Federal Court  Cour fédérale

~~**TOP SECRET**~~

Date: 20210607

Docket: [redacted]

Citation: 2021 FC 541

Ottawa, Ontario, June 7, 2021

PRESENT: The Honourable Madam Justice Kane

IN THE MATTER OF AN APPLICATION BY [redacted] **FOR WARRANTS PURSUANT TO SECTIONS 12 AND 21 OF THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT*, RSC 1985, c C-23**

AND IN THE MATTER OF ISLAMIST TERRORISM, [redacted]

PUBLIC ORDER AND REASONS

I. Background

[1] The background to this matter is set out more fully in my Orders dated June 16, 2020 and January 21, 2021.

[2] The overall context is also described in the decision of Justice Gleeson in *In the Matter of an Application by* [redacted] *for Warrants Pursuant to Sections 12 and 21 of the Canadian Security Intelligence Service Act*, RSC 195, c C-23 *And in the matter of Islamist Terrorism*, [redacted]

[redacted] 2020 FC 616, [Case B] which addresses common issues raised in *en banc* proceedings in three matters, [Case B], [Case D] and this proceeding, [Case C], and the specific issues raised in [Case B].

[3] Justice Brown also describes the *en banc* proceedings in his Order and Reasons in *In the Matter of an Application by* [redacted] *for Warrants Pursuant to Sections 12 and 21 of the Canadian Security Intelligence Service Act*, RSC 195, c C-23 *And in the Matter of* [redacted], 2020 FC 1190, [Case D].

[4] Most recently, the Federal Court of Appeal described the *en banc* proceedings in its judgment, *In the Matter of an Application by* [redacted] *for Warrants Pursuant to Sections 12 and 21 of the Canadian Security Intelligence Service Act*, RSC 195, c C-23 *And in the matter of Islamist Terrorism*, [redacted], 2021 FCA 92, which focusses on findings made in [Case B].

[5] This Order focuses on the specific issues that arise in this matter, guided by the framework set out in 2020 FC 616, which the Federal Court of Appeal acknowledged, at para 161 of 2021 FCA 92, is not in dispute, and the determination of the common issues raised therein. It is intended to provide a record of what transpired and to conclude this matter. The issuance of this Order has been delayed by the impact of health and safety measures

implemented with respect to COVID -19, which has necessitated the exchange of further written submissions rather than an oral in-person hearing.

A. *Context for [Case C]*

[6] Justice Mosley first issued warrants to investigate the threat-related activities of the above noted individuals on February [redacted], 2017 for a period of one year. A new application for warrants was made in February 2018. I considered the affidavits submitted in support of the application, held an *ex parte, in camera* hearing and, based on the evidence and submissions, was satisfied that the criteria in sections 12 and 21 of the *CSIS Act* had been established. I issued the warrants on February [redacted], 2018 for a period of one year. The warrants expired on February [redacted], 2019.

[7] In January 2019, Mr. Owen Rees, Senior General Counsel, National Security Litigation and Advisory Group, Department of Justice, advised the Court by letter that the Canadian Security Intelligence Service (CSIS or the Service) had become aware that the Service had relied on information that may have been collected illegally in support of seeking certain warrants. This issue had been previously identified by Justice Simon Noël in [Case A]. At the time of the January 2019 correspondence, three warrant applications were identified by CSIS: [Case C] (only with respect to [a target]), [Case A] (which became [Case B]) and [Case D]. The Service undertook to conduct a review to determine if there were other such warrants.

[8] As more fully described by Justice Gleeson in 2020 FC 616, the Court convened an *en banc* panel of three designated judges to consider and determine the common issues raised in the three warrant applications. The common issues focussed on the possible breach of the duty of candour arising from the failure of the Service and of Counsel for the Attorney General of Canada [AGC] to disclose to the Court that the information relied on to support the applications for warrants was, or may have been, collected illegally, the circumstances underlying the collection of that information, and the consequences of relying on information that had, or may have been, collected illegally. The Court received submissions common to the three applications and conducted several hearings over the course of a year.

[9] Given that the Service did not seek to renew the warrants issued for [redacted], which expired on February [redacted], 2019, I advised Counsel for the AGC that I would consider the impact of the particular information relied on by the Service to support the application for the warrants for [the target] at a later date, following the issuance of the decision in the *en banc* proceedings.

B. *June 16, 2020 Order*

[10] Following the issuance of Justice Gleeson's decision, I issued an Order, dated June 16, 2020, inviting Counsel for the AGC to make submissions regarding the impact of the disclosure of the illegal activity on the validity of the warrants in [Case C] and whether the information gathered by the Service pursuant to the warranted powers with respect to [the target] should remain isolated or other measures should be considered.

[11] In that Order, I briefly set out the information that had been brought to the Court's attention following the issuance of the warrants in the period following Mr. Rees' January 2019 letter to the Court. (This included information set out in affidavits from Counsel for the AGC who had sought the warrants in 2017 and 2018, both of whom explained that at the time the warrants were sought, they were unaware of the source's directed activities which may have been illegal.) I noted that additional information may be of assistance in order to determine what should be done with the information collected, and now isolated, in light of Justice Gleeson's framework in [Case B].

[12] I indicated that the determination whether the warrants would or could have been issued without the information that had been collected as a result of the activities of the directed human source who [redacted] became privy to [the target's] musings, opinions and intentions, or via the [investigative techniques] [redacted], would be difficult to assess without further information.

[13] In my June 16, 2020 Order, I set out two general issues requiring further consideration:

1. Whether the warrants issued in February 2018 with respect to [the target] should be rescinded given that they were issued in reliance on information that includes information that arose from illegal activities or whether, if that information were excised, there would be sufficient information to satisfy the Court that the warrants could have issued.

2. If the warrants are not rescinded, what use should be permitted for the information collected based on the warrants, in the event that the Service proposes to use this information, or alternatively, whether the information should remain isolated or be destroyed.

[14] In response to my Order, the AGC filed several new affidavits which provided additional information. Both the AGC and *amici* submitted Memoranda of Fact and Law addressing the impact of the illegal activities on the issuance of the warrants and how the framework established by Justice Gleeson should be applied to the particular circumstances.

C. *January 14, 2021 Order – Additional Questions*

[15] Upon review of the additional information provided and the Memoranda filed, I identified two additional questions and requested, by Order dated January 14, 2021:

1. Any further explanation why the threat posed by [the target], given the nature of the evidence in 2017 and 2018 and afterwards regarding the nature of the threat posed by [the target, could change from that of a threat to the security of Canada to that of no threat at all based only [redacted].

2. An explanation why the Briefing Note prepared by the Service, dated January 30, 2017, titled "Overview of CT HS Operations - Impact of Legal Risk" (referred to and attached as an exhibit to an affidavit filed by the AGC in September 2020 in response to the Court's June 2020 Order), which reports on the results of a review of all human source activities and identifies the activities related to the source engaged with [the target], was not provided to the Court or referred to until more than 10 months after the conclusion of the *en banc* proceedings and four months after Justice Gleeson issued his

> decision on the common issues in the *en banc* proceedings (2020 FC 616 [Case B]).

[16] I noted, among other things, that the contemporaneous timing of the January 30, 2017 Briefing Note to the issues that were front and centre with respect to the Service's reliance on Crown Immunity, the specific reference to the source engaged with [the target], and the failure of the witnesses to refer to the existence of, or to provide, the Briefing Note in the context of the *en banc* proceedings called out for an explanation.

D. *The Process for Submissions*

[17] The Court had scheduled an *ex parte, in camera* hearing for the purpose of providing an opportunity for oral submissions on the issues addressed in the Memoranda of the AGC and *amici*. However, due to the public health and safety measures to combat COVID-19, which continue to limit in-person hearings, the Court proposed, and the parties agreed, that the Court could determine the issues based on the written Memoranda and affidavits and on the responses to the two additional questions posed by the Court.

[18] This Order and Reasons focus on the status of the warrants issued in 2017 and 2018 and the information gathered as a result.

II. Information Provided to the Court in Response to the June 16, 2020 Order

[19] Several new affidavits were filed in response to my request for additional information to assist me in conducting the *ex post facto* review, including from the affiants who sought the 2017 and 2018 warrants.

A. *The 2018 affiant*

[20] The affiant who provided the affidavit in support of the 2018 application for the warrants noted that some of the illegal activities of one of the sources predated the issuance of the warrants in both 2017 and 2018. The affiant explained that the Service's interest in [the target] [redacted]. The affiant provided examples of information provided by the source regarding, among other things, [the target's] extremist views, [the target's] possible connection with extremist groups and [redacted] and other violent activities, including [redacted]. The affiant also provided information about the results of [an assessment of the risk of violence posed by the target] [redacted].

[21] With respect to the context for the illegal activities undertaken, the affiant provided additional information about why the source's relationship with [the target] was critical and had to be honed, including by the provision of [redacted]. The affiant elaborated on the information gathered from [the target] by the source as a result of the relationship.

[22] I note that some of this information had not previously been set out in the same detail in the affidavits in support of the warrant applications in 2017 or 2018.

[23] The affiant attested that although some assessment of the legal risks of activities undertaken by the source were conducted in 2017 and 2018, the affiant was not aware of the activities now at issue that were subsequently identified as high risk [redacted]. These activities only came to the affiant's attention in the course of preparing for a new application, which was not pursued. The affiant stated that she was not aware of the January 2017 Briefing Note that identified the activities of the source as high risk.

[24] The affiant explained that "after considering the risk to public safety posed by [the target] and the unlawful activities uncovered in the course of preparing a new application for warrant powers against [the target], the Service decided to not seek further warrant powers." The affiant added that the Service ended its investigation of [the target] [redacted] after concluding that "[the target] no longer posed a threat to the security of Canada."

B. *The 2017 affiant*

[25] The affiant, who had provided an affidavit in support of the 2017 application for the warrants issued by Justice Mosley, swore a new affidavit in August 2020. The affiant reiterated the facts relied on to support the affiant's previous view that [the target] was a threat to the security of Canada and also provided additional information.

[26] The affiant noted that she was aware that the source was [redacted] but was unaware that the source had been [redacted]. She was also aware that [redacted] but was not aware [redacted].

[27] The affiant further explained that she was not aware that the activities of the source would be considered illegal and was not aware of the January 30, 2017 Briefing Note that had identified these activities as high risk.

[28] The affiant also noted that the issue of illegality or risk was not raised at the Warrant Review Committee meeting on [redacted], January [redacted], 2017, held in preparation for seeking the 2017 warrants.

[29] Both the 2017 and 2018 affiants attested in their new affidavits that if they had been aware that the activities of the sources were potentially illegal, they would have raised the issue and sought the advice of counsel in the course of preparing the warrant applications and they would have advised the Court, given their recognition of the duty of candour.

III. The AGC's Submissions

[30] The AGC acknowledges that the activities of the [...] sources – primarily providing [redacted] – were contrary to the terrorist financing provisions of

the *Criminal Code* and that the facts surrounding these activities should have been disclosed to the Court. The AGC also acknowledges that the duty of candour was breached.

[31] The AGC adds that some of the activities at issue pre-date the 2017 warrants and acknowledges that some of the information relied on for the 2018 warrants was obtained as a result of the execution of the 2017 warrants.

[32] Regardless, the AGC submits that neither the 2017 nor 2018 warrant should be set aside because the warrants could have been issued without the information derived from these illegal activities. The AGC submits that the other information was sufficient for the Court to conclude that the warrants could have issued.

[33] Alternatively, the AGC submits that if the Court finds that the warrants could not have been issued without the information collected from the illegal activities, the information should not be excluded.

[34] The AGC also submits that the failure to disclose the illegal activities does not amount to an abuse of process, noting that this was not deliberate, rather the result of now well-documented institutional issues.

A. *The 2017 warrants*

[35] With respect to the first application for warrants, issued by Justice Mosley in February 2017, the AGC notes that the Service first identified [the target], known to be [redacted] source [redacted] provided [redacted] and [redacted] source assisted [redacted] and provided [redacted] and [redacted].

[36] The AGC notes the information gleaned by the sources, including [redacted]. The AGC highlights that in [redacted], the sources reported on [redacted].

[37] The AGC acknowledges that although the information gathered from the [...] sources was relied on in support of the 2017 warrant application, Justice Mosley was not informed - either by the affiant or the submissions of counsel - that: [redacted] sources provided [the target] with [redacted] and [redacted].

[38] The AGC notes, and as the affiant attested, that the affiant for the 2017 warrants was not aware of the legal issues arising from some of the source's activities. The AGC explains that the

only document in the Service's holdings setting out the legality of the source's activities was the January 30, 2017 Briefing Note, of which both the affiant and Counsel for the AGC were unaware.

B. *The 2018 warrants*

[39] The AGC acknowledges that the Service employed [redacted] and [redacted] to, among other things, [assist in the investigation] [redacted]. As noted by the affiant, technical intercepts revealed that [the target] [redacted].

[40] The AGC acknowledges that in the 2018 warrant application, I was not advised of the illegal activities of the sources predating the issuance of the warrants in 2017 or subsequently [redacted] and [redacted] or that [redacted].

[41] The AGC again notes that neither the affiant nor Counsel for the AGC were aware of the legal issues related to the sources' activities.

C. *The review of source activities*

[42] The AGC notes that prior to the Service's application for the warrants in February 2017, the Service reviewed all its human source files to identify the operational impact if the high risk human source operations were terminated. The AGC notes that the Service's review of human sources, which was a preliminary assessment and conducted hastily, was reported in the January 30, 2017 Briefing Note.

[43] With respect to the sources engaged with [the target], the review identified [redacted] [the risk associated with the termination of the source]. The AGC adds that by 2018, [redacted] [the risk had been reassessed] [redacted].

[44] The AGC further notes that the legality of the human source activities was not raised at the Warrant Review Committee meetings for the 2017 or 2018 warrant applications.

D. *The AGC submits that the Court should not rescind the warrants issued in 2017*

[45] The AGC submits that even if information derived from illegal activities is excised, there is sufficient and credible information for the Court to conclude that the warrants could have issued.

[46] The AGC submits that the 2017 affidavit included the following information, which was not based on illegal activity:

- [redacted]

- [redacted]
- [redacted]
- [redacted]

[47] Alternatively, the AGC submits that a contextual analysis, as described by Justice Gleeson, which balances the seriousness of the illegal activities against fairness and societal interests, supports the same conclusion – that the warrants could have been issued and the information gathered based on the illegal activities should not be excised.

[48] The AGC notes that applying the framework established by Justice Gleeson begins with identifying which activities were illegal, with reference to the elements of the terrorist financing offences in the *Criminal Code*. The AGC acknowledges that the Service, the [...] sources [redacted] contravened section 83.3 by providing [redacted]. However, the AGC argues that this activity was lawful up until the time that the Service became aware that [the target] was engaged in terrorist activities. Despite that [the target] was already a concern to the Service due to [the target's] statements and other conduct, [the target's] conduct did not rise to the level of terrorist activity until [redacted] when [the target] stated [redacted]. At that point, [the target's] conduct crossed the threshold and became terrorist activity as defined in the *Criminal Code.* The AGC submits that the provision of [redacted] by the sources before this date was not illegal.

[49] The AGC also submits that the illegality activity was relatively minor, was not pursued knowingly and that institutional issues led to the failure of the Service to identify and disclose the conduct.

[50] The AGC adds that the illegality does not undermine the credibility or reliability of the information gathered from the sources. The AGC notes that the [redacted] sources were the primary source of information about [the target's] [redacted] and other conduct, which appeared to be escalating, and that the Service [redacted].

[51] The AGC further submits that the conduct of the Service does not support setting aside the 2017 warrants for abuse of process as there was no deliberate non-disclosure or bad faith.

E. *The 2018 warrants*

[52] With respect to the 2018 warrants, the AGC submits that once the information derived from illegal activities is excised, there would remain other information sufficient for the Court to conclude that the warrants could have issued.

[53] First, the AGC submits that if the Court concludes that the information derived from the 2017 warrants need not be excised, there is ample support for the Court to conclude that the 2018 warrants could have issued.

[54] Second, even if the information derived from the 2017 warrants that is based on illegal activity is excised, there is still other information that the Court can consider to support the conclusion that the 2018 warrants could have issued.

[55] The AGC submits that the Court can rely on the evidence of [the target's] extremist views, [redacted], and on information from the [redacted].

[56] The AGC acknowledges, however, that if the Court were to excise all the information gathered from the warrants issued in 2017, there would not be sufficient information to support the view that [the target] presented a threat to the security of Canada.

[57] The AGC submits that a contextual analysis and balancing would lead to the same conclusion- that the information derived from the illegal activities should not be excised.

[58] The AGC also acknowledges that the sources were engaged in executing the warranted powers in 2018, including providing [redacted] and providing [redacted].

F. *Submissions in response to the January 14, 2021 Order*

[59] In response to my question about the Service's change in characterization of [the target] from that of a serious threat to the security of Canada justifying warranted powers in 2017 and 2018 to not posing any such threat, the AGC explains that the Service decided not to seek the renewal of warrants in 2019 due to the ongoing *en banc* proceedings and its assessment of the threat posed by [the target] at that time.

[60] The AGC explains that based on information gathered about [the target's] activities and circumstances since around [redacted], the Service determined that [the target] did not show any "national security threat indicators" and that [redacted] there were no reasonable grounds to suspect that [the target] was involved in activities that would constitute a threat to the security of Canada. As a result, the Service terminated its investigation of [of the target].

[61] In response to the Court's request for an explanation why the January 30, 2017 Briefing Note was not provided to the Court or referred to until after Justice Gleeson issued his decision, the AGC notes that the information contained in the Briefing Note was provided by several witnesses who appeared before the Court in the course of the *en banc* proceedings. The AGC points to excerpts of the testimony of witnesses who conveyed, among other information, that the Service conducted a review of human source files in January 2017, which concluded that the activities of some human sources may have entailed some type of criminal activity. The witnesses advised the Court that this preliminary review indicated that approximately [one-third of the] human sources would fall in the high risk category and that the risk was known at the highest levels in the Service.

[62] The AGC acknowledges that in the *en banc* proceedings the Court was not advised about the content of the Briefing Note that refers specifically to the [...] sources at issue in [Case C] (by their source names) or [redacted] in [Case D]. The AGC also notes that in the *en banc* proceedings the AGC acknowledged that the actions of these sources were likely illegal.

[63] With respect to why the Briefing Note was not disclosed to the Court, the AGC explains the approach it took to the disclosure of the several exhibits, noting that many documents were provided. The AGC further explains that it was only after Justice Gleeson issued his decision and I issued my June 16, 2020 Order, seeking submissions about how the principles and framework set out by Justice Gleeson should be applied in this matter, that the AGC realized that the January 2017 Briefing Note included relevant information that had not been - but should have been – disclosed to the Court. Upon making this discovery, the AGC submitted an affidavit, providing the background to the preparation of the Briefing Note, along with the Briefing Note.

[64] The AGC disputes the *amici*'s contention that the AGC's failure to disclose the January 30, 2017 Briefing Note until after the conclusion of the *en banc* proceedings is a breach of the duty of candour. The AGC reiterates that it fulfilled its duty by providing the same information by way of witness testimony and that there is no basis for the Court to draw any adverse inference that the AGC or Service intentionally withheld the Briefing Note.

IV. The *Amici*'s Submissions

A. *The 2017 and 2018 warrants*

[65] The *amici* submit that whether the warrants could have issued without the illegally obtained information does not diminish the seriousness of the breach of the duty of candour. The *amici* submit that the seriousness of the illegality (characterized as relatively minor) should be distinguished from the seriousness of the failure to disclose the illegality.

[66] The *amici* point to paragraph 195 of Justice Gleeson's judgment (2020 FC 616) which sets out three key factors and related considerations for the Court to determine whether information derived from illegal activities should be admitted in support of a warrant application: the seriousness of the illegal activity; whether the illegal activity is isolated or part of a pattern; and, the societal interest.

[67] The *amici* submit that in the present case the illegality was relatively minor and the assistance provided by the sources would not have been sufficient for [the target] to carry out any terrorist activity [redacted].

[68] However, the *amici* question whether the activities of the Service were conducted in good faith given that the Service was aware of the concerns about relying on Crown immunity. The *amici* note that January 2017 was a key time period given that the Department of Justice had drafted an opinion stating that Crown immunity could not be relied on, which then precipitated a review of human source operations and discussions between the Department of Justice and the Service. The *amici* submit that as of January 2017, the Service was "fixed with the knowledge"

that Crown immunity could not be relied on and that making payments to those engaged in terrorist activity was illegal.

[69] The *amici* acknowledge that some of the conduct at issue predates January 2017, although [redacted] was provided to [the target] by a source in [redacted] 2018.

[70] With respect to whether the illegal activities are isolated or part of a broader pattern of conduct, the *amici* highlight that the January 30, 2017 Briefing Note, only disclosed in September 2020, reveals that 35% of the Service's human source activity was high risk (i.e., having likely engaged in one or more of the terrorism offences). The *amici* submit that this demonstrates a pattern that continued and was sanctioned by the Service.

[71] With respect to the breach of the duty of candour, the *amici* accept that Counsel for the AGC and the affiants were unaware of the illegal activities of the sources. However, the *amici* highlight that the Service as an institution was aware of the illegal activities. The *amici* again point to the January 30, 2017 Briefing Note that was prepared [shortly] before the first warrants for [the target] were sought.

[72] The *amici* submit that in some circumstances institutional failures and non-disclosure, even without any showing of bad faith, in the context of a warrant application can and should result in consequences in relation to warrants and the information collected based on the execution of the warrants.

[73] However, in the present circumstances, a proportionate remedial order would be difficult to fashion. The *amici* submit that although the non-disclosure was serious and material, no remedy is needed.

B. *Submissions in response to the January 2021 Order - two additional questions*

[74] The *amici* submit that the AGC's response about the non-disclosure of the January 30, 2017 Briefing Note is unsatisfactory given that the *en banc* proceedings focussed on the duty of candour and the level of awareness in the Service that Crown Immunity could not be relied on to excuse illegal activities. The *amici* note that the level of detail in the Briefing Note and the time frame in which it was prepared sets it apart from other documents disclosed to the Court.

[75] The *amici* add that given that the witnesses shared some of the contents in their testimony, yet the existence of the Briefing Note was not disclosed, it may appear that a decision was made to not disclose the Briefing Note to the Court. In other words, the non-disclosure may not be as inadvertent as the AGC now submits.

[76] The *amici* submit that even if the AGC's failure to disclose the Briefing Note was inadvertent, in the context of the *en banc* proceedings and this proceeding, this conduct cannot be excused as it further compounds the concerns regarding the breach of the duty of candour.

[77] The *amici* submit that the Briefing Note should have been disclosed at the same time as several other documents in early 2019 and the failure to do so constitutes a further breach of the duty of candour.

[78] However, the *amici* acknowledge that the information was provided to the Court in other ways. The *amici* also note that the Court has addressed the process for determining the impact of illegally obtained information on warrants and has addressed the duty of candour more generally.

V. The 2017 and 2018 Warrants Could Have Been Issued

[79] Justice Gleeson and Justice Brown both emphasize the importance of the duty of candour in their respective decisions, as does the Federal Court of Appeal in 2021 FCA 92 at paras 120-133. I need not say more.

[80] I note that Justice Gleeson's recommendation that a more comprehensive and external review be conducted to "fully identify systemic, governance and cultural shortcomings and failures that resulted in the Canadian Security Intelligence Service engaging in operational activity that it has conceded was illegal and the resultant breach of candour" has been accepted by the Service and AGC. The National Security and Intelligence Review Agency published the terms of reference for this review on November 4, 2020 and has launched its review. This review will address the institutional challenges that the AGC submits have contributed to the failure to disclose relevant information to Justice Mosley and to me in the warrant applications at issue.

[81] The issue at hand is whether, once the information relied on in support of the warrants granted in 2017 and 2018, which was based on illegal activities, is excised, there remains sufficient information to satisfy me that [the target] posed a serious threat to national security and that the warrants could have been issued.

[82] As Justice Gleeson noted in 2020 FC 616, at para 195, the preferable approach is that the Designated Judge who issued the warrant should conduct the *ex post facto* review and determine if the warrant could have issued but for the illegally obtained information. In the present case, it would be for Justice Mosley to determine the relevant issues with respect to the 2017 warrant. However, given my participation in the *en banc* proceedings and given that the 2018 warrants, which I granted, were based to some extent on information gathered pursuant to the 2017 warrants, I will determine the impact of the late disclosure of illegal activities on both the 2017 and 2018 warrants. The AGC does not oppose this approach. In addition, Justice Mosley is aware and supportive of this approach.

[83] Although the *amici* have noted their concerns about the breach of the duty of candour-particularly given that the issue of whether Crown immunity could be relied on and, if not, how human source operations would be affected - was top of mind within the Service in January 2017, if not before, the *amici* agree with the AGC that the warrants could have issued in both 2017 and 2018.

[84] I agree that there was sufficient information to support the issuance of the warrants without reliance on the information gathered from illegal activities.

[85] In the 2017 application for warrants, the affiant described [the target] [redacted]. None of this information was derived from the activities which became illegal after the turning point in [redacted] when [the target] [redacted]. Despite that [redacted] [the target] may have had little, if any, [redacted], it marked a change in [the target's] behaviour.

[86] As noted above, the information set out in the 2018 affiant's more recent affidavit, filed in this proceeding, provides more detail than I recall that I had at the time of the 2018 warrant application, including the focus on the [redacted]. However, the information is consistent with the evidence before me in 2018. In my view, even if the information gleaned from [redacted] is not considered, there remains sufficient information to conclude that I could have issued the warrants. For example, [other information in the application] [redacted] supports the threat to the security of Canada. I could have issued the warrants based on this information.

[87] Given the finding that the warrants could have issued, I agree with the AGC and *amici* that there is no need for a remedy in the present circumstances.

[88] However, I also agree with the *amici* that in other circumstances, the Court could fashion a remedy to address the non-disclosure of essential information.

[89] With respect to my question about the Service's discontinuation of their investigation based on their change in the threat assessment of [the target], the additional information provided by the AGC is consistent with that provided by the affiant, but does not elaborate further. I accept that when the Service seeks warrants, it must rely on the information available at the relevant time and that hindsight is not a basis for revisiting critical decisions. As the *amici* note, the sources' activities did not result in [the target] pursuing any of [the target's] ideas. However, this example highlights the need for the Court to carefully scrutinize applications for warranted powers based on assessments of the threats posed by individuals that, thankfully, appear not to have the capacity to carry out their threats.

[90] With respect to the failure to disclose the January 30, 2017 Briefing Note to the Court in the context of the *en banc* proceedings, I acknowledge that some of the contents of the Briefing Note were disclosed via the testimony of several witnesses. The Court was advised of the review and its findings, including that a third of source operations had been identified as high risk. This information was not withheld from the Court. I simply observe that it is odd that the existence of a document that puts to paper the very issues the Court was focussing on in the *en banc*

proceedings was not even alluded to by the witnesses, who otherwise shared helpful information and responded candidly to the Court's questions. I note that the Court was not made aware that the sources at issue in this matter ([Case C]) had been identified in the review that culminated in the Briefing Note. It is also troubling that no one who was aware of the results of the review and of the Briefing Note connected the dots between the January 30, 2017 Briefing Note and the February 2017 request for warrants against [the target] that was based on information from […] sources that were identified in that Briefing Note.

[91] That said, I accept the AGC's submission that the affiants and counsel were not aware of the Briefing Note at the relevant times and that the failure to identify and disclose the Briefing Note in the context of the *en banc* proceedings was overlooked in the search for and provision of many other documents and that this may be an example of the institutional challenges regarding the sharing of information by those that need to know, and that this issue is being addressed. The AGC readily acknowledges that the Briefing Note should have been disclosed.

[92] In conclusion, the submissions of the AGC and the *amici* have been very helpful in responding to the questions I posed, as have the additional affidavits provided by the AGC.

[93] I find that the warrants issued in the above noted matter in 2017 and 2018 could have issued based on the information that was not derived from the illegal activities, subsequently acknowledged by the Service and AGC and, as a result, the information gathered as a result of the execution of the 2017 and 2018 warrants need not be destroyed or isolated.

THIS COURT ORDERS that:

1. The warrants issued in this matter in 2017 and 2018 could have been issued based on other information presented to the Court that was not derived from the illegal activities subsequently brought to the Court's attention.

2. The information gathered as a result of the execution of the warrants issued in 2017 and 2018 may be retained.

"Catherine M. Kane"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	[redacted]
STYLE OF CAUSE:	**IN THE MATTER** of an Application by [redacted] for warrants pursuant to sections 12 and 21 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 **AND IN THE MATTER** OF ISLAMIST TERRORISM, [redacted]
DATE OF HEARING (*IN CAMERA, EX PARTE*):	FEBRUARY [redacted], 2018; JANUARY 21 AND 25, 2019; FEBRUARY 21, 2019; APRIL 1,2, 12, 29 AND 30, 2019; MAY 13 AND 29, 2019; JUNE 27, 2019; JULY 30, 2019; AUGUST 28, 2019.
PUBLIC ORDER AND REASONS:	KANE J.
DATED:	JUNE 7, 2021

WRITTEN SUBMISSIONS DATED SEPTEMBER 4, 2020, SEPTEMBER 22, 2020, OCTOBER 14, 2020, FEBRUARY 10, 2021, FEBRUARY 24, 2021, AND MARCH 2, 2021, CONSIDERED AT OTTAWA, ONTARIO, WITH RESPECT TO [redacted].

APPEARANCES IN *EN BANC* PROCEEDINGS:

Mr. Robert Frater Mr. Owen Rees Ms. Gabrielle White Ms. Helene Robertson Ms. Jennifer Poirier Ms. Stéphanie Dion Mr. Arlo Litman Mr. Timothy Fairgrieve	FOR THE ATTORNEY GENERAL OF CANADA
Mr. Gordon Cameron	*AMICUS CURIAE*
Mr. Matthew Gourlay	*AMICUS CURIAE*

Mr. Brian Gover	REPRESENTING AFFIANT
Mr. Stephen Aylward	GRANTED LIMITED
Mr. Donald Bayne	STANDING IN THE HEARINGS

APPEARANCES IN [redacted]:

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