Federal Court of Appeal | Cour d'appel fédérale

~~**TOP SECRET**~~

Date: 20210512

Docket: A-150-20

Citation: 2021 FCA 92

CORAM: **DE MONTIGNY J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

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

AND IN THE MATTER OF ISLAMIST TERRORISM, [redacted]

Heard at Ottawa, Ontario, on February 9, 2021.

Judgment delivered at Ottawa, Ontario, on May 12, 2021.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.
MACTAVISH J.A.

CONCURRED IN BY: LASKIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY AND MACTAVISH JJ.A.

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[1] Before the Court is an appeal from a decision of Justice Gleeson, sitting as a designated judge of the Federal Court (reported as 2020 FC 616). Justice Gleeson concluded that the Canadian Security Intelligence Service (the Service) had breached the duty of candour it owed to the Court in the context of an *ex parte* warrant application. The Federal Court came to this conclusion based on its finding that the Service had failed to disclose that some of the information on which it relied in support of its warrant application had been obtained using methods that the Service knew likely violated the terrorist financing provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 (the *Criminal Code*).

[2] The Attorney General of Canada submits that the Federal Court erred in finding that the Service had breached its duty of candour in relation to this application, and that all of the relevant material facts had been put before the Court in this case. The Court further erred, the Attorney General says, in finding that the duty of candour required that the Service proactively waive the solicitor-client privilege that attached to legal opinions provided to the Service with respect to the legality of operations such as the one in issue in this case.

[3] For the reasons that follow, we have concluded that the Federal Court erred in concluding that the Service breached its duty of candour because it did not disclose that some of the information in support of warrant application CASE B was likely derived from illegal activities. We have further found that the Federal Court erred in finding that in "the unique circumstances of this case", the duty of candour required counsel for the Service to have sought a waiver of solicitor-client privilege prior to appearing before the Court on this warrant application. Consequently, we would grant the appeal.

I. Background

[4] In order to put the issues raised by the Attorney General on this appeal into context, it is necessary to have an understanding of the law governing terrorist financing. It is also necessary to understand precisely how the proceedings before the Federal Court unfolded, what were the issues before the Court in the warrant application that resulted in the decision under appeal CASE B and the history of this and other matters as they relate to the Service's efforts to obtain warrants against targets of their investigations.

A. *The Terrorist Financing Provisions of the Criminal Code*

[5] In the wake of the terrorist attacks in the United States on September 11, 2001, the *Criminal Code* was amended to expressly prohibit the financing of terrorists and terrorist entities. Of particular concern in this case is section 83.03 of the *Code*, which makes it an indictable offence to provide financial assistance to individuals knowing that it will be used for the purpose of facilitating or carrying out terrorist activities.

[6] There appears to be no dispute that the [redacted] targets of the Service's investigation named in the CASE B application were involved in terrorist activities [redacted]. What is in issue is the potential illegality of the payments and material support that was provided to [redacted] by the Service, and the significance that this had for the warrant application.

B. *The Investigation*

[7] The Service has for a number of years sought to obtain information with respect to the threat to the security of Canada posed by Canadians who have travelled [redacted] to fight for Islamist groups [redacted] Such individuals are known as "extremist travellers".

[8] The Service has faced significant challenges in obtaining information with respect to extremist travellers [redacted]

[9] As part of its continuing effort to obtain information with respect to extremist travellers, [redacted] the Service decided to conduct an investigation, during which it paid an individual known to be facilitating or carrying out terrorism [redacted]

[10] [redacted]

[11]

C. *The Warrant Application in CASE A*

[12] In furtherance of its investigation regarding extremist travellers, in March of 2018, the Service brought a warrant application before the Federal Court under sections 12 and 21 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 (the Act). The Service was seeking a variety of warrant powers with respect to on the basis that they posed a threat to the security of Canada (file number CASE A.

[13] Some of the information being relied on by the Service in support of its warrant application had been obtained as a result of the investigation . The affidavit filed with the Federal Court in support of the warrant application described the investigation and payments There was, however, nothing in the materials filed by the Service in CASE A to suggest that the payments may have been illegal, or that some of the information being relied upon in support of the warrant application may have been illegally obtained.

[14] The CASE A warrant application was heard by Justice Noël on April [redacted] 2018. In the course of questioning the affiant, Justice Noël asked about the payments made [redacted] The affiant advised Justice Noël that **the service had provided payments over a few years to an individual or individuals known to be facilitating or carrying out terrorism.** [redacted]

[15] There was nothing in counsel's submissions to Justice Noël, or in the affiant's affidavit or her initial testimony, to suggest that there was anything potentially illegal about the payments that the Service had made [redacted] Counsel representing the Service at the April [redacted] 2018 hearing subsequently explained that he had not brought the potential illegality of the payments to the attention of the Court as he was not aware of the terrorist financing provisions of the *Criminal Code* when he prepared the application materials and appeared before the Court in CASE A

[16] It was only towards the end of Justice Noël's questions regarding the payments [redacted] that the question of the legality of these payments was raised by Justice Noël himself. When the affiant and counsel were unable to provide information to address certain concerns of Justice Noël, undertakings were given to provide further information in this regard. Justice Noël did, however, issue the warrants as requested, based largely on the strength of information obtained from [redacted] without consideration of the evidence obtained through the collection methods he had questioned

[17] Following a series of exchanges between counsel and the Court, a case management conference was held by Justice Noël on May 31, 2018, with new counsel now representing the Service. During this conference, counsel for the Service acknowledged that the questions that had been raised by Justice Noël during the April [redacted] 2018 hearing were both valid and important. Counsel suggested, however, that the questions would be better determined on the basis of a more complete record. Consequently, counsel proposed that the Service 'start from zero' by bringing a fresh warrant application, supported by an affidavit from a different affiant – one who would provide the evidentiary record necessary to address the lingering concerns on the part of Justice Noël.

[18] In the course of the discussions surrounding the Service's proposal, Justice Noël voiced his concern that the payments that had been made [redacted] by the Service potentially violated the terrorist financing provisions of the *Criminal Code*. This was the first time that a concern with respect to the possible violation of section 83.03 of the *Code* was expressly articulated by anyone in connection with CASE A

[19] The Service's suggestion that it start over by bringing a fresh warrant application was reiterated in a June 6, 2018 letter to the Court. Counsel acknowledged in that letter that there had been errors and omissions in the record that had been put before the Court in CASE A and that these would be addressed in the new application. Justice Noël accepted the Service's proposal as a way of dealing with the Court's outstanding concerns.

D. *The Warrant Application in CASE B*

[20] Justice Gleeson was subsequently assigned to deal with the fresh warrant application. He held a case management conference with counsel for the Service on July 4, 2018, in anticipation of the Service bringing its new application. The purpose of this conference was to identify the Court's continuing areas of concern, to provide counsel for the Service with an opportunity to detail a proposed way forward in addressing the outstanding areas of concern, and to allow the Court to assess whether the appointment of an *amicus curiae* would be appropriate in this case.

[21] In the course of the case management conference, Justice Gleeson asked that any new warrant application deal with the legal issues that had been raised in CASE A but that the new warrant application not be linked to CASE A and that it "stand on its own".

[22] One legal issue that Justice Gleeson identified during the case management conference was the legality of the Service's investigation and the potential contravention of the terrorist financing provisions of the *Criminal Code* by Service personnel. Justice Gleeson also noted his concern as to whether information obtained that was being relied upon by the Service had been legally obtained, or potentially involved the commission of criminal offences.

[23] In the course of this case management conference, Justice Gleeson also reminded the Service of its obligation to bring unique or special circumstances in warrant applications to the attention of the Court.

[24] A fresh warrant application was filed by the Service on September [redacted] 2018, as CASE B A motion was also brought by the Service to set aside the warrants issued by Justice Noël, in the event that the Court was prepared to issue new warrants in CASE B so as to prevent there being overlapping warrants. In the meantime, the warrants issued by Justice Noël remained in effect so as to avoid any gaps in the Service's operational capabilities.

[25] The CASE B application was supported by an affidavit from [redacted] an intelligence officer with the Service. [redacted] affidavit contained similar information to that placed before Justice Noël in CASE A but provided additional detail about the collection methods he had questioned and updated information regarding the payments and other forms of support that had been provided [redacted] since Justice Noël had issued his warrants in April of 2018 [redacted] affidavit also discussed the nature of the information that had been obtained [redacted] and the importance of this information to the Service's investigation of Canadian extremist travellers.

[26] [redacted] advised that additional payments had been made [redacted] between the time that the application in CASE A was heard in April of 2018 and early September of 2018, when the warrant application in CASE B was filed. As of the date of his affidavit, [redacted] stated that [redacted] during this intervening period. [redacted] further advised that [redacted] and that the Service was seeking additional warrant powers to address this eventuality.

[27] Although there was nothing in [redacted] affidavit regarding the potential illegality of the payments [redacted] the covering letter from the Service's counsel accompanying the application referred to the question of the legality of the payments made [redacted] In addition, all of the information in [redacted] affidavit that was being relied upon by the Service in support of the warrant application that had been obtained through collection methods questioned by Justice Noël was highlighted.

E. *The Appointment of the Amici*

[28] By order dated September 19, 2018, Justice Gleeson appointed Messrs. Gordon Cameron and Matthew Gourlay to act as *amici* in CASE B In a subsequent order, Justice Gleeson specified that the role of the *amici* would be to assist the Court in deciding the legal questions raised by the application.

F. *The October 2018 Hearings before Justice Gleeson*

[29] A hearing in CASE B was held on October 18, 2018, during which [redacted] testified before Justice Gleeson.

[30] [redacted] explained that the Service had provided additional benefits [redacted] during the period between the hearing in CASE A in April of 2018, and the filing of the warrant application in CASE B in September of 2018. [redacted]

[redacted]

[31] [redacted] testified that after the warrants were issued by Justice Noël in [redacted] a payment [redacted] was made to [redacted]

[redacted]

[redacted] CASE A and CASE B [redacted]

[32] To be clear: the payments [redacted] occurred after Justice Noël raised the issue of the potential illegality of the payments [redacted] at the April [redacted] 2018 hearing, a concern that Service counsel subsequently acknowledged was both valid and important.

[33] [redacted] testified that the Service was aware that paying money to an individual who was engaged in terrorist activity "could be viewed" as being illegal, and that it had "very serious implications". As a consequence, such operations required the approval of the Director of the Service, who would, in turn, advise the Minister of Public Safety and Emergency Preparedness (the Minister) of the activity in question. [redacted] also testified that, despite the illegality concern, the Service was of the view that the risks posed by such payments could be managed.

[34] [redacted] subsequently testified that payments such as those in issue in this case "could be construed as financing a terrorist", and that "there is a risk of that occurring". According to [redacted] the Service had not reached the conclusion that such payments violated the *Criminal Code*, but it recognized that operations such as the one in issue in this case carried with them "a high legal risk".

[35] At this point in [redacted] testimony, counsel for the Service intervened to advise the Court that the Department of Justice had been consulted with respect to the legality of payments being made by the Service to those engaged in terrorist activities, and that its analysis was subject to solicitor-client privilege. This disclosure was followed by a discussion between the parties and Justice Gleeson as to the potential relevance of any legal opinions that may have been provided to the Service by the Department of Justice. Justice Gleeson concluded it was not necessary to deal with the solicitor-client privilege issue at that point, but that this issue might have to be revisited once the legal issues raised by the application were fully fleshed out.

[36] The hearing before Justice Gleeson resumed the following day. In the course of a discussion regarding the legal issues raised by the application, Justice Gleeson raised a question as to whether the events that took place before Justice Noël in CASE A were relevant to the determination of the issues in CASE B In this context, Justice Gleeson stated "[a]nd it's not in the context of this specific application, but really why we're here with this specific application coming out of CASE A And it really does link back to this question of [the] duty of candour, but candour in the context of 'prepared to engage'"? Justice Gleeson then went on to ask counsel about the propriety of looking at "that whole question, the Segal Report [Review of CSIS

Warrant Practice, Report of Murray D. Segal, December 2016 [Segal Report]], and what happened here".

[37] At the conclusion of the October 19, 2018 hearing, Justice Gleeson stated that he was reserving his decision as to whether the warrants should issue pending the resolution of the outstanding legal questions. He asked counsel to confer with each other in an effort to formulate the legal questions that remained outstanding. In the meantime, the warrants issued by Justice Noël in April of 2018 remained in effect.

G. *The Formulation of the Legal Issues*

[38] Throughout the remainder of October and November the Court worked with the parties to define the legal issues raised by the warrant application, and on December 10, 2018, Justice Gleeson issued a Direction setting out the legal questions that were to be addressed in CASE B These included, amongst others, the question of whether an issue of lawfulness arises in circumstances where the Service has provided or directed the provision of money or goods to individuals [redacted] who the Service believes were engaged in terrorist activities at the time that the money or goods were provided where the provision of money or goods was necessary to facilitate the collection of information relied on in the warrant application.

[39] Justice Gleeson also asked the parties to address whether the Service had a duty to disclose a possible contravention of the law to the Court, including a potential breach of the

Criminal Code, in the context of warrant applications, and the source of that duty. He further asked the parties to address whether the Service had provided sufficient information initially in CASE A and then in CASE B with respect to the issue of lawfulness as it related to information or intelligence relied on in those warrant applications.

[40] Justice Gleeson also raised questions as to the standard of proof that the Court should apply in determining whether there had been a potential violation of the law. He further asked what factors the Court should consider in determining whether illegally obtained information should be taken into account in support of a warrant application, or should be excluded from consideration.

[41] Once these legal questions had been formulated, counsel for the Service advised that it would be necessary to file additional evidence with the Court to enable the Service to respond to the questions.

[42] Thus it appeared that the legal issues raised by the CASE B application had been clearly identified as of December 10, 2018. However, as Justice Gleeson noted in his decision, "the candour and illegality issues evolved significantly through January and February of 2019", and it "became clear that the outstanding issues from CASE A would require some time to fully address": at para. 17. Indeed, as matters progressed before Justice Gleeson, questions as to the legality of collection methods questioned by Justice Noël and its implications for the warrant hearings emerged as the principal issue.

H. *Possible Illegalities Disclosed in Relation to Other Warrant Applications*

[43] On January 18, 2019, the Senior General Counsel for the National Security Litigation and Advisory Group [NSLAG] (the group within the Department of Justice responsible for representing and advising the Service) wrote to the Court advising that the Service had become aware that information that it had relied upon in two other warrant applications CASE C and CASE D had been derived through activities that "may engage provisions of the Criminal Code". Justice Kane had been seized with CASE C and Justice Brown had been seized with CASE D and warrants had already been issued in each of these cases.

[44] The Court was further advised that the Service was carrying out a review in an effort to determine whether this issue had arisen in any other cases.

[45] Included with counsel's January 18, 2019 letter was a document entitled *Interim Direction on the Conduct of Operations Likely Involving the Commission of Criminal Offences*. This document, which had been issued the previous day by the Service's Deputy Director Operations, indicated that the Service would no longer approve operations that were likely illegal, referring to them as posing a "high legal risk". The Interim Direction further stated that the Service would be reviewing any such operations that were ongoing in order to mitigate any potential illegality.

[46] Counsel for the Service subsequently explained that the issuance of the Interim Direction had been prompted by the Service's experience in CASE A which had led it "to reconsider the

legal risk it was prepared to accept in relation to human source operations that potentially engage the *Criminal Code*".

[47] The disclosure that there were other cases where information relied upon by the Service had been derived through potentially illegal activities led to a joint case management conference being convened in CASE C and CASE D on January 21, 2019 by Justice Mosley, who was then the coordinating judge of designated proceedings. Justices Mosley and Kane were present at the case management conference, but Justices Gleeson and Brown were not, as they were not available.

[48] The Senior General Counsel for the NSLAG appeared at the case management conference on behalf of the Service. He confirmed that the provisions of the *Criminal Code* that were referred to in his January 18, 2019 letter were the terrorist financing provisions of the *Code*, as they related to conduct by the Service, or by human sources acting on its direction.

[49] Counsel further advised that the Service had isolated the information that had been collected under the authority of the warrants issued by Justice Kane and Justice Brown in its databases and that although the collection of information in these matters was ongoing, it was being reviewed only to the extent necessary to determine if it disclosed an imminent danger. Counsel finally added that the Service was conducting a review to determine whether information that had been relied upon to obtain any other active warrants had been collected through illegal activity.

[50] In the course of the case management conference, Justice Mosley asked counsel whether legal advice had been provided to the Service as to whether it was potentially at risk of criminal liability. Counsel declined to answer Justice Mosley's inquiry on the basis that the legal advice provided to the Service was subject to solicitor-client privilege.

[51] Justice Mosley then asked counsel whether, in counsel's view, a contravention of the *Criminal Code* by a Service agent or officer would taint a warrant application. Counsel responded that "it ought to have been disclosed to the issuing judge. That goes without saying. So there was a duty, and we accept that there was a duty, on us to disclose these operations to the issuing judges in the warrants". Counsel then went on to state "[h]owever, our position is that a judge may rely on information in the context of a warrant under section 21 that is obtained as a result of those operations".

I. *The Filing of Additional Evidence in* CASE B *and the Disclosure of Legal Opinions*

[52] On January 25, 2019, counsel for the Service filed additional evidence with the Court in CASE B Included in this package were legal opinions and other documents containing information that was subject to solicitor-client privilege. In the covering letter accompanying the documents, counsel for the Service explained that, for the purpose of this application only, the Director of the Service had waived the solicitor-client privilege that attached to the legal advice that had been received by the Service with respect to the matters at issue in application CASE B

[53] While there was subsequently some suggestion by the Attorney General that the waiver of solicitor-client privilege by the Service had not been entirely voluntary, Justice Gleeson found that this was not the case, and the Attorney General conceded before us that the waiver had indeed been voluntary.

[54] The new evidence included a January, 2017 legal opinion from a lawyer with the NSLAG that concluded that it could "no longer be credibly argued that CSIS employees and sources are protected by Crown immunity if they engage in conduct that, on its face, violated the law" (the Lajeunesse opinion). The Lajeunesse opinion went on to state that "[t]he doctrine of Crown immunity has been removed as a possible defence in the national security context". This conclusion was consistent with earlier legal opinions that had been provided to the Service, and with findings made by the Security Intelligence Review Committee. As was the case with the earlier opinions, the Lajeunesse opinion discussed the need for a "legislative fix" to address the potential exposure of Service employees to criminal charges.

[55] Also produced was a January 7, 2019, opinion from the Senior General Counsel for the NSLAG that came to a similar conclusion with respect to the non-availability of the Crown immunity defence to the Service (the Rees opinion). In particular, the Rees opinion advised the Director of the Service that "there is no lawful basis for the Service to commit criminal offences under the existing legal framework. The *CSIS Act* does not authorize the Service to engage in criminal conduct, even if it yields valuable intelligence". The Rees opinion stated definitively that "CSIS cannot rely on Crown immunity in the context of its human source operations", and

that "[n]o alternative authority exists that would allow the Service to conduct otherwise illegal operations".

[56] Also produced was all of the relevant documentation regarding the approval of the Service's payments [redacted] as well as the provision of material support [redacted] These documents (some of which had been provided to the Minister by the then-Director of the Service) indicated that the [redacted] identified as presenting "a high legal risk".

[57] Several of the approvals documents contained excerpts from legal opinions regarding the legality of payments or the provision of material by the Service to individuals engaged in terrorism, and whether the defence of Crown immunity would be available to the Service.

[58] The approvals documents also included legal opinions from counsel for the Service with respect to the payments [redacted] One such opinion [redacted] specifically refers to section 83.03 of the *Criminal Code*, noting that "[t]here is little doubt here that most of the elements of the financing terrorism offen[c]e would be met. The Service is directly providing money to [redacted] a person the Service knows to be engaged in terrorist activity, while knowing that it will be used or benefit him".

[59] Other comments in the [redacted] risk analysis note the benefit of [redacted] and the value of the information received [redacted] Michel Coulombe, the then-Director of the

Service, is recorded as saying "[p]ending DOJs final opinion on Crown Immunity and further to the advice provided by [individuals within the Service], I have weighed the value of the collection methods versus the legal risk". Mr. Coulombe went on to state "I am of the opinion that the value outweighs the risk and approve the collection methods to proceed". He then observed that "prior notification must be given to the Minister [redacted]". It appears that such notice was indeed provided to the Minister shortly thereafter.

[60] Mr. Coulombe subsequently explained that he had understood that the Lajeunesse opinion was not intended to be the last word as to the availability of the Crown immunity defence, and that further advice would be forthcoming from the Department of Justice. In the meantime, he was prepared to approve the collection methods notwithstanding the fact that the Service's activities likely violated the *Criminal Code*, on the basis that the potential intelligence value of the information that could be obtained [redacted] outweighed the legal risks [redacted]

[61] Evidence was also received from Jeff Yaworski, who was the Service's Deputy Director Operations [redacted] Mr. Yaworski had recommended to Mr. Coulombe that [redacted] the collection methods be approved, notwithstanding that it presented a "high legal risk". He testified that while he was aware that the Service could not engage in illegal activities, the "reality of the operational environment" meant that the Service could find itself "butting up against the *Criminal Code* with respect to terrorist financing". He further explained that the Service had to balance the high legal risk [redacted] with "the potential for

intelligence gain", and that, in his view, the benefit to be derived [redacted] outweighed the legal risks [redacted]

[62] Upon the filing of this evidence on January 25, 2019, counsel representing the Service in application CASE B withdrew, as she had provided one of the legal opinions now in issue.

[63] The content of these newly-disclosed documents led Justice Gleeson to comment at a February 13, 2019 case management conference that they had "significantly changed the landscape here with respect to the significance of some of the questions that were originally raised in this matter, particularly the candour issues".

[64] Counsel for the Service then explained why it had chosen to voluntarily waive the solicitor-client privilege that attached to the legal opinions and the approvals documents. According to counsel for the Service, "[t]he purpose of providing those documents goes directly to the questions that this Court settled on. One of the questions that the Court has asked is whether the activities in question were lawful or not". Counsel went on to explain that "[o]ur duty of candour required us to provide information. It was already abundantly clear from the very first day of questioning of [redacted] that questions were being asked about what legal advice was provided".

[65] Counsel for the Service went on to state that "[o]ne of the questions is the duty of candour. These are parts of the elements that are before the Court and we are trying to be responsive with the evidence that is requested".

J. *The February 21, 2019 En Banc Hearing*

[66] In the meantime, Justice Mosley had scheduled an *en banc* hearing of the designated judges of the Federal Court to take place on February 21, 2019. The purpose of the *en banc* hearing was to address the implications that the disclosure of illegal conduct on the part of the Service had for applications CASE C, CASE B and CASE D Also to be considered was what, if any, obligation there was on the part of the Service to disclose such illegality to the Court in the context of warrant applications that seek to rely on illegally obtained evidence, along with other related issues.

[67] Of particular relevance to the issues in this appeal is the scope of the concessions that were made by counsel for the Attorney General at the *en banc* hearing.

[68] At the commencement of the hearing, Justice Mosley asked why it had taken the Service and the Attorney General so long to inform the Court that the Service had been relying on information in support of warrant applications that had been obtained by methods that, on their face, contravened the *Criminal Code*, "based on, at best, a shaky claim for justification under the Crown immunity doctrine". Justice Mosley went on to ask "[h]ow does that behaviour, protracted behaviour, conform to respect for the rule of law and the duty of candour of both the Service and the Attorney General to this Court?".

[69] Justice Noël then reviewed what had happened in CASE A including the failure of the Service to flag the fact that some of the evidence on which it was relying in support of the

warrant application in that case had been obtained using methods that potentially contravened the terrorist financing provisions of the *Criminal Code*.

[70] Counsel for the Attorney General commenced his submissions at the *en banc* hearing by stating that "you are not going to hear any argument from me that the duty of candour was met in these files. There has been a failure by both the Department of Justice or the Attorney General and CSIS in warrant applications …". Counsel went on to acknowledge that where a warrant application is placed before the Court that may involve information that was illegally obtained, the duty of candour required that the Service and counsel representing the Service ensure that the judge seized with the application was made aware of the illegality so that the judge could assess its relevance in deciding whether or not warrants should issue. Counsel agreed that this had not been done "in these three files".

[71] The question, then, is which three files was counsel referring to?

[72] Counsel for the Attorney General discussed what had occurred in CASE A at the *en banc* hearing, stating that once Justice Noël had raised the illegality issue, "it's not that we didn't take action. We did take action. It's as a result of the action that we took that the issues were identified to have occurred in two other files" [emphasis added].

[73] Counsel for the Attorney General went on to state that "[t]he investigation is still ongoing. We think it's limited to those three files" [emphasis added]. Further on in the hearing, counsel for the Attorney General addressed Justice Noël's concerns as to what had gone on in

CASE A by saying "you were owed better", acknowledging that Justice Noël should have been made aware of the potential illegality. When Justice Noël asked what was to be done about this now, counsel responded by stating "[w]hat we did in fact was to withdraw that application and try and start again".

[74] It thus appears that while the *en banc* hearing had been convened in the context of applications CASE C, CASE B and CASE D counsel's concession that there had been a breach of the duty of candour in three files actually related to applications CASE C, CASE A and CASE D and not CASE B

K. *Events Following the En Banc Hearing and the Issuance of the Warrants in CASE B*

[75] The warrants issued by Justice Noël in CASE A were scheduled to expire on April 2019. Consequently, in April, 2019, the Service filed a further affidavit from updating the information with respect to the Service's investigation into the threat-related activities of the targets of the warrants sought in CASE B Once again, the information in affidavit that was being relied on by the Service in support of the warrant application that had been obtained through potentially unlawful collection methods was identified by highlighting.

[76] A hearing and case management conference was held before Justice Gleeson on April 3, 2019. testified before Justice Gleeson once again, and additional submissions were received from counsel for the Service and the *amici*. testified that

[redacted] additional payments had been made [redacted] since [redacted] had testified in October of 2018.

[77] After hearing from [redacted] Justice Gleeson was satisfied that the Service had provided sufficient information to justify the issuance of the warrants against the [redacted] named individuals, even if no reliance was placed on any of the [redacted] Consequently, Justice Gleeson issued the warrants sought by the Service, albeit for only three months. He further stated that he would remain seized of [redacted] for the purpose of dealing with the questions identified in his December 10, 2018 Direction.

[78] One additional payment to a target [redacted] came to light after the warrants were issued by Justice Gleeson in April, 2019. It was subsequently discovered that a human source had, with the Service's approval, provided [redacted] with [redacted] While the payment had been made prior to the commencement of the application in [redacted] it had only recently been uncovered in a file review relating to the human source, and the Court was promptly advised accordingly. The Attorney General submitted that this was the only instance where a payment had been made or a benefit had been provided to a subject of the investigation that had not been disclosed to the Court before the warrants were issued in [redacted]

[79] A new warrant application was filed by the Service in June of 2019, seeking to renew the warrants against [redacted] and new warrants were subsequently issued [redacted] The issuance of those warrants is not in issue in this appeal. [redacted]

[redacted]

L. *The "Common Issues Hearings"*

[80] In the meantime, hearings had commenced before Justices Gleeson, Kane and Brown, sitting together, to address the issues that were common to the cases with which each of them were seized. These "common issues hearings" proceeded off and on over the next several months, with the judges receiving affidavits and oral testimony from numerous current and former senior officials within the Service and the Department of Justice. Testimony was also received from several counsel for the Service, including counsel who had represented the Service before Justice Noël in CASE A

[81] In a case management conference held on April 12, 2019, Justice Gleeson stated that as the evidence had unfolded in these cases, an issue had emerged as to "who knew what when with respect to the issues in play here". Indeed, counsel for the Attorney General submits that "who knew what when" about the giving and receipt of legal advice then became the primary focus of the hearings before Justices Gleeson, Kane and Brown.

[82] The evidence received at the common issues hearings addressed a range of topics, including the legal advice that had been provided to the Service with respect to the availability of the Crown immunity defence for Service personnel. Also discussed was what had happened

within the Service over the two years between the Lajeunesse opinion being provided in early 2017 and the delivery of the Rees opinion in early 2019.

[83] Michelle Tessier, the Service's Deputy Director of Operations, stated that upon receipt of the Lajeunesse opinion, the Director of the Service suspended all "high legal risk" source operations, effective January 31, 2017. However, Mr. Coulombe authorized the resumption of "high legal risk" operations on March 30, 2019.

[84] Mr. Coulombe subsequently explained that as a result of a meeting with senior officials within the Department of Justice in February of 2017, he understood that the applicability of Crown immunity remained uncertain, and that further research was to be done by the Department in this regard. Given his view that the terrorism threat "had never been so high", Mr. Coulombe was concerned about the impact that ceasing operations would have for public safety and the Service's ability to fulfill its mandate. Consequently, he resumed approving operations that potentially involved illegal activities on the part of Service personnel.

[85] Also discussed by several witnesses were the efforts that had been made to obtain a legislative "fix" that would address the potential criminal exposure of Service personnel who used illegal means to obtain useful information.

[86] Witnesses also addressed the risk assessment methods employed by the Service in determining whether a particular operation should be authorized, and the warrant approval process employed by the Service. The Service personnel's understanding of the duty of candour

owed to the Court, and the efforts that had been made by the Service to ensure that their employees understood their obligations in this regard, also formed part of the discussions.

[87] Justice Gleeson continued to receive evidence with respect to CASE B during this period, in the absence of Justices Kane and Brown. The hearings into application CASE B were completed on November 1, 2019, and Justice Gleeson rendered his decision in this matter on May 15, 2020.

II. Justice Gleeson's Decision

[88] Justice Gleeson's decision is lengthy and detailed, and it addresses a number of matters that are not in issue in this appeal. The focus of this summary is thus on Justice Gleeson's treatment of the duty of candour issue as it relates to the legality of the collection methods questioned by Justice Noël and the Service's reliance on information obtained from those collection methods.

[89] Also at issue is Justice Gleeson's finding that, in the unique circumstances of this case, the duty of candour required that counsel should have proactively sought a waiver of solicitor-client privilege with respect to the legal advice that had been provided to the Service prior to appearing before the Court in the warrant application.

A. *The Duty of Candour and the Illegality Issue*

[90] After a lengthy review of the history of this case and that of CASE A Justice Gleeson first considered whether the Service had complied with its duty of candour in failing to identify the illegality issue arising out of the Service's collection methods He concluded that the Service had breached the duty of candour that it owed to the Court by failing to proactively identify and disclose that it was relying on information in support of the warrant applications in CASE A and CASE B that was likely derived from illegal activities: at para. 93.

[91] In coming to this conclusion, Justice Gleeson started his analysis by stating that the Attorney General had acknowledged that the duty of candour had been breached in this case. He also noted that the Attorney General had contended that counsel and the Service had acted in good faith, and that they had tried to uphold their duty of candour in this matter and in the cases before Justice Kane and Justice Brown. The Attorney General had also argued that individual conduct was not in issue in this case, but that the breach resulted from "institutional failures" that had prevented Service employees and counsel from recognizing the illegality issue and raising it with the Court: at para. 91.

[92] While seemingly accepting the Attorney General's arguments, Justice Gleeson observed that such "institutional failures" did not lessen "the corrosive effect of the breach on the Court's confidence in the Service's ability to be candid". According to Justice Gleeson, it suggested rather that the Court could not rely on the Service representatives appearing before it to be candid – not because of individual failings – but because of institutional failings that rendered it

difficult or impossible for individuals to inform themselves of relevant information or to act on the information of which they are aware. According to Justice Gleeson, this was perhaps more troubling than a single individual's failure to comply with the duty of candour: at para. 92.

[93] Justice Gleeson concluded this section of his analysis by finding that there was no doubt that the Service had breached its duty of candour "in this matter". He further found that whether the Service had illegally collected information that was being relied on to support a warrant application was highly relevant to the Court's assessment of that information, and to the ultimate exercise of the Court's discretion to grant or refuse the warrants: at para. 93.

[94] Justice Gleeson noted that Justice Noël had clearly been concerned that payments had been made to an individual who had been involved in terrorism, explicitly referring to potential breaches of the terrorist financing provisions of the *Criminal Code*. While counsel had assured Justice Noël that the Service had "addressed the issue", this was clearly not the case. While new counsel assigned to deal with CASE A did subsequently acknowledge to Justice Noël that the legality of the Service's actions was in issue, Justice Gleeson was of the view that this acknowledgement did not paint a full and candid picture of the history of the matter: at paras. 94-95.

[95] Justice Gleeson stated that he immediately attributed the failure to accurately respond to Justice Noël's concerns to counsel, but that this failure had to be placed in its broader, more concerning context. He noted that Service advisors had been aware for years that the Service was gathering information to be used in warrant applications through activities that were, on their

face, illegal. Despite this, experienced Service counsel was apparently unaware that illegality was an issue when he appeared before Justice Noël in April of 2018. According to Justice Gleeson, this demonstrated "not only a lack of individual awareness but also a severe institutional failing": at para. 96. As will be discussed below, these broader concerns were considered in greater detail further on in Justice Gleeson's reasons.

B. *Whether Duty of Candour Required that the Service Proactively Disclose Legal Advice to the Court*

[96] Justice Gleeson was also very concerned that the Service had continued to engage in potentially illegal activities, even after it had been told that the Crown immunity defence would not be available to it.

[97] After reviewing the legal advice that had been provided to the Service over time, Justice Gleeson stated that "[i]t is difficult to overstate how disturbing these circumstances are. Operational activity was undertaken in the face of legal advice to the effect that the activity was not authorized by the *CSIS Act*". He further noted that reliance had been placed on the Crown immunity doctrine "despite the Service having been advised by senior counsel […] that '[b]estowing of Crown immunity on CSIS is not consistent with the *CSIS Act*'". Nevertheless, the Service continued to rely on Crown immunity, with the apparent acquiescence of the Department of Justice, notwithstanding the unambiguous direction from the Minister that "the Service must observe the rule of law in discharging its responsibilities": at para. 122.

[98] Justice Gleeson then found that Service counsel breached the duty of candour owed to the Court by failing to seek a waiver of the solicitor-client privilege that attached to the legal advice that had been obtained by the Service with respect to the legality of certain collection methods and the unavailability of the Crown immunity defence: at para. 134.

[99] The *amici* had argued before Justice Gleeson that the candour breach continued even after counsel identified illegality as an issue in CASE A because counsel did not candidly advise the Court that the Service was aware, based on the legal advice, of the illegal character of the collection activities it had undertaken. The *amici* had submitted to Justice Gleeson that counsel was required to proactively seek a waiver of the solicitor-client privilege that attached to this legal advice prior to appearing before the Court so as to allow these circumstances to be fully disclosed.

[100] Justice Gleeson noted that counsel appearing for the Service in CASE B had provided evidence in this proceeding and had testified that she was mindful of her obligations to not disclose legal advice that had been provided to the Service. Justice Gleeson noted that counsel had also asserted that, in her view, she was under no obligation to disclose the Service's degree of knowledge as to the potential illegality of certain collection methods or the legal conclusions that had been reached within the NSLAG at that point in the proceedings: at para. 133.

[101] However, Justice Gleeson accepted the *amici*'s argument, finding that in the "unique circumstances" of this case, the duty of candour required that counsel seek a waiver of privilege prior to appearing before the Court on the warrant application: at para. 134.

[102] Justice Gleeson recognized, however, that counsel had been faced with a difficult task in balancing her duty of candour against her duty to protect the solicitor-client privilege that attached to the legal advice that had been received by the Service. He went on to state that how counsel were to resolve these conflicting duties required "active consideration and discussion in advance of a situation such as the one that arose". He further found that "[n]either the Service nor the Department of Justice were well-positioned to identify and engage in a principled balancing of the competing interests early on in the process" and that "[t]his needs to be addressed moving forward": at para. 134.

C. *The Causes of the Breach of the Duty of Candour*

[103] These findings led Justice Gleeson to then examine the causes of the breach of the duty of candour and what he saw as the institutional and systemic issues that had contributed to the candour breach in this case.

[104] Justice Gleeson reviewed the voluminous body of evidence before him, including the various legal opinions that had been provided to the Service with respect to the availability of the Crown immunity defence. He also considered matters such as the role of the Department of Justice and its legal risk assessment framework, NSLAG's knowledge management and information sharing processes, information silos and compartmentalization, communications among senior Service officials and the Service's warrant application process. He then concluded that "[t]he circumstances disclosed here suggest a degree of institutional disregard for – or, at the

very least, a cavalier institutional approach to – the duty of candour and regrettably the rule of law": at para. 163.

[105] In addressing what he viewed as the causes of the breach of the duty of candour, Justice Gleeson noted that the evidence before him indicated that the issue of the potential illegality of the Service's operations had been widely known within the circle of the organizations and institutions that play a role in the oversight or management of such operations. However, despite this widespread knowledge, and the potential relevance that the issue of illegality had in the context of warrant applications, the illegality issue was never brought to the Court's attention, and "only the Court was left in the dark": at para. 168.

[106] According to Justice Gleeson, this was "inexcusable", especially given that there was "a heightened awareness of the import of the duty of candour and ongoing engagement between the Court, the Service and the Department of Justice in the aftermath of [the Federal Court's decision in *X (Re)*, 2016 FC 1105] and the Segal Report": at para. 168.

[107] Justice Gleeson further found that the breach of candour in this case was "symptomatic of broader, ongoing issues relating to the Service's organizational and governance structure and perhaps institutional culture". He noted that questions had been raised with respect to the way in which legal services were structured and delivered to the Service and that, "even more fundamentally, the roles and responsibilities of AGC counsel". In particular, Justice Gleeson asked rhetorically why interim measures to address the issue of illegality had not been pursued before January of 2019: at para. 170.

[108] Justice Gleeson noted that the Supreme Court had observed in *R. v. Campbell*, [1999] 1 S.C.R. 565 [*Campbell and Shirose*] that any police illegality is a serious matter, but that police illegality that is planned and approved and is implemented "in defiance of legal advice would, if established, suggest a potential systemic problem concerning police accountability and control": *Campbell and Shirose* at para. 73, quoted in Justice Gleeson's decision at para. 171. While these comments were made in the context of police illegality, Justice Gleeson observed that illegality on the part of the Service is as serious as police illegality: at para. 172.

[109] After discussing the need for public confidence in the Service, Justice Gleeson noted that the Court also had to be able to have confidence in the organization, and that the Court's confidence in the Service had once again been shaken. In coming to this conclusion, Justice Gleeson referred to the fact that the illegality, or the likelihood thereof, of the payments made [redacted] "was not proactively disclosed; in fact it was not even identified by the Service or the Department of Justice in the preparation of warrants": at para. 174.

[110] Justice Gleeson further noted that the illegality in this case "did not arise in context of exigent or unforeseen circumstances; it arose in the context of a difficult reality". According to Justice Gleeson, the institutional response to that difficult reality "was to act as though it did not exist": at para. 174.

[111] Justice Gleeson concluded his findings with respect to the duty of candour by observing that the circumstances and events that led to the Service engaging in illegal acts contrary to legal advice warranted a comprehensive and detailed review – one that was mandated to consider

"broad issues of institutional structure, governance and culture within both the Service and relevant elements of the Department of Justice". According to Justice Gleeson "[a]nything less than this will, in my view, fall short of ensuring that confidence and trust in the Service as a key national institution is restored and enhanced": at para. 174. While recognizing that it was beyond his authority to order a review of this type, he strongly recommended that such a review take place: at para. 175.

D. *The Factors to be Considered in Assessing whether Information Connected to Illegal Conduct Should be Admitted in Support of a Warrant Application*

[112] After considering a number of other issues that need not be addressed here, Justice Gleeson concluded that illegally obtained evidence did not automatically have to be excised from warrant applications: at paras. 186-187. He then addressed the factors that the Court should consider in determining whether information connected to illegal activity should be admitted in support of a warrant application.

[113] After reviewing the relevant jurisprudence, Justice Gleeson held at paragraph 195 of his decision that the Court should consider three factors when determining whether illegally obtained evidence should be admitted in support of a warrant application. These factors are:

(1) the seriousness of the illegal activity;
(2) fairness; and
(3) the societal interest.

[114] Justice Gleeson further stated that each factor required that the Court consider a series of sub-questions, some of which are relevant to the issues on this appeal. These sub-questions are:

A. Seriousness of the Illegal Activity:

i. Was the illegality minor, technical or trivial, or was it a significant breach of the law?

ii. Did the illegality arise out of inadvertent or unwitting conduct undertaken in good faith, or was it pursued knowingly, out of ignorance, recklessness, negligence, or willful blindness?

iii. Was the illegality isolated or part of a broader pattern of conduct?

B. Fairness:

i. How closely linked was the illegal activity to the collection of the information?

ii. Did the illegality meaningfully impact on individual legal rights or interests?

iii. Does the illegality undermine the credibility or reliability of the information?

C. Societal Interest:

i. Are there extenuating circumstances including, but not limited to, the immediacy or severity of any threat to the security of Canada, linked to the unlawfulness?

ii. Are there any other factors that arise out of the unique circumstances of the case?

[115] Neither the Attorney General nor the *amici* take issue with this test. The *amici* argue, however, that the seriousness of the illegal activity is very much in issue in this case. In particular, the *amici* point to the fact that the illegality on the part of the Service in this case was not minor, technical or trivial, but was, rather, a significant breach of the law that was pursued knowingly, in the face of legal advice, and that it formed part of a broader pattern of conduct.

III. Issues

[116] The overarching issue on this appeal is whether Justice Gleeson erred in finding that the Service had breached the duty of candour that it owed to the Court in CASE B

[117] In particular, the Attorney General challenges Justice Gleeson's finding that the Service had breached its duty of candour in failing to identify and disclose that information that was being relied upon in both CASE A and CASE B had likely been derived from illegal activities. While the Attorney General concedes that issues of potential illegalities committed in the course of the Service's investigation should have been more clearly brought to the attention of Justice Noël in **CASE A** he contends that no such concession was made with regard to CASE B

[118] The Attorney General further contends that Justice Gleeson erred in finding that in the "unique circumstances" of this case, counsel for the Service had a duty to proactively seek a waiver of the solicitor-client privilege that attached to the legal advice that the Service had received with respect to the legality of certain collection methods and the payments and benefits provided to targets and to provide that advice to the Court.

[119] There is no issue between the parties that the applicable standard of review is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. This is indeed the standard that has been applied by this Court in matters involving the issuance of warrants pursuant to sections 12, 16 and 21 of the Act, and more generally when this Court sits on appeal from Federal Court

decisions relating to national security: see *X (Re)*, 2014 FCA 249, [2015] 1 F.C.R. 684 at paras. 41-42; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344. Accordingly, pure questions of fact are reviewed on correctness, whereas findings of fact and of mixed fact and law are reviewed on the standard of palpable and overriding error, unless an extricable error in principle is established. If an extricable question of law or legal principle can be identified, the standard of correctness applies.

A. *The Duty of Candour*

[120] The duty to make full, fair and frank disclosure of all material facts on *ex parte* applications is a well-established principle, and the judge's articulation of the scope and content of that duty is clearly a question of law reviewable on a correctness standard. To what extent, if at all, the duty of candour requires counsel to seek a waiver of solicitor-client privilege or the disclosure of legal advice, for example, is clearly a question of law. On the other hand, whether the judge erred in finding that the duty of candour was breached as a result of a failure to disclose material facts (*e.g.* illegal activities) is a question of mixed fact and law that attracts a lower level of scrutiny.

[121] The duty of candour is central to the repute of the administration of justice. As officers of justice, counsel in particular are bound by their professional code of conduct to treat courts and tribunals with fairness and in a way that promotes the parties' right to a fair hearing in which justice can be done. Where a party is before a court on an *ex parte* basis, that duty is elevated and the party must act in utmost good faith, both in the representations made and in the evidence

presented. As the Supreme Court stated in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 at paragraph 27, "[t]he evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld…". See also: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 at para. 102 [*Morelli*]. The breach of that duty can be visited with legal consequences, and most codes of professional conduct also impose such an ethical obligation on lawyers: see, for example, Federation of Law Societies of Canada, *Model Code of Professional Conduct*, as amended October 19, 2019, paragraph 5.1-1, p. 79.

[122] The rationale behind the duty of candour is obvious: when the court hears an *ex parte* motion in the absence of one of the parties and is at the mercy of the party bringing the motion, the ordinary checks and balances of the adversarial system do not operate, and the opposite party is deprived of the opportunity to challenge the factual and legal grounds advanced by the moving party. This is why the Court must be able to trust that all material information will be laid before it. The duty is shared by counsel and the affiant: *R. v. Land* (1990), 55 C.C.C. (3d) 382 (Ont. H.C.J.) at 398; *R. v. Lee*, 2007 ABQB 767, [2008] 8 W.W.R. 317 at para. 28; *R. v. Ebanks*, [2007] O.J. No. 2412 (S.C.J.) at para. 26 [*Ebanks*].

[123] The duty of candour has been applied in all kinds of *ex parte* proceedings. Mareva and Anton Piller orders, for example, have been held to trigger a high standard of disclosure: *Roofmart Ontario Inc. v. Canada (National Revenue)*, 2020 FCA 85, 448 D.L.R. (4th) 437 at para. 52; *Secure 2013 Group Inc. v. Tiger Calcium Services Inc.*, 2017 ABCA 316 at para. 46; *United States of America v. Friedland*, 30 O.R. (3d) 568, [1996] O.J. No. 3375 (Gen. Div.) at para. 9; *Green v. Jernigan*, 2003 BCSC 1097, 18 B.C.L.R. (4th) 366 at para. 25. The same

stringent standard has been applied in the context of an *ex parte* order for exclusive possession of a matrimonial home in the context of divorce proceedings (*Nafie v. Badawy*, 2015 ABCA 36, 381 D.L.R. (4th) 208 at para. 127), when issuing an order for service *ex juris* (*Nexen Energy ULC v. ITP SA*, 2020 ABQB 83 at paras. 72-76), when applying for an order permitting seizure of private property without notice (*British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2010 BCCA 539 at paras. 16-30), in a motion for an *ex parte* order to enforce a foreign arbitral award (*TMR Energy Ltd. v. Ukraine*, 2005 FCA 28, [2005] 3 F.C.R. 111 at paras. 63 ff), and in an *ex parte* application for a garnishing order before an action (*Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2002 BCCA 342 at paras. 36-51). An interesting and extensive discussion of the duty of candour in the context of *ex parte* orders made pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 can also be found in *Marciano (Séquestre de)*, 2012 QCCA 1881 at paras. 40-57.

[124] Needless to say, the duty of candour is particularly critical when the Service applies for warrants pursuant to section 21 of the Act, not only because of their breadth and intrusiveness but also because they rarely lead to a criminal prosecution. This contrasts with *ex parte* applications for search and seizure warrants issued under the *Criminal Code*.

[125] Under section 196 of the *Criminal Code*, persons whose private communications have been intercepted pursuant to a judicial authorization delivered *ex parte* in accordance with section 185 of the *Code* must be notified, generally within 90 days after the period for which the authorization was given, that they were the subject of such interceptions. Similarly, section 490 of the *Criminal Code* sets out an elaborate procedure governing the retention and the return of

things seized pursuant to a search warrant. In both cases, the target of the search and seizure can challenge the warrant authorizing it. Moreover, an accused is entitled to a pre-trial hearing (also referred to as a "Garofoli" hearing, named after the Supreme Court decision allowing for such procedure: see *R. v. Garofoli*, [1990] 2 S.C.R. 1421) to determine whether the wiretap authorization complies with section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter) and, if not, whether the evidence should be excluded under subsection 24(2) of the Charter. In the course of that proceeding, the accused is entitled to have the contents of the affidavits upon which the authorization to intercept the communications was granted, subject to editing, in order to enable him to make full answer and defence.

[126] Unless a warrant issued under section 21 of the Act leads to a criminal prosecution, which is the exception rather than the rule, the target of the warrant will never know that he or she was the subject of investigative measures or information collection and there will never be *ex post facto* adversarial litigation over the propriety or legality of the warrant. The Court will therefore be, in most instances, the only check on state power since the target of the warrant cannot rely on the adversarial process to test the assertions made by the Service. This very special feature of the warrants issued to the Service, for the investigation of threats to the security to Canada and the performance of its duties under section 16 of the Act, makes it even more incumbent on counsel and affiants to show the highest degree of good faith and transparency. That requirement has been applied to all of the Service's *ex parte* proceedings: see *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33 at paras. 101-102, referring to *Almrei (Re)*, 2009 FC 1263, [2011] 1 F.C.R. 163 at para. 500; *Charkaoui v.*

Canada (Minister of Citizenship and Immigration), 2004 FCA 421, [2005] 2 F.C.R. 299 at paras. 153-154; *X (Re)*, 2013 FC 1275, [2015] 1 F.C.R. 635 at para. 83 [*X (Re) 2013 FC*], aff'd 2014 FCA 249 [*X (Re) 2013 FCA*]; *X (Re)*, 2016 FC 1105, [2017] 2 F.C.R. 396 at paras. 100, 107 [*X (Re) 2016 FC*].

[127] What, then, are the disclosure obligations of the Service when it seeks a warrant pursuant to section 21 of the Act? The short answer to that question is that all material information should be disclosed. As a matter of law, information is material if it is relevant to the determination a judge must make in deciding whether or not to issue a warrant, and if so, on what terms.

[128] The leading case on disclosure obligations in warrant applications is the decision of the Supreme Court in *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, where the Court (*per* LeBel) wrote:

> [46] …The legal obligation on anyone seeking an *ex parte* authorization is <u>full and frank</u> disclosure of <u>material facts</u> …. All that [the affidavit] must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. Ideally, an affidavit should be not only full and frank but also <u>clear and concise</u>. …
>
> [47] A corollary to the requirement of an affidavit being full and frank is that it should never attempt to trick its readers. At best, the use of boiler-plate language adds extra verbiage and seldom anything of meaning; at worst, it has the potential to trick the reader into thinking that the affidavit means something that it does not. … There is nothing wrong – and much right – with an affidavit that sets out the facts truthfully, fully and <u>plainly</u>. Counsel and police officers submitting materials to obtain wiretapping authorizations should not allow themselves to be led into the temptation of misleading the authorizing judge, either by the language used or strategic omissions.
>
> [Emphasis in original.]

[129] This notion that police officers seeking a search warrant must refrain from concealing or omitting relevant facts was taken up again in *Morelli* at paragraph 102. The Supreme Court did not elaborate on what constitutes a material fact. But the case law is replete with statements to the effect that material facts are those which may be relevant to an authorizing judge in exercising his or her discretion and determining whether the criteria for granting an authorization have been met. Needless to say, relevant facts will include those facts known to the affiant which would tend to go against what is sought: see, for example, *R. v. G.B. (application by Bogiatzis, Christodoulou, Cusato and Churchill)*, [2003] O.J. No. 3335 (S.C.J.) at para. 11, 108 C.R.R. (2d) 294; *R. v. Luciano*, 2011 ONCA 89 at para. 207. Counsel should also ensure that the legal issues raised by an application are clearly identified: *R. v. Spackman*, [2008] O.J. No. 2722 (S.C.J.) at para. 18, citing *Ebanks* at para. 30.

[130] What does that mean in the context of section 21 of the Act? Pursuant to subsection 21(3), a judge to whom an application is made must be satisfied of the matters set out in paragraphs 21(2)(*a*) and (*b*), which state as follows:

21(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,	21(2) La demande visée au paragraphe (1) est présentée par écrit et accompagnée de l'affidavit du demandeur portant sur les points suivants :
(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 and functions under section 16;	(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);
(b) that other investigative procedures have been tried and have failed or why it appears that they are unlikely	(b) le fait que d'autres méthodes d'enquête ont été essayées en vain, ou la raison pour laquelle elles

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;	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;

[131] It would appear, therefore, that material facts will be those that may be relevant to a designated judge in determining whether the criteria set forth in paragraphs 21(2)(*a*) and (*b*) have been met. To make such a determination, the judge will have to make findings of both fact and law. It is therefore incumbent upon counsel and affiants appearing on behalf of the Service to provide every piece of information in their possession that could inform the judge's determinations with respect to both types of findings. Because of the special nature of warrants covered by the Act, this Court went even further in *X (Re) 2013 FCA* and confirmed the broad conception of relevance adopted by the Federal Court.

[132] In that case, Justice Mosley had issued a warrant authorizing the Service to intercept foreign telecommunications and [redacted] from within Canada. He was persuaded that a prior decision by his colleague Justice Blanchard, holding that the Federal Court did not have jurisdiction to authorize the Service employees to conduct intrusive investigative activities outside of Canada where those activities were likely to constitute a violation of foreign law, was distinguishable. He came to that conclusion on the basis of a different legal argument presented by the Service according to which the Federal Court had jurisdiction to issue the requested

warrants because the acts the Court was asked to authorize would all take place in Canada. Yet it was later found that the Service failed to disclose to Justice Mosley that it intended to make requests to foreign agencies to intercept the telecommunications of Canadians abroad, information that was before Justice Blanchard. Justice Mosley found that the Service had breached its duty of candour as a result of that omission, and also concluded not only that the Service had no lawful authority under section 12 of the Act to request foreign agencies to intercept the telecommunications of Canadians abroad, but also that section 21 did not allow the Federal Court to authorize the Service to make such requests.

[133] In coming to his conclusion on the duty of candour, Justice Mosley rejected a narrow conception of relevance that would exclude information about the context in which warrant applications are brought. Rather, Justice Mosley expressed the view that the Court should not be kept in the dark "about matters it may have reason to be concerned about if it was made aware of them" (*X (Re) 2013 FC* at para. 89). On appeal, the Attorney General objected to that test for disclosure, claiming that it did not articulate an intelligible standard. While conceding that this paragraph of the Federal Court decision could have been more elegantly crafted, this Court confirmed that "factors beyond those enumerated in paragraphs 21(2)(*a*) and (*b*) will be material to the judicial exercise of discretion" on warrant applications by the Service. As this Court stated, "[h]ad Parliament intended otherwise, subsection 21(3) would provide that upon being satisfied of the enumerated matters a judge 'shall' issue a warrant", instead of "may" (*X (Re) 2013 FCA* at para. 61). In the particular circumstances of this case, therefore, considerations material to the Court's decision whether to issue the requested warrants included the prior attempt to obtain Justice Blanchard's authorization to collect security intelligence abroad, and

the potential implications of sharing information about Canadian persons with foreign security and intelligence agencies.

[134] It is against this backdrop that Justice Gleeson's finding of a breach of candour must be assessed. He found that neither the Service nor counsel brought the issue of illegally collected information to the Court's attention. The Attorney General submits that the Judge erred in so finding. It bears reiterating that this Court may only set aside this finding if there was a palpable and overriding error with respect to underlying findings of fact or if the inference-drawing process used to reach this conclusion was palpably in error.

[135] At the very beginning of his reasons, Justice Gleeson made it clear that it was only as a result of Justice Noël's inquiries in warrant application CASE A that the issue came to light: at paras. 3-4. After a long recapitulation of the vagaries through which that file, the two companion applications CASE C and CASE D and the file he was seized with CASE B had passed, he concluded:

> [168] The evidence indicates that the issue of potential illegality was widely known within the circle of those organizations and institutions that play a role in the oversight or management of CSIS operations. SIRC has undertaken reviews and identified concerns to the Service; Public Safety and the Privy Council Office also had knowledge not later than January 2017 as a result of the meeting convened by the then Director that was attended by the then Deputy Minister of Public Safety and the then National Security Advisor. Despite this widespread knowledge and the potential relevance the issue of illegality had in the context of warrant applications, the matter was never brought to this Court's attention. This is inexcusable, particularly where there was a heightened awareness of the import of the duty of candour and ongoing engagement between the Court, the Service and the Department of Justice in the aftermath of the *Associate Data* decision and the Segal Report. It appears only the Court was left in the dark.

[136] The Attorney General submits that the Judge erred in finding that the Service breached its duty of candour in the case before him; that is, CASE B With all due respect, we are of the view that the Attorney General's submission is well-taken, and that the Judge arrived at this finding in large part because the Judge was overly influenced by the genesis of the CASE B application and the protracted proceedings that preceded its filing in September 2018.

[137] There is no doubt that the Service and the Attorney General failed to meet their duty of candour to provide all material facts and to identify the legal issues that may be of concern to the Court in CASE A, CASE C and CASE D This was repeatedly and explicitly acknowledged by the Attorney General, first at the *en banc* meeting of February 21, 2019 (see above, paras. 70-74), and then both before Justice Gleeson and this Court, in writing and orally. Indeed, the whole purpose of filing a fresh application for warrants in September 2018 was to remedy that failure. At the case management conference of May 2018, counsel for the Attorney General suggested starting over to ensure that all facts be disclosed, that the concerns raised by Justice Noël be addressed and that potential illegalities be identified and dealt with. This was repeated at the *en banc* hearing, where counsel for the Attorney General stated, in reply to a question from Justice Noël, "you were owed better", and explained that the new application was meant to disclose all the facts allowing the Court to determine whether the information upon which the application was sought had been legally obtained.

[138] In their memorandum before this Court, counsel for the Attorney General submitted that all the material facts regarding the activities by the Service and persons operating on its behalf that likely contravened the *Criminal Code* were proactively identified and disclosed in

CASE A and that the duty of candour was breached only to the extent that the legal issues of potential concern to the Court were not identified. That distinction was not taken up at the hearing, and in our view nothing turns upon it. For that reason, there is no need to delve into it.

[139] We can readily appreciate the difficulty of dissociating what took place prior to the filing of the application in CASE B and what took place after. In fact, there is a long history of what has been, at times, a tense relationship between the Service and the Federal Court. Referring notably to the cases of *X (Re) 2013 FC* (where Justice Mosley held that the Service had breached its duty of candour by "strategically omit[ting]" to mention the fact that it intended to seek the assistance of foreign partners in the execution of the requested warrants) and *X (Re) 2016 FC* (where the Federal Court noted that it had only become aware that the Service was indefinitely retaining third-party associated data collected in the execution of warrants as a result of the publication of the 2014-2015 Annual Report of the Security Intelligence Review Committee), Murray Segal characterized the Court's trust in the Service as "strained" (Segal Report, p. 6; Appeal Book, Vol. 7, tab 64-B, p. 2580). We also find various expressions of exasperation in comments made by the Chief Justice, Justice Noël and Justice Mosley in the proceedings leading to the hearing before Justice Gleeson, most notably during the February 2019 *en banc* hearing: see, for example, Appeal Book, Vol. 11, tab 95, pp. 4110-4114, 4126-4128 (summarized above, para. 68). In his Direction dated March 20, 2019, the Chief Justice again spoke of the "systemic nature" of the failures to respect the duty of candour (Appeal Book, Vol. 9, tab 72, p. 3274). Clearly, the Service has fallen short on numerous occasions of living up to the standard of good faith that one is entitled to expect in *ex parte* proceedings, and a number of judges of the Federal Court have rightly expressed their displeasure with such behaviour.

[140] That being said, judges are expected to rule on the matter before them on the sole basis of the record pertaining to that matter. Having carefully considered the record, affidavits, exhibits and testimony supporting the application in [redacted] as well as the transcripts of the various proceedings in that file, we are of the view that Justice Gleeson's finding that the duty of candour was breached by the Service in this particular application is not supported by the evidence. Not only were all the material facts disclosed, but the legal issues that could be of concern to the Court were also appropriately flagged.

[141] Most of the relevant facts relating to the [redacted] in which the Service [redacted] paid an individual believed to be engaged in terrorist activities in exchange for information, had been already disclosed in the material supporting the [redacted] application. In her affidavit dated March [redacted] 2018, the Service's affiant described at length the nature of the [redacted] The affiant also identified the information in her affidavit that had been collected by [redacted] Upon appearing before Justice Noël in April 2018, that same affiant was questioned by the Judge and gave more detail.

[142] The real concern of Justice Noël during that *ex parte* April hearing was legal in nature, and did not seem to relate to the facts being disclosed (or not disclosed, for that matter). He was concerned that the application for the warrant appeared to be based on information that may have been potentially illegally collected, and that he was the first one to raise that issue (Appeal Book,

Vol. 3, tab 24, p. 905). That failure of the Service and of the Attorney General to proactively raise that issue was the breach of candour in the CASE A application. In a Direction following the April hearing, Justice Noël sought further clarification from the Service on a number of issues. With respect to the investigation he once again queried the Service's authority to conduct such investigations and asked for written representations with respect to the legality of the payments made [redacted]

[143] It was precisely to come to grips with the "important questions" (as counsel for the Service characterized them) raised by Justice Noël, and to ensure that they were dealt with in light of all the relevant facts, that the fresh application in CASE B was filed in September of 2018. In her letter to the Court dated June 6, 2018, counsel acting on behalf of the NSLAG stated that additional evidence would be filed to address the legal issues raised by the Court, one of which she identified as follows: "…whether section 12 of the *CSIS Act* authorizes the Service to engage in this type of investigation and […] whether there are limits on the collection, retention or use of information obtained through an investigation that entails providing a payment to an individual known to be facilitating or carrying out terrorism " (Appeal Book, Vol. 3, tab 24, p. 1062; see also the transcript of the February 2019 *en banc* hearing, Appeal Book, Vol. 11, tab 95, pp. 4119-4120). And this is clearly how the new application was perceived by Justice Gleeson. At the July 4, 2018 case management conference hearing, the Service reiterated that it wanted to file a fresh application to deal with the legal issues that were of concern to the Court, with more evidence, and Justice Gleeson understood that this fresh application "ha[d] its genesis in the circumstances of CASE A" but "need[ed] to stand on its own" (Appeal Book, Vol. 3, tab 24, p. 1103).

[144] The affidavit initially filed in support of the new application in September of 2018 contained much of the same information that had been before Justice Noël, but with additional context and detail with respect to the payment and provision of goods [redacted] and, [redacted] to [redacted] The Service went as far as to highlight the paragraphs containing information that had been obtained through [redacted] the reliability and legality of which had been questioned by Justice Noël (Appeal Book, Vol. 6, tab 44, p. 2405). During the course of his examination, the affiant acknowledged that the Service was aware that the payments [redacted] may have been unlawful (Appeal Book, Vol. 5, tab 37, pp. 1852, 1871).

[145] The Service went beyond this initial affidavit and responded to a number of requests from the Court throughout both the [redacted] application and the common issues proceeding. It filed a first supplementary affidavit on November 8, 2018 relating to the Service policies applicable to the [redacted] an affidavit of documents on January 25, 2019 disclosing all of the records concerning the approvals of payments and the provision of [redacted] to [redacted] and payment operations related to [redacted] another affidavit of documents sworn January 25, 2019 providing the Court with copies of three legal opinions on the applicability of the Crown immunity defence to the activities of the Service, and two other supplementary affidavits (sworn respectively on February 28, 2019 and March 8, 2019) responding to undertakings and reviewing the documentation and records to determine, among other things, when the potential illegality of [redacted] was first considered and whether the Director of the Service, the Minister and the Deputy Minister of Public Safety were alerted to the fact that

information relied upon in CASE A and CASE B applications was likely derived from illegal activities.

[146] On top of these affidavits, eleven other affidavits from former and current officials from the Service and the Department of Justice were filed by the Service to address questions from the Court as to "who knew what when" about the provision of legal advice on Crown immunity. As recognized by Justice Gleeson, this brought the total number of affiants who placed evidence before the Court to fourteen, eleven of whom appeared before the Court for examination and cross-examination on their affidavits: at para. 33. Finally, a supplemental affidavit updating the investigation was filed in April 2019, providing details on further payments and provision of [redacted] by a human source, and a copy of the initial affidavit of September 2018 highlighting all potentially unlawful activities was refiled: at para. 251-252; see also Appeal Book, Vol. 4, tab 33; Vol. 5, tab 34 and Vol. 6, tab 51.

[147] In light of all that evidence and of the fact that each of the required affiants appeared voluntarily before the Court without any subpoenas being issued, it is difficult to say that the Service was not forthcoming or that it did not disclose all the material facts regarding the potentially unlawful activities from which the information supporting the CASE B application originated. Indeed, Justice Gleeson himself seems to have recognized as much, not only because he granted the warrants but more importantly because he acknowledged in his reasons that the Service "had … disclosed the circumstances in which payments, goods or services had been provided in contravention or potential contravention of the *Criminal Code*" and that "[t]he

information collected through those sources and the investigation and relied upon in the application was identified": at para. 263.

[148] It appears that what really bothered Justice Gleeson and prompted him to conclude that the Service breached its duty of candour was its failure to recognize the issue of illegality and to raise it with the Court. There are several paragraphs in the reasons where this flaw is identified as being of particular concern for the Court (see, for example, paras. 4, 93 and 98). The very first paragraph of the formal Judgment, which is precisely the paragraph that the Attorney General seeks to set aside in this appeal, reads as follows:

> The Canadian Security Intelligence Service breached the duty of candour it owed to the Court in failing to proactively identify and disclose that it had included in support of warrant applications CASE A and CASE B information that was likely derived from illegal activities.

[149] We must confess that we find it hard to reconcile this finding (as it applies to CASE B with the record that was before Justice Gleeson. The Attorney General did indeed concede that the legal issues flowing from the provision of money and other goods to a person who was [redacted] believed to be engaged in terrorist activities should have been more clearly brought to the attention of Justice Noël in CASE A That breach was attributable not only to the failings of a particular counsel who testified that he had not recognized that these issues arose, but more importantly, as noted by Justice Gleeson, to a "severe institutional failing": at para. 96. But the leap from that acknowledgement to the finding that a similar breach occurred in CASE B is never clearly explained and is, in our view, unwarranted.

[150] As previously mentioned, it was at the initiative of counsel for the Service that a proposal was made to file a fresh application to deal more exhaustively with the legal issues raised by Justice Noël in May 2018, a proposal initially well-received by Justice Noël and then formalized by the Service by way of a letter in early June 2018. This offer was taken up by Justice Noël, who issued a Direction a week later whereby he asked the Chief Justice to appoint another designated judge who would deal with the issues he had identified (one of which being the impact of relying on illegally-gathered evidence to obtain a warrant) and possibly "adjudicate afresh or *de novo*" a duly filed new application (Appeal Book, Vol. 3, tab 24, pp. 1065-1066).

[151] Following several months of discussion between the Court, counsel for the Service and the *amici*, and after a few case management conferences, the Court finally set out the questions that were to be addressed in CASE B including the legal implications of having provided money or goods to individuals who are subjects of investigation [redacted] If questions of lawfulness or the infringement of Charter Rights indeed arose in that respect, the Court went on to ask whether the Service, "initially (in CASE A or subsequently (in CASE B)", provided sufficient information in respect of those questions as they related to the information relied upon in the warrant applications (Appeal Book, Vol. 2, tab 17, pp. 645-646).

[152] It is difficult to conceive how the question could have been more bluntly put forward, and how it can be said that the Service breached its duty of candour in failing to proactively identify and disclose its use of information likely derived from illegal activities in support of its application in CASE B The Judge was obviously entitled to come to that conclusion with

respect to the CASE A application (it was indeed conceded by the Attorney General), but it was a palpable and overriding error in effect to amalgamate the two applications and to apply the same conclusion to the CASE B application. There is simply no justification to take the Attorney General's concession that the duty of candour had been breached in the first application as an admission that a similar breach occurred in the second, which stood on its own.

[153] The *amici* submitted that the Judge made no such mistake and was not confused when he found a breach of the duty of candour in the case before him. In their view, it was not sufficient for the Attorney General to disclose, both in CASE A and CASE B that the evidence relied upon to support the warrant applications was obtained illegally; what should also have been disclosed is that the illegality was intentional, to the extent that the Service and the Attorney General acted in the face of legal advice confirming that Crown immunity could not be raised as a defence by the Service employees and sources engaged in conduct that violates the prohibition of the *Criminal Code* relating to the financing of terrorism. When Justice Gleeson's reasons are read in context and as a whole, contended the *amici*, it is clear that the duty of candour breach identified in CASE B related to the failure to disclose that background information and the institutional policy of weighing illegality against the value of intelligence. In other words, what the Judge really wanted to say was that the Service, having sought to rely on evidence that was likely derived from illegal activities, breached the duty of candour in CASE B by failing to disclose that it knew about the illegal character of these activities.

[154] This interpretation is borne out by the reasons provided by Justice Gleeson, at paragraphs 132 and 134:

> [132] The *amici* argue that the candour breach continued even after counsel identified illegality as an issue in CASE A This is because counsel did not candidly advise the Court that the Service was aware, based on the legal advice it had received, of the illegal character of the collection activities it had undertaken. The *amici* argue that counsel was required to seek a waiver of privilege prior to appearing before the Court to allow these circumstances to be fully disclosed.
>
> […]
>
> [134] I am persuaded by the *amici* view: in these unique circumstances candour required that counsel seek a waiver of privilege prior to appearing before the Court. …

[155] Needless to say, the Attorney General vigorously disputed this position and stated that there was nothing unique in the circumstances of this case that would justify an interference with solicitor-client privilege. We agree with the *amici* that this is the core issue on this appeal, and we will now turn our attention to it.

B. *Solicitor-Client Privilege*

[156] In his reasons, Justice Gleeson aptly reiterated that the Service is limited in its capacity to investigate threats to the national security to Canada by its "foundational commitment" to act within the bounds of the law: at para. 37. This commitment, as he points out, is rooted in the statement in the 1981 McDonald Commission Report, that the rule of law must be observed in all security operations. This is uncontroversial, and has repeatedly been reiterated by this Court and the Federal Court: see, for example, *X (Re)*, 2018 FC 738, [2019] 1 F.C.R. 567 at paras. 22-26; *X (Re) 2016 FC* at paras. 129-132. What is novel, however, is the inference drawn by the Judge that the duty of candour, as a corollary to the respect for the rule of law, necessarily required counsel appearing on behalf of the Service to seek a waiver of solicitor-client privilege prior to

appearing before the Court. This would permit counsel to inform the Court that the Service was aware of the illegal character of its collection activities on the basis of the legal advice it had received.

[157] In the Judge's view, the failure by counsel to disclose the legal advice provided to the Service and, therefore, the degree of knowledge by the Service of the illegally-obtained nature of the information relied upon to support its application for a warrant, was "in the unique circumstances of this case", a breach of the rule of law: at paras. 134, 163. Unfortunately, Justice Gleeson does not elaborate on the rationale underlying this crucial finding, devoting only three paragraphs to the question (at paras. 132-134), and one is therefore left to rely on the *amici*'s argument to which he explicitly refers with approval.

[158] In their submission before us, the *amici* developed the argument that they put before the Federal Court. It is premised on the test ultimately adopted by the Federal Court with respect to the use of illegally collected information in support of a section 21 warrant request. A brief discussion of that test is therefore in order to fully grasp the *amici*'s position.

[159] Based on *R. v. Grant*, [1993] 3 S.C.R. 223 at paragraph 79 (*Grant #1*), it appears that a judge must automatically excise evidence arising from a Charter breach or that was otherwise unlawfully obtained when considering a police officer's reasonable and probable grounds in applying for a warrant. See also, to the same effect, *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212 at para. 74; *R. v Mahmood*, 2011 ONCA 693, 107 O.R. (3d) 641 at para. 116; *R. v. Wiley*, [1993] 3 S.C.R. 263. This rule may seem harsh, especially in light of the fact that similar

evidence will only be excluded at trial as a result of a carefully balanced exercise, but it has survived so far. Both the Attorney General and the *amici* agreed that such a draconian rule was not desirable in a national security context, and the Federal Court also agreed, stating that "an automatic excision rule could lead a designated judge to not issue a warrant due to a minor illegality even where the threat under investigation is significant": at para. 186.

[160] Accepting that it is the role of the designated judge to balance the societal interest of maintaining national security against individual rights and interests, the Court therefore adopted a more nuanced approach along the lines of the test developed in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (*Grant #2*) in the context of subsection 24(2) of the Charter. As a result, the Court held that three factors should be considered when determining whether information that was likely collected in contravention of the law should nevertheless be admitted in support of a warrant application under the Act. These factors (the most relevant one for our purposes being the seriousness of the illegal activities) are reproduced at paragraph 114 of these reasons.

[161] This finding of the Federal Court is not challenged by the parties, nor could it be since it is the test that they proposed in the first place. The *amici*, however, drew a conclusion from this test that was vigorously opposed by the Attorney General.

[162] Stripped to the essential, the *amici*'s argument goes like this. In light of the factors to be considered when determining whether information connected to illegal conduct should be admitted in support of a warrant application, and in particular the first one relating to the seriousness or the intentionality of that illegal conduct, it is not sufficient for the Service to

simply let the Court know that the evidence was obtained with knowledge of the illegality involved in its collection. If the judge is to be in a position to perform the balancing analysis called for by the test adopted by the Court, he or she must be provided with all of the information going to the state of mind of those who obtained the information illegally. According to that logic, it is only through an examination of the legal advice received by the Service and of the Service's response, that a judge will be able to assess the gravity of its conduct and its good faith. In other words, waiving solicitor-privilege is the *quid pro quo* for asking the Court to make an exceptional ruling and to admit illegally-gathered evidence in support of a warrant request.

[163] As previously mentioned, this thesis is vigorously opposed by the Attorney General, on the basis that such an exception to solicitor-client privilege is unsupported by the case law and is incompatible with the privilege's fundamental importance for the maintenance of the rule of law. For the reasons that follow, we are of the view that accepting the *amici's* argument and confirming the Federal Court's decision on this matter would result in an unjustifiable and dangerous incursion into the solicitor-client privilege.

[164] Solicitor-client privilege first evolved as a rule of evidence, and was meant to prevent privileged material from being tendered in evidence in a court room. Numerous decisions have since extended its application well beyond its original limits, and it is now considered a substantive rule that attaches to any communication between solicitor and client which entails the asking for or giving of legal advice and which is intended to be confidential by the parties: *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 837 [*Solosky*]; *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875-876; *Smith v. Jones*, [1999] 1 S.C.R. 455 at paras. 48-49 [*Smith*];

Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44, [2008] 2 S.C.R. 574 at para. 10. Indeed, the Supreme Court reaffirmed in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209 at para. 49 [*Lavallee*] that solicitor-client privilege is a principle of fundamental justice within the meaning of section 7 of the Charter, and stated in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 at para. 39 that such privilege is generally seen as a "fundamental and substantive" rule of law. The Supreme Court has repeatedly said that it must remain "as close to absolute as possible" and "should not be interfered with unless absolutely necessary" (*Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 at para. 43), and that it only yields in "certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis" (*R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 at para. 35 [*McClure*]).

[165] It is important to stress that solicitor-client privilege, far from being in tension with the rule of law, is on the contrary, essential to its fulfillment and nurtures it. In his *Solicitor-Client Privilege* (Toronto: LexisNexis, 2014), Professor Adam M. Dodek explains that the privilege has been held to further frank and full disclosure between a lawyer and his or her client, the well-functioning of the adversary system and access to justice. These justifications of the privilege share a common theme, namely the efficacy of the justice system. Along the same lines, Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst submit that the modern articulation of solicitor-client privilege rests on the premise that "[e]ffectual legal assistance … [can] only be given if clients frankly and candidly disclosed material facts to their solicitors, which, in turn,

[is] essential to the effective operation of the legal system": *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2018) at §14.46.

[166] The first of the justifications enunciated by Professor Dodek, the "frank and full disclosure" argument, has perhaps received the most attention from courts and scholars alike. The classic statement of that argument in *Greenough v. Gaskell* (1833), 39 E.R. 618, 1 My. & K. 98 (Ch. Div.) and its restatement in *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 are often cited by Canadian courts, and continue to form part of the dominant rationale underlying solicitor-client privilege. In an effort to improve upon jurisprudential discussions regarding the theoretical foundations of the privilege, the Supreme Court of Canada has repeatedly asserted the critical role of solicitor-client privilege in fostering open communication between clients and lawyers.

[167] In *Smith*, for example, Justice Cory resorted to the vast scope of situations where legal advice is sought, and the need for clients to speak freely to their lawyers in such contexts, in support of the proposition that the privilege is an integral part of the functioning of the legal system:

> [46] Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. It cannot be forgotten that the privilege is that of the client, not the lawyer. The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. It is an element that is both integral and extremely important to the functioning of the legal system. It is because of the fundamental importance

> of the privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step.

[168] In *McClure*, Justice Major similarly evoked the law's complexity and the lawyers' unique role, both of which militate for the fullest disclosure within the confines of the solicitor-client relationship. The danger of eroding solicitor-client privilege, Justice Major posited, resides in the potential to stifle communications between the lawyer and his or her client:

> [33] The importance of solicitor-client privilege to both the legal system and society as a whole assists in determining whether and in what circumstances the privilege should yield to an individual's right to make full answer and defence. The law is complex. Lawyers have a unique role. Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client's position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and client. The need to protect the privilege determines its immunity to attack.

[169] The various jurisprudential iterations of the rationale for solicitor-client privilege consistently appeal to a sense of efficacy in the operation of the legal system. *Smith* establishes that the privilege speaks to the "functioning of the legal system" (at para. 46), *McClure* recognizes that it is "integral to the workings of the legal system" and is "a part of that system, not ancillary to it" (at para. 31), and *Lavallee* likewise discusses the central contribution of the privilege to "the administration of justice in an adversarial system" (at para. 49). We read this repeated insistence on the functioning of the legal system or the administration of justice as an acknowledgement, albeit an implicit one, of the privilege's critical role to the preservation of the rule of law.

[170] Endorsing the "rule of law" rationale developed by Professor Adrian Zuckerman in *Civil Procedure: Principles of Practice* (London: Thompson/Sweet & Maxwell, 2006), the House of Lords has enunciated the necessity of solicitor-client privilege's British equivalent – legal professional privilege – in a societal order built upon a belief in the rule of law:

> [34] It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyer's legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy-bodies or anyone else (see also paras 15.8 to 15.10 of Adrian Zuckerman's Civil Procedure where the author refers to the rationale underlying legal advice privilege as "the rule of law rationale"). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material.
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> *Three Rivers District Council & Ors v. Bank of England*, [2004] UKHL 48 at para. 34.

[171] Solicitor-client privilege is no less crucial for government officials than it is for individuals and corporations. This is not disputed by the *amici*, nor could it be in the face of the clear finding to that effect by this Court in *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89, 161 D.L.R. (4th) 85 at paragraph 22:

> …[T]he identity of the client is irrelevant to the scope or content of the privilege. […] Whether the client is an individual, a corporation, or a government body there is no distinction in the degree of protection offered by the rule […] Furthermore, I can find no support for the proposition that a government is granted less protection by the law of solicitor-client privilege than would any other client. A government, being a public body, may have a greater incentive to waive the privilege, but the privilege is still its to waive.

[172] The fact that greater transparency on the part of intelligence agencies may be desirable, from a public perspective, has therefore no bearing on the contours of solicitor-client privilege. Professor Patrick J. Monahan, now a judge of the Ontario Superior Court of Justice, eloquently asserted the importance of legal advice and of solicitor-client privilege in the context of governmental activities:

> As I have argued above, government lawyers have an obligation to provide candid, thorough and objective legal advice to their clients within government, even when such advice might be at odds with the policy objectives of a particular government. The provision of such thorough and objective advice is in fact essential to government officials who wish to ensure that their actions are in accordance with the rule of law. The fact that privilege attaches to the opinions provided by their legal advisors encourages and facilitates the seeking of such advice by government decision-makers in a timely way. It also enables such advice to be developed in a consistent and principled fashion, in accordance with strict standards for review and approval, thus enabling a single, authoritative source of legal advice within government. In short, solicitor-client privilege within government reinforces and advances respect for the rule of law in the administration of public affairs.
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> Patrick J. Monahan, "'In the Public Interest': Understanding the Special Role of the Government Lawyer", (2013) 63 Supreme Court Law Review 43 at 53.

[173] The following excerpt from *Waterford v. Australia (1987)*, 163 C.L.R. 54 (H.C.) at 74-75, cited with approval by the Ontario Superior Court of Justice in *R. v. Ahmad*, 59 C.R. (6th) 308, 77 W.C.B. (2d) 804 at para. 78, similarly raises the importance of legal professional privilege in seeking legal advice on the limits of government officers' exercise of powers, functions and duties:

> I should think that the public interest is truly served by according legal professional privilege to communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and the manner in which the powers, functions and duties of government officers are required to be exercised or performed. If the repository of the power does not know the nature or extent of the power or if he does not appreciate the legal restraints on the manner in which he is required to exercise it, there is a significant risk that a purported exercise of the power will miscarry. The same

> may be said of the performance of functions and duties. The public interest in minimizing the risk by encouraging resort to legal advice is greater, perhaps, than the public interest in minimizing the risk that individuals may act without proper appreciation of their legal rights and obligations. In the case of governments no less than in the case of individuals, legal professional privilege tends to enhance the application of the law, and the public has a substantial interest in the maintenance of the rule of law over public administration.

[174] In our view, requiring counsel to seek a waiver from the Service relating to the legal advice it received concerning the potential illegality of its collection activities, even in what Justice Gleeson presents as "unique circumstances", risks creating a disincentive for the Service to seek candid legal advice. This, we believe, is antithetical to the preservation of the rule of law in the context of intelligence activities. Indeed, the Attorney General claims that the Service only attempted to mitigate the extent of the potential illegality – refusing to approve certain operations, limiting money payments and their amounts, and terminating the use of certain sources – after having received the legal opinions. To that extent, it is clear that the candid legal advice received by the Service was instrumental to the way the Service conducted itself. It goes without saying that the Service, like any other government institution or official or, for that matter, any other private citizen, is always free to disregard legal advice but at its own peril.

[175] For all of the above reasons, we agree with the Attorney General that, absent a valid waiver, the solicitor-client privilege is subject to very few exceptions. If Parliament seeks to abrogate or curtail the privilege, it must do so in clear, precise and unequivocal language.

[176] One of the clearest exceptions to the privilege is where the communication between client and lawyer falls within the "future crimes and fraud exception", that is, where a client seeks guidance from a lawyer in furtherance of a criminal purpose. Similarly, the privilege will not

apply where the lawyer from whom the advice is sought is not contacted in his or her professional capacity: *Solosky* at 835.

[177] The *amici* attempted to make much of a further exception delineated by the Supreme Court in *Campbell and Shirose*. However, a careful examination of that case does not lend support to the *amici's* thesis. At issue in that case was the legality of a "reverse sting" operation carried out by the police. Having been found guilty of conspiracy to traffic in cannabis resin and conspiracy to possess cannabis resin for that purpose, the appellants applied for a stay of proceedings; they argued that they had been sold the drug by RCMP undercover officers posing as large-scale hashish vendors, and that such an operation constituted illegal police conduct which shocks the conscience of the community and is contrary to the proper administration of justice.

[178] In opposing the motion for a stay, the Crown sought to establish that the police had acted in good faith, in the belief that the reverse sting operation was legal. To this end, the Crown questioned a police officer about his efforts to obtain advice as to the legality of the proposed operation and his reliance on that advice in proceeding with the operation. The appellants then sought access to the legal advice provided to the police by the Department of Justice on which the police claimed to have placed good faith reliance. The Crown objected to producing the advice on the basis that it was subject to solicitor-client privilege. The issue before the Supreme Court was thus whether, having put the police officer's good faith belief in the legality of the reverse sting operation in issue, the RCMP had waived the right to shelter the contents of that advice behind solicitor-client privilege. The Court concluded that the appellants were indeed

entitled to disclosure of the legal advice provided to the RCMP with respect to the legality of the operation.

[179] In coming to this conclusion, the Supreme Court noted that our collective perception of police misconduct will vary depending on the knowledge the police had of the illegality of their conduct:

> [45] … Superadded to the issue of illegal conduct is the possibility of a police operation planned and executed contrary to the advice (if this turns out to be true) of the Department of Justice. The suggestion is that the RCMP, after securing the relevant legal advice, nevertheless put itself above the law in its pursuit of the appellants. The community view of the police misconduct would, I think, be influenced by knowing whether or not the police were told in advance by their legal advisers that the reverse sting was illegal […].

[180] The *amici* make much of this statement and argue that the Service's state of mind in carrying out the illegal activity that led to the information used in the warrant application is similarly crucial in determining the seriousness of that illegality and, ultimately, the admissibility of the evidence. We do not understand counsel for the Attorney General to dispute that if the Service was knowingly engaging in illegal activities, it could be considered more serious under the first prong of the revised *Grant #2* test than if its conduct was the result of an innocent mistake. Rather, the argument is that relevance alone is not sufficient to justify abrogating the solicitor-client privilege.

[181] In other words, the mere fact that knowledge by the Service of the illegal nature of its actions would be an important factor in assessing whether the evidence should be excluded does not give a right to access to the legal advice it may have received. Unless the Crown wants to argue that the illegality was not serious because the Service acted in good faith, relying on legal

advice received, the confidentiality of that advice is protected by solicitor-client privilege and the Service's state of mind will have to be established by other means.

[182] Justice Binnie's reasons in *Campbell and Shirose* support the position taken by the Attorney General. It is clear that his order to disclose the legal advice received by the RCMP in that case was premised on the use made by the Crown of that advice to support the good faith of the RCMP officer involved in the reverse sting operation. In our view, the following excerpts leave no doubt in this respect:

> [46] … Most importantly for present purposes is the fact that the Crown emphasized the good faith reliance of the police on legal advice.
>
> […]
>
> The RCMP's reliance on legal advice was thus invoked as part of its "good faith" argument. The privilege belonged to the client, and the RCMP joined with the Crown to put forward that position. While not explicitly stated in so many words, the plain implication sought to be conveyed to the appellants and to the courts was that the RCMP accepted the legal advice they were given by the Department of Justice and acted in accordance with it. The credibility of a highly experienced departmental lawyer was invoked to assist the RCMP position in the abuse of process proceedings.
>
> [47] … A police force that chooses to operate outside the law is not the same thing as a police force that made an honest mistake on the basis of erroneous advice. We have no reason to think the RCMP ignored the advice it was given, <u>but as the RCMP did make an issue of the legal advice it received in response to the stay applications, the appellants were entitled to have the bottom line of that advice corroborated</u>. [emphasis added]
>
> [48] It appears, therefore, that the only satisfactory way to resolve the issue of good faith is to order disclosure of the content of the relevant advice. This should be done (for the reasons to be discussed) on the basis of waiver by the RCMP of the solicitor-client privilege. …

[183] Later on in his reasons, Justice Binnie returns to the waiver issue and clarifies that, had the RCMP officer only testified that he sought out the opinion of the Department of Justice to

verify the correctness of his own understanding of the law, it would not have been sufficient to waive the privilege. However, the RCMP officer and the Crown went further, both orally and in writing, implying that the legal advice had assured the RCMP that the proposed reverse sting was legal:

> [71] Cpl. Reynolds was not required to pledge his belief in the legality of the reverse sting operation. (…) Nor was it necessary for the RCMP to plead the existence of Mr. Leising's legal opinion as a factor weighing against the imposition of a stay of proceedings (…). The RCMP and the Crown having done so, however, I do not think disclosure of the advice in question could fairly be withheld. [emphasis added]

[184] We acknowledge that in their affidavits, various senior officials and key decision-makers of the Service testified that they believed they could potentially rely on Crown immunity to proceed with operations labelled as "high risk". In other words, they subjectively believed that there was no clear, definitive view that such activities were illegal. They also stated that they were waiting for a final opinion on the subject. Critically, however, the Service's witnesses never said that they acted in good faith, in reliance on legal advice to approve the illegal operations, as was the case with the RCMP officer and counsel in *Campbell and Shirose*.

[185] It is no doubt true, as submitted by the *amici*, that an institution's attitude to illegality can be a most relevant factor in assessing harm to the rule of law. In *Campbell and Shirose*, the Supreme Court recognized that a legal opinion pronouncing the reverse sting operation unlawful would have a different impact in the weighing of community values than an opinion confirming its validity. As the Court stated: "[p]olice illegality of any description is a serious matter. Police illegality that is planned and approved within the RCMP hierarchy and implemented in defiance of legal advice would, if established, suggest a potential systemic problem concerning police

accountability and control" (*Campbell and Shirose* at para. 73). This statement, however, cannot be divorced from the context in which it was made. It is clear from the few sentences immediately following that the disclosure of the relevant legal advice will not be ordered in every instance where the Court may find it useful to assess the attitude of the police officer or the RCMP towards potential unlawfulness. Responding to the Court of Appeal's approach that disclosure was not necessary since it was sufficient to "assume the worst" in the event the privilege was asserted, Justice Binnie once again clearly linked the duty to disclose with the good faith reliance placed on the legal advice by the RCMP:

> The RCMP position, on the other hand, that the Department of Justice lent its support to an illegal venture may, depending on the circumstances, raise a different but still serious dimension to the abuse of process proceeding. In either case, it is difficult to assume "the worst" if neither alternative has been explored to determine what "the worst" is. Because the RCMP made a live issue of the legal advice it received from the Department of Justice, the appellants were and are entitled to get to the bottom of it. [Emphasis added]

[186] Finally, it is interesting to note that Justice Binnie was careful to tailor his disclosure order to capture only the specific advice relating to three matters identified by the RCMP officer in his submission. He added that it was not "an 'open file' order in respect of the RCMP's solicitor and client communications" (at para. 74). This is consistent with the near absolute character of the privilege, and with the exceptional nature of its limitation.

[187] On the basis of the foregoing analysis, we are unable to agree with the *amici* that the Service should be deemed to have voluntarily waived the solicitor-client privilege merely by relying upon illegally gathered evidence in support of its warrant application. Nor do we agree with the proposition that the decision below does not involve an abrogation of the privilege because the Service always has a choice either not to use the illegally obtained evidence or to

disclose the legal advice should it wish to use it. Such a proposition would bring to naught the privilege and, for all intents and purposes, deprive the Service of the protection of its solicitor-client communications. Again, this is not to say that the seriousness of the illegality committed by the Service, its senior officers, its employees and its sources is of no relevance in coming to grips with the admissibility of the information derived from such illegality in a warrant application; but unless the Service relies, explicitly or implicitly, on legal advice it had received to mitigate the seriousness of that illegality, it is entitled to rely on solicitor-client privilege and to resist the disclosure of legal advice.

[188] We think it is worth emphasizing, in closing, that the damage to the rule of law could be much worse if the Service was routinely required to disclose its legal advice rather than being allowed to rely on the privilege and to resist any attempt to access that advice. The Service, like any other government institution or official, must be able to seek frank legal advice before embarking on any investigative operation that is often of the most sensitive nature. If the Service could not rely on the privileged nature of legal opinions, it might be tempted to dispense with such advice, inviting all the attendant risks of such an attitude. The only constraints on its activities (at least from a legal perspective), would then be the distant possibility of indirect adverse consequences in those rare instances where an investigation led to criminal prosecution, and the criticism it could be exposed to in the annual reports of the National Security and Intelligence Review Agency or in parliamentary committees. These *ex post facto* mechanisms are obviously a far cry from the provision of legal advice prior to the conduct of any intelligence-gathering activity and covert operation. Indeed, the evidence in this file is that measures were taken to mitigate the extent of the potential legal risks identified by lawyers. Whether the Service

should have exercised more caution or should have dropped some operations altogether, are not matters for the Court. In the absence of clear and authoritative jurisprudence squarely addressing whether these activities were in fact unlawful, the Service was entitled to come to its own decision and to balance the legal risks with other pressing objectives.

[189] In the absence of the kind of exceptional circumstances discussed in these reasons, courts should not be able to peek behind the veil of solicitor-client privilege to assess the Service's state of mind in conducting its operations, even if it would be relevant to the determination to be made (in this case, the admissibility of illegally obtained evidence in a warrant application). This is not to say, as mentioned earlier, that the Service's state of mind is to be left out of the equation and should not be considered in assessing the seriousness of the illegality; only that it should be evaluated without relying on legal advice, admittedly on the basis of other, more indirect evidence. This is the price to pay to uphold solicitor-client privilege, which is itself of critical importance for a society living by the rule of law.

[190] The fact that in this particular case, solicitor-client privilege was eventually waived by the Service is of no import for our conclusion and is irrelevant to the narrow issue to be decided, *i.e.* whether counsel breached its duty of candour by not proactively seeking a waiver.

[191] Moreover, one cannot infer from the Service's decision to waive privilege in this particular file, for whatever reason, an obligation to do the same in any future file of a similar nature. Nor does the fact that the Service chose to waive the privilege in this case lead to a general proposition that counsel who intends to rely on illegally obtained evidence on a warrant

obligation must seek a waiver of the privilege prior to appearing before the Court so as to be able to disclose legal advice pertaining to the legality of the operations leading to the obtaining of that evidence. Indeed, it is clear that the Service forcefully disputed the compellability of such legal advice, and decided to disclose it in the case at bar before any argument was made as to what the test should be regarding the admissibility of illegally obtained evidence on a warrant application. As a result, the waiver in this case is clearly not meant to be a statement of principle for the future.

IV. Conclusion

[192] For all of the above reasons, we are of the view that the appeal should be granted, and that the first paragraph of the Judgment found at page 123 of the Judgment and Reasons dated May 15, 2020 should be set aside.

"Yves de Montigny"
J.A.

"Anne L. Mactavish"
J.A.

"I agree
J.B. Laskin J.A."

~~TOP SECRET~~

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-150-20
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*, R.S.C. 1985, c. C-23 AND IN THE MATTER OF ISLAMIST TERRORISM, [redacted]
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 9, 2021
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A. MACTAVISH J.A.
CONCURRED IN BY:	LASKIN J.A.
DATED:	MAY 12, 2021

APPEARANCES:

Robert Frater Owen Rees Jennifer Poirier	FOR THE APPELLANT
Gordon Cameron Matthew Gourlay	*AMICI CURIAE*

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE APPELLANT

Blake, Cassels and Graydon
Ottawa, Ontario

AMICI CURIAE

Henein Hutchison
Toronto, Ontario