

TERMS OF REFERENCE

NSIRA Review Arising from the Federal Court's Judgment in 2020 FC 616

Introduction

On May 15, 2020, the Federal Court of Canada issued its decision in (2020 FC 616).¹ The decision focused on the legality of the Canadian Security Intelligence Service's (CSIS) human source operations, the adequacy of the legal advice provided by the Department of Justice (DoJ), and the requisite degree of candour owed to the Court by these two organizations.

The decision followed a lengthy process, which began in early 2018 following a warrant application pursuant to sections 12 and 21 of the *CSIS Act*. During the initial warrant hearing, Justice Noël asked a number of questions regarding the legality of CSIS human source activities that yielded information used in support of the warrant application.

On February 21, 2019, an *en banc* hearing of fourteen designated justices examined how CSIS relied on Crown immunity as a defence for possible violations of the *Criminal Code*, and the legal advice that had informed CSIS's decision-making. Multiple hearings followed, with fourteen affiants submitting evidence and eleven affiants appearing before the Court, many of whom were senior officials at CSIS and DoJ.

In its decision, the Federal Court found that CSIS had breached its duty of candour to the Court by failing to proactively identify and disclose that information used in support of warrant applications was likely derived from illegal activities. Some of the Court's findings in relation to candour are currently subject to appeal.

NSIRA's Review

In its decision, the Court recommended that there be an extensive, independent review of what it characterized as the systemic, governance and cultural shortcomings and failures that resulted in CSIS having engaged in operational activity that it conceded was illegal, and the related breach of duty of candour.

The Court's decision follows two earlier decisions where CSIS was found to have failed in its duty of candour to the Court. This duty requires full, frank and fair disclosure and is heightened by the *ex parte* nature of warrant applications involving the infringement of *Charter* rights. The judge in such hearings must balance the need to safeguard national security with the interests of those who would be subject to intrusive action by the state in circumstances that preclude adversarial challenge and public transparency.² As such, the designated judge must be able to trust that counsel are disclosing – in a full, frank and fair

¹ The decision was published on July 16, 2020.

² Review of CSIS Warrant Practice, Murray D. Segal, December 2016.

manner – all the facts and issues pertaining to the case. This full disclosure is also essential in the *ex parte* context to enable the issuing judge to meaningfully exercise the discretion provided under paragraphs 21(4)(f) or 21.1(5)(f) of the *CSIS Act* to specify in a warrant any terms or conditions advisable in the public interest.

Subject to the caveat below, this review will encompass elements recommended by the Court. The review will also examine the circumstances leading up to CSIS’s unlawful activities and the related breach of candour with the goal of understanding the systemic, governance and cultural factors that contributed to this outcome, as well as the steps that have been taken to date to remedy some of identified problems. At the conclusion of its review, NSIRA will provide the recommendations that it considers appropriate to remedy any problems found.

Legal Authority

While the Minister of Justice and the Minister of Public Safety and Emergency Preparedness, following up with the recommendation of the Federal Court and on the basis of paragraph 8(1)(c) of the *NSIRA Act*, referred the review to NSIRA, NSIRA also undertakes the review under its own jurisdiction based on paragraphs 8(1)(a) and 8(1)(b) of the *NSIRA Act*.

As such, in this review, NSIRA shall exercise its independent authority to review national security or intelligence activities. In keeping with subsection 8(3) of the Act, NSIRA shall “make any finding or recommendation that it considers appropriate, including findings and recommendations relating to (a) a department’s compliance with the law and any applicable ministerial directions; and (b) the reasonableness and necessity of a department’s exercise of its powers”.

Scope and Period under Review

This review will focus primarily on DoJ and CSIS. NSIRA may pursue additional lines of inquiry involving other departments, as it deems necessary to gain a full understanding of the issues.

While not determinative of the full range of this inquiry, the review will be attentive to the first eight areas of inquiry found at paragraph 2 of the judgment in *2020 FC 616*. Should it become necessary to consider the ninth element recommended by the Court – to review whether individual conduct and decision-making warrants further action – NSIRA will initiate a separate review. That second review would be conducted independently of the current review and would be governed by its own Terms of Reference, in order to ensure procedural fairness in relation to any additional issues that could stem from this matter.

The review will encompass the period of January 1, 2015, to September 30, 2020. This period encompasses the key developments described by the Federal Court in its decision.³ NSIRA may request and review information from outside this period if it adjudges it necessary to do so in order to complete the objectives of this review.

³ See, *2020 FC 616* at paragraph 56.

Objectives

The objective of the review is to identify fully the systemic, governance and cultural shortcomings and failures that resulted in CSIS engaging in operational activity that it has conceded was illegal and the related breach of candour. These areas of inquiry have been restructured into five sections of review for operational efficiency. Some additions regarding issues to be reviewed that arose in the decision, but not the judgment, have also been incorporated.

The objectives of the review are to identify and analyze gaps and shortcomings regarding:

- A. CSIS and DoJ internal organizational culture, governance, and practices and their role in fostering the values necessary to ensure government compliance with the:
 - 1- Rule of law; and
 - 2- Duty of candour, as a particular expression of the rule of law.
- B. The manner in which legal advice is delivered to CSIS by DoJ, including but not limited to:
 - 1- The application and appropriateness of DoJ's legal risk management framework as a tool to provide legal advice to CSIS on its intelligence operations.
 - 2- The existence of any systemic or governance practices within the legal risk management framework that are counterproductive in governing how advice is communicated to the CSIS, and then is assessed by it.
 - 3- The sharing of information within DoJ's National Security Litigation and Advisory Group (NSLAG), particularly between those employees fulfilling an advisory function and those appearing before the Court.
 - 4- The systemic, governance and cultural practices surrounding communications between the various relevant DoJ units with whom NSLAG interacts, including the sharing of expertise and the implementation of internal processes to test and challenge legal advice internally before it is communicated to CSIS.
- C. Rigour in relation to warrants, including but not limited to:
 - 1- The process and manner by which DoJ advises CSIS on when a warrant is required.
 - 2- The process and criteria employed within CSIS to ensure that matters meeting this threshold requirement for a warrant are flagged, and, should CSIS decide to proceed, that a warrant is then sought.

- 3- The process by which CSIS and DoJ ensure that information, and human source information in particular, has been subject to rigorous challenge during the warrant preparation process, including rigorous challenge to expose any internal operational bias.
 - 4- The internal process followed by CSIS with respect to the provision of relevant information to its senior decision-makers and advisors to ensure that these decision-makers and advisors are attentive to:
 - (a) When operational initiatives require warrants; and
 - (b) Whether operational initiatives approved by a warrant comply with the terms of that warrant.
 - 5- The systemic, governance and cultural environment in which CSIS senior decision-makers operate, and whether it contributes to or detracts from the ability of these decision-makers to exercise the requisite level of oversight noted in point 4 above.
- D. Internal CSIS horizontal communication amongst senior decision-makers, including but not limited to:
- 1- The internal communication practices and standards followed by CSIS management to ensure that senior decision-makers are sufficiently aware of all linkages and aspects of distinct operational initiatives to allow them to:
 - (a) Comply with the rule of law;
 - (b) Fulfill their transparency and accountability obligations to the Minister; and
 - (c) Meet the duty of candour owed to the Court.
 - 2- The systemic, governance and cultural environment in which CSIS operates in relation to the compartmentalization of information at senior levels of management.
- E. Issues relating to the duty of candour owed to the Court, including but not limited to:
- 1- The systemic, governance and cultural environment within NSLAG regarding the interplay between CSIS counsel's duty of candour to the Court and their duty of loyalty to CSIS.
 - 2- The systemic, governance and cultural environment within NSLAG regarding the nature and extent of any duty to act where counsel for the Attorney General of Canada is aware that a client is, or probably is, operating contrary to the law.
 - 3- The measures adopted by CSIS and DoJ to prepare and inform affiants such that they may fully satisfy their duty of candour obligations within a warrant application process.
 - 4- The implementation of training on the duty of candour for every NSLAG and CSIS employee who is expected to interact with the Court.

Criteria for Assessment

CSIS

- 1 Has CSIS fostered the values of compliance with the rule of law and candour towards counsel, as well as candour towards the Federal Court and other review and oversight bodies?
- 2 Has CSIS fostered a culture of effective, timely and appropriate information sharing internally and with DoJ counsel?
- 3 Has CSIS implemented clear, comprehensive, and robust internal processes, policies, procedures and directions regarding:
 - i The warrant application process, including but not limited to:
 - i.a The warrant life cycle;
 - i.b The identification and participation of necessary individuals in the preparation of requisite court documents, e.g., the human source précis;
 - i.c Ensuring accuracy and completeness of information used in warrant applications; and
 - i.d Accountability within the warrants process including clearly defined roles and responsibilities.
 - ii The provision of information to DoJ counsel and affiants during warrant preparation.
 - iii The implementation of the 2015 Ministerial Direction for Operations and Accountability.
 - iv The implementation of the 2019 Ministerial Direction on Accountability.

CSIS & DoJ

- 4 Has CSIS ensured that its employees have been trained on and have a clear understanding of the DoJ legal risk management framework?
- 5 Have CSIS and DoJ implemented clear, comprehensive, and robust internal processes and procedures regarding the application of the principles contained in the “CSIS-DoJ Policy on the Duty of Candour in *ex parte* Proceedings”?
- 6 Have CSIS and DoJ trained employees and counsel on their duty of full, frank and fair disclosure to the Court?
- 7 Have CSIS and DoJ employed a robust and formal process for identifying new or emerging issues touching on warrants of which the Court should be made aware?

DoJ

- 8 Has DoJ fostered the values of impartial and independent advice, vigilance regarding the rule of law, and candour towards the Court?
- 9 Has NSLAG fostered a culture of effective, timely and appropriate information sharing within NSLAG and with relevant sections of DoJ?
- 10 Does the process and manner by which DoJ provides legal advice clearly:
 - i Describe if a proposed operation is lawful or unlawful;
 - ii Separate between mitigable and non-mitigable legal risk;
 - iii Discourage the “risk management” of unlawful activities; and
 - iv Address the particular needs of national security and intelligence.
- 11 Does DoJ clearly communicate and provide legal justification to CSIS regarding when and why a warrant may be required to conduct a certain activity?
- 12 Does DoJ have established policies and practices pursuant to internal directions regarding warrant applications?
- 13 Does DoJ have clear, effective and appropriate mechanisms for reporting and internal communication?
- 14 Does NSLAG have a robust internal legal advice challenge function in order to ensure that the legal advice provided to CSIS reflects the considered view of DoJ as a whole?
- 15 Does DoJ have clear, comprehensive, and robust internal processes and procedures regarding how counsel should act when they become aware that a client is, or probably is, operating contrary to the law?

Methodology and Information Requirements

NSIRA will request preliminary briefings from DoJ and CSIS. NSIRA will request further formal briefings as required from individuals who, based on NSIRA’s assessment, have relevant authority and information in relation to the objectives of this review.

NSIRA will request that CSIS and DoJ (including NSLAG) issue an internal preservation notice, which will be followed by collection of specific documents of relevance. This will allow NSIRA to access and review documents not present in the accessible corporate repository but that may be of relevance to its review.

NSIRA will request documents pertaining to the internal processes, procedures and policies of CSIS and DoJ. In particular, NSIRA will seek documents related to the provision of legal advice by NSLAG to

CSIS in support of policy development, operational decision-making and warrant preparation. NSIRA will also seek records of communication between and within CSIS and DoJ on these matters. NSIRA may request other documents or information as needed.

NSIRA will consider previous internal reviews as well as current developing initiatives and efforts to address the candour and warrants issues that have arisen. NSIRA will be requesting documents pertaining to these initiatives (including both drafts and final versions) and their proposed implementation.

In addition to document review, NSIRA will use various information collection techniques such as quantitative and qualitative questionnaires.

NSIRA will also proceed with employee-level interviews and interviews with various levels of management aimed at providing insight into the cultural issues identified by the Court. In line with best practices for reviews aimed at addressing organizational cultural issues, NSIRA will invite a wide range of CSIS and DoJ staff to participate in an interview. These interviews will be kept confidential from employees' management. Employees will be assured that no attribution will be made in any report in relation to information obtained during interviews. Interviews may be conducted by NSIRA members or staff.

NSIRA intends to consult with various external experts in Canada and abroad, at various stages in this review, on discrete issues related to the provision of legal advice in the national security sphere and advocacy in an *ex parte* setting in order to benefit from expert external knowledge and in order to "ground truth" preliminary conclusions. These consultations will not involve the sharing of classified or privileged information. No attribution will be made in any reporting without the consent of the expert in question.

Timeframe

Departments will be updated on timelines and deadlines associated with this review as the review progresses. Once a draft has been completed, it will be shared with departments to permit review for factual accuracy. A decision as to whether to consult on the proposed findings and recommendations will be made at a later date.

Timeframes are currently contingent on any possible delays that result from increased restrictions due to COVID-19.

Members

This will be a member-led review:

- The Honourable Marie Deschamps, C.C.
- Professor Craig Forcese