions necessary for the issuance of the warrants were established. This was done to my satisfaction.

[26] The Court was given no reason to be concerned with any breach of the duty of candour by either the Service or its counsel, AG Canada. The Service affiant was called to give oral testimony before me, and assured me relative to knowledge of and compliance with the duty of candour. The Service affiant was examined by counsel for the Service, and the witness was cross-examined by specialized *amici* appointed by me to assist the Court.

[27] While the material filed in support of the 2018 Warrants specifically referred to human source information reported in the Service employee's affidavit, there was no indication that the human source information relied on might be connected to contravention or contraventions of the anti-terrorism provisions of the *Criminal Code*.

[28] Nor was the Court given any reason to believe that the human source information was unreliable or not credible even though brief information was presented in the Human Source

Précis. A Human Source Précis is an outline provided by the Service with the Warrant application of issues related to the credibility and reliability of human source information. In this case it was to the effect that human source information was provided by a person or persons who had 'run-ins' with the law.

[29] It may be that information presented in the Human Source Précis might also go to the character of a relevant human source. I note this because while of course character evidence might go to the reliability or credibility of human source information, there is no requirement that human sources be without blemish or exemplars of rectitude for their evidence to be believed by the Court.

[30] Suffice it to say that nothing in the October 2018 warrant application could have stood in the way of issuing the 2018 Warrants.

[31] The issue of solicitor-client privilege, however, was immediately, very specifically and properly flagged by the Service when it applied for the 2018 Warrants. The Service disclosed that [redacted] As noted, the Service fully and as required by

the duty of candour, disclosed that communications [redacted] would likely be incidentally intercepted during surveillance of individuals named as targets of the requested warrants.

III. Solicitor-client privilege

[32] The Federal Court has long provided specific protections to prevent unauthorized interceptions and use of communications protected by solicitor-client privilege. This is accomplished through special conditions forming part of each warrant issued by the Court pursuant to the *CSIS Act*.

[33] The warrants I was asked to issue included among other things the following provisions relating to solicitor-client privilege, the first of which was set out in the definition section, and the second was set out in the applicable warrant conditions:

> "solicitor" means persons authorized to practice as an advocate or notary in Quebec or as a barrister or solicitor in any territory or other province in Canada;
>
> "solicitor-client communication" means any communication of a confidential character between a client and a solicitor directly related to the seeking, formulating or giving of legal advice or legal assistance;
>
> …
>
> CONDITION 1
>
> No communication and no oral communication may be intercepted and no information may be obtained at the office or residence of a solicitor or at any other place ordinarily used by solicitors for the purpose of consultation with clients.
>
> Any solicitor-client communication intercepted or obtained shall be destroyed unless the Deputy Director Operations or his

> designate has reasonable grounds to believe the communication relates to a threat in relation to which a warrant issued pursuant to section 21 of the *Act* is in force, in which case an application shall be brought to the Court for directions before the Service can use, retain or disclose the communication.
>
> However, where the Deputy Director Operations or his designate determines that there is information that raises real concerns that an individual or group is in imminent danger of death or serious bodily harm, the Deputy Director Operations or his designate may use, retain or disclose the communication to the extent strictly necessary to address that danger. The Service shall advise the Court, in writing, within 48 hours of such determination and shall seek directions from the Court for further retention or disclosure of the communication.

[34] Two problems arose with the above.

A. *The definition of solicitor-client communication was too narrow*

[35] First, the definition of "solicitor" was too narrow because it only applied to those actually authorized to practice as a lawyer or notary. In this connection, it appeared the Service treated communications with a lawyer differently from communications between a client and an individual acting in support of a lawyer's law practice, such as a secretary, legal assistant, paralegal, or articling student. However, the law extends solicitor-client privilege not just to communications between a client and his or her actual lawyer (or notary), but also to those acting in support of a lawyer's law practice.

[36] In this connection, the definitions in the warrants needed to be expanded to protect communications between a client and any individual acting in support of a lawyer's law practice.

In this respect the Supreme Court of Canada has made it clear that all communications made with a view to obtaining legal advice must be kept confidential, whether the communications are made to the lawyer or to employees and whether the communications deal with matters of an administrative nature or with the actual nature of the legal problem. The Supreme Court did so in *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 per Lamer J (as he was then) at 892-893 [*Descôteaux*]:

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications [page 893] are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.
>
> There are certain exceptions to the principle of the confidentiality of solicitor-client communications, however. Thus communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged, *inter alia*.
>
> …
>
> [Emphasis added.]

[37] The solution to the excessively narrow definition of "solicitor" was achieved in two stages. Initially, the Service and AG Canada agreed, and I ordered that the definition of solicitor was "understood to include such communications between a client and an individual acting in support of a solicitor's law practice." This addition was made at the suggestion of AG Canada's

counsel in a recital as part of an Order. Subsequently, on April 10, 2019, I specifically ordered that the definition of solicitor-client privilege "includes communications between a client and an individual acting in support of a solicitor's law practice." This revision to the definition of solicitor has been adopted by subsequent judges and currently applies in all national security warrants issued by the Court.

B. *It was necessary to strengthen the conditions to minimize access by the Service and AG Canada to communications potentially covered by solicitor-client privilege*

[38] The second solicitor-client issue posed by the draft Condition in the circumstances of this case was that while the Deputy Director Operations [DDO] of the Service was authorized to seek directions from the Federal Court in relation to solicitor-client privileged communications, it turned out that many other individuals in addition to the DDO were in fact involved in the process leading up to the DDO's decision.

[39] Without going into the details that are on the record, evidence at the hearing revealed some of those individuals had lower level functions, while others had what I will call operational and managerial responsibilities in the risk and threat analysis and assessment. In fact, the evidence was that as many as eight or ten, and possibly more, Service personnel would have access to communications that were potentially solicitor-client privileged communications, as they worked their way up the chain of command from initial analyst's report on the intercept, to the report to the DDO him or herself.

[40] Mindful of the constitutional and legal imperative to minimize access to solicitor-client privilege and the wide scope of what is protected, I determined at the outset that too many Service personnel had potential access to potential solicitor-client communications. In addition, I determined that once anyone with hands-on responsibility for the analysis and assessment of risk read a potentially solicitor-client privileged communication, it would be difficult if not impossible not to factor that into subsequent assessments. The privilege in other words could or would have been lost by the time the DDO made a decision.

[41] In my view at the time, this situation could very well have been in breach of Supreme Court of Canada jurisprudence. That indeed turned out to be the case as discussed below.

[42] Accordingly, I ordered the sequestration of all information that might be protected by solicitor-client privilege, and did so on October [redacted] 2018, the day after I signed the 2018 Warrants.

[43] At this point it is useful to set out relevant jurisprudence governing the warrant provisions in the *CSIS Act* in the context of solicitor-client privilege.

C. *Jurisprudence governing solicitor-client communications*

[44] To begin with, there is constitutional jurisprudence to support the proposition that the regime respecting communication intercept warrants issued by the Federal Court pursuant to the *CSIS Act* complies with the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution*

Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. In particular, the *CSIS Act* warrant regime complies both with the protection of fundamental justice and the prohibition against unreasonable search and seizure set out in sections 7 and 8 of the *Charter*. It also complies with the common law rules governing solicitor-client privilege as they have evolved: *Atwal v Canada*, [1988] 1 FC 107 (FCA); *Mahjoub (Re)*, 2013 FC 1096, per Blanchard J at paras 66–89 [*Mahjoub* per Blanchard J]; and *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, per Stratas JA at paras 311–319 [*Mahjoub per FCA*], leave to appeal refused by the Supreme Court of Canada in *Mahjoub v Canada (Citizenship and Immigration)*, [2017] CSCR no 379.

[45] This jurisprudence specifically allows communications between a solicitor and client to be intercepted incidentally under warrants properly issued by the Federal Court on national security grounds under section 21 of the *CSIS Act*. As stated in *Mahjoub* per Blanchard J:

> *Conclusion on the first issue*
>
> [88] On the basis of the challenges submitted by Mr. Mahjoub and the facts of this case, I find that the impugned provisions of the *CSIS Act* infringe neither section 7, section 8 nor any other section of the *Charter*.
>
> [89] The term "threats to the security of Canada" is adequately defined in section 2 of the *CSIS Act* to provide notice to the citizen of what kind of activities will be investigated and limits on the Service's discretion to investigate activities. Parliament did not contemplate that section 12 would authorize unreasonable searches and seizures when privacy rights were engaged. Instead, intrusive searches and seizures were to be authorized by section 21 warrants. Section 6 does not engage Mr. Mahjoub's rights and cannot be impugned by allegations attacking the constitutionality of the Service's policies developed thereunder. Arrangements with foreign agencies established by the authority of section 17 do not

> infringe Mr. Mahjoub's rights, even if they entail sharing the personal information in the possession of the Service as intelligence. The public interest in sharing the information to further the mandate of CSIS is greater than the "residual" privacy interest that Mr. Mahjoub has in the information. Lastly, sections 21-24 of the Act do not permit unreasonable searches and seizures simply because they allow the Federal Court to authorize the interception of solicitor-client communications. Prior to the commencement of any legal proceedings against a target, it may be necessary to incidentally intercept such communications in the interests of national security.
>
> [Emphasis added.]

[46] The Federal Court of Appeal, on appeal from Justice Blanchard's decision, made the same determination, namely that solicitor and client communications may be incidentally intercepted, that is, intercepted incidentally during the course of warranted intercepts targeting someone other than a lawyer. In *Mahjoub per FCA,* Stratas JA considered the situation where the target of national security warrants was an individual who was expected to be in contact with his lawyer from time to time. While the warrants did not target the lawyer involved, it was reasonable to expect that communications with the lawyer could and would be intercepted incidentally during warranted surveillance of communications with the target. This situation is the same in principle as that in the case at bar; while the lawyer was not a target of warranted interceptions, in my view it was reasonable to expect that communications with the lawyer could and would be intercepted incidentally during warranted surveillance of communications with the target. In this respect, Stratas JA stated for a unanimous Federal Court of Appeal:

> [315] At the outset, one must recognize that it is inevitable that national security warrants authorizing the interception of communications sent and received using Mr. Mahjoub's phone will result in the interception of solicitor-client communications.

> When a lawyer phones Mr. Mahjoub and discusses the proceedings, those discussions will inevitably be intercepted. This sort of "initial interception," an inevitable one, is not fodder for an abuse of process complaint in itself: *Atwal*, above at paras 15 and 30. The key is what happens to those interceptions afterwards.
>
> [316] In *Atwal*, this Court held that solicitor-client communications can be intercepted and reviewed by a Director or Regional Director General of the Security Service to ascertain whether the communication relates to a "threat to the security of Canada." If not, the communication is destroyed and no further disclosure is made: *Atwal* at paras 15 and 30. This has been incorporated into a policy that requires an analyst to disengage from the communication once it is known to be a solicitor-client communication. This policy then requires the destruction of the communication. Except for a small number of calls in which Mr. Mahjoub's wife acted as an agent, this policy was followed.
>
> [Emphasis added.]

[47] Justice Blanchard also relied upon Justice Mosley's ruling in *Almrei (Re)*, 2008 FC 1216 [*Almrei*], to the effect that while it is permissible to intercept and review solicitor-client communications under national security warrants, the privilege is to be pierced "in as minimal ways as the circumstances dictate." As noted in *Mahjoub* per Blanchard J:

> [84] In *Almrei (Re)*, 2008 FC 1216, Justice Mosley addressed a constitutional challenge to the IRPA based on an alleged breach to solicitor-client privilege. He observed the following on the issue at paragraphs 60 and 61 of his reasons:
>
> > [60] Despite its importance, solicitor-client privilege is not absolute: *R v McClure*, [2001] 1 SCR 445, at paragraphs 34-35. The case law relied upon by the named persons to buttress the importance of the solicitor-client privilege does not exclude its possible breach for reasons of necessity: *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 SCR. 574 at paragraphs 17 and 22; *Lavallee, Rackel & Heintz v Canada (Attorney General)*; *White,*

> *Ottenheimer & Baker v Canada (Attorney General)*; *R v Fink*, 2002 SCC 61, at paragraph 36; *Smith v Jones*, [1999] 1 SCR.455, at paragraph 57.
>
> [61] Avoiding injury to national security, which can include the risks of inadvertent disclosure, may constitute a necessity that warrants piercing the privilege in as minimal ways as the circumstances dictate. This should not be decided in a factual vacuum.

[Emphasis added.]

[48] As Justice of Appeal Stratas held in *Mahjoub per FCA* that, "the key is what happens to those interceptions afterwards."

[49] This, with respect, is certainly the case and the next subject discussed in these Reasons.

[50] In this context, it is critical to recognize the nature, breadth and scope of solicitor-client privilege. I will refer to several decisions of the Supreme Court of Canada, the Federal Court of Appeal and Federal Court in this respect.

[51] First, solicitor-client privilege is recognized as a rule of law and a principle of fundamental justice that has constitutional protection. This was determined by the Supreme Court of Canada in *Lavallee v Canada (Attorney General)*, 2002 SCC 61 [*Lavallee*], where the Court struck down provisions of the *Criminal Code* by which Parliament purported to create a regime governing search warrants authorizing searches of law offices. In *Lavallee*, the majority of the Supreme Court, per Justice Arbour, set out a number of governing principles concerning

law office searches, which I will set out in full because they illustrate the extent to which solicitor-client privilege must be protected:

> [49] In the interim, I will articulate the general principles that govern the legality of searches of law offices as a matter of common law until Parliament, if it sees fit, re-enacts legislation on the issue. These general principles should also guide the legislative options that Parliament may want to address in that respect. Much like those formulated in *Descôteaux, supra*, the following guidelines are meant to reflect the present-day constitutional imperatives for the protection of solicitor-client privilege, and to govern both the search authorization process and the general manner in which the search must be carried out; in this connection, however, they are not intended to select any particular procedural method of meeting these standards. Finally, it bears repeating that, should Parliament once again decide to enact a procedural regime that is restricted in its application to the actual carrying out of law office searches, justices of the peace will accordingly remain charged with the obligation to protect solicitor-client privilege through application of the following principles that are related to the issuance of search warrants:
>
> 1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.
>
> 2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
>
> 3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.
>
> 4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.
>
> 5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.

> 6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.
>
> 7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.
>
> 8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.
>
> 9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.
>
> 10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.
>
> Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences.

[52] It is noteworthy that while *Lavallee* establishes these general principles and guidelines, warrant issuing judges "are not intended to select any particular procedural method" to protect

solicitor-client privilege. Therefore, the procedures to protect the privilege must be judicially crafted on a case-by-case basis by the designated judge with the *Lavallee* guidelines in mind.

[53] Secondly, in *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20, the Supreme Court of Canada confirms the need for minimal impairment of solicitor-client privilege which is not to be interfered with unless absolutely necessary given it must remain as close to absolute as possible. The Supreme Court also reiterates the constitutional and substantive law nature of solicitor-client privilege:

> [28] On the first question, it should be remembered that professional secrecy, which started out as a mere rule of evidence, became a substantive rule over time (*Solosky v The Queen*, [1980] 1 SCR 821, at p 837; *Descôteaux v Mierzwinski*, [1982] 1 SCR 860, at pp 875-76; *Smith v Jones*, [1999] 1 SCR 455, at paras 48-49; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, at para 10). The Court now recognizes that this rule has deep significance and a unique status in our legal system (*R v McClure*, 2001 SCC 14, at paras 28 and 31-33; *Smith*, at paras 46-47). In *Lavallee*, the Court reaffirmed that the right to professional secrecy has become an important civil and legal right and that the professional secrecy of lawyers or notaries is a principle of fundamental justice within the meaning of s. 7 of the *Charter* (para 49). Moreover, professional secrecy is generally seen as a "fundamental and substantive" rule of law (*R v National Post*, 2010 SCC 16, at para 39). Because of its importance, the Court has often stated that professional secrecy should not be interfered with unless absolutely necessary given that it must remain as close to absolute as possible (*Lavallee*, at paras 36-37; *McClure*, at para 35; *R v Brown*, 2002 SCC 32, at para 27; *Goodis v Ontario (Ministry of Correctional Services)*, 2006 SCC 31, at para 15).
>
> [Emphasis added.]

[54] The Supreme Court of Canada and the Federal Court of Appeal have both taken a very broad approach to the scope of solicitor-client privilege, by establishing in broad terms communications covered by the privilege. Whether communications are made to the lawyer or to the lawyer's employees, and whether the communications deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. As stated by the Federal Court of Appeal in *Telus Communications Inc v Canada (Attorney General)*, 2004 FCA 380, per Linden JA, quoting the Supreme Court of Canada in *Descôteaux*:

> [6] In *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 at 892-93, Lamer C.J. summarized the privilege in this way:
>
> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, <u>all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.</u>
>
> [Emphasis added.]

[55] The Supreme Court also recognizes that there is a presumption that facts connected with a solicitor-client relationship are presumed to be privileged absent evidence to the contrary. In *Canada (National Revenue) v Thompson*, 2016 SCC 21 at para 19, the Court states:

> [19] Although *Descôteaux* appears to limit the protection of the privilege to communications between lawyers and their clients, this Court has since rejected a category-based approach to solicitor-client privilege that distinguishes between a fact and a communication for the purpose of establishing what is covered by the privilege (*Maranda*, at para 30). While it is true that not everything that happens in a solicitor-client relationship will be a privileged communication, facts connected with that relationship (such as the bills of account at issue in *Maranda*) must be presumed to be privileged absent evidence to the contrary (*Maranda*, at paras 33-34; see also *Foster Wheeler*, at para 42). This rule applies regardless of the context in which it is invoked (*Foster Wheeler*, at para 34; *R v Gruenke*, [1991] 3 SCR 263, at p 289).
>
> [Emphasis added.]

[56] In my respectful view, it is central to the role of the Federal Court that the Court itself is the judicial decider of what – if anything – obtained under national security warrants may be accessed by CSIS. This Court is and must be the gatekeeper in this respect. This is generally true, and is specifically true with respect to communications that may contain solicitor-client privilege. In my view, the centrality of this Court's role flows from the above set-out case law. This Court's role as the gatekeeper or 'firewall' is necessary to protect solicitor-client privilege. As *Lavallee* directs, access to what may be solicitor-client privileged material is to be sealed (point 4), and claims of solicitor-client privilege are to be "judicially decided" (point 6), that is, as I see it, determined by judges, and specifically in this context, by the judges of the Federal Court.

[57] I also note, as per point 8 of *Lavallee*, that the "Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand," which is what in fact occurred in this case.

[58] In addition to emphasizing the centrality of the issuing court's role, *Lavallee* requires that in the event the privilege is pierced, it must be pierced in as minimal a way as the circumstances permit. As the Supreme Court of Canada put it in *Maranda v Richer*, 2003 SCC 67, there is a duty to minimize impairments of solicitor-client privilege when a search in a lawyer's office is authorized and executed. The duty to minimize access applies to the interception of communications that is or that might be covered by solicitor-client privilege:

> [14] The first problem that arises is the question of the existence and effect, in Canadian criminal law, of a duty to minimize impairments of solicitor-client privilege when a search in a lawyer's office is authorized and executed. Under the current law, as set out in the decisions of this Court, there is no doubt that such a duty exists. It rests on the informant who applies for a search warrant, the authorizing judge and those responsible for executing it.

[59] I would add a further element to be factored into national security warrants. Warrants issued by the Federal Court under section 12 of the *CSIS Act* may only be issued in relation to threats to the security of Canada. It may be obvious, but in my respectful view requests for such national security warrants should be considered and determined in a timely way consistent with the interest to be protected, namely the security of Canada. The Service should not be left to wait unduly once this Court is seized with making a decision on an issue: investigation of threats to

the security of Canada should not be frustrated by delay in the judicial decision-making processes.

[60] To summarize, and in the factual context of the case at bar, I came to several conclusions. First, the Federal Court itself has the duty to protect solicitor-client privilege. It cannot be delegated to others, such as to either an *amicus* or a Referee no matter how experienced. That said, it may be necessary for the Court to appoint an *amicus* or Referee, as I did in this case, charged with the duty to review communications that might potentially contain solicitor-client privilege, and report their views and related advice to the Court. But it is this Court that must make the judicial determination of what is solicitor-client privileged and what is not, and thus to determine what may be seen by the Service and or its counsel.

[61] As a consequence, it is, and was in this case necessary for the Court, as well as for any *amicus* or Referee, to actually see communications to determine which, if any, may be covered by solicitor-client privilege. That said, as set out in the *Lavallee* guidelines, although the Attorney General may make submissions on the issue of privilege, the Attorney General should not be permitted to inspect the documents beforehand. I take this to mean that while AG Canada, as counsel for the Service, may make submissions on the issues of solicitor-client privilege *generally*, the Attorney General may *not* see any actual communication that might contain the solicitor-client privilege until the Federal Court judicially determines the communication is not protected by solicitor-client privilege.

[62] In practice, then, where the Court determines a communication contains no solicitor-client privileged content, the Service and AG Canada will be permitted to see the entire communication. That permission should be granted with as much dispatch as possible as noted above. However, where the Court determines that an intercept contains communications that might be protected by solicitor-client privilege, the Service and its counsel may not be permitted to see the communication and instead may only see copies of the communication report with what may be solicitor-client privileged communications redacted. Further, in making a judicial determination whether to allow the Service to see what might be a privileged solicitor-client communication, the Court should keep in mind the presumption set out by the Supreme Court of Canada that facts connected with solicitor-client relationship "must be presumed to be privileged absent evidence to the contrary."

[63] In the case at hand, the Court was also obliged to ensure that solicitor-client privilege was impaired in as minimal a way as possible. The Court must recognize that jurisprudence surrounding CSIS warrants authorizes the Service to intercept and review solicitor-client communications collected under national security warrants, and does so regardless of whether [redacted]

[64] However, Service review should not be automatic, least of all by a large number of Service personnel. Service review, as *Lavallee* dictates, must be as minimal as possible. Evidently, someone has to prepare the communication report (a brief note prepared by an analyst who listened to the intercept) to decide if it might contain solicitor-client communication. In my

view, that someone should be the first level analyst and possibly his or her superior. Once identified as containing possible solicitor-client communications, that communication may not be seen by higher level Service personnel. At that point, the Service must forward the report to and in effect seek the Court's approval before the Service conducts any further review. There is no reviewing role for the Attorney General of a communication that might contain solicitor-client privilege once it is determined the communication might contain solicitor-client communication. And as noted, given the important role in relation to Canada's national security granted to the Service by Parliament, the Court must make its determinations in a timely manner. This allows for lawfully intercepted non-privileged communications to be reviewed by those responsible for national security on as timely a basis as possible.

[65] I should add that in cases of imminent danger of death or serious bodily harm, the Service's Deputy Director of Operations may still use, retain or disclose a communication that might be a solicitor-client communication, but only to the extent strictly necessary to address that danger as provided by the following provision set out in the warrants themselves. This provision is in my respectful view clearly restricted to exceptional circumstances. This provision is subject to its own terms, created and sanctioned by this Court over the years, which include the presence of danger of death or serious bodily harm, and the duty to report back to and seek further directions from the Federal Court:

> However, where the Deputy Director Operations or his designate determines that there is information that raises real concerns that an individual or group is in imminent danger of death or serious bodily harm, the Deputy Director Operations or his designate may use, retain or disclose the communication to the extent strictly necessary to address that danger. The Service shall advise the

> Court, in writing, within 48 hours of such determination and shall seek directions from the Court for further retention or disclosure of the communication.

D. *Need to appoint* amici *and Referees*

[66] It was also obvious from the outset in this complex warrant application that the Court should engage an *amicus*, or a friend of the Court, to assist the Court in dealing with the solicitor-client issues, and to provide analysis of and recommendations concerning communications that might be covered by solicitor-client privilege. Thus, I appointed Barbara McIsaac, Q.C. as *amicus*, a security-cleared, very experienced and capable lawyer who is also designated as a 'special advocate' under section 87.1 of the Immigration and Refugee Protection Act, SC 2001, c 27. Ms. McIsaac is also on a list of lawyers approved by the Federal Court to act as *amicus* in national security cases. Her appointment was made shortly after I became seized of this matter.

[67] In addition, [redacted] I appointed two capable security-cleared lawyers experienced in criminal law to act as Referees, namely Howard Krongold and Ian Carter. While not special advocates, Messrs. Krongold and Carter are also on the list of lawyers approved by the Federal Court to act as *amici* in national security cases.

[68] All three of the *amicus* and Referees reside in the national capital region permitting timely access to the Court's secure premises if necessary. The appointment of two Referees

ensured that if one was not available, the other could step in and provide the Court with timely advice. In addition, if neither Referee could attend and provide assistance to the Court, *amicus* McIsaac could step in. I kept all three up to date in this matter through copies of various decisions and orders. Each was able to review documents and discuss matters amongst themselves at the Court's secure premises.

E. *Review of documents at the Federal Court's secure premises*

[69] I also considered it best and directed that documents to be viewed by the *amicus* and or Referees must be examined at the Court's secure facility and not, for example, at CSIS headquarters. In this connection, all three are officers of the Court and as such must always be seen to be acting under the authority of the Court and no one else. Examination at the Court's secure premises also protects judicial independence. In this manner, the Court best complies with its obligations under section 27 of the *CSIS Act* to keep consideration of warrant applications secret, i.e., "in private" which I take to mean 'secret':

Hearing of applications	Audition des demandes
27 An application under section 21, 21.1 or 23 for a warrant, an application under section 22 or 22.1 for the renewal of a warrant or an application for an order under section 22.3 shall be heard in private in accordance with regulations made under section 28.	27 Une demande de mandat faite en vertu des articles 21, 21.1 ou 23, de renouvellement de mandat faite en vertu des articles 22 ou 22.1 ou d'ordonnance présentée au titre de l'article 22.3 est entendue à huis clos en conformité avec les règlements d'application de l'article 28.

[Emphasis added.] [Non souligné dans l'original.]

F. *Provincial bar not engaged regarding likely incidental intercept of lawyer's communications*

[70] I did not consider it necessary to involve the provincial bar in the appointment of either the *amicus* or the Referees, a step referred to in the *Lavallee* guidelines. I came to this conclusion because of the national security sensitivity of the issues at hand, the need to retain security cleared counsel for all three roles, and the very short time frames under which the Court was operating. Additional points of distinction include the fact that the warrants at issue in *Lavallee* involved the search of a lawyer's office which was not the case with the 2018 Warrants, which dealt with intercepted communications in respect of which potential solicitor-client privileged intercepts would only arise as incidental intercepts. Additionally, the warrant regime under review in *Lavallee* did not involve any national security element and did not engage the secrecy provisions of section 27 of the *CSIS Act.*

[71] In this connection, I note that Justice Downs of the Québec Superior Court in *Rizzuto c R*, 2018 QCCS 582, after an extensive review, came to the same conclusion and likewise did not consider it necessary to involve the Barreau du Québec in relation to warrants issued under subsection 186(2) of the *Criminal Code* respecting intercepted communications at a law office. Justice Downs concluded:

> [123] Even if the Court rejects a straightforward application of the principles in *Lavallee* to a wiretap authorization, it still remains relevant to ask whether an authorization to wiretap law offices

should nevertheless provide for a mechanism whereby a representative of the Bar may oversee the various stages of the interceptions, as the applicants propose.

[124] The Supreme Court has already ruled on the fact that s. 186(3) Cr. C. does not require the judge to impose terms and conditions. Thus, the Supreme Court does not seem to consider that a wiretap authorization necessarily has to include a mechanism whereby representatives of the Bar ensure the protection of the privilege.

[125] Moreover, it does not appear to the Court that the presence of a representative of the Bar is as sound in a case involving wiretapping as it is in the context of a physical search.

[126] First, the involvement of one or more representatives of the Bar is difficult to reconcile with the particularly sensitive and secret nature of such an investigation. The presence of one or more representatives of the Bar might interfere with the surreptitious and delicate nature of the operation.

[127] Second, the Court does not believe that the presence of a representative of the Bar would have prevented the problems of execution that the applicants invoke. For example, it is difficult to imagine how the involvement of a representative of the Bar would have made it possible for sessions 143-144 and 195, which had been classified as privileged, not to be released.

[128] The problems the applicants raise, such as the unlocking of conversations classified as privileged by the judge, are problems of execution caused by some negligence, not by a defective authorization.

[129] Finally, the Court rejects the proposal that a representative of the Bar would be in a better position than a judge to determine whether or not a conversation is privileged.

[130] In any event, even if involving representatives of the Bar might be appropriate in some wiretap authorizations, the "firewalls" provided by the authorizing judge in this case were sufficient to ensure the protection of solicitor-client privilege.

[Footnotes omitted.]

G. *Sequestration and preservation Orders*

[72] From October [redacted] 2018 forward it became necessary to implement procedures to reflect the foregoing. At the same time, I was concerned that no communications in the possession of the Service that might contain solicitor-client privilege could be left without adequate protection from viewing by unauthorized personnel of CSIS and or AG Canada.

[73] Therefore, as already noted, I issued a sequestration Order that took place immediately. The sequestration Order covered all communications intercepted by the Service containing communications [redacted] incidentally intercepted under previous warrants, pending determination by the Court as to whether their contents should be subject to review by the Court or the Applicant for potential solicitor-client privilege.

[74] While I left in place the warrant condition discussed above which allowed the Service's DDO to use such communications in the event of imminent danger of death or serious bodily harm, I sought submissions from the Service and its counsel (AG Canada) as well as from the *amicus* (at this time the Referees had not yet been appointed) as to procedures required to be implemented on a going forward basis.

[75] Shortly thereafter, I ordered the preservation of all communications obtained under previous warrants [redacted] I directed Ms. McIsaac, who in addition to being *amicus*, I also appointed a Referee, to review all Reports of communications involving [redacted]

[redacted] and to advise and provide all instances of any communications that might contain solicitor-client communications. Ms. McIsaac subsequently advised there were none that contained solicitor client privileged information. With her report in hand I personally reviewed the communications and agreed with her conclusion, at which point I ordered the release from sequestration of all communications intercepted under previous warrants and authorized their use by the Service in the normal course of its investigations in accordance with the terms of the previous warrants.

H. *Procedure adopted with respect to communications potentially containing solicitor-client privileged information implemented in the Fall of 2018*

[76] Eventually, after several hearings, submissions, and related interim and further Orders, the following procedure was put in place with respect to intercepted communications obtained under the 2018 Warrants. When a CSIS analyst reviewed a communication obtained under the 2018 Warrants in which a lawyer or a person supporting the lawyer was involved, the analyst would prepare a written Draft Report. For quality control purposes, his or her supervisor was authorized to review the Draft Report.

[77] I authorized [redacted] of the Service's DDO Secretariat to take responsibility for assembling binders containing the Draft Reports prepared by the analyst(s), which binders would then be forwarded weekly (or more frequently) directly to clerical staff with AG Canada. The intent was that the roles of both the DDO Secretariat and AG Canada were to be entirely administrative. Such clerical staff would then send the binder directly to the Federal Court's

secure facility without review by any other Service or AG Canada personnel, i.e., neither anyone else in the Service or within AG Canada would see the contents of the binder.

[78] At that point, the binder of Draft reports would be reviewed by a Referee or *amicus* at the Court's secure facilities. The *amicus* or Referees as the case may be, would then prepare a written submission advising the Court if any part of any Draft Report contained communications that might be covered by solicitor-client privilege.

[79] The Court would then review the Draft Reports and determine if any communications were covered by solicitor-client privilege. Depending on this review, the Court would issue such instructions as might be required.

[80] I wish to note the Court did not make these decisions alone; it always sought and obtained input from the *amicus* or Referees before making a decision one way or the other. I did so because in the circumstances of this case the interposition of and input from the *amicus* or Referees provided an extra layer of protection for such communications. It was also relevant that [redacted]

[81] In practice, the binders arrived on Fridays. Usually, a Referee or the *amicus* would complete the review and prepare a report to the Court quickly, sometimes the same day, sometimes the following Monday. On occasion the Court was able to review communications that might contain solicitor-client communications, review and consider the advice of the

Referee or *amicus*, and if appropriate, release the Draft Reports to the Service and Attorney General's counsel either with full or unrestricted access, on the same day, or the first business day the following week.

[82] The procedures set out above were worked out over many days of hearings and many written filings and submissions. I have not set out all of the many Orders and directions issued, nor will I summarize the various positions which, in the end, entailed remarkably few disagreements. I do wish to thank AG Canada and the Service for their helpful and candid roles in developing and implementing the procedures that accomplished the various goals of protecting solicitor-client privilege, making decisions in a timely manner, and releasing non-privileged information to the Service.

[83] I stress that prior to implementing this procedure, AG Canada and the Service had the right to and made submissions as to what system should be put in place, what constituted solicitor-client privilege, and other relevant matters. AG Canada, the Service, the *amicus* and the Referees were given the opportunity to comment and work together to craft the workable procedural regime set out above, and for that I am very appreciative.

[84] Importantly, except for Service analysts who prepared the Draft Reports and their supervisors, and the clerical staff of AG Canada who assembled, tabbed and delivered sealed binders of Draft Reports to the Court's secure facility, nobody at either the Service or AG Canada had access to the Draft Reports unless and until the Draft Reports were released in whole

or in part by Order of the Federal Court. The role of intercepting and preparation of Draft Reports was unavoidable and in my view could not be further minimized; while I had initial doubts about the supervisor having access, I determined this was necessary for quality control purposes.

[85] Likewise, the preparation and delivery of tabbed binders was necessary and unavoidable; it was a job that simply had to be done. In my view, the procedure developed barred to the extent possible, access by the Service and AG Canada to communications that might be protected by solicitor-client privilege, except of course where there was imminent threat to life.

I. *Decisions on Draft Reports – forwarded in some cases without and in some cases with redactions*

[86] As to ultimate results, in some cases I decided, after input from the Referees or *amicus*, that the entire Draft Report should be released from sequestration and made available to the Service for use in the normal course of its investigations, i.e. to be used in accordance with the 2018 Warrants under which they were obtained. In those cases, I made an order accordingly.

[87] In other cases, in the same manner, I authorized the release of *redacted* Draft Reports from sequestration. Where this was done, the Court withheld the redacted content of the Draft Reports from any further viewing by either the Service or AG Canada. The Court made its judicial decision pursuant to *Lavallee* after hearing from the *amicus* or Referees, as the case may be, and did so in hearings at which neither the Service nor its counsel the AG Canada was

present (*in camera* and *ex parte*). As noted, the Service and AG Canada had been consulted on this approach, as it would exclude their participation, and advised the Court they did not object.

[88] Importantly, and in the final result, those parts of the Draft Reports redacted by the Court because they contained communications that were protected by solicitor-client privilege or could potentially be covered by solicitor-client privilege, by virtue of an Order of the Court dated December 19, 2018, became subject to and were treated in accordance with Condition 1 of the warrants which required their destruction by the Service.

IV. Duty of Candour

A. *First interruption of review and release of redacted or complete Draft Reports January – February 2019 – disclosure of potentially illegal conduct by human sources not brought to the Court's attention in October 2018*

[89] The procedure outlined above continued until January 2019. On January 18, 2019, counsel for the Service wrote to advise the Court that the Service had taken steps to isolate all collection and reporting in relation to the 2018 Warrants because the Service had breached its duty of candour by failing to disclose information relating to potentially unlawful activities by human sources relied upon in seeking the 2018 Warrants.

[90] My narrative in this respect should be seen as a supplement to the Reasons of Justice Gleeson (2020 FC 616) referred to earlier.

[91] As the same time, the Service filed evidence detailing potentially unlawful human source conduct that had not been provided to the Court in its October 2018 application. At this time and shortly thereafter, the Service also provided information from both the CSIS employee whose evidence I had relied upon, and evidence from AG Canada counsel who represented the Service during the course of the 2018 Warrant application. I shall refer to this newly filed material as the "Supplemental Evidence."

[92] I should note that different counsel with AG Canada was appointed in relation to the Supplemental Evidence from the counsel who represented the Service in relation to the solicitor-client issues.

[93] After further submissions and a hearing, on February 13, 2019, I ordered that "[u]ntil further Order of the Court, the Service shall not provide Draft Reports to the Referees as contemplated in the Order of December 19, 2018." This Order was necessary to respect the Service's decision to isolate all collection and reporting under the 2018 Warrants, in that it relieved the Service from the Draft Reporting procedure outlined above. I should note the isolation did not apply to Service communication analysts who continued to review intercepted communications for the express purpose of determining whether or not they disclosed an imminent threat to life, thus possibly engaging the special provisions of the 2018 Warrants; during this exercise they were also marking communications that might become the subject of Draft Reports if the isolation was ended, as eventually happened. I should add that where an analyst identified a threat to life, the matter would be brought to the attention of the Regional

Director General who, if necessary, would bring it directly to the attention of the Deputy Director of Operations referred to in the 2018 Warrants.

B. *CSIS ordered to report non-disclosure to SIRC*

[94] At this time and to ensure it was aware of the potentially unlawful conduct issues, I directed the Service to report the issues raised by the Supplementary Evidence to the Security Intelligence Review Committee (SIRC, now replaced by the National Security and Intelligence Review Agency, or NSIRA), which the Service subsequently did.

C. *Interruption of Draft Reports and Orders allowing full or redacted Draft Reports – February 2019 to April 2019*

[95] In late February 2019, I appointed two additional *amici* in this case. These two *amici* had been appointed by my colleagues Justice Catherine Kane and Justice Patrick Gleeson in relation to other warrant matters also raising breaches of the duty of candour in relation to potentially unlawful activities, in Court files [redacted] and [redacted] The two *amici* were Gordon Cameron and Matthew Gourlay; both are security-cleared and both are on the Federal Court's list of approved *amici* for engagement as needed in national security files. Mr. Cameron is in addition a Special Advocate.

[96] At this time, the focus of attention in this file (and in the other two cases just referred to) shifted from solicitor-client issues to the newly-raised issue of breach of the duty of candour in relation to potentially unlawful conduct by human sources. Numerous hearings were planned and

held, including an *en banc* hearing involving all available Designated Judges, the Service and AG Canada. This phase of the Court's proceeding is extensively outlined in the Reasons for Judgment of my colleague Justice Patrick Gleeson (2020 FC 616).

[97] It became increasingly apparent that the Court's inquiry into the consequences of non-disclosure of potentially criminal conduct would be very time consuming. This turned out to be the case; final written submissions were not filed on that matter until November 2019, and Justice Gleeson's Reasons were delivered May 15, 2020.

[98] To put it in context, following the *en banc* hearing, the general issue of duty of candour was examined in numerous mini *en banc* hearings jointly presided over by Justices Kane, myself and Justice Gleeson, leading to the Reasons issued by Justice Gleeson dealing with general issues in addition to matters specific to his case.

[99] However at various times during and after the *en banc* and mini *en banc* hearings, I continued to deal with matters arising out of the 2018 Warrants.

[100] In my case, additional affidavits were filed and considered both before and after the release of Justice Gleeson's Reasons. Indeed submissions continued to be made in this case until October 21, 2020, at which time the *amici* filed final submissions on the duty of candour issue.

[101] As noted above, as of January 2019, the Service had continued the intercepts and collections, but reporting was suspended in relation to the suspected [redacted] identified in the 2018 Warrants. This was the case even though the 2018 Warrants were still valid.

[102] I was not asked to make this decision, it was one taken by the Service. In my view, this created an unsatisfactory situation that needed correction. Warrants had been issued because the statutory requirements had been established in terms of threat to the security of Canada. I did not wish to terminate or impede necessary investigations already approved by this Court. I wanted a timely determination of the impact of the Supplementary Evidence on the 2018 Warrants, particularly given the evidence of the threat to the security of Canada [redacted] identified in the 2018 Warrant applications. I did not want any isolation of information or intelligence gathered under the 2018 Warrants to unduly or unnecessarily impair the Service's investigation of the alleged threat to the security of Canada which led to the issuance of the 2018 Warrants.

[103] Therefore, to bring resolution to these pressing concerns, I sought and received submissions from AG Canada and from the newly-appointed *amici* Messrs. Cameron and Gourlay as to what effect, if any, the Supplemental Evidence had on the 2018 Warrants: should they be set aside; should that determination be delayed until the potentially much later conclusion of hearings of the three matters; should the Court resume the review and possible release of Draft Reports including potentially privileged solicitor-client communications?

[104] The answer to these questions entailed an analysis of the Supplementary Evidence and its impact on the 2018 Warrants.

[105] The key Supplemental Evidence concerning potentially unlawful conduct was provided in an affidavit dated February 8, 2019, and was set out by a senior officer in the Service who supervised Service personnel responsible for human sources in issue. It is fair to say this evidence disclosed four types of potential criminality related to the human source information in this file.

[106] In addition to outlining potentially unlawful conduct, this senior CSIS official also provided evidence pointing to the importance of the human source information in the investigation [redacted] which in my respectful view was considerable, and the nature of the human source directions given by the Service, which included a requirement they not engage in illegal activities.

[107] Service evidence both in October 2018 and in February 2019 was consistently to the effect that the human sources in question provided investigative information assessed by CSIS as "partially confirmed." CSIS defined this assessment as meaning that a "significant body of reporting has generally been accurate and/or corroborated by other sources of information."

[108] The Service made it clear that the intelligence provided by the human sources in question was viewed as reliable and credible, [redacted]

[redacted] Service evidence filed on February 8, 2019 did not point the Court to any facts speaking to either the unreliability or lack of credibility of human source information. To the contrary, the evidence of the Service was that the human source information concerned was from "the Service's predominant" source or sources in its [redacted] investigation. In addition, the evidence was that the human source information had earned the recognition of being preeminent to the investigative efforts [redacted]

D. *Alleged illegality of human source activities disclosed February 2019*

[109] In my view, I am not required to assess whether or not crimes were actually committed by anyone providing human source information; this is not a criminal court. For these purposes, I am reviewing the Supplemental Evidence to assess the seriousness of the potentially illegal activity as one of the factors to consider in the balancing test out in Justice Gleeson's judgment. I find on balance the evidence should not be excluded. I am also concerned with non-disclosure of activities of human source or sources that might have affected the reliability or credibility of information such that the 2018 Warrants could not have been issued. I have concluded the Supplemental Evidence filed in early 2019 and the Fall of 2019 was such that, had it been disclosed as it should have been, the 2018 Warrants could have been issued. My detailed reasons follow.

[110] The alleged illegality was argued in the context of sections 83.01 and following of the Criminal Code, and related jurisprudence from the Supreme Court of Canada including guidance

on the issue of *de minimis* non curat lex, a Latin expression to the effect that the law does not care for small or trifling matters, which principle I shall simply refer to as "*de minimis*."

[111] I will set out the relevant provisions of the *Criminal Code* and jurisprudence on these issues, and then return to describe how the *Criminal Code* and related jurisprudence applied to the four types of potential criminal activity identified by the Service by letter in January and by affidavit sworn on February 8, 2019.

E. Criminal Code *provisions on participation in terrorist activity*

[112] The *Criminal Code* provides at sections 83.02, 83.03, 83.08, 83.18 and 83.19:

Providing or collecting property for certain activities	**Fournir ou réunir des biens en vue de certains actes**
83.02 Every one who, directly or indirectly, wilfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out	**83.02** Est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans quiconque, directement ou non, fournit ou réunit, délibérément et sans justification ou excuse légitime, des biens dans l'intention de les voir utiliser — ou en sachant qu'ils seront utilisés — en tout ou en partie, en vue :
(a) an act or omission that constitutes an offence referred to in subparagraphs (a)(i) to (ix) of the definition of	**a)** d'un acte — action ou omission — qui constitue l'une des infractions prévues aux sous-alinéas a)(i) à (ix) de la définition de activité

terrorist activity in subsection 83.01(1), or

terroriste au paragraphe 83.01(1);

(b) any other act or omission intended to cause death or serious bodily harm to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, if the purpose of that act or omission, by its nature or context, is to intimidate the public, or to compel a government or an international organization to do or refrain from doing any act,

b) de tout autre acte — action ou omission — destiné à causer la mort ou des dommages corporels graves à une personne qui ne participe pas directement aux hostilités dans une situation de conflit armé, notamment un civil, si, par sa nature ou son contexte, cet acte est destiné à intimider la population ou à contraindre un gouvernement ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte quelconque.

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

Providing, making available, etc., property or services for terrorist purposes

Fournir, rendre disponibles, etc. des biens ou services à des fins terroristes

83.03 Every one who, directly or indirectly, collects property, <u>provides or invites a person to provide, or makes available property or financial or other related services</u>

83.03 Est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans quiconque, directement ou non, <u>réunit des biens ou fournit — ou invite une autre personne à le faire — ou rend disponibles des biens ou des services financiers ou connexes :</u>

(a) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any

a) soit dans l'intention de les voir utiliser — ou en sachant qu'ils seront utilisés — , en tout ou en partie, pour une activité terroriste, pour

terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or	faciliter une telle activité ou pour en faire bénéficier une personne qui se livre à une telle activité ou la facilite;
(b) knowing that, in whole or part, they will be used by or will benefit a terrorist group,	**b)** soit en sachant qu'ils seront utilisés, en tout ou en partie, par un groupe terroriste ou qu'ils bénéficieront, en tout ou en partie, à celui-ci.
is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.	
[…]	[…]
Freezing of property	**Blocage des biens**
83.08 (1) No person in Canada and no Canadian outside Canada shall knowingly	**83.08 (1)** Il est interdit à toute personne au Canada et à tout Canadien à l'étranger :
(a) deal directly or indirectly in any property that is owned or controlled by or on behalf of a terrorist group;	**a)** d'effectuer sciemment, directement ou non, une opération portant sur des biens qui appartiennent à un groupe terroriste, ou qui sont à sa disposition, directement ou non;
(b) enter into or facilitate, directly or indirectly, any transaction in respect of property referred to in paragraph (a); or	**b)** de conclure ou de faciliter sciemment, directement ou non, une opération relativement à des biens visés à l'alinéa a);
(c) provide any financial or other related services in respect of property referred to in paragraph (a) to, for the	**c)** de fournir sciemment à un groupe terroriste, pour son profit ou sur son ordre, des services financiers ou tout

benefit of or at the direction of a terrorist group.

No civil liability

(2) A person who acts reasonably in taking, or omitting to take, measures to comply with subsection (1) shall not be liable in any civil action arising from having taken or omitted to take the measures, if they took all reasonable steps to satisfy themselves that the relevant property was owned or controlled by or on behalf of a terrorist group.

[…]

Participation in activity of terrorist group

83.18 (1) Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Prosecution

(2) An offence may be committed under subsection (1) whether or not

autre service connexe liés à des biens visés à l'alinéa a).

Immunité

(2) Nul ne peut être poursuivi au civil pour avoir fait ou omis de faire quoi que ce soit dans le but de se conformer au paragraphe (1), s'il a agi raisonnablement et pris toutes les dispositions voulues pour se convaincre que le bien en cause appartient à un groupe terroriste ou est à sa disposition, directement ou non.

[…]

Participation à une activité d'un groupe terroriste

83.18 (1) Est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans quiconque, sciemment, participe à une activité d'un groupe terroriste, ou y contribue, directement ou non, dans le but d'accroître la capacité de tout groupe terroriste de se livrer à une activité terroriste ou de la faciliter.

Poursuite

(2) Pour que l'infraction visée au paragraphe (1) soit commise, il n'est pas nécessaire :

(a) a terrorist group actually facilitates or carries out a terrorist activity;	**a)** qu'une activité terroriste soit effectivement menée ou facilitée par un groupe terroriste;
(b) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or	**b)** que la participation ou la contribution de l'accusé accroisse effectivement la capacité d'un groupe terroriste de se livrer à une activité terroriste ou de la faciliter;
(c) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.	**c)** que l'accusé connaisse la nature exacte de toute activité terroriste susceptible d'être menée ou facilitée par un groupe terroriste.
Meaning of participating or contributing	**Participation ou contribution**
(3) Participating in or contributing to an activity of a terrorist group includes	**(3)** La participation ou la contribution à une activité d'un groupe terroriste s'entend notamment :
(a) providing, receiving or recruiting a person to receive training;	**a)** du fait de donner ou d'acquérir de la formation ou de recruter une personne à une telle fin;
(b) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group;	**b)** du fait de mettre des compétences ou une expertise à la disposition d'un groupe terroriste, à son profit ou sous sa direction, ou en association avec lui, ou d'offrir de le faire;
(c) recruiting a person in order to facilitate or commit	**c)** du fait de recruter une personne en vue de faciliter ou de commettre une infraction de terrorisme ou un acte à l'étranger qui, s'il était

commis au Canada, constituerait une telle infraction;

(i) a terrorism offence, or

(ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence;

(d) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group; and

d) du fait d'entrer ou de demeurer dans un pays au profit ou sous la direction d'un groupe terroriste, ou en association avec lui;

(e) making oneself, in response to instructions from any of the persons who constitute a terrorist group, available to facilitate or commit

e) du fait d'être disponible, sous les instructions de quiconque fait partie d'un groupe terroriste, pour faciliter ou commettre une infraction de terrorisme ou un acte à l'étranger qui, s'il était commis au Canada, constituerait une telle infraction.

(i) a terrorism offence, or

(ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence.

Factors

(4) In determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused

Facteurs

(4) Pour déterminer si l'accusé participe ou contribue à une activité d'un groupe terroriste, le tribunal peut notamment prendre en compte les faits suivants :

(a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group;	**a)** l'accusé utilise un nom, un mot, un symbole ou un autre signe qui identifie le groupe ou y est associé;
(b) frequently associates with any of the persons who constitute the terrorist group;	**b)** il fréquente quiconque fait partie du groupe terroriste;
(c) receives any benefit from the terrorist group; or	**c)** il reçoit un avantage du groupe terroriste;
(d) repeatedly engages in activities at the instruction of any of the persons who constitute the terrorist group.	**d)** il se livre régulièrement à des activités selon les instructions d'une personne faisant partie du groupe terroriste.
Facilitating terrorist activity	**Facilitation d'une activité terroriste**
83.19 (1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.	**83.19 (1)** Est coupable d'un acte criminel passible d'un emprisonnement maximal de quatorze ans quiconque sciemment facilite une activité terroriste.
Facilitation	**Facilitation**
(2) For the purposes of this Part, a terrorist activity is facilitated whether or not	**(2)** Pour l'application de la présente partie, il n'est pas nécessaire pour faciliter une activité terroriste :
(a) the facilitator knows that a particular terrorist activity is facilitated;	**a)** que l'intéressé sache qu'il se trouve à faciliter une activité terroriste en particulier;
(b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or	**b)** qu'une activité terroriste en particulier ait été envisagée au moment où elle est facilitée;

(c) any terrorist activity was actually carried out.	**c)** qu'une activité terroriste soit effectivement mise à exécution.

F. *Supreme Court of Canada jurisprudence on participation in terrorist activities generally and section 83.18*

[113] The leading authority on participation in activities of a terrorist group generally and section 83.18 specifically is the Supreme Court of Canada's decision in *R v Khawaja*, 2012 SCC 69 [*Khawaja*], per McLachlin CJ which states at paras 41–54:

> (b) *The Scope of the Law*
>
> [41] Section 83.18(1) criminalizes participation in or contributions to the activities of a terrorist group. It requires for conviction that the accused (a) knowingly (b) participate in or contribute to, (c) directly or indirectly, (d) any activity of a terrorist group, (e) for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity. Subsection (2) specifies that, in order to secure a conviction, the Crown does not have to prove that (a) the terrorist group actually facilitated or carried out a terrorist activity, that (b) the accused's acts actually enhanced the ability of a terrorist group to do so, or that (c) the accused knew the specific nature of any terrorist activity facilitated or carried out by a terrorist group. As the Ontario Court of Appeal found in *United States of America v Nadarajah (No. 1)*, 2010 ONCA 859:
>
> > . . . s. 83.18 applies to persons who, by their acts, contribute to or participate in what they know to be activities of what they know to be a terrorist group. In addition, those acts must be done for the specific purpose of enhancing the ability of that terrorist group to facilitate or carry out activity that falls within the definition of terrorist activity. [para 28]
>
> [42] The appellants argue that s. 83.18 is overbroad because it captures conduct that does not contribute materially to the creation of a risk of terrorism, such as direct and indirect participation in

legitimate, innocent and charitable activities carried out by a terrorist group. They contend that, "[i]n the absence of some explicit disassociation from the group's terrorist ideology, participating in any activity of the group could be viewed as intending to enhance the group's abilities to carry out terrorist activities" (Nadarajah factum, at para 35 (emphasis added)). Thus, innocent individuals, who may or may not sympathize with the cause of a terrorist group, could be convicted under s. 83.18 purely on the basis of attending a visibility-enhancing event held by the charitable arm of a group that also engages in terrorist activity. Professor Roach has opined that even lawyers and doctors who legitimately provide their professional services to a known terrorist could be convicted under s. 83.18: see K. Roach, "The New Terrorism Offences and the Criminal Law", in R. J. Daniels, P. Macklem and K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001), 151, at p 161. According to the appellants, these scenarios demonstrate that the law is overbroad.

[43] The first step in assessing the validity of this argument is to interpret s. 83.18 to determine its true scope: *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031, *per* Lamer C.J., at para 10.

[44] The Terrorism section of the *Criminal Code*, like any statutory provision, must be interpreted with regard to its legislative purpose. That purpose is "to provide means by which terrorism may be prosecuted and prevented" (*Application under s. 83.28 of the Criminal Code (Re)*, at para 39) — *not* to punish individuals for innocent, socially useful or casual acts which, absent any intent, indirectly contribute to a terrorist activity.

[45] This purpose commands a high *mens rea* threshold. To be convicted, an individual must not only participate in or contribute to a terrorist activity "*knowingly*", his or her actions must also be undertaken "*for the purpose*" of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. The use of the words "for the purpose of" in s. 83.18 may be interpreted as requiring a "higher subjective purpose of enhancing the ability of any terrorist group to carry out a terrorist activity": K. Roach, "Terrorism Offences and the Charter: A Comment on R. v. Khawaja" (2007), 11 *Can Crim LR* 271, at p 285.

[46] To have the *subjective* purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity, the accused must *specifically intend* his actions to have this general

effect. The specific nature of the terrorist activity, for example the death of a person from a bombing, need not be intended (s. 83.18(2)(*c*)); all that need be intended is that his action will enhance the ability of the terrorist group to carry out or facilitate a terrorist activity.

[47] The effect of this heightened *mens rea* is to exempt those who may unwittingly assist terrorists or who do so for a valid reason. Social and professional contact with terrorists — for example, such as occurs in normal interactions with friends and family members — will not, absent the specific intent to enhance the abilities of a terrorist group, permit a conviction under s. 83.18. The provision requires subjective fault, as opposed to mere negligent failure to take reasonable steps to avoid unwittingly assisting terrorists: see K. Roach, "Terrorism Offences and the Charter: A Comment on R. v. Khawaja", at p 285. For example, a lawyer who represents a known terrorist may know that, if successful at trial, his client will thereafter pursue his contributions to terrorism. However, the lawyer could only be convicted under s. 83.18 if his intent was specifically to enable the client to pursue further terrorist activities, as opposed to simply affording his client a full defence at law.

[48] To convict under s. 83.18, the judge must be satisfied beyond a reasonable doubt that the accused intended to enhance the ability of a terrorist group to facilitate or carry out a terrorist activity. There may be direct evidence of this intention. Or the intention may be inferred from evidence of the knowledge of the accused and the nature of his actions.

[49] The appellants argue that, even if the scope of s. 83.18 is narrowed by the high *mens rea* requirement, it is still overbroad because it captures conduct that, while perhaps animated by the intent to enhance the abilities of a terrorist group, is essentially harmless. For example, a person who marches in a non-violent rally held by the charitable arm of a terrorist group, with the specific intention of lending credibility to the group and thereby enhancing the group's ability to carry out terrorist activities, is not necessarily contributing to terrorism in any meaningful way. Yet, on the basis of the plain meaning of s. 83.18, that person could be convicted for participating in terrorism.

[50] This argument relies on an incorrect interpretation of s. 83.18. The *actus reus* of s. 83.18 does not capture conduct that discloses, at most, a negligible risk of enhancing the abilities of a

terrorist group to facilitate or carry out a terrorist activity. Although s. 83.18(1) punishes an individual who "participates in or contributes to . . . any activity of a terrorist group", the context makes clear that Parliament did not intend for the provision to capture conduct that creates no risk or a negligible risk of harm. Indeed, the offence carries with it a sentence of up to 10 years of imprisonment and significant stigma. This provision is meant to criminalize conduct that presents a real risk for Canadian society.

[51] A purposive and contextual reading of the provision confines "participat[ion] in" and "contribut[ion] to" a terrorist activity to conduct that creates a risk of harm that rises beyond a *de minimis* threshold. While nearly every interaction with a terrorist group carries some risk of indirectly enhancing the abilities of the group, the scope of s. 83.18 excludes conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group *to facilitate or carry out a terrorist activity*.

[52] The determination of whether a reasonable person would view conduct as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity hinges on the nature of the conduct and the relevant circumstances. For example, the conduct of a restaurant owner who cooks a single meal for a known terrorist is not of a nature to materially enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity: K. E. Davis, "Cutting off the Flow of Funds to Terrorists: Whose Funds? Which Funds? Who Decides?", in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, 299, at p 301. By contrast, giving flight lessons to a known terrorist is clearly conduct of a nature to materially enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity: *House of Commons Debates*, vol 137, No. 95, 1st Sess, 37th Parl., October 16, 2001, at p 6165 (Hon Anne McLellan).

[53] I conclude that a purposive interpretation of the *actus reus* and *mens rea* requirements of s. 83.18 excludes convictions (i) for innocent or socially useful conduct that is undertaken absent any intent to enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity, and (ii) for conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity.

[Emphasis added.]

G. *Supreme Court jurisprudence on the defence of* de minimis

[114] The Supreme Court of Canada recognizes the defence of *de minimis*; see for an example, paragraph 51 in *Khawaja* just cited. In my respectful view, the law concerning the defence of *de minimis* is set out by Justice Arbour in her reasons, albeit dissenting although not in this respect, in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 [*Canadian Foundation for Children*] at paras 203–204:

> (6) The Defence of *De Minimis*
>
> [200] The Chief Justice is rightly unwilling to rely exclusively on prosecutorial discretion to weed out cases undeserving of prosecution and punishment. The good judgment of prosecutors in eliminating trivial cases is necessary but not sufficient to the workings of the criminal law. There must be legal protection against convictions for conduct undeserving of punishment. And indeed there is. The judicial system is not plagued by a multitude of insignificant prosecutions for conduct that merely meets the technical requirements of "a crime" (e.g., theft of a penny) because prosecutorial discretion is effective and because the common law defence of *de minimis non curat lex* (the law does not care for small or trifling matters) is available to judges.
>
> [201] The application of some force upon another does not always suggest an assault in the criminal sense. "Quite the contrary, there are many examples of incidental touching that cannot be considered criminal conduct" (*R v Kormos* (1998), 14 CR (5th) 312 (Ont Ct (Prov Div)), at para 34).
>
> [202] The common law concept of *de minimis non curat lex* was expressed in the English decision of *The "Reward"* (1818), 2 Dods 265, 165 ER 1482, at p 1484, in the following manner:
>
> > The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex*. — Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be

> inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

[203] Admittedly, the case law on the application of the defence is limited. It may be that the defence of *de minimis* has not been used widely by courts because police and prosecutors screen all criminal charges such that only the deserving cases find their way to court. Nonetheless *de minimis* exists as a common law defence preserved by s. 8(3) of the *Code* and falls within the courts' discretion (J. Hétu, "Droit judiciaire: De minimis non curat praetor: une maxime qui a toute son importance!" (1990), 50 *R du B* 1065, at pp 1065-76) to apply and develop as it sees fit. In effect, the defence is that there was only a "technical" commission of the *actus reus* and that "the conduct fell within the words of an offence description but was too trivial to fall within the range of wrongs which the description was designed to cover" (E. Colvin, *Principles of Criminal Law* (2nd ed 1991), at p 100). The defence of *de minimis* does not mean that the act is justified; it remains unlawful, but on account of its triviality it goes unpunished (S. A. Strauss, "Book Review of *South African Criminal Law and Procedure* by E. M. Burchell, J. S. Wylie and P. M. A. Hunt" (1970), 87 *So Afr LJ* 471, at p 483).

[204] Generally, the justifications for a *de minimis* excuse are that: (1) it reserves the application of the criminal law to serious misconduct; (2) it protects an accused from the stigma of a criminal conviction and from the imposition of severe penalties for relatively trivial conduct; and (3) it saves courts from being swamped by an enormous number of trivial cases (K. R. Hamilton, "De Minimis Non Curat Lex" (December 1991), discussion paper mentioned in the Canadian Bar Association, Criminal Recodification Task Force Report, *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code of Canada* (1992), at p 189). In part, the theory is based on a notion that the evil to be prevented by the offence section has not actually occurred. This is consistent with the dual fundamental principle of criminal justice that there is no culpability for harmless and blameless conduct (see my opinion in *R v Malmo-Levine*, 2003 SCC 74, at paras 234-35 and 244).

[205] In Canadian jurisprudence, the defence of *de minimis* has been raised in drug cases that involve a tiny quantity of the drug (*R v Overvold* (1972), 9 CCC (2d) 517 (NWT Mag Ct.), at pp 519-

21; *R v S* (1974), 17 CCC (2d) 181 (Man Prov Ct), at p 186; and *R. v McBurney* (1974), 15 CCC (2d) 361 (BCSC), aff'd (1975), 24 CCC (2d) 44 (BCCA)), in theft cases where the value of the stolen property is very low (*R v Li* (1984), 16 CCC (3d) 382 (Ont HC), at p 384), or in assault cases where there is extremely minor or no injury (*R v Lepage* (1989), 74 CR (3d) 368 (Sask QB); *R v Matsuba* (1993), 137 AR 34 (Prov Ct); and in *obiter* in *Kormos*, *supra*); see also: Department of Justice of Canada, *Reforming the General Part of the Criminal Code: A Consultation Paper* (1994), "Trivial violations", at pp 24-25). Though the case law is somewhat unsatisfactory, the defence has succeeded on several occasions (see Stuart, *supra*, at pp 594-99) and this Court has expressly left the existence of the defence open (see *R v Cuerrier*, [1998] 2 SCR 371, at para 21, and *R v. Hinchey*, [1996] 3 SCR 1128, at para 69). In discussing the *actus reus* of the offence of "fraud on the government" under s. 121(1)(*c*) of the *Code*, L'Heureux-Dubé J. in *Hinchey*, *supra*, wrote the following, at para 69:

> In my view, this interpretation removes the possibility that the section will trap trivial and unintended violations. Nevertheless, assuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimis non curat lex*, that "the law does not concern itself with trifles". This type of solution to cases where an accused has "technically" violated a *Code* section has been proposed by the Canadian Bar Association, in *Principles of Criminal Liability*: Proposals for a New General Part of the Criminal Code of Canada . . . and others: see Professor Stuart, *Canadian Criminal Law: A Treatise* (3rd ed. 1995) at pp 542-46. I am aware, however, that this principle's potential application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below. Since a resolution of this issue is not strictly necessary to decide this case, I would prefer to leave this issue for another day. [Emphasis added.]

[206] A statutory formulation of the defence was proposed in the American Law Institute's *Model Penal Code* (1985), s. 2.12 under

> "De Minimis Infractions" (in Stuart, *supra*, at p 598). The C.B.A. Task Force Report reviewed the uncertain state of the law and recommended codification of a power to stay for trivial violations (see Stuart, *supra*, at p 598). A codification of the defence may cure judicial reluctance to rely on *de minimis*; however, the common law defence of *de minimis*, as preserved under s. 8(3) of the *Code*, is sufficient to prevent parents and others from being exposed to harsh criminal sanctions for trivial infractions.
>
> [Emphasis added.]

[115] In this connection I note Chief Justice McLachlin cited with approval Justice Arbour's description of the *de minimis* defence in *Canadian Foundation for Children*, in *R v JA*, 2011 SCC 28:

> [63] The Crown suggested that this Court could allow for mild sexual touching that occurs while a person is unconscious by relying on the *de minimis* doctrine, based on the Latin phrase *de minimis non curat lex*, or the "law does not care for small or trifling matters": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, at para 200, *per* Arbour J., dissenting. Without suggesting that the *de minimis* principle has no place in the law of sexual assault, it should be noted that even mild non-consensual touching of a sexual nature can have profound implications for the complainant.

H. *Application of legal principles to the Supplemental Evidence*

[116] The Supplemental Evidence filed in February 2019 disclosed four types of potential criminality related to the human sources in this file. I will now review each in terms of the law set out above.

[117] The first type of potential criminality dealt with relatively small payments made by the Service for [redacted] reciprocal basis. [redacted] The [redacted] were not expensive, and it appears to the extent there was a benefit it would have been relatively small. AG Canada submitted on the authority of *R v Hinchey*, [1996] 3 SCR 1128 [*Hinchey*], that where, as here, there was no net benefit there is no benefit in law; where there is no benefit in law there is no crime, a point with which in the circumstances of this case I am inclined to agree.

[118] In *Hinchey*, the appellant and his wife were charged with two counts of fraud and the appellant with a breach of section 121(1)(c) of the *Criminal Code*, which makes it an offence for an official or employee of the government to accept from a person who has dealings with the government a benefit of any kind directly or indirectly, by himself or through a member of his family, unless he has the consent in writing of the head of the branch of government that employs him. Justice L'Heureux-Dubé, writing for the majority, states at paras 63-69:

> [63] While the occasional free lunch or dinner might not concern the public, the conclusion may well be different in a situation where the friend purchases lunch or dinner every day, or for a sustained period of time. What may cast a shadow upon the appearance of integrity will likely depend on a number of different factors. I wish to point out that to impose a restriction, as I believe my colleague has done, which puts all of these transactions out of reach is a virtual rewriting of the section; it is to do what Parliament has specifically restrained from doing. In my view, as much as is possible within the valid corners of the law, and absent constitutional considerations which mandate otherwise, we should respect Parliament's wishes on these matters and not impose unwanted hindrances.
>
> [64] I believe the term "advantage or benefit" can be interpreted in a manner which does not include the recipient of a cup of coffee.

In *Hoefele v The Queen*, 94 DTC 1878 (TCC), the court found that to constitute a benefit worthy of measurement, it needed to be a "material economic advantage" (p 1880). It was recognized, therefore, that trivial advantages did not satisfy the confines of the law. In a taxation sense, a benefit does not occur when the payment is a reimbursement or does not advance the recipient's position in any material sense.

[65] The decision of *R v Dubas*, [1992] BCJ No. 2935 (SC), aff'd without reference to this point (1995), 60 BCAC 202, is also instructive in narrowing the section's application. In that decision, the Deputy Minister of Health for British Columbia was charged after it became known that he had accepted a hotel room and hotel expenses from a company which manufactured high technology hospital equipment and often sold this equipment to agents of the ministry. MacDonell J. utilized the following approach in deciding the case (at paras 29-30):

> It is apparent from the authorities that all of the circumstances must be considered in deciding whether Mr. Dubas received a benefit or not. In deciding that, the purpose of the trip has to be considered: whether it was essentially on government business and, if so, what advantage was there to Mr. Dubas to receive free accommodation. Was it the government, or the taxpayers of British Columbia, who received the benefit by not having to pay for the trips which would otherwise be paid for by the Ministry, or was the benefit for Siemens?
> . . .
>
> With respect to Count 1, I am of the view that no benefit was received by Mr. Dubas from Siemens Electric Ltd. with respect to the February/March, 1986 trip. All that was provided was accommodation of which the Minister was aware and approved. Mr. Dubas was there on government business and, if the trip were authorized and had the accommodation not been offered, he would be entitled to charge out the expenses for it. In neither case does he personally benefit. Accordingly, I conclude that the Crown has failed to prove beyond a reasonable doubt the guilt of the accused under Count 1.

> [66] In my view, this reasoning is quite appropriate. While conduct similar to that in the *Dubas* case might attract sanction under a government's conflict of interest guidelines, it does not fall within the purpose or wording of s. 121(1) (c). It is true that the appearance of integrity may be harmed by such conduct, but it is not because the government employee personally benefits. This particular section is designed to prevent an employee from actually benefiting. Where this does not occur, the criminal sanction is not warranted.
>
> [67] This would also address many of the situations suggested by Cory J. Where friends take each other to dinner on a reciprocating basis, it is unfair to suggest that one "benefits" by receiving a dinner on an isolated occasion. It would be acceptable for an accused in such a situation to raise evidence which showed that this was part of an ongoing relationship between friends who periodically exchanged dinners. Where the benefits, however, were obviously one-sided, it might lead to a different conclusion. This would be a matter for the trier of fact to consider on all the facts of the case, and its unique circumstances.
>
> [Emphasis added.]

[119] I note human source or sources were also reimbursed by the Service for small payments to assist the targets, including payments for [redacted] In terms of the reciprocal [redacted] as occurred in relation to human sources in the case at bar, these payments and the other small charges may also be treated under the legal defence of *de minimis* principles. In addition such payments are trivial matters, albeit technically perhaps criminal in nature. Further, it seems to me these are merely casual acts which, absent any intent, may only very indirectly contribute, if at all, to terrorist activity contemplated by paragraph 44 of the Supreme Court's decision in *Khawaja*.

[120] The second type of potential criminality involved [redacted] assistance provided to the targets by human sources [redacted] Here, human sources were [redacted] and while perhaps technically contraventions, the targets could just as easily have [redacted] Essentially AG Canada argued this matter is *de minimis* and in the circumstances should not attract criminal liability. In any event, it was argued, the failure of the duty to disclose could not possibly have had any connection to the issuance or non-issuance of the warrants in question. I accept the latter point and also note this category also involves trivial matters with very little if any benefit.

[121] The third type of potential criminality involved human sources [redacted] for use by targets. However, most of a particular [redacted] was arranged [redacted] to assist the Service. It seems to me that while the targets benefited, so too did the Service [redacted] While this might technically constitute an offence, again it is trivial and a truly *de minimis* one-off activity in respect of which there was also an entitlement [redacted]

[122] The same may be said of the fourth activity, namely assisting on occasion [redacted] a target: this trivial matter is in my view likely excused by the *de minimis* defence in addition to lacking the necessary intent discussed in *Khawaja*. Further, in this respect and in relation to the other three categories just discussed, the causal connection between the activities and evidence relied on in support of the 2018 Warrants appears to be very indirect.

[123] The *amici* made submissions on these matters at a hearing on April 8, 2019. The *amici* emphasized that the Court could consider the seriousness of the criminality, if any, and the directness of the causal connection between any alleged criminality and the collection of information. I agree.

[124] The following day, April 9, 2019, AG Canada and the *amici* Messrs. Cameron and Gourlay filed an agreed-upon submission addressing the Court's concerns, which would also allow evidence and submissions in this matter to be completed in coordination with the other two cases. The *amici* and AG Canada agreed that, on the evidence to date, it was not certain that the potentially unlawful activities identified in the Supplemental Evidence were contrary to the *Criminal Code*, and that if they were, the causal connection between those activities and the evidence relied on in support of the Warrants appears to be relatively indirect. I agree with this joint submission.

[125] Additionally I now have the benefit of the analytical framework set out by Justice Gleeson in 2020 FC 606. If these potentially illegal activities had been disclosed, applying this analytical framework, I have no doubt and find that the 2018 Warrants could have issued.

[126] Indeed, even if I assessed that there would not have been sufficient information to issue the 2018 Warrants if the human source information provided was automatically excised from the application, as outlined by Justice Gleeson, I would still have to engage in a full balancing

analysis to determine whether the warrants could have issued taking into account the (1) seriousness of the illegal activity, (2) fairness, and (3) societal interest.

I. *Full Balancing Analysis – determining whether any information should be excised from the 2018 Application for Warrants*

[127] As I have explained above, the seriousness of these activities is minor and the illegality does not constitute a broader pattern of conduct but rather common sense activities designed to facilitate access by human sources to Court approved targets of Service investigation under the *CSIS Act*.

[128] With respect to fairness, the potentially illegal activities were not closely linked to the collection of information and did not meaningfully impact on individual rights or interests. I am also of the view, especially given the minor nature of the activities, that they do not undermine the credibility or reliability of the human source information provided. Indeed, even if all these incidents constituted crimes worthy of prosecution either individually or cumulatively, I am unable to see real causality between the admitted failure to disclose and the issuance or non-issuance of the 2018 Warrants.

[129] Finally, as these Reasons make clear, the Court is of the view that there was a real and genuine societal interest in investigating the alleged threat to the security of Canada through the use of the warranted powers. There were no extenuating circumstances linked to the potential

illegal activities that could have justified excising the information provided by the human sources.

[130] For the above reasons, in conducting the balancing exercise in my *ex post facto* review, I find that no information obtained from potential illegal activities of human sources should be excised from the record. As a result, despite the breach of the duty of candour and the additional information provided to the Court after the 2018 Warrants had been issued, I find that the 2018 Warrants could have issued.

J. *Resumption of Draft Reports and Orders allowing full or redacted Draft Reports – April 10, 2019*

[131] Following the joint submission referred to, on April 10, 2019 I issued an Order allowing the resumption of the preparation, review and possible release from sequestration of Draft Reports. This Order re-started the review procedure in respect of communications that might be protected by solicitor-client privilege. The Order stated in part:

> **AND WHEREAS** the Court is concerned that, as time passes during the Court's consideration of this and other matters raising similar issues, and because it now appears that further time and consideration will be necessary, the above-referenced isolation of information or intelligence could unduly impair, to the detriment of the security of Canada, the investigation by the Service of the Threat in respect of which the Warrants were issued in the first place;
>
> **AND WHEREAS** at an *En Banc* hearing on February 21, 2019, the Court was advised the Attorney General was not going to be suggesting before any of the judges dealing with this and the other matters referred to above, that there weren't offences, such that the Chief Justice in his Direction dated March 20, 2019,

> determined that the commission of illegal activities was acknowledged in this and the other matters;
>
> **AND WHEREAS** now the Attorney General and the *amici curiae* have agreed that, on the evidence to date, it is not certain that the activities identified in the Supplemental Evidence were contrary to the *Criminal Code of Canada*, and that if they were so, the causal connection between those activities and the evidence relied on in support of the Warrants appears to be relatively indirect.
>
> **THEREFORE THIS COURT ORDERS that:**
>
> 1. Subject to paragraph 3 hereof, the Service is permitted to resume the collection of and reporting on the information or intelligence obtained pursuant to the Warrants until the Court finally disposes of the matters raised by the Supplemental Evidence.

[132] This Order also indicated that the Court remained seized of the matter and could make further orders, including orders arising out of issues relating to possible criminality and failure to observe the duty of candour.

[133] The *amicus* appointed for the solicitor-client issue and the Court resumed their review of Draft Reports and the release of full or redacted copies to the Service for use under the 2018 Warrants.

[134] The procedures with respect to the protection of solicitor-client privilege outlined above continued throughout the Spring and Summer of 2019.

K. *Second interruption of review and release of Draft Reports September / October 2019 due to additional evidence concerning (1) non-disclosure of material going to reliability*

and credibility of human sources and (2) disclosure of additional potentially criminal conduct by human sources

[135] By letter dated September 16, 2019, AG Canada informed the Court that the Service, after yet a further review of human source information in its many files, had identified material potentially affecting both the reliability and credibility [redacted] relied upon in issuing the 2018 Warrants. While for the most part just then discovered, all this material had been available to the Service in its various file holdings when it applied for the 2018 Warrants, but was not disclosed.

[136] In addition, the Service reported on further potentially unlawful conduct [redacted] which was essentially of the same nature the Service disclosed in January and February 2019, discussed above, but which had taken place between then and September 2019.

[137] AG Canada informed the Court that pending direction from the Court, the Service itself had decided once again to take steps to sequester collection and reporting from the 2018 Warrants except for the purpose of making disclosure and submissions to the Court and for the Service's internal review of the non-disclosure.

[138] A lengthy affidavit of a senior Service employee was subsequently filed on October [redacted] 2019. This affidavit sets out a considerable amount of information relating to the reliability and credibility [redacted] Some information raised questions, and some confirmed [redacted] reliability and credibility. The affidavit also outlined additional potentially

unlawful human source conduct that had occurred since the disclosures of January and February 2019.

[139] The affidavit said that in [redacted] 2019, the Service obtained indications [redacted] had engaged in conduct that might qualify [redacted] credibility or reliability, which caused the Service to look further into its files. The Service had picked up reports of alleged [redacted]

[140] This ultimately caused the Service's Director General Human Sources, who reports to the DDO, to ask the affiant to conduct what I will refer to as a 'deep dive' into a number of files maintained by the Service containing material relevant to [redacted]

[141] While the deep dive initially was conducted only by the affiant, it was soon expanded to engage five additional Service personnel [redacted] to enable a proper report to be provided to superiors at the Service and to this Court.

[142] The results of the deep dive were reported to the Court in the October [redacted] 2019 affidavit. The Court also had the benefit of oral testimony from this affiant at a hearing. The Court was advised that [redacted] files were reviewed through computer word searches and manual searches and interviews involving material and matters going back to [redacted] Corroboration was sought of what was found in one place elsewhere in various records and databases.

[143] I will not go into all of the evidence produced in the affidavit and testimony; it is in the record and some will be discussed shortly. The affidavit was some 65 pages in length. However, I do wish to say that the deep dive work was done both with dispatch and in my respectful view, with thoroughness. It is worth recalling that the new affidavit was filed to bring these matters to the attention of the Court on October [redacted] after the deep dive was ordered and started on September 17, 2019.

[144] After hearing submissions, both verbal and written, from AG Canada and the *amici*, both prior to, at, and after an October [redacted] 2019 hearing, and upon considering the matter, the Court issued a further Order to sanction the resumed isolation and limited use of warranted intercepts. Accordingly, on October [redacted] 2019, I issued an Order that provided, among other things:

> **AND WHEREAS** by letter dated September 16, 2019 the Attorney General of Canada informed the Court of additional non-disclosure of information at the time the 2018 Warrants were issued and that, pending direction from the Court, the Service will take steps to sequester collection and reporting from the 2018 Warrants (Sequestering);
>
> **AND WHEREAS** the Attorney General of Canada also specified that the present Sequestering means that the Service will cease reporting and using communications or information intercepted or obtained under the 2018 Warrants except for the purpose of making disclosure and submissions to the Court and for the Service's internal review of the non-disclosure;
>
> **AND WHEREAS** the Attorney General of Canada filed supplemental evidence from a Service witness on October [redacted] 2019 providing disclosure of the information that was not provided to the Court at the time the 2018 Warrants were issued;
>
> **AND WHEREAS** on October [redacted] 2019 the Court received oral representations from the Attorney General of Canada and heard *viva voce* evidence from the Service witness;

AND WHEREAS the Attorney General of Canada has requested that, in the interim, the Court approved that the Sequestering be modified for the limited additional purpose of preparing an application to replace the 2018 Warrants;

AND WHEREAS the Attorney General of Canada has indicated that any draft reports subject to referee review, and which were not already released by the Court for retention by the Service, will be held in abeyance and would not be accessible under the requested modification to the Sequestering;

AND WHEREAS the Court remains seized of this matter and this Interim Order is without prejudice to any remedy this Court may deem appropriate in the final disposition of this matter and in the common issues in application [redacted] (Kane J.), [redacted] (Gleeson J.) and [redacted] (Brown J.) hereinafter referred to as the "*En Banc*" matter;

THIS COURT ORDERS that:

1. This Court remains seized of this matter for the purpose of possibly issuing any remedy deemed appropriate in the final disposition of this matter and the "*En Banc*" matter.

2. Until further Order of the Court and except as provided by paragraph 3 of this Interim Order, the Service is permitted to use communications or information intercepted or obtained under the 2018 Warrants for the limited purpose of making disclosure and submissions to the Court, for the Service's internal review of the non-disclosure, and for the preparation of an application if the Director or any employee designated by the Minister for that purpose believes, on reasonable grounds, that a warrant under sections 12 and 21 of the *CSIS Act* is required.

3. Any draft reports subject to referee review, and which were not already released by the Court for retention by the Service, shall be held in abeyance and will not be accessible under the requested modification to the Sequestering granted by this Interim Order.

[145] While perhaps slightly out of place, I will note here that the 2018 Warrants were issued for a period of one year. They expired on October [redacted] 2019. [redacted]

[146] I turn now to assess the new evidence and testimony submitted on October [redacted] 2019, and at the hearing October [redacted] 2019.

[147] The October [redacted] 2019 affidavit outlined the threat [redacted]

[148] The affidavit outlined in general terms the Service's investigation into [redacted] as a threat to the security of Canada. It detailed a very large number of instances of the collection value of human source information noting as well matters that were corroborated; they are in the record and are not repeated here. It is enough to say the human sources relied in this matter were, in my respectful view, correctly considered to be key contributors in the collection of reliable and vital intelligence [redacted]

L. *New information regarding credibility and reliability* [redacted]

[149] While fragments of the newly disclosed information concerning credibility and reliability were disclosed in October 2018, practically none of the potentially negative material in the

October [redacted] 2019 affidavit were disclosed in the 2018 Warrants application. Counsel conceded and I agree that all the information being disclosed in October 2019 was available at the time of the 2018 Warrants.

[150] It was also conceded, and I have no hesitation in finding that the newly disclosed information should have been disclosed in October 2018 under the duty of candour lying on the Service.

[151] In the application for the 2018 Warrants, the Court was given information concerning human sources and their credibility and reliability. This was contained in a page and a half singled-spaced Human Source Précis prepared for each human source.

[152] Judges of this Court expect a Human Source Précis to bring to their attention all information known to the Service that might be relevant to the Court's assessment of the credibility or reliability of a human source. The Service must provide the Federal Court with a relevant and full picture concerning the credibility and reliability of a human source. This Human Source Précis must be relevant, full and complete if the Service is to comply with the duty of candour. The Service employee must not pull punches, conceal information, or convey half-truths, nor may he or she bring false or misleading information to the Court.

[153] The Court expects and acts as if the Service has complied with its duty of candour. In reaching their decisions on national security warrants, judges of this Court are entitled to rely on

information regarding human sources provided by the Service. Human source information supplied to the Court must comply with and fully discharge the duty of candour.

[154] As is well known, this is particularly the case because the Service and its Counsel seek national security warrants under the *CSIS Act* in secret hearings where decisions are made based on information provided by the Service. The Court has no other information before it, such that the Service's duty of candour is very heavy.

[155] Critically, Service human source information must disclose information known to the Service that supports the warrant application. It must also disclose information that might cast doubt on the reliability or credibility of human source information and/or the Service.

[156] The Human Source Précis filed with the 2018 Warrant application provided only a very brief narrative about the human sources in question, their value to the Service generally and to the investigation and warrants in question. They outlined a history of interactions between the Service and human sources. They also discussed [redacted] the Service's assessment of their reliability.

[157] I have reviewed both the Human Source Précis provided in October 2018 at the time the warrants were issued, and the new information set out in affidavit filed October [redacted] 2019.

[158] What was disclosed in the summary document prepared in support of the October 2018 Warrants is in the record and will not be repeated here. Likewise what was disclosed in the October [redacted] 2019 affidavit is in the record and details need not be repeated here.

[159] However, in my respectful view, a number of matters that might affect the Court's assessment of the credibility and/or reliability [redacted] were revealed for the first time in October 2019. Virtually none of these were disclosed in 2018.

[160] I will address the new information in the October 2019 affidavit under the following headings: [redacted] non-Service directed potentially unlawful activity [redacted] and Service-directed potentially unlawful activity. These headings were chosen by the Service.

[161] But before reviewing the information under each heading, I would like to make the following observations.

M. *General observations on reliability and credibility*

[162] First, many of the new facts concern conduct and activities dating back years [redacted] That said, all matters newly disclosed in October 2019 were available to the Service in October 2018, if the Service had decided to look through its multiple files. The information was not new to the Service, but was new to the Court. The Service had access to all this information in October 2018, except for the relatively small amount of

information obtained after the 2018 Warrants were issued and in relation to the February 8, 2019 Supplementary Evidence.

[163] Second, in my respectful view, the fact that human sources live what some would consider unsavory lives is something to be expected when assessing human source information provided in the context of a *CSIS Act* warrant application. Also, the Court knew when it issued the 2018 Warrants that [redacted] relied on by the Service had experienced [redacted] as detailed in the material before it.

[164] In this case, human sources were useful because in the Service's submission and in my view, they had provided and continued to provide valuable information in connection with [redacted] This value flows from human sources having access to those implicated with [redacted] It is a matter of public record that [redacted] had resorted among other things to [redacted] to further their violent objectives.

[165] No one should be so naïve as to think these sorts of violent extremists associate only with persons of good standing or high repute in the community; I take it as a given that violent extremists are comfortable associating with those who to a greater or lesser degree, live as they do, that is, those who may and often do live outside the norms of both Canadian morality and law. In this connection I could expect useful human sources on occasion to be themselves

unsavory individuals; their very unsavouriness may indeed best enable them to obtain access and valuable intelligence information from and concerning even more unsavoury people.

[166] In a warrant application, the Court is concerned with reliable and credible information, which on occasion will be produced by human sources who associate with persons of unsavoury or bad character. I take it as a given that good information may also be provided by human sources who themselves are of unsavoury or bad character.

[167] The value of information from human sources of bad character must be examined critically and with open eyes. The Court must remain vigilant and caution itself when dealing with information from unsavoury informants; this was the case in my assessment of the human source information provided in October 2018. This is a fact driven examination.

[168] While one might be inclined to greater or lesser caution, there is no rule of automatic exclusion, nor, with respect, should there be such a rule given the interest involved related to threats to the security of Canada.

[169] What is required is a case-by-case analysis and determination as to whether the human source information is sufficiently credible and reliable to support the requested warrant.

[170] In assessing the reliability and credibility of human sources, their lifestyles and unlawful activities may be relevant. The decision on relevance is for the Court to make. Therefore, the

Service must disclose such information to the Court where known. But the true value of human source information in this case derives from [redacted] successful ability to penetrate the milieu of the alleged extremists and obtain and report valuable intelligence to CSIS. It is obvious that valuable information best enables CSIS [redacted] to ensure such threats to the security of Canada are appropriately monitored and contained.

[171] Turning to the specific concerns, it is important to note the Service brought the various lifestyle and other issues potentially affecting credibility and reliability to the Court's attention as soon as it was recovered from its various files – within days of completing the deep dive started in September 2019. Of course, the deep dive should have been conducted long before the 2018 Warrants were issued. However, in my view, once commenced it was done thoroughly, professionally, and importantly, quickly. This speaks to candour, even if late in the day.

[172] In this connection, it is noteworthy that the 2018 Warrants would expire on October [redacted] 2019; the Service had to come to grips with the reliability and credibility of its human sources quickly if it wished to seek fresh warrants.

[173] Counsel fairly conceded that the non-disclosure of matters going to reliability and credibility was not acceptable. I agree and so find. Counsel also submits that there is no evidence of deliberate non-disclosure. I agree and so find. Counsel submits I may infer a lack of due diligence on the part of the Service in failing to identify these matters in 2018. I draw that

inference in the circumstances of this case on the all the evidence before me in this file, as well as that from the mini *en banc* I participated in with Justices Kane and Gleeson.

[174] I note that in 2018, counsel for the Service did not have access to the Service's human source files when preparing the warrant application. This was a critical fault. It should have had such access as it was previously ordered by this Court. In this connection, the Service should have been allowing AG Canada's warrant counsel access to its human source files as early as 2009 – a decade earlier. In this circumstance, I am not able to criticize counsel for lack of due diligence. Rather, that failing lies squarely at the feet of the Service. I say this because the Service in not providing access ignored the Court's ruling in *Harkat (Re)*, 2009 FC 1050, where my colleague Justice Simon Noël instructed CSIS to ensure its counsel, AG Canada, had access to all information available. Otherwise, counsel is unable to effectively advise his or her client and is unable to ensure the administration of justice is being served. As Justice Noël stated at paras 48 and 49:

> [48] This Court has, in an earlier order, recognized the importance of human source information to Canada's national security and the need to protect the identity of sources (see *Re Harkat* 2009 FC 204 par 24). The importance of human sources to intelligence gathering is not in question. However, when human source information is used to support serious allegations against an individual, the Court and the special advocates must be able to effectively test the credibility and reliability of that information. This is consistent with the decision of the Supreme Court of Canada in the Charkaoui decisions (see: *Charkaoui v Canada* 2007 SCC 9 ("*Charkaoui 1*") and *Charkaoui v Canada* 2008 SCC 38 ("*Charkaoui 2*")) and with the legislative purpose underpinning the amendments providing for the appointment of special advocates. <u>To conform to the law, CSIS and the Ministers must give the Court all of the information necessary to test the credibility of the source</u>

> and not just the information that a witness, trained as an intelligence officer, considers operationally necessary.
>
> [49] CSIS must also ensure that nothing prevents its legal counsel from fulfilling his role as legal advisor to CSIS or his ability to act as officer of the Court. A lawyer has an obligation to represent his client to the utmost subject to an overriding duty to the Court and to the administration of justice. Without access to all the information available, counsel is unable to effectively advise his or her client and is unable to ensure that the administration of justice is being served. It is also clear that despite his best efforts, counsel for CSIS has been overwhelmed by the magnitude of this file. Adequate administrative and legal resources must be dedicated to these complex and time consuming files.
>
> [Emphasis added.]

[175] As noted later in these reasons, while at the time there were in fact CSIS policies militating in favour of more fulsome information gathering in connection with the warrant application process, in practice some relevant policies had fallen into disuse.

[176] I return now to consider the potentially negative concerns identified in the Service affidavit sworn October [redacted] 2019. Positive factors will be dealt with later in these reasons. In summary these are my conclusions.

[177] The potentially negative concerns relating to the credibility and reliability [redacted] means the Court is reviewing the validity of a previously issued warrant for reasons of candour. Therefore, the analytical framework applied by Justice Gleeson applies here as well. At issue is whether a breach of candour casts doubt on the entire evidence [redacted] and how this breach impacts the validity of a previously issued warrant. In deciding

whether the previously undisclosed information could invalidate the 2018 Warrants, I must first determine if any of the information [redacted] should be excised taking into account (1) seriousness of the activities giving rise to questioning the credibility and reliability of the information, (2) fairness, and (3) societal interest. Once I have conducted the excision analysis, I must determine whether the 2018 Warrants could have issued based on the remaining record.

N. *Assessment of potentially negative information concerning the credibility and reliability* [redacted]

[178] As to [redacted] and [redacted] issues, I am not persuaded the evidence in this respect materially affected the reliability or credibility of human source information provided in support of the 2018 Warrants. While evidence of events after October 2018 would of course be considered in the context of an application to renew the warrants, with respect, they are not of themselves of sufficient concern to allow me to determine that the 2018 Warrants could not issue; they could.

[179] However, evidence of activities before the issuance of the 2018 Warrants, does raise the issue of the validity of those warrants. In this respect, the affidavit contained some information [redacted] referencing [redacted] interlaced with [redacted] Some of this evidence was in fact put before the Court in October 2018 and came as no surprise, [redacted]

[180] Specifically, while Service records obtained in the deep dive indicated instances of [redacted] I am unable to discredit [redacted] evidence on this ground particularly given the impressive intelligence gathered, corroborated in many cases, and provided to the Service. In this connection, I also observe that the Service gave [redacted] as a reward for successful work. This information does not of itself persuade me that information [redacted] should be excised from the record in an *ex post facto* review.

[181] Likewise, evidence of [redacted] would have had very little, if any, effect on the issuance of the 2018 Warrants, given [redacted] the lack of evidence that such [redacted] affected the reliability or credibility of the information obtained.

[182] In terms of [redacted] issues, the evidence in the October [redacted] 2019 affidavit was that [redacted] and there were difficulties [redacted] Frankly, what the Court puts a premium on in terms of human source reliability and credibility is whether they obtain and provide useful information to the Service. In this respect these human sources did very well. In my view, [redacted] provided impressive intelligence to the Service, including corroborated matters and valuable information. Perhaps more information could have been provided, but in my view these alleged [redacted] issues do not diminish the fact that [redacted] provided valuable information which was reliable and credible.

[183] In terms of [redacted] the October 2019 evidence was that [redacted] On occasion, [redacted] engaged in some [redacted] Neither is remarkable. [redacted] at times to have enjoyed [redacted] Not surprisingly also [redacted] at least in the last few years. I have no difficulty concluding [redacted] at times motivated by [redacted] In my respectful view, neither this conclusion nor the evidence of [redacted] could have affected the issuance of the 2018 Warrants, particularly given the credibility and reliability of the information previously provided to the Service, as confirmed and reconfirmed [redacted] See the discussion below under at paragraph 192 "*Assessment of new evidence of potentially positive reliability and credibility*."

[184] Issues going to what might be called personal character were also detailed in the evidence filed October [redacted] 2019, including suggestions of possible [redacted] In the circumstances of this case, such matters are in my respectful view of little relevance [redacted] although they should be disclosed if known to the Service.

[185] I am not persuaded that issues of [redacted] reported in October 2019 could have led to the denial of the 2018 Warrant application. As noted already, I have no doubt human

sources were motivated to a large extent by [redacted] while at the same time other motives [redacted] played a larger or smaller role over time. It is also noteworthy that the Service took steps to determine if human sources were [redacted] but without any success. In my view, nothing would or could have been changed by the new evidence filed in terms of the 2018 Warrants.

[186] I also reviewed new allegations of potentially unlawful activity, namely [redacted] On closer examination, the allegation – and that is all it is – [redacted] seems to involve [redacted] An instance of possible [redacted] was also brought to the Court's attention. Other evidence of possible [redacted] included more recent allegations based not on any actual evidence but on unsupported accusations. [redacted] Some of the evidence in this respect derived from [redacted] I am not persuaded that the [redacted] may be taken as accurately describing the situation a year earlier when the warrants were applied for. While I am suspicious [redacted] in this respect, overall these allegations are too dated or too tenuous to conclude that the [redacted] information should be excised or that the 2018 Warrants could not have been issued.

[187] The Service advised by letter and affidavit [redacted] that [redacted] The Service said it was renewing its assessment of information provided [redacted] I am not satisfied, without more evidence, that these [redacted] reflect the situation that existed when the warrants in question were issued in 2018, which is the material time to assess whether the warrants could have issued.

[188] I also looked at evidence of [redacted] and more recent concerns including allegations made by [redacted] The evidence in this connection, while it should have been disclosed, was marginal. Indeed, [redacted] advised the Service that they have used the impression of being [redacted] as a means of gaining access to individuals and social circles; essentially this aura enhanced their credibility in those circles. I am not persuaded this evidence is such that if disclosed at the time of the application, the 2018 Warrants could not have issued.

[189] Additional evidence was tendered, once again [redacted] to which I am unable to attach much significance. Unsubstantiated allegations made by others of more serious activity are noted but lacks material corroboration. More [redacted] issues are reported, as are yet more complaints from [redacted]

Not surprisingly, given their association with [redacted] some reports surfaced that [redacted] implicated in [redacted] an observation an outsider might make but which does not displace my conclusion that the warrant could have issued notwithstanding these allegations.

[190] Two instances of Service-directed potentially unlawful activities were also noted: both involved [redacted] one of which was initially disallowed by the Service but then allowed because it was more or less completed. I am unable to conclude these affect either the reliability or credibility of the human sources, if only because the Service was consulted beforehand on both occasions. If anything, this demonstrates a degree of loyalty to the Service and reliability. Nor am I able to find these transactions to be serious crimes given they were monitored by and conducted under the auspices of the Service, and given the doubts I have in relation to intent [redacted]

[191] Standing back, and looking at the totality of the evidence revealed in October 2019 and subsequently, and while it could and should have been provided when the 2018 Warrants were requested, none of the evidence put before the Court either individually or in the aggregate, leads me to the conclusion that the information [redacted] should be excised from the record. In my view, had the information relating to the credibility and reliability [redacted] been disclosed when the application was made, the 2018 Warrants could have issued.

O. *Assessment of new evidence of potentially positive reliability and credibility*

[192] The October [redacted] 2019 evidence filed by CSIS contained not only previously undisclosed information that might negatively affect the Court's assessment of [redacted] credibility and reliability, but also new evidence that might lead to a positive assessment of human sources. Essentially, this evidence was to the effect, and I find, that [redacted] provided a great deal of valuable intelligence over the years.

[193] The affidavit filed by CSIS in support of the credibility and reliability [redacted] deposes, among other things, to the following:

[redacted]

[redacted]

28. The Service assesses that a substantial (but not overwhelming) amount of [redacted] has been regularly corroborated by a variety of validation instruments, [redacted]

[redacted]

29. As an illustrative sampling of [redacted] corroboration, I note the following forms of validation that [redacted]

[redacted]

[redacted]

[194] In this connection, the Service's affiant was subjected to cross-examination by the *amici*. Mr. Cameron noted one mistake [redacted] in connection with to the identification of [redacted] The Service confirmed that [redacted] was in fact [redacted] The affiant characterized this as a "mistake" and I accept that it was. It could also have been [redacted] This information was uncovered in the deep dive and should have been disclosed before me but was not. That said, it is but one instance and in my view does not detract from the overall credibility and reliability of the information provided [redacted]

[195] Overall, I agree with the Service that the information provided [redacted] was accurate far more often than not, in addition to being genuinely useful, truthful and very often corroborated. It is more probable than not that the information provided [redacted] should be considered in the same vein, and I so find.

P. *High legal risk assessments, report to the Minister of Public Safety and Emergency Preparedness, and meeting of Warrant Committee in the Summer of 2018*

[196] While my colleague Justice Gleeson describes the events in his case and the general issues of breach of duty candour in his decision in [redacted] (2020 FC 616), whose finding I generally agree with and accept, I will outline a concerning series of events relating to [redacted] this file.

[197] By way of background, an AG Canada lawyer prepared a Legal Risk Assessment dated February 19, 2018 in connection with a human source [redacted] described as a "human source of the Service who has been providing information [redacted] is described as a productive human source who was paid [redacted] was said to be in a relationship of general reciprocity with individuals where one person would pay [redacted] and would either be reimbursed or accept that the next time, someone else would pay. Overall, it was assessed that there was a general parity with no net financial gain or loss [redacted] That said, this Legal Risk Assessment concluded this arrangement would entail "high legal risk" for both the Service and the human source.

[198] Later in 2018, the same human source [redacted] was referred to in the application leading to the 2018 Warrants, where the human source was called [redacted]

[199] The human source identified as [redacted] in the 2018 Warrants application is the same as [redacted] the human source referred to in the February 19, 2018 Legal Risk Assessment.

[200] Pursuant to a 2015 Ministerial Direction, CSIS was required to provide notice of intelligence collection activities assessed as high risk to the Minister of Public Security and Emergency Preparedness [Minister] in advance of the activities in question.

[201] However, on March 9, 2018, the Director of CSIS, Mr. David Vigneault, approved an operation involving human source [redacted] which, as per the Legal Risk Assessment prepared by AG Canada dated February 19, 2018, posed a high legal risk.

[202] The required advance notice was not given to the Minister.

[203] In fact, the Minister was not advised for some four months, notwithstanding the Director's assurance to the Minister in an earlier memorandum dated September 25, 2017, that he "will immediately notify you of high risk operations I approve, should any be identified."

[204] That said, on July 3, 2018, CSIS Director David Vigneault provided a written report to the Minister notifying him retroactively of the high legal risk operation he had approved for

[redacted] Director Vigneault assured the Minister that "the activities within the scope of this operation assessed as carrying a high legal risk have not yet taken place."

[205] I pause to note that in fact, the Legal Risk Assessment of February 19, 2018, identified the high legal risk as "general reciprocity" [redacted] and described such activity, as previously discussed. It is clear that these payments and this arrangement had taken place in the past, was continuing in the present and would continue in the future. In his affidavit, Director Vigneault made it clear he was writing to the Minister to report facts to his knowledge, which I accept. However the qualifying words "to my knowledge", which were included in his affidavit, were not in the report to the Minister.

[206] The Director's July 3, 2018 notification to the Minister took the form of a memorandum. It appears that a fairly large number of individuals, possibly a dozen, were involved in preparing the Director's report to the Minister.

[207] Two and a half months later, on September 13, 2018, Service personnel took the draft for the 2018 Warrants application to a Warrant Review Committee meeting for challenge and approval.

[208] A large number of Service individuals and others were involved on the Warrant Review Committee.

[209] Up to 10 Service employees and others were involved in relation to both the report to the Minister of July 3, 2018, and the Warrant Review Committee meeting of September 13, 2018.

[210] Despite this overlap between the individuals who participated in both the July 3, 2018 notice to the Minister and the Warrant Review Committee on September 13, 2018, it appears and I accept the evidence of Director Vigneault (who chaired the Warrant Review Committee) that no one at the Warrant Review Committee discussed the fact that [redacted] relied on in the 2018 Warrant application was the same as [redacted] who was the subject of the July 3, 2018 report to the Minister. Likewise the fact that human source activity was assessed as "high legal risk" was not discussed at the Warrant Review Committee.

[211] This omission is important. The Service should have informed the Court when it applied for the 2018 Warrants that [redacted] was the subject of a report from the Director of CSIS to the Minister on July 3, 2018 based on operational high legal risk. The Court should also have been told that [redacted] operation had been assessed by AG Canada counsel as high legal risk on February 19, 2018.

[212] The Court is left to ask why this omission took place. It may have been because code names are not used in warrant applications, only [redacted] It may be participants were not focussing on who [redacted] was. The matter was not raised at the time by anyone, and it seems no one thought it important to know who [redacted] was or his or her background. It is also possible the omission would not have occurred if the Service had given

counsel for AG Canada assigned to assist in this warrant application access to the relevant human source files in accordance with Justice Noël's decision in *Harkat*, *supra.*

[213] I remain concerned why not one of so many Service personnel caught this omission at the Warrant Review Committee when the material in support of the 2018 Warrants was reviewed in preparation for the Federal Court application.

[214] I asked this question of then-Assistant Deputy Director of Operations Ms. Michelle Tessier, who is now DDO and who, although not present at the Warrant Review Committee meeting itself, had supervisory responsibility for the preparation of the affidavit, exhibits and all other material the Service filed in this matter:

> JUSTICE BROWN: Would you hazard a guess or do you have a view on the number of people that might have been involved in common, the number of individuals that were common to both the memo to the Minister and the warrant application?
>
> THE WITNESS: There's also Public Safety that's involved in the review of the warrants as well as the note to the Minister. I don't know how many would be there. Certainly the operational executive -- I would have to hazard a guess, but certainly a number, six, 10 if I hazard a guess. Certainly several individuals would have been.
>
> JUSTICE BROWN: Six to 10 in common. The evidence we saw from Mr. Coulombe -- let's put it this way: No one made the link.
>
> THE WITNESS: No one made the link, no.
>
> JUSTICE BROWN: Help me with that.
>
> THE WITNESS: For the reasons I was saying earlier, I think our focus was elsewhere. Our focus was on getting the legislation, getting C-59. Our focus in terms of that particular

application was on other issues. [redacted]

JUSTICE BROWN: Yes.

THE WITNESS: We sort of lost sight of the high legal risk. As I said earlier, it's that lack of appreciation that this is as significant an issue as others that we have raised in other contexts of non-compliance that we should have raised. We just didn't have that appreciation. So that signal that certainly I would have in terms of saying "this is an issue we need to bring in front of the Court," we just did not have that discussion. There was a lack of a system that was connecting those dots, that was raising that as an issue that should have been raised.

JUSTICE BROWN: And no more than that, you're saying.

THE WITNESS: No, I don't think it was -- from my part anyway, I don't think it was more than that.

Obviously now today we are trying to fix the process. As simple as this sounds, something as simple as putting -- and what we receive as committee members. When we receive the application package and we have the annex, we don't have the source précis. We only have the source numbers. We don't have the code names, something as basic as a code name. A source number doesn't mean anything to me, but a code name may. It's a very basic thing, but it's something that -- you would like to think it would have to be more than that. I understand that. But just trying to basically assist in ensuring that these types of issues are identified and putting in place a system that allows us and ensures that we will identify those issues.

I really think we just weren't looking at the high legal risk issue that way. Today obviously we recognize that and are putting in place procedures to correct that, but at the time unfortunately that was the situation.

JUSTICE BROWN: This could have been picked up, I gather, by a number of people.

THE WITNESS: Yes.

JUSTICE BROWN: Including the affiant.

THE WITNESS: Yes.

JUSTICE BROWN: And including, I think you mentioned, the Justice counsel.

THE WITNESS: Yes.

JUSTICE BROWN: And any number of others in that common group.

THE WITNESS: Yes.

JUSTICE BROWN: And there's nothing top down or cultural in terms of suppressing the discussion that you are aware of.

THE WITNESS: Not that I am aware of, no, absolutely not.

JUSTICE BROWN: You are asking a lot in the sense of this explanation, nobody saw it. I'm not saying that you're not asking it without complete justification and complete good faith. My concern is whether there is an absence of good faith lying behind this or a mental element to suppress or keep information away from the Court, and you are saying, so far as you are aware, there wasn't.

THE WITNESS: No, and even in August of 2018 -- it's in my affidavit -- I issued an expectation of affiants memo. We issued the duty of candour policy. In one of the applications -- I think it was the refresh of [redacted] I think it's called -- our current Director asks about the duty of candour.

So, no, it was really -- I firmly believe what I say in my affidavit.

JUSTICE BROWN: Thank you for that, Ms. Tessier. I appreciate that.

[215] I asked current CSIS Director Vigneault the same question, namely why no one made the link between [redacted] and [redacted] Director Vigneault signed the notice to the Minister

regarding [redacted] on July 3, 2018 and he chaired the Warrant Review Committee meeting on September 13, 2018:

> JUSTICE BROWN: Thank you.
>
> Mr. Vigneault, I have asked a series of questions to Mr. Coulombe and Madame Tessier yesterday and today about the [redacted] situation in Canada.
>
> My understanding is, and I just want you to confirm for me that my understanding is correct, that it's fair to say that there's [redacted] that are being monitored by CSIS in 2018.
>
> THE WITNESS: Yes. That would be accurate.
>
> JUSTICE BROWN: And there would be more than that number or could be more than that number of human sources but one of them [redacted] namely, [redacted]
>
> THE WITNESS: [redacted]?
>
> JUSTICE BROWN: [redacted]
>
> THE WITNESS: [redacted] yes, absolutely.
>
> JUSTICE BROWN: I went through the number of people that would be involved with the memo to the Minister on July 3rd. The information I gathered at the end of the day -- I asked how many people would have assisted in the development of the memo that you sent to the Minister and of course the Minister would be assisted by the Deputy Minister probably as Chief of Staff possibly and himself. But there would be a number. It could be 10, it could be 15 people within CSIS, including [redacted]
>
> Then I asked questions about how many people would be involved in the warrant application leading up to the committee hearing at which there were at least 10 people plus four observers.
>
> Then I asked how many of those would be common, the same people, the same individuals who looked at the development of the memo to the Minister and who looked at the development of the warrant.

What I understand is there may be six or 10 people would be the same.

THE WITNESS: That sounds about right, yes.

JUSTICE BROWN: The issue that I have is we have a number of people. Yes, we have the analyst. Maybe the analyst could have found out by asking. Maybe the Department of Justice could have found out by asking. But there are a number of people around that table who could be adding value. They see what I imagine is an unusual memo to the Minister on a high risk operation. It has not yet taken place, but I don't imagine that is a daily occurrence.

So they see this in July. Then they gear up for a warrant in August and come to a meeting in September and no one makes the link. It was suggested that it was a systemic lack of appreciation of the significance of the linkage, legal risk and warrant linkage.

You don't have an explanation or if you do -- maybe I could ask you: How do you explain that all these people in such a short period of time -- that the penny doesn't drop, that they don't say, "Wait a minute, isn't this the same person that we saw six or 10 weeks ago?"

Just to sharpen it, the warrant that I saw -- there's a warrant application, there's an affidavit and there is a human source précis, and there's nothing in the human source précis about high legal risk.

Help me with this. What is your analysis, your best judgment? What happened?

THE WITNESS: My best analysis is that because -- and this is how I would look at it myself. Because at that point the high legal risk was something that the Director approved based on the Crown immunity protection, that information was known from one set of your brain, but the link as you describe, Justice Brown, has not been made, that cross-reference to the affidavit.

It's not that the people were trying to obfuscate or to -- it was just not a link that was being made from that perspective. Even without direction from the Court, the clarity of the legal opinion that says "there's no legal protection, therefore these

> operations will be illegal" brings a clarity that I think is something that we all now can benefit from that was not there before.
>
> I do believe that the approach of how the human source operations are being dealt with, and the affiant with the counsel and the analyst have access to, I think it speaks to our continuing need to make sure that they are the best prepared possible, but I would not want to put the onus on them when it's a failure of the direction from the Service to be able to say this is how you should be doing your work.
>
> There is no satisfactory explanation, is the best way I can describe it, as to why these dots had not been connected other than the fact that I think that people were in their brains saying, "It's high legal risk, but it's an operation that we can undertake," and to then not say that it's a high legal risk with the following potential consequences and, therefore, what is the impact this could have on a warrant application. It's that second and third step that had not been taken. But there is not a satisfactory explanation, Justice Brown.
>
> JUSTICE BROWN: You are saying that there's no -- you obviously didn't issue any kind of direction that suppressed discussion of high legal risk, a connection in the warrant. It's inadvertent, so far as you are concerned.
>
> THE WITNESS: It's inadvertent. The best way I can describe it is I have been actively pushing counsel and affiant to say how they would approach, how they would share information with the Court. I'm glad these minutes exist where it records my concerns with making sure that the Court is -- you know, our duty of candour has been fulfilled properly. I can only reassure you and the Court that it is my clear intent, and unfortunately in that specific circumstance you describe, Justice Brown, that intent did not materialize the way it should have, for sure.

[216] I accept the evidence of Ms. Tessier and of Mr. Vigneault, and I find there was no intent to conceal and I accept that there was no suppression of evidence or bad faith on the part of either the Service or AG Canada in relation to this omission.

[217] However, and with respect, the proposition that among perhaps ten or more highly trained, highly experienced Service professionals, not one thought of a possible link between [redacted] and [redacted] is very difficult to understand. CSIS and AG Canada undoubtedly owe a duty of candour to this Court. It seems this duty was not top of mind at the Warrant Review Committee, because no one made the connection between the Ministerial report [redacted] on July 3, 2018, and [redacted] relied on regarding the 2018 Warrants; both were [redacted] human sources involved in investigating the threat to Canada [redacted]

[218] The Director and DDO must and did accept their responsibility for their supervisory and decision-making roles in connection with the 2018 Warrant application to this Court.

[219] However, in addition, the Service should take steps to ensure that every individual attending Warrant Review Committee meetings or similar structures, or whose input is sought on related circulation lists, adds as much value as possible to the process by identifying questions or concerns they might have.

[220] In this respect, they should be reminded that they will fail to add value to a decision when they have something to say, but say nothing.

[221] In other words, the responsibility for fully informed decision-making lies on every person participating in the decision. All participants must be encouraged to share concerns. It seems to

me this needs to be emphasized down the ranks both within CSIS and AG Canada so those participating may fully engage on the point.

[222] In light of this failing, the Service should continue to take steps to ensure that the duty of candour in relation to warranted operations are properly communicated and understood by Service personnel engaged on such applications. This likewise applies to AG Canada in relation to its role in warrant applications: AG Canada must ensure that the duty of candour in relation to warranted operations are properly communicated and understood by AG Canada personnel engaged on such applications.

[223] In closing, I note that in November 2019, AG Canada informed the Court the Service had taken measures to examine its practice regarding the disclosure of information about human sources in warrant applications, and in particular, with respect to [redacted] To that end, Mr. Morris Rosenberg, a respected and former senior Deputy Minister, was engaged to conduct such a review. The report, formatted as a presentation constituting of a series of slides, was provided to the Court in March 2020.

[224] AG Canada submitted the Rosenberg report has no impact on the remedy to be ordered by the Court in this matter. In AG Canada's view, the Service and the Department of Justice recognize that the admitted institutional failures demand an institutional response. In response to the Rosenberg report and AG Canada's corresponding submissions, on May 29, 2020, the *amici* filed written submissions to the effect that the Rosenberg report did not fully resolve what

remedy the Court should issue because the Court did not have the required evidence to determine whether the admitted breach of the duty of candour was deliberate, or inadvertent. More specifically, the *amici* submitted that the Court had not received a proper account of why information that could affect the Court's assessment of credibility and reliability [redacted] had not been presented to the Court at the time of the application for warrants.

[225] On June 15, 2020, an additional affidavit of the same CSIS senior official who had provided the affidavit accompanying the October 2018 application was filed, providing additional details about the preparation of his earlier affidavit. The affiant's evidence included the following:

> **Human Source Précis Drafting in 2018**
>
> 8. At the relevant time, human source Précis' were drafted by an analyst [redacted] at Service Headquarters (HQ). The Service had two resources in place to assist with Précis writing, the *Guidelines for the Preparation of Source Précis* (the Guidelines, attached as Exhibit "B") and a webpage on the internal system (the Webpage).
>
> 9. The Guidelines set out the roles and responsibilities amongst those involved in the preparation of warrant applications, the requirements of a source Précis and content guidelines. This includes five points to be considered by the analyst before they begin drafting the affidavit: (1) if a source Précis already exists, to build on this Précis; (2) to verify the source's [redacted] (3) to contact the source handler in the regional office to query if there was any outstanding information not yet uploaded into the source file; (4) to conduct a review in the database [redacted] (described below), and (5) to provide all information on a source, even if it may be damaging to the source's reliability or credibility.
>
> 10. The Webpage provided guidance on how to obtain access to specified databases and provided templates and examples.
>
> [redacted]

11. I have been informed [redacted] and do believe, that the failure to inform the Court of issues related to [redacted] was inadvertent and not deliberate.

12. [redacted] drafted following the procedure set out in the Guidelines and the standard practice in 2018. The Guidelines stated [redacted] However, based on my experience and recollection, this was not the practice at the time. The practice was [redacted] Therefore, any information that had not been previously included would not have been brought to light.

13. Information from and about human sources was not stored in a single location. Information related to [redacted] Material related to investigative powers under sections 12 and 21 of the *CSIS Act* was stored in [redacted]

14. The different databases were structured in different formats and required different searching methods, and there was no consistent access across them in an integrated matter. To search further into these databases [redacted] At the time, it was not standard practice to [redacted] in other Service databases, and As [redacted] and I were not aware of the issues, we did not know to search for them.

15. Consultation with [redacted] was not standard practice [redacted] Therefore, [redacted] did not have access to the Service's entire holdings. In this case, comprehensive material regarding [redacted] was not routinely documented and therefore not available. In addition, [redacted]

16. As part of my preparation for my role as affiant [redacted] I was responsible for becoming familiar with the human sources whose information was being included in the affidavit. [redacted] to identify any potential problems on file that could affect the credibility of the reporting being referenced in support of the affidavit.

17. None of the documents that I reviewed mentioned [redacted] Because the [redacted] database is [redacted] in order to find documents regarding [redacted] I would have had to know to [redacted] As I was not aware of [redacted] I did not conduct searches of this type.

18. In my October 2018 Affidavit and at the October [redacted] 2018 hearing, I disclosed what I knew at the time regarding any [redacted] I was not aware of any of the issues raised in the [redacted] Affidavits. At that time, I believed that I met my duty of candour obligations owed to the Court. I did not intend, in any way, to mislead or withhold material information from the Court.

[226] In a responding July 3, 2020 letter to the Court, the *amici* reiterated their earlier point that in their view and, despite the June 15, 2020 affidavit, the Court still had not received evidence on the circumstances leading to the preparation of [redacted] potentially unfavourable information [redacted] on whose evidence the 2018 Warrants were requested. The *amici* put their argument this way:

> 1. The essential explanation [redacted] Despite this admission, there has been neither disclosure of the particulars of that earlier situation, nor, so far as the *amici* are aware, notification to the judge(s) [redacted] and

2. The Attorney General attempts to attribute the serious breach of the duty of candour in this case to amorphous "systemic and institutional" problems. In fact, the conclusion supported by the evidence is that the breach was due to the "standard practice" of failing to follow very clear and specific duty of candour guidelines. The Attorney General's submissions downplay this troubling institutional disrespect for the duty of candour by blending it in with unrelated and inapplicable information management and internal communication issues.

[227] In the *amici*'s submissions, without additional evidence, given that the unfavourable information [redacted] was available somewhere in the Service's holdings [redacted] intentionally unbalanced, either because the drafter thought it was acceptable, institutionally, to forego the inclusion of the unfavourable information, or because the drafter's intent was to mislead the Court.

[228] Upon AG Canada seeking the Court's direction as to how to proceed, the Court directed that no additional evidence was required at that time.

[229] In September and October 2020, legal submissions were submitted in [redacted] one of the related matters before Justice Kane in which the same *amici* have been appointed. These submissions included a previously undisclosed January 2017 briefing note and appendix prepared by the Human Sources and Operational Security (HSOS) Branch of the Service to the Director of the Service that included an assessment of the legal risk (low, medium or high) associated with the activities of the Service's human sources. The activities of [redacted] identified as [redacted] were evaluated as "high" risk.

[230] Both the late disclosure of the January 2017 briefing note as well as the fact that its content shows that the senior members of the Service were aware of the legal risk associated with [redacted] activities while the information was unknown to the individuals preparing [redacted] is troubling. It underscores the institutional failures addressed by Justice Gleeson in his decision in 2020 FC 616.

[231] The legal submissions in [redacted] led the *amici* to reiterate their July 3, 2020 submission in an October 21, 2020 letter to the Court.

[232] The proposition [redacted] was "intentionally misleading" [redacted] is a very serious allegation. With respect, I do not accept it for several reasons. First it is answered by the evidence put forward in the June 12, 2020 affidavit already referred, which supports my earlier conclusion that the breach of the duty of candour was not the result of any intention to mislead or deceive the Court. Second there is no evidence to support the allegation of deliberately misleading this Court. Indeed, the "intentionally misleading" argument is entirely speculative because it lacks an evidentiary basis. There is in my respectful view, no air of reality to it. Third, it is an argument that may be made in respect of many if not most documents which rely on previous documents, the pursuit of which, without more justification, could lead to virtually endless inquiries.

[233] In addition and having reviewed the submissions in [redacted] I am satisfied that the June 15, 2020 affidavit, along with the totality of the evidence before me, supports the conclusion that the breach of the duty of candour was not the result of any intention to mislead or deceive the Court. In particular, the June 15, 2020 affidavit highlights the problems of information silos and compartmentalization discussed by Justice Gleeson in 2020 FC 616 (see in particular paras 152-156). Given the absence of any evidence suggesting an intention to mislead, I do not attribute any such intention to the individuals engaged in preparing [redacted]

[234] As such, I am satisfied that these reasons will serve to alert the Service, AG Canada, the Court, as well as the Canadian public that unfortunately, and once again, and despite previous and frequent judicial admonitions and commissioned expert reports, the Service has failed to respect, and failed to instill respect for, the duty of candour within it.

[235] That said, and because of the regrettable frequency with which the Service has breached its duty of candour, I will order the Service and AG 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 2020 FC 616.

V. Concluding remarks

[236] With respect to issue of the duty of candour, I agree with Justice Gleeson's judgment in 2020 FC 616, at paragraph 2, where he "recommended that a comprehensive external review be

initiated to fully identify systemic, governance and cultural shortcomings and failures that resulted in the Canadian Security Intelligence Service engaging in operational activity that it has conceded was illegal and the resultant breach of candour."

[237] Following the issuance of the public version of 2020 FC 616, the Court was advised by AG Canada that pursuant to section 8(1)(c) of the *National Security and Intelligence Review Agency Act*, SC 2019, c 13, s 2, the Minister of Public Safety and the Minister of Justice had requested that NSIRA review and report back as soon as feasible with findings and recommendations in relation to the lines of review identified in the Federal Court's decision. The Ministers also asked NSIRA to report regularly to the National Security and Intelligence Committee of Parliamentarians on its progress and informed NSICoP that they expect that the Committee's members may wish to look further at issues that arise in relation to the Court's findings. AG Canada also advised the Court that the Minister of Justice had appointed former Supreme Court Justice Ian Binnie to provide the Minister and the Department of Justice with operational and policy advice on the provision of advisory and litigation services to clients, as well as to provide advice on the implementation of recommendations made by NSIRA as they pertain to the Department of Justice.

ORDER in [redacted]

THIS COURT ORDERS that:

1. The Canadian Security Intelligence Service breached the duty of candour it owed to the Court in warrant applications [redacted] by:

    a. not disclosing that human source information relied upon might have been derived from activities that potentially contravened the *Criminal Code*; and

    b. failing to disclose information that had the potential to reflect adversely on the reliability and credibility of Service human sources relied upon.

2. The 2018 Warrants are not set aside.

3. The Service and AG Canada shall keep the Court appraised of progress and findings including recommendations and follow up related to the external independent reviews undertaken in response to 2020 FC 616.

4. These Reasons, within twenty (20) days of the date of this Judgment and Reasons, shall be reviewed by counsel for the Attorney General and the Canadian Security Intelligence Service for the purposes of identifying what parts may be made public. After those twenty (20) days, and within the following twenty (20) days, the *amici* Messrs. Gordon Cameron and Matthew Gourlay shall review the suggested redactions. All counsel are to be guided by the open court principle and

shall work cooperatively in conducting this review. Any contentious issues shall be referred to the undersigned within the following five (5) days for determination.

"Henry S. Brown"
Designated Judge

~~**TOP SECRET**~~

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	[redacted]
STYLE OF CAUSE:	**IN THE MATTER** of an Application by [redacted] 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 [redacted]
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING: **(*IN CAMERA, EX PARTE*)**	October [redacted] 2018; November 2 and 8, 2018; December 10 and 19, 2018; January 21, 2019; February 13 and 21, 2019; March 13 and 29, 2019; April 1-3, 8, 12, 17, 24, 26, 29 and 30, 2019; May 13 and 29, 2019; June 27-28, 2019; July 30, 2019; August 28, 2019; October [redacted] 2019; November 1, 2019.
ORDER AND REASONS:	BROWN J.
DATED:	DECEMBER 31, 2020

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