



Fact sheet: Measures taken by Justice Canada to Address Practices in Warrant Matters before the Federal Court of Canada




In July 2020, the Federal Court issued a decision in which it found that institutional failings by both the Canadian Security Intelligence Service (CSIS) and the Department of Justice Canada led to a breach of CSIS’s duty of candour to the Court in failing to proactively identify and disclose all relevant facts in support of warrant applications. As a result, the Court has recommended a comprehensive external review of the policies and practices of Justice Canada and CSIS in this area.

Both lawyers and witnesses owe important duties to the administration of justice. When seeking an *ex parte* authorization such as a search warrant, an informant has an obligation to present all material facts, favourable or not, in support of the warrant application.

Prior to the Court’s decision, Justice Canada had been working on a number of measures to address issues of duty of candour, best practices on warrant measures, and the sharing of legal information in the national security context, as well as updating its legal risk framework. Highlights of the measures already taken are summarized in the chart below.

Measure	Description
<p><u>Murray Segal and John Sims Reports</u></p>	<p>In 2016, the Government of Canada retained Murray Segal, a former Deputy Attorney General of Ontario, to provide advice on best practices in warrant matters. In 2017, John Sims, a former Deputy Minister of Justice and Deputy Attorney General of Canada, provided advice on implementing the Segal Report and more effectively managing and conducting warrant applications before the Federal Court.</p> <p>Many of the Segal and Sims recommendations were addressed through the joint Policy of the Department of Justice and the Canadian Security Intelligence Service on the Duty of Candour in <i>ex parte</i> Proceedings and through the <i>Action Plan of the Department of Justice and the Canadian Security Intelligence Service to Address Practices in Warrant Matters before the Federal Court of Canada</i>.</p>



<p><i>Morris Rosenberg Review</i></p> 	<p>In 2020, the Government of Canada retained Morris Rosenberg to conduct a duty of candour review. Mr. Rosenberg, a former Deputy Minister of Justice Canada, reviewed CSIS's document management, information collection, and human source management processes, and identified institutional failures that contributed to issues related to fulfilling its duty of candour to the Court. Justice Canada participated in this review process, given its role in national security litigation involving CSIS.</p> <p>Mr. Rosenberg made recommendations for improvement, and Justice Canada is working with CSIS to implement these recommendations through a specialized project team.</p>
<p><i><u>Policy of the Department of Justice and the Canadian Security Intelligence Service on the Duty of Candour in ex parte Proceedings</u></i></p> 	<p>In 2016, Justice Canada and CSIS issued a joint <i><u>Policy of the Department of Justice and the Canadian Security Intelligence Service on the Duty of Candour in ex parte Proceedings</u></i> in response to the <u>Segal</u> and <u>Sims</u> reports.</p> <p>This joint policy sets out principles that guide the discharge of the duty of candour by counsel acting for the Attorney General of Canada and CSIS officers appearing as witnesses or affiants or otherwise providing support in such matters.</p> <p>The policy is now due for renewal, providing an opportunity to ensure that it meets the needs of Justice and CSIS and addresses the concerns of the Court.</p>
<p><i>National Security Act, 2017</i></p> 	<p>The <i>National Security Act, 2017</i>, which came into force in June 2019, provides a framework under which CSIS may be justified in engaging in activities that would otherwise be unlawful when carrying out its intelligence collection activities. Examples include paying a source for information or providing a cell phone to a source to assist them in undertaking their work. Where the subjects of an investigation are engaged in unlawful offences, sources may be required to participate to some degree in order to gain trust, maintain credibility, and develop access. Not being able to do so can potentially put them at risk.</p>

<p><u>Action Plan of the Department of Justice and the Canadian Security Intelligence Service to Address Practices in Warrant Matters before the Federal Court of Canada</u></p>	<p>In 2019, Justice Canada and CSIS developed the <u>Action Plan of the Department of Justice and the Canadian Security Intelligence Service to Address Practices in Warrant Matters before the Federal Court of Canada</u>. The Action Plan includes the establishment of regular compliance reporting to the Federal Court to confirm that a warrant was executed in accordance with its terms or whether there have been any material changes, for example.</p> <p>As set out in the plan, the Attorney General of Canada also tracks legal issues raised by the Court and provides an update on efforts to address these issues twice a year.</p>
<p><u>Practice Directions on the Disclosure of Unlawful Activities in Warrant Applications and in the Disclosure of Information regarding Human Sources in Warrant Applications</u></p>	<p>Justice Canada has issued two Practice Directions addressing the disclosure of information in warrant applications, which, in combination with the <u>joint Policy of the Department of Justice and the Canadian Security Intelligence Service on the Duty of Candour in ex parte Proceedings</u>, provide guidance to counsel who appear before the Federal Court.</p>
<p><u>Justice Legal Risk Assessment Framework</u></p>	<p>The legal risk framework provides guidance for legal practitioners in Justice Canada as they help clients make and carry out decisions. Its purpose is to reduce the frequency and severity of legal problems that prejudice the government’s ability to meet its objectives successfully.</p> <p>Justice Canada is currently in the process of undertaking a comprehensive review and update of its legal assessment framework to improve both how legal risk is assessed and communicated to clients and when and how senior officials within Justice Canada are notified of significant legal risks.</p>
<p><u>Improved sharing of information between relevant employees</u></p>	<p>Justice counsel have been tasked with improving the knowledge management tools available to counsel and to better integrate the barrister and solicitor work performed within the National Security Litigation and Advisory Group (NSLAG).</p> <p>In 2019, Justice Canada developed the National Security Litigation Practice Group, which provides a forum for counsel at NSLAG and across the National Litigation Sector to consult and reach consensus positions on national security litigation issues, including practice and procedure.</p>