Federal Court  Cour fédérale

~~**TOP SECRET**~~

Date: 20250206

Docket: CSIS-23-12

Citation: 2025 FC 219

Ottawa, Ontario, February 6, 2025

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

IN THE MATTER OF an application by [...] for warrants pursuant to sections 12 and 21 of the *Canadian Security Intelligence Service Act*, RSC 1985, c. C-23

and

AND IN THE MATTER OF International Islamist Terrorism - [...]

JUDGMENT AND REASONS

I. Overview

[1] This review relates to a 2012 warrant issued to the Canadian Security Intelligence Service [the Service, or CSIS] by this Court in respect of Mr Awso Peshdary. The information the Service obtained from the execution of that warrant was shared with the Royal Canadian Mounted Police [RCMP]. The RCMP subsequently obtained its own warrants for the purpose of investigating Mr Peshdary. In 2015, the RCMP investigation resulted in a number of charges

against Mr Peshdary to which he ultimately plead guilty in 2023. He was sentenced to 14 years of imprisonment.

[2] Mr Peshdary launched a number of challenges to the warrants issued against him. In particular, in 2018, Mr Peshdary sought to quash the 2012 CSIS warrant in this Court by way of a so-called *Wilson* application, which I dismissed (*Peshdary v Canada (Attorney General)*, 2018 FC 911). I also dismissed his request for further disclosure of documents that he believed would assist him in challenging the validity of that warrant (*Peshdary v Canada (Attorney General)*, 2018 FC 850). Mr Peshdary appealed both decisions but subsequently discontinued them after his guilty pleas. He also discontinued a request to reconsider his *Wilson* application.

[3] In 2019, the Attorney General of Canada [AGC] informed the Court that, for purposes of the 2012 CSIS warrant and possibly other warrant applications in 2009-2011, the Service had relied on some information that may have been illegally obtained. In particular, the information may have been derived from activities that contravened the provision of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] with respect to providing, or making available property or services for terrorist purposes.

[4] While Mr Peshdary's guilty pleas would normally have rendered all the proceedings in this Court moot, that was not the case in the unusual circumstances before me. The outstanding concerns regarding the propriety of the 2012 warrant and the potential reliance on illegally obtained evidence remained to be addressed. Accordingly, I continued with this *ex post facto*

review of the 2012 warrant even though it would have no practical effect on Mr Peshdary's criminal proceedings.

[5] In 2022, in his capacity as *amicus curiae*, Mr Ian Carter (now Mr Justice Carter), identified a number of areas of concern regarding the affidavit that had been filed in support of the 2012 warrant application. Mr Carter identified fourteen issues. Subsequently, the *amicus* appointed to replace Mr Carter, Mr Matthew Gourlay, suggested that only eight issues merited the Court's consideration. I address each of those issues below, as well as the issue relating to potentially illegally-obtained evidence.

[6] I find that there were a number of worrisome omissions and misleading statements in the 2012 affidavit. However, leaving those aside, I also find that there remained a sufficient basis for the issuance of the 2012 warrant. The AGC and the *amicus* agree with that conclusion. I also conclude that there is no evidence of fraud or deceit that would justify invoking the Court's residual discretion to quash the 2012 warrant. Finally, while some information used in the 2012 warrant application may have been obtained through illegal activity, the 2012 warrant could have issued in the absence of that information and, in any case, should not be quashed.

II. Issues and Analysis

[7] There are three issues:

1. If the misleading statements and omissions in the 2012 affidavit were excised from the warrant application, could the warrant have issued anyway?

2. Should the Court exercise its residual discretion to invalidate the 2012 warrant?

3. Should the fact that some information in the 2012 warrant application may have derived from illegal activity invalidate the warrant?

A. *Issue One: If the omissions and misleading statements in the 2012 affidavit were excised from the warrant application, could the warrant have issued anyway?*

[8] The standard of review for a challenge to an authorization was set out by Sopinka J. in *R v Garofoli*, [1990] 2 SCR 1421, 1990 CanLII 52 (SCC) and has since been consistently applied by the courts, including in the national security context (*Re Mahjoub*, 2017 FCA 344). The question is whether the warrant could have issued even if the omissions and misleading statements were removed.

[9] Here, the AGC and the *amicus* agree that if the 2012 affiant's errors and omissions were corrected, there remained sufficient reliable information about Mr Peshdary's threat-related activities to support the issuance of the warrant under s 21 of the *Canadian Security Intelligence Service Act*, RC 1985, c C-23 [*CSIS Act*]. However, they disagree about the seriousness of the misleading statements and omissions. The AGC urges me to consider the warrant application holistically rather than on a fact-by-fact basis. I agree that the application must be viewed as a whole, but I also accept the *amicus'* view that the alleged errors and omissions must first be assessed individually to determine their nature and seriousness. Only then should the application be considered holistically.

[10] The following are the eight areas of potential concern:

(1) Attack on Parliament and US Embassy

[11] The 2012 affidavit summarizes conversations from 2010 in which Mr Peshdary was said to be discussing carrying out an attack in Canada, including references to the Parliament buildings and the US Embassy. This summary is potentially misleading because it did not include information that provided important context, namely, Mr Peshdary's comment that a Service employee was listening on the line, an analyst's report that Mr Peshdary's motivation for engaging in this discussion was "unknown," the fact that the parties to the conversation were laughing much of the time, and Mr Peshdary's expression of having reservations about the attack planning.

[12] The AGC submits that the omissions do not undermine the uncontroverted evidence that Mr Peshdary was discussing his intention to carry out a terrorist attack. The AGC notes that the analyst responsible for the initial reporting of this information was viewing it in isolation and without access to other information that might have revealed Mr Peshdary's true motivation. The *amicus* submits that all the relevant information should have been put before the issuing judge for an assessment of its significance. I agree with the *amicus.* The judge should have been provided the full picture so that he or she could make the necessary inferences regarding the seriousness of the alleged threat.

[13] The AGC also submits that Mr Peshdary's apparent misgivings about attacking the Parliament buildings or the US Embassy do not detract from the fact that he was discussing an intention to carry out a terrorist attack with two possible targets. Further, the affiant did not assert that Mr Peshdary was actually planning an attack, only that he was discussing the possibility of

one. The *amicus* suggests that the affidavit gave a misleading impression that Mr Peshdary had engaged in a serious attack-related discussion, instead of the more nuanced version of that discussion, which had actually been provided to the Court in earlier warrant applications. I agree with the *amicus* that the Court should have been given the information necessary to make its own assessment of the evidence.

(2) **Radicalization of [...]**

[14] The 2012 affidavit includes a paragraph stating that Mr Peshdary was known to have radicalized a Muslim convert ([...]). This passage did not include other potentially relevant information which had been disclosed in an earlier warrant application. In particular, it did not mention that [...], which potentially undermines the notion of a one-way stream of influence. It also failed to mention that [...].

[15] The AGC submits that this additional information does not detract from the fact that [...]. The AGC submits that the Service was justified in concluding that [...].

[16] The *amicus* points out that, without the omitted information, the Service effectively provided the Court with a confident assertion that Mr Peshdary had successfully radicalized [...]. I agree. The full picture, which should have been provided to the Court, was more complicated and equivocal.

(3) **Failure to include exculpatory evidence**

[17] The 2012 affidavit failed to include four pieces of exculpatory information:

1. [...] characterized his discussions with Mr Peshdary as a form of "adolescent rebellion." [...]. In any case, in [...] view, Mr Peshdary lacked the means to travel overseas and would not undertake a violent attack within Canada;

2. Mr Peshdary told [...] that he was no longer interested in jihad – he just wanted to get a good job and to take care of his family;

3. Mr Peshdary stated that committing a terrorist attack in Canada would be wrong; and

4. Mr Peshdary stated that he did not believe that radicalization was occurring in Canada, or that any Muslims were planning to carry out violent acts in Canada.

[18] The AGC agrees that this information should have been included in the 2012 affidavit. However, the AGC submits that whether the warrant could have issued with this information included should be assessed with reference to other relevant information about Mr Peshdary's extremist opinions and activities. Further, in the AGC's view, these exculpatory statements could have been intended by Mr Peshdary to mislead the Service.

[19] The *amicus* submits that this exculpatory information was available to the 2012 affiant, and that some of this information was included in two earlier affidavits and reports which the affiant would have reviewed. The *amicus* also submits that the affiant's failure to include this exculpatory information is the most serious shortcoming in the 2012 affidavit and amounts to a breach of the duty of candour. I agree. The fact that there may have been other grounds for the

warrant does not justify the omission of exculpatory facts. It was for the issuing judge to determine what weight to give this evidence and, in particular, to assess whether it was indeed exculpatory or, as the AGC suggests, simply an attempt by Mr Peshdary at obfuscation.

(4) Mr Peshdary urges Mr Maguire to listen to Anwar Al-Awlaki

[20] The 2012 affidavit describes a conversation in which Mr Peshdary urged Mr Yehia John Maguire to listen to Al-Awlaki's "lectures about the prophets." This description was potentially misleading because it did not include the fact that Mr Peshdary told Mr Maguire to focus only on Al-Awlaki's teachings about the prophets and nothing else, especially not Al-Awlaki's "crazy new stuff."

[21] The AGC submits that Mr Peshdary's distinction between Al-Awlaki's teachings about the prophets and his later lectures is one without a difference, characterizing all Al-Awlaki's teachings as extremist.

[22] The *amicus* argues that the Court was entitled to know that Mr Peshdary distinguished between Al-Awlaki's traditional teachings and his "crazy new stuff." I agree. The Service should have informed the Court that Mr Peshdary's advice about Al-Awlaki's lectures distinguished between religious teachings and more extreme material. This information was relevant and potentially exculpatory.

(5) Mr Peshdary talks to Mr Maguire about survival skills

[23] The 2012 affidavit summarized a conversation between Mr Peshdary and Mr Maguire about acquiring survival skills, ostensibly in preparation for engaging in violent jihad. However, the summary omitted some information, including Mr Peshdary's statement that he wanted to do "a halaka together, but it's not an Islamic halaka." A "halaka" is a kind of group study. Mr Peshdary proposed a halaka solely for purposes of learning survival skills, such as camping and hunting.

[24] The AGC submits that survival skills are a critical element of *dawah,* a call to radical Islamic ideology. The AGC argues that, while these communications may, on their face, seem like innocent conversations, they should properly be viewed as a discussion about preparing for jihad.

[25] The *amicus* submits that the affiant should have included more details about this conversation even if the intended inferences were supportable. I agree. It was for the issuing judge to evaluate the significance of this conversation in context to determine whether it was, indeed, innocent or connected to a violent objective.

(6) **Conversation about a pellet gun**

[26] The 2012 affidavit describes a conversation between Mr Peshdary and Mr Samr Farhat with respect to a third unidentified person. The description implied that Mr Peshdary and Mr Farhat had threatened someone with a gun. The actual dialogue does not accord with that description. The transcript suggests that the conversation was hypothetical and likely a joke.

[27] Nevertheless, the AGC submits that the affidavit is not misleading because it did not state that Mr Peshdary had actually threatened anyone. It merely suggested that that was Mr Peshdary's perception.

[28] The *amicus* submits that the affiant's summary of the conversation was misleading. I agree. The affiant should have provided the full context of this conversation to the Court.

(7) Internet searches for weapons

[29] The 2012 affidavit describes Mr Peshdary's Internet searches for weapons, in particular, a hunting rifle, a grenade launcher, and an assault rifle. The affiant did not mention that Mr. Peshdary also viewed non-threat-related videos, or that the assault rifle video came up on a side bar; it was not the product of Mr. Peshdary's search. In addition, the affiant did not disclose the fact that the hunting rifle video did not appear to be serious – the participants were laughing throughout.

[30] The AGC submits that Mr Peshdary's non-threat-related Internet usage is neither material nor exculpatory. It does not contradict the fact that Mr Peshdary was searching for and viewing videos of weapons. According to the AGC, these searches had to be considered against the backdrop of Mr Peshdary's interests in survival skills.

[31] The *amicus* submits that this omission is relatively minor, but the searches still needed to be understood in their full context. I agree. Nevertheless, the omission appears to be consistent

with the affiant's tendency to state an incriminating conclusion while withholding information that casts some doubt on that conclusion.

(8) Internet searches for Yemen and Al-Qaeda

[32] The 2012 affidavit mentions that Mr Peshdary viewed two articles about Yemen and Al-Qaeda. The affidavit does not disclose that the articles came from a reliable news source, namely, CNN, and not from an extremist organization.

[33] In the *Wilson* application, I found that the additional information was relevant and ought to have been provided in the affidavit. However, I noted that the affiant's intention was simply to "underscore the depth of [Mr Peshdary's] interests in the region and his willingness to support Muslims wanting to join the fray, even though there would have been nothing terrorism-related about his view or potential actions." Accordingly, nothing turns on this particular omission.

(9) Conclusion on Issue One

[34] There were a number of misleading statements and omissions in the 2012 affidavit. Each of them represents a failure to adhere to the standards the Court expects the Service to achieve in discharging the duty of candour, and the standards the Service should apply to itself. Still, the substantive question is whether there continues to be a sound basis for the decision of the authorizing judge to issue the 2012 warrant. The AGC and the *amicus* agree that, once the misrepresentations and omissions are corrected, the 2012 warrant could still have issued. I agree.

The information in the record provides a basis on which the Court can conclude that the statutory preconditions in s 21 of the *CSIS Act* were met, notwithstanding the problems identified above.

[35] I note that some of the omissions and misleading statements may have been the result of the affiant's efforts to summarize what were believed to be the most important facts without duplicating all of the contents of the affidavits prepared for previous warrant applications. That is understandable. But that editing exercise, if embarked on, must be carried out with great care and with utmost fidelity to the duty of candour. Otherwise, as we can see, the result may be a less than fair and accurate representation of the information the issuing judge requires.

B. ***Issue 2: Should the Court exercise its residual discretion to invalidate the 2012 warrant?***

[36] Even though I have found that the 2012 warrant could still have issued, the Court retains a discretion to redress a breach of the duty of candour where there has been misconduct that is "particularly egregious:"

> *Garofoli's* "could have issued" standard does not displace the Court's power to redress abuses of its own process that may arise in instances where non-disclosure involves a breach of candour or some other form of improper conduct on the part of the Service or the AGC. This possibility is recognized in the *Garofoli* jurisprudence. In such a circumstance, the Court might consider a number of remedies, the most significant being the striking of the warrant. However, in my opinion, as in the criminal context, a designated judge should not strike an otherwise valid warrant unless the underlying conduct is particularly egregious. [Citations omitted].

[37] This residual discretion may be exercised where state conduct "has subverted the pre-authorization process through deliberate non-disclosure, bad faith, deliberate deception,

fraudulent misrepresentation or the like." The standard to be met is "high," possibly akin to an abuse of process.

[38] Accordingly, this Court has a residual power to set aside a warrant to safeguard the integrity of the pre-authorization process. Again, the AGC and the *amicus* agree that the Court should not exercise that discretion here. I agree with their submissions.

[39] The AGC acknowledges that the four pieces of exculpatory information summarized above ought to have been included in the 2012 affidavit. However, it submits that those omissions were not deliberate or made in bad faith, and do not amount to egregious conduct. The AGC points out that the 2012 affidavit was pieced together by persons who had different levels of familiarity with the file. For example, three individuals were involved in writing the 2012 affidavit; the affiant had no prior involvement in the Service's investigation of Islamist terrorism or the investigation against Mr Peshdary; the affiant claimed that they had not knowingly left out any exculpatory information; and one of the two other individuals involved in the preparation of the 2012 affidavit indicated that they were unaware of two pieces of exculpatory information and would have included this information had they known about it.

[40] The AGC adds that, while the content of the duty of candour obligation was not different in 2012, the Service's understanding of these obligations and its methods for meeting them are better now.

[41] The *amicus* notes that the passage of more than a decade since the drafting of the affidavit prevents our gaining any real insight into the Service's preparation of the 2012 affidavit. In short, it is difficult to draw a strong adverse inference in these circumstances.

[42] I agree with the AGC and the *amicus* that the record simply does not disclose sufficient evidence of fraud or deceit to engage the Court's residual discretion.

C. *Issue 3: Should the fact that some information in the 2012 warrant application may have derived from illegal activity invalidate the warrant?*

[43] The Court must first determine whether information included in the affidavit was obtained through illegal activity. If so, the question arises whether the 2012 warrant could have issued in the absence of the impugned information. If it could not, the question of whether the warrant should be invalidated must be addressed.

[44] The AGC advised the Court and prior *amicus* that affidavits sworn in 2009, 2010, 2011 and 2012 may have omitted information regarding potentially illegal activities by the Service or its human sources. In particular, between [...]. Information collected [...] was used in the 2009, 2010, 2011 and 2012 warrant applications against Mr Peshdary.

[45] More specifically, information collected [...] was relied on in the 2009 affidavit. In applying for the 2009 warrant, the Service informed the Court that [...]. Information collected [...] was also relied on in the 2010 and 2011 affidavits. In applying for the 2010 and 2011 warrants, the Service did not inform the Court that [...]. With respect to information collected

[...], none of that information was included in any warrant applications in respect of Mr Peshdary. As for information collected [...], it was relied on in the 2011 affidavit. In applying for the 2011 warrant, the Service did not inform the Court that [...]. Finally, information collected [...] was likewise relied on in the 2012 affidavit. Again, in applying for the 2012 warrant, the Service did not inform the Court that [...]. In each instance, the possibility that there may have been a contravention of the *Criminal Code* was not brought to the Court's attention.

[46] I must consider whether the conduct [...] amounts to illegal activity and, if so, whether the 2012 warrant could have issued in the absence of the information contained in the 2012 affidavit which potentially derived from this activity. The AGC, for the purposes of its submission, assumed that the conduct [...] could amount the offence of providing or making available property or services for terrorist purposes, contrary to s 83.03 of the *Criminal Code*:

> 83.03 Every one who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services
>
> (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 terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or
>
> (b) knowing that, in whole or part, they will be used by or will benefit a terrorist group,
>
> is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

[47] However, the AGC submits that, even if there had been a breach of s 83.03, the 2012 warrant still could have issued even if the information derived from this activity were excised

from the 2012 affidavit; there remained a sufficient evidentiary basis to conclude that Mr Peshdary was reasonably believed to be engaged in threat-related activities. In the alternative, the AGC argues that if the information derived from this activity is necessary to support the issuance of the 2012 warrant, this illegal conduct should be admitted applying the balancing test articulated by Justice Gleeson in the *En Banc #1* decision. In support of their position, the AGC submits that the potential illegal conduct was not, *inter alia*, deliberate or wilful or done in bad faith and that any illegal acitivity was closely linked to the collection of information, and that there are no extenuating circustances justifying the excision of the information derived from this activity. Finally, in the AGC's view, the Court should not exercise its residual discretion to invalidate the 2012 warrant on abuse of process grounds for the same reasons that information derived from this activity could be admitted applying the balancing test from the *En Banc #1* decision.

[48] The *amicus* submits that it is open to question whether [...] would fall within the scope of the s 83.03 terrorism offence. If it did, and even if the information derived from that activity was necessary to support the issuance of the warrant, there is no reason to conclude that the warrant should be invalidated. The test to be applied takes account of the seriousness of the illegality, fairness, and societal interests. The *amicus* suggests that the balance would be struck in favour of upholding the warrant given the minor nature of the benefit, the Service's tenuous connection to the activity, and the relatively minor role of any potentially illegal conduct in the collection of information for the warrant application.

[49] I agree. Once again, this information should have been provided to the issuing judge to determine whether the warrant should issue. It is difficult on an *ex post facto* review, years after the original warrant application, to make a fair and reasonable assessment of that question. In the result, I find that the warrant could have issued in the absence of the information derived from this activity. That said, if the information derived from this activity is necessary to support the issuance of the 2012 warrant, I find that it should be admitted applying the balancing test and factors identified by the *amicus* above. I also agree, for similar reasons, that the Court should not exercise its residual power to quash the 2012 warrant on abuse of process grounds.

III. Conclusion and Disposition

[50] The 2012 affidavit contained a number of worrisome omissions and misleading statements that ought to have been before the issuing judge. Despite the concerns that I have expressed in relation to the Service's failure to adhere to the expectations arising from the duty of candour, there remained a basis on which the 2012 warrant could have issued.

[51] Further, the record did not establish sufficient evidence to set aside the warrant pursuant to the Court's residual discretion.

[52] Finally, while the judge should also have been made aware that some of the information may have been obtained through illegal activity, the 2012 warrant could have issued with that information excised from the affidavit. In any case, if the information [...] was necessary to support the issuance of the 2012 warrant, it should be admitted pursuant to the balancing test

articulated by this Court. Lastly, this illegal activity does not support the quashing of the warrant on abuse of process grounds.

JUDGMENT in CSIS-23-12

THIS COURT'S JUDGMENT is that:

1. The 2012 warrant is confirmed to be valid.

2. Counsel for the Attorney General of Canada and the *amicus curiae* shall, within 10 days, make recommendations for information in this Judgment and Reasons that should be redacted before it is released publicly. The Attorney General of Canada and the *amicus curiae* must be guided by the open court principle and make every effort to keep redactions to a minimum.

"James W. O'Reilly"
Judge

~~**TOP SECRET**~~

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	FEBRUARY 6, 2025

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