Advice on Implementing the Recommendations of Murray D. Segal's Review of CSIS Warrant Practice

John H. Sims, Q.C.
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Part I - Introduction

I have been asked by the Department of Justice to offer opinions, advice and assistance to counsel acting on behalf of the Crown in CSIS warrant applications before the Federal Court.

More particularly, my mandate requires me to

> (1) review the report provided by Murray Segal (Segal Report)
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> (2) interview members of the National Security Litigation and Advisory Group, the Canadian Security Intelligence Service, or the Federal Court, as necessary
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> (3) provide advice regarding implementation of the Segal Report and effectively managing and conducting warrant applications before the Federal Court, and
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> (4) provide any additional report(s) in reply to or in addition to any report that may be presented on the matter at hand.

It should be noted that I have not been retained to give legal advice, and I have not done so in this Report.

Context

The Department of Justice (DOJ) and the Canadian Security Intelligence Service (CSIS or the Service) both understand the urgent need to restore the confidence of the Federal Court in them, and have resolved to make every effort to repair this vital relationship. In two recent cases, the Court has held that CSIS and Justice counsel have breached the duty of candour that they owe the Court.[1] In each case, the Court expressed its disapproval in very strong language. In the *Associated Data* case, for example, Justice Noël said:

> The CSIS has a privileged role to play with the Court; yet it cannot abuse its unique position. The CSIS cannot solely decide what the Court should and should not know. The CSIS, through its elevated duty of candour must inform the Court fully, substantially, clearly and transparently of the use it makes or plans to make of the information it collects through the operation of Court issued warrants. Failing to do so, the Court is in no position to properly assume its judicial obligation to render justice in accordance with the rule of law. **The CSIS must have the confidence of the Court when it presents warrant applications. In the present file, it has certainly not enhanced the Court's trust.**[2] (emphasis added)

As one part of a multi-faceted approach to improving how CSIS and the Department of Justice present warrant applications to Court, and in an effort to restore the relationship of trust with the Court, the DOJ retained Mr. Segal and me to provide our advice.

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[1] *X(Re),* 2013 FC 1275 per Mosley J ; *X(Re*) 2016 FC 1105, per Noël J (*Associated Data*)
[2] *Associated Data*, at para. 107

Methodology

In preparation for writing this report, I conducted a review of many background documents, including the pertinent legislation, much of the jurisprudence relevant to CSIS warrant applications, factums, files, reports and other materials that identify or relate to the issues of concern. Much of this material was classified Top Secret.

In addition, I interviewed the Senior General Counsel and Director of the Department of Justice Legal Services Unit at CSIS (LSU), and many of the LSU counsel engaged in warrant application work. I interviewed other counsel in the LSU primarily engaged in opinion work, as well. These initial interviews were conducted with the main purpose of understanding the context, the issues and the challenges faced by the primary actors in CSIS warrant applications, but also to get their perspectives on and suggestions about the concerns expressed by the Court.

I also spoke with the Assistant Deputy Attorney General, Litigation; the Chief General Counsel; the Deputy Assistant Deputy Attorney General; the Assistant Deputy Minister, Public Safety, Defence and Immigration; with the current Acting Director of the National Security Group (NSG); with a former longtime Director of NSG; and with other Justice employees with information about other aspects of this review.

Mr. Segal and I discussed the general issues facing the Service and Justice and, together, we met a group of LSU lawyers to hear their views, suggestions and concerns relating to CSIS warrants.

I have also spoken with the Director of CSIS and with the top CSIS official responsible for all technical operations in the Service.

I reviewed the Segal Report when it became available, and had another series of discussions with the Senior General Counsel and several lawyers in the LSU about the Report and about their ideas for implementing its proposals.

General Comments

My work on this project began in August 2016. Over the ensuing months, I spent a few hours at a time in the LSU offices on many different days. I thus had the opportunity to meet many of the lawyers, paralegals and other staff, and to interact with them as I went about my work. Invariably, they went out of their way to be helpful and to answer my numerous questions patiently and thoroughly. I thank them for being so accommodating.

I have also come away from my many encounters with counsel impressed by their professionalism and their determination to do whatever they can to restore the trust they once enjoyed with the Court. They clearly understand that, in the balancing of national security and civil liberties, their work can have a profound impact on individuals' privacy rights. They know this imposes a heavy responsibility. They also know they owe a duty of candour to the Court, and that this imposes additional, serious obligations.

From my many conversations with counsel, I believe that they are committed to discharging these responsibilities in accordance with the highest professional standards of knowledge and skills, and consistent with all relevant legal and ethical principles.

Part II — Implementing Recommendations

Duty of Candour (Chap. IV, V, VI)

Mr. Segal opens his Report by quoting Justice Noël declaring that "The CSIS has breached, again, the duty of candour it owes the Court"[3], thus signaling from the outset the central importance of that duty to the work he was asked to undertake. He devotes three separate chapters and part of his Introduction, over half the pages of the Report, to different aspects of the duty.

Segal report analysis and recommendations

Mr. Segal tackles the duty of candour in three parts: first, he examines the general legal principles underlying the duty; secondly, he surveys best practices followed in other jurisdictions; and, lastly, he revisits additional aspects of the duty of candour as he considers how to implement it, and he includes a discussion of ten scenarios to test how the principles might be applied in concrete situations.

Chapter IV — first principles

In what will certainly be essential reading for LSU counsel and CSIS affiants alike for a long time,[4] Mr. Segal sets out here and in the Introduction a comprehensive *tour d'horizon* of first principles related to the duty of candour. He quotes the classic statements on candour from the leading Supreme Court judgments, and cites Federal Court authority. He explains what is meant when the obligation is expressed as the duty to make "full *and* frank *and* fair disclosure" and why each word in that formula is important. The Report also explains the tension between making complete disclosure, on the one hand, and the need to be clear and concise, on the other.

Mr. Segal is particularly strong in explaining why the duty of candour is essential in *ex parte, in camera* warrant applications. CSIS warrants can authorize profound intrusions into a person's privacy, yet the "adversarial challenge mechanism that elsewhere helps keep state power in check is generally absent".[5] Unlike for a criminal wiretap authorization, there is no *ex post facto* review of a CSIS warrant. If this "extraordinary, exceptional" process is to be fair, and if the Court is to properly assume its duties to assess very intrusive warrants, LSU counsel and CSIS affiants must accept the "profound responsibility to inform the Court about anything and everything it needs to carry out its tasks". In short, he says, there is a

[3] Segal Report, p. 1, citing *Associated Data*, per Noël J, p. 127
[4] As well as for other Department of Justice lawyers engaged in similar national security proceedings, such as hearings under section 38 of the *Canada Evidence Act* or proceedings under section 87 of the *Immigration and Refugee Protection Act*
[5] Segal Report, p. 3

> heavy responsibility on the Service, on counsel, and on the court to *get it right* – both in terms of safeguarding national security and protecting civil liberties.[6]

Mr. Segal includes a discussion of the "unique overriding obligations of the Attorney General in the administration of justice that are deeply rooted in our constitutional traditions",[7] and what this means for the CSIS warrant process.

The Report then examines the scope or content of the duty of candour in the CSIS context. It is necessary to quote the Report in sufficient detail here that one can later understand the particular challenges in implementing this duty.

This part of the discussion begins with a quotation from the Court's judgment in *X(Re):*

> … I do not accept the narrow conception of relevance advocated by the DAGC in this context as it would exclude information about the broader framework in which applications for the issuance of CSIS Act warrants are brought. In my view it is tantamount to suggesting that the Court should be kept in the dark about matters it may have reason to be concerned about if it was made aware of them.[8]

Mr. Segal explicates this passage in words that bear repeating at length:

> The implicit formulation of the duty in this passage means that counsel cannot calibrate relevance solely with reference to the strict statutory requirements for issuance. As the Federal Court of Appeal stated in dismissing the government's appeal of Justice Mosley's decision, the court's decision to issue a warrant is a discretionary judgment; it is not a simple "box-ticking" exercise.[9] The discretion is informed by the broader context in which the warrant is issued, which includes the profoundly intrusive nature of the powers commonly sought and the warrant's virtually unreviewable nature. The scope of the duty of candour needs to be calibrated to the reality of the court's discretion and likewise cannot be reduced to a box-ticking exercise.[10]

The Report reiterates this theme:

> … But a careful analysis of the statutory criteria does not necessarily exhaust the question of *what the court may have reason to be concerned about if it was made aware of it*. Again, this is not a mechanical or technical exercise. Rather, a broader understanding is called for – one informed by the practical realities of implementation and the policy context in which the warrant process operates.[11]

CSIS counsel have long understood the basic elements of the duty of candour, but the particular value of the Segal Report is its elucidation of what that duty entails in today's CSIS warrant practice. As Mr. Segal notes, this is not always an easy exercise and "CSIS counsel and affiants face challenges that do not have precise analogies in, for instance, the world of criminal investigations."

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[6] Segal Report, p. 3
[7] Segal Report, p. 14
[8] *X (Re)*, 2013 FC 1275 at para. 89
[9] X (Re), 2014 FCA 249, at para. 61
[10] Segal Report, p. 16
[11] Segal Report, p. 16

Chapter V — best practices

From his survey of best practices in other jurisdictions, Mr. Segal makes several recommendations about the qualifications, experience, training and personal qualities ideally found in the affiants who should work on CSIS warrant affidavits. His standards are very high. Thus, he says CSIS affiants should be "experienced, authoritative, and independent", theirs should be "a respected and coveted role" within CSIS, one "invested with prestige and authority". Affiants "must have both the authority and temperament to push back where necessary against investigative overreach". As I read these recommendations, Mr. Segal puts less weight on the individual's rank or level within the organization, than on that person's knowledge, experience and training, combined with the personal authority or gravitas that he or she brings to the task.

Mr. Segal also emphasizes that anything novel (legal or technological) must be brought clearly to the Court's attention, and that *amici* should be recommended where a warrant application raises a novel or difficult legal issue.

Chapter VI — implementation and scenarios

Chapter VI seeks to deepen the discussion of the duty of candour. Mr. Segal restates the familiar principle that it is the court, not the party seeking relief, which determines which facts are relevant. This is the implication in the context of the duty of candour:[12]

> But when the dividing line of relevance is not clear, the counsel must err on the side of disclosure, precisely because it is the court's job to make these judgment calls, not one party's. As Chief Justice Richard stated in *Charkaoui*:[13]
>
> > Counsel has a strict duty to put forward all the information in its possession, both favourable and adverse, regardless of whether counsel believes it is relevant. It is then up to the designated judge to decide whether or not the evidence is material.

Before they can err on the side of disclosure, however, CSIS counsel need to be able to recognize the facts and issues that might be subject to this duty.

> Getting better at recognizing where further inquiries and disclosure beyond the four corners of a given application are required is one of the critical improvements that needs to be made … [14]

The Report develops another important theme in this chapter, namely, the Court's role as "gatekeepers of intrusive powers, ensuring a balance between private interest and the state's need to intrude upon that privacy for the collective good".[15]

To the question "why did the court need to be informed about the retention of third-party associated data",

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[12] Segal Report, p. 30
[13] *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 421, at para. 154, rev'd on other grounds, [2007] 1 S.C.R. 350, 2007 SCC 9
[14] Segal Report, p. 31
[15] *Associated Data*, at para. 100

> … Noël J. provides an answer in the form of a rhetorical question:
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> > How can the Court properly assume its duties to assess very intrusive warrants when the party appearing in front of it *ex parte* and *in camera* does not inform the Court of retention policies and practices directly related to the information the Court allows the CSIS to collect through the warrants it issues? [16]

In other words, Mr. Segal says, "the Court could not properly carry out its legislatively assigned role as arbiter of the balance between state and individual interests in this area without a full appreciation of what intrusions its warrants are explicitly and implicitly authorizing."

Finally, the Report says that counsel should try to put themselves in the shoes of the Court:

> … counsel should not ask "what does the Court *need* to know in order to adjudicate this particular warrant application?" but rather: "what *should* the Court know in order to adjudicate this particular warrant application *in the context of* its overall mandate to maintain a proper balance between state and individual interests under the Act?" [17]

Mr. Segal recommends that the Department of Justice and CSIS should establish a joint policy or protocol on implementing duty of candour. This policy would start from the general principles set out in the leading Supreme Court cases and the later Federal Court case law, and then move to a more "granular" level. The scenarios identify many of the issues he would expect to see covered in the protocol. To ensure it stays fresh and relevant, the protocol should be reviewed and revised every two to three years, or earlier as necessary.

Early in these chapters, Mr. Segal asserts that all parties involved in CSIS warrants, the Court, counsel and the Service, must "get it right". He ends his discussion by reinforcing the obligation on CSIS and its counsel, saying that they are under a "super-added" duty. The factors contributing to this heightened duty include the highly intrusive nature of CSIS warrant powers, the absence of any *ex post facto* review, the special obligations of the Attorney General, and the fact that the duty continues potentially well beyond the life of the warrant itself.

[16] Segal Report, p. 34
[17] Segal Report, p. 35

Implementation

These chapters in the Segal Report constitute an excellent treatise on the duty of candour in the CSIS context. They present a thorough review of the legal and policy principles that underlie the duty, and offer scenarios to test the reader's understanding of how the duty might apply in certain concrete circumstances. In my opinion, this part of the Report in particular will be indispensable for LSU counsel and CSIS affiants preparing for future warrant applications to the Federal Court.

The lengthy extracts set out above, however, also show how challenging it will be to implement this part of the Report. Invaluable as this overview is, the principles are expressed in general and abstract terms. Even with the scenarios, I believe that it will be difficult to apply in an operational setting without additional advice. For example, officials called upon to identify emerging issues that should be brought to the attention of the Court would find it impracticable to have to work with a 40-odd page text as their guide. See related discussion under the heading "Preliminary identification of issues" beginning at page 21.

I wish to emphasize that, to say this, is not to criticize either what Mr. Segal has written, or what the courts have expounded. For his part, Mr. Segal has laid out a clear exposition of the relevant law, but the law itself is nebulous. For its part, the Court has explained in *X (Re)* and *Associated Data*, why a narrow or mechanical approach to relevance in the national security context is inappropriate. Resort to broad principle is inevitable.

That still leaves practitioners searching for clarity and certainty. What are the tests for disclosure? According to the extracts above, these are all possible factors:

- any matter that may concern the Court
- counsel cannot rely solely on strict statutory requirements as the test of materiality
- counsel's judgment of what is relevant is not a reliable guide to disclosure
- counsel should consider:
    - the broader framework in which applications are being brought, or
    - the broader context in which the warrant is issued, or
    - a broader understanding, informed by the practical realities of implementation and the policy context in which the warrant process operates
- the duty of candour needs to be calibrated to the reality of the court's discretion
- counsel may need to inquire beyond the four corners of a given application
- what *should* the court know in order to adjudicate this particular warrant application *in the context of* its overall mandate to maintain a proper balance between state and individual interests under the Act?

The call to apply a wider lens to decisions on disclosure is clear. The Court needs a fuller context on warrant applications than it has sometime been given in the past. Counsel fully accept that, but the parameters of the new enlarged context are still uncertain. In my view, there is therefore an important piece missing from the suite of instruments that are needed to guide CSIS and the LSU in this area.

Joint protocol / policy on duty of candour

Mr. Segal himself recommended that more work be done. Thus, as mentioned above, he suggested that CSIS and the Department of Justice establish a joint policy or protocol on implementing the duty of candour.

I strongly support this idea.

At the mid-January training conference, Mr. Segal said that he had envisaged that the entire package of advice to Justice and CSIS on candour might be structured along the lines of something like the Federation of Law Societies' *Model Code of Professional Conduct*. The typical section in the *Code* comprises a short sentence or two setting out a rule or statement of principle, followed by commentary that can run on for many paragraphs. Sometimes the section includes several 'examples'.

This is an excellent way to present complex material. It combines a pithy, concise statement of the main ideas that practitioners can readily grasp and remember, with an exposition of the theory and background to enrich the reader's understanding of the simple statement. The examples further deepen the understanding.

With the Segal Report, what we have now are two of the three parts of "a Model Code section". We have the long commentary and examples, but we still lack a concise statement of the governing principles.

Writing such a protocol will be challenging. The starting point, of course, is to try to distill short propositions from the Segal Report's examination of the duty of candour.

Moving to the more granular level, it should also be possible to identify the factors that preoccupy the Court when exercising its gatekeeper's role over intrusive powers. Without falling into the trap of creating tick boxes, the Protocol might include, for example, reference to considerations like the degree of intrusion into privacy interests, retention of innocent third party data, and the potential of harm to Canadians abroad. This is not an exhaustive list.

The Protocol has to be treated as a living document, and amended to accord with experience. CSIS and the LSU are bringing a multi-faceted approach to improving how they present evidence to the Court. As counsel and affiants work through scenarios and difficulties in training sessions, they will get better at spotting where candour issues may arise. As the LSU responds to judicial concerns over warrant and affidavit templates, they will gain insights into the warrant process. So, too, as CSIS systematically reviews its business practices, it will discover issues that need attention. All these lessons need to be incorporated into the Protocol on an on-going basis.

Once the Protocol is developed, put into practice, and adjusted as necessary, I agree with Mr. Segal that the Protocol should then be reviewed periodically, and that a three-year cycle would likely be reasonable.

The Protocol must also make plain that the duty of candour continues after the application is finished. As one of Mr. Segal's scenarios discusses, counsel must correct any representation of material fact or law that he or she later learns is false.

There is a great need for such a protocol. Counsel and CSIS affiants are all acutely aware that they bear a heavy responsibility for the profound consequences of what they do, a responsibility they take very seriously. They also know that the standards expected of them are very high: in Mr. Segal's words, theirs is "a super-added duty", they need to use "unimpeachable judgment" and "to get it right". They also know, of course, that the Court has been critical of them[18] and that its trust in CSIS and the LSU has been strained by recent events.[19]

And yet, as Mr. Segal also says, "as in any human process, mistakes will be made". Counsel and affiants genuinely want to do everything they can to prevent a recurrence of the mistakes that were made in the past.

A well-crafted protocol should go some distance to providing essential guidance for the performance of their duties in an uncertain domain.

Responding effectively to judicial concerns (Chap. VII)

Segal Report Analysis & Recommendations

In this chapter of his Report, Mr. Segal relays a number of important messages learned during his meeting with the Chief Justice and two of the designated judges, as well as from his reading of transcripts and other documents. What emerges is that the Court sometimes feels that the concerns it expresses during warrant proceedings about recitals, powers or conditions in the proposed warrant are being ignored, or not being addressed sufficiently promptly. This failure to keep the Court apprised of the status of its requests leaves an impression that the Service and LSU are not treating these concerns seriously. Mr. Segal reports that this sometimes engenders frustration among the judges.

Mr. Segal advises counsel to become more responsive and transparent.

> Judges simply need to know where CSIS stands on issues that have been "flagged", so that (where necessary) the judge can make appropriate changes to a warrant, pursue a matter further with counsel, or simply be satisfied that his or her concerns have been allayed.[20]

To this end, he says, counsel should follow up promptly after any hearing in which a judge has made comments by writing to the Court to acknowledge the concern, confirm

[18] *X (Re)*, at paras 90, 117-118; *Associated Data*, at paras. 7, 108, 235
[19] *Associated Data*, at para. 107
[20] Segal Report, p. 51

that a review is being conducted, and to advise the Court of the expected timeline for providing a substantive response.

In an idea developed more fully elsewhere in the Report, Mr. Segal suggests that, in circumstances where the LSU respectfully disagrees with the judge's comment or concern and wishes to seek a ruling, it would be desirable for counsel to be able to request an *en banc* hearing where the issue could benefit from the Court's collective consideration.

Implementation

I agree with this recommendation. Starting now, the LSU should adopt new practices to acknowledge when a judicial concern has been raised and to keep the Court informed of the LSU's and Service's efforts to address that concern until the matter is resolved.

Tracking judicial concerns — former practice

The LSU has begun to implement changes in how it will track and respond to judicial input, commentary and concerns on warrant applications. To understand the anticipated benefits of these innovations, it is useful to know a little about its earlier practices.

The LSU has long had a system for tracking and managing concerns expressed by the judges related to warrants, affidavits and practice issues before the Federal Court. Immediately after every warrant application hearing in the past, counsel recorded the outcome of the hearing and any issues raised, including suggestions for rewording the warrant or affidavit templates. These quick, early reports were always shared with other lawyers in the LSU. In longer reports prepared later, counsel would outline in more detail the concern raised, and set out their analysis of the issues and how they might be addressed.

Even seemingly simple issues can sometimes be difficult to resolve (see below), so months might elapse while analysis, research, consultations and decision-making were taking place.

The former practice had certain strengths, but one of its biggest flaws was identified in the Report. Too often, the work going on behind the scenes in the LSU and CSIS was unknown to the Court. Individual judges might not be told the interim status of the matter they had raised. Moreover, for the Court as a whole, there was no ready way to determine how many concerns, in total, had been registered, or whether they revealed any patterns. Was there duplication, overlap or inconsistency among judicial comments and suggestions?

From the LSU perspective, the old system presented problems, too. Information about template issues was not stored centrally but on individual warrant application files, making it hard to search.

Importantly, there was no procedure for ensuring that answers developed in response to a concern brought up by one judge would necessarily reach another designated judge who might share the same concern. On the one hand, if the proposal resulted in a

significant change to the warrant or affidavit template, then the change would almost certainly come to the attention of the entire Court. Indeed, if the changes were important enough, the Court might convene an *en banc* hearing at which to discuss the implications of the proposal.

On the other hand, if the change was minor or if, after hearing counsel's oral submissions the judge simply agreed that no modification was required at all, then the fruits of this analysis and discussion between LSU counsel and one individual judge would be recorded in the transcript of a particular warrant hearing, but would not necessarily be known or accessible to the rest of the Court.

The new tracking system

As Mr. Segal notes, the Legal Services has put in place a new system to track issues related to warrants. Shortly after she arrived in the LSU last spring, the General Counsel, Legal Operations implemented a simple but more effective way to monitor and take stock of judicial comment and concerns relating to warrants and affidavits.

Counsel still prepare a report after every hearing, but now specific issues and questions related to the affidavit or warrant template are entered into a so-called **Change Request Form** (Form). The Form records every one of these judicial concerns, big or small, simple or complex. As will be noted further below, this system also serves to record and manage issues and changes requested by the Service or identified by counsel. Critically, these Forms are now stored in one central repository, accessible to all LSU staff. Readily searchable by all LSU counsel, the Forms systematically capture every detail about suggestions or commentaries relating to the templates: what the issue is; who originated it; when and to whom work was assigned; any related research, transcripts, legal opinions or exchanges among counsel; who needs to be consulted; when the work is completed; and, the final decision.

In addition, the LSU now also maintains a consolidated list of these concerns in chronological order. The table shows the status of the concern: the issue, when it arose, its priority, who is responsible, deadlines, outcome, decision taken, etc.

When the system is fully implemented, these tools will allow much more effective management of judicial concerns and commentary, as well as better communications with the Court. They will enable data analytics: how many changes have been proposed, covering which terms in the templates, their age and priority, expected completion date, etc.

The Forms and the list contain raw data. They are working documents for internal use by the LSU. They are not intended, as is, for use by the Court. What they do provide, however, is the material from which regular reports can be given to the Court and to the Service about the status of warrant-related issues.

Concerns logged over first eight months

In just the eight months since the new system began, counsel had already logged 22 items related to concerns of the Court,[21] a number of which had emanated from recent

[21] As at the date of drafting this portion of the Report.

en banc hearings. As in the past, it sometimes happens that more than one judge has expressed comments about the same warrant terms. Sometimes they agree on what changes should be made, but not always. Sometimes judges suggest different modifications for the same term. This is entirely to be expected, because the template wording may take on a different colouration depending on the specific factual context of different warrant applications.

(It should be noted that CSIS and LSU counsel have made another 31 suggestions for possible changes to the warrant/affidavit template.)

Upon receipt of these change requests, the General Counsel reviewed and prioritized them. Some of the issues are straightforward; others are quite complicated. Some are more important or urgent than others. Based on her assessment of the priorities, she assigned LSU counsel to work on individual issues.

Research and consultation

If an issue is complex, then developing the best response may require some time. The LSU and the Service each have a part to play.

Thinking through how to reconcile or choose among different, related proposals requires analysis. There is always a history behind the wording that now appears in the template, and it is essential to understand why that wording was originally adopted before deciding to change it. For example, there is a large suite of different warrant templates that are now used in CSIS applications. As technology and investigative techniques have changed and evolved over time, new warrant templates were developed to address the new circumstances. In some instances, this resulted in overlap between the old and new warrants, creating complexity. Everyone agrees that it would be desirable to simplify and rationalize these warrants, and parts of this have been done. The LSU says, however, that in recent years neither the law nor the technology has remained still long enough to permit a complete overhaul.

Responding to judicial concerns always involves consultation with the Service, because any changes to the warrants also affect CSIS. Some changes, for example, would affect how CSIS collects and retains intelligence. The Service has integrated operational systems and procedures for collection, retention and destruction and it can take time to re-engineer them. It can also take time to work out and understand how the technological and system impacts should be described so that the amended warrants will properly reflect the change and incorporate the right new powers. Similarly, if the issue is complex, there may be consequential changes required to Service policy or training.

Status of the current change requests

Of the 22 concerns raised by the Court, 6 of varying scope and complexity have been completed.

The remaining issues have been prioritized and will be completed, in *tranches*, no later than the end of 2017.

Next steps

The first stages of the new tracking system have been in place for eight months. It is now time to exploit its potential to enable a more effective response to judicial concerns.

Oral summary

If a judge makes specific comments about recitals, powers or conditions in a CSIS warrant during a section 21 proceeding, counsel should not wait for a transcript before confirming, or possibly clarifying, the judge's concerns. In all future applications, counsel should adopt the practice, where possible, of summarizing their understanding of the concerns raised by the judge at the end of the same hearing. The more timely the indication that the LSU has understood the judge's concern and commits to addressing it the better.

Sometimes, this will not be feasible. Sometimes counsel are focused so intently on answering the Court's substantive questions about the warrant application itself that it is simply not possible for him or her to have grasped, in the moment, all the nuances of an ancillary point about a template.

If that occurs, it would still be a good practice for counsel to tell the Court at the end of the same hearing that they recognize that a concern has been raised, and that as soon as the transcript becomes available they will write to the Court to follow up. See the next section.

Acknowledgment letters to the Court

Starting immediately, the LSU and Service should also adopt the practice recommended by Mr. Segal of sending a letter to the Court to state, in writing, the LSU's understanding of any concerns raised, and of the projected deadline for returning to the Court with a substantive response to the issue. Ideally, the LSU would have the transcript before writing the letter, but if delivery of the transcript becomes unduly delayed, the LSU should send an interim letter to inform the Court of this fact and that a more substantive response will be forthcoming as soon as possible.

Status report to the Court

I recommend that, within one month, the LSU send a first report to the Court on the status of the concerns raised during this eight-month period. This report should provide enough detail that the Court can see the nature and extent of the issues identified by the designated judges. If it is not feasible to lay out a work schedule for all 16 of the remaining issues at this time, the initial report should nevertheless indicate which issues have been given top priority and are being actively worked on now, and the estimated time to completion of that work.

The LSU should update this report semi-annually, or as needed, and, in particular, should inform the Court of any changes in priorities or deadlines that may become necessary.

Results & priorities

Having compiled the judges' change requests, CSIS and Justice have to do the actual work needed to respond to the concerns without undue delay. There is already a backlog of issues requiring attention, and the Court will expect concrete results in a reasonable time frame. Some progress has been made already but, given the importance both of the issues and of restoring a strong relationship with the Court, the Service and LSU should continue to give this work some priority.

It may happen that unexpected complications, competing demands or strained resources threaten to interfere with the timely completion of this work. There needs to be a forum where the Court and Justice can discuss work planning and what priority to give to individual matters.

It might be appropriate for the Bench and Bar Committee to discuss a process for determining such priorities.

Confirm final resolution in writing

The final disposition of every issue raised by the Court should be confirmed in writing. This already happens where the judge's concern culminates in a significant change to the warrant or affidavit template. As explained above, however, where either no change or only a minor change resulted from the exchange, then counsel in the past might simply have agreed orally with the presiding judge on how to dispose of the matter.

In the future, the final resolution of every issue should be confirmed in writing to enable the Court, should it choose, to keep track of every issue raised, big or seemingly small.

I would recommend that, by default, the reporting on these matters could be done in the semi-annual status report mentioned above.

En banc *hearings*

Mr. Segal suggests that it would be desirable for counsel to be able to request an *en banc* hearing where discussion and resolution of an emerging legal issue of broad concern could benefit from the Court's collective consideration. CSIS counsel support this recommendation. As the Report indicates, it will sometimes happen that counsel become aware of a developing issue before the Court does, so it would useful for counsel to be able to initiate this request. It would then be up to the Court to decide whether the matter would be suitable for an *en banc* hearing, and, if so, how many judges should sit.

While logistics and manageability might favour smaller panels, having all designated judges hear, for example, about a novel new use of technology might favour the larger bench. The Court will decide which route is most appropriate in the circumstances.

This may also be an opportunity for the Court to envisage enlarging the scope of how it uses its *en banc* procedures. At present, while all designated judges attend *en banc* hearings, at the end of the day, only one judge decides. The other judges are not there to adjudicate, but to learn more about novel or difficult issues affecting the CSIS warrant

practice, and to offer their insights and perspectives to the single presiding judge. The purpose of the *en banc* process as it is now used was explained by Noël J in *Associated Data* as follows:

> An *en banc* hearing is one where all available designated judges attend, may participate, and hear the evidence tendered. This format is helpful as it allows the presentation of evidence pertinent to future warrants applications and helps avoid repetition. Designated judges can also benefit from each other's perspectives.[22]

This valuable but limited use of the *en banc* hearing is not how other courts typically use *en banc* procedures. For other courts, the goal is not just to ensure that all judges are aware of issues that affect their docket and have the opportunity to offer advice, but to enable adjudicative decision-making by the entire Court.

In the case of the Foreign Intelligence Surveillance Court (FISC) in the United States, for example, the court may order a hearing or rehearing en banc where "it is necessary to secure or maintain uniformity of the Court's decisions, or the proceeding involves a question of exceptional importance." [23]

Whereas, in the CSIS warrant court, the other designated judges have a very limited role, all judges that sit *en banc* in the FISC are equally seized of the matter before that court. They participate fully in the deliberations, they all take part in the decision-making, and they are all bound by the outcome.

Mr. Segal is clear that he is not recommending this more common model. He emphasizes that, under the Federal Court's practice, the judge that is designated for the proceeding retains absolute decision-making independence and that this prevails even where the Court has convened an *en banc* hearing. As he characterizes it, the concern "is not so much with the authority to create new precedent as … with the practical benefits of having multi-judge input on a novel and difficult issue …".

And yet, one can imagine situations where it might be advantageous both for the Court and for the Service if the decision on a novel or difficult issue were taken by more than a single judge. The Segal Report describes a scenario where

> … a particular issue may have gone through too many iterations in too many different applications for full disclosure of the entire history to be helpful to the Court. If clarity has failed to emerge and the required disclosure is becoming unwieldy, the issue may be ripe for *en banc* consideration.[24]

Depending upon the nature of the 'particular issues' that had gone through 'too many iterations', it could assist all involved if the Court could pronounce definitively either on the novel subject or on divergent approaches that may have materialized over time by issuing its decision in the name of all in attendance at the *en banc* hearing.

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[22] *Associated Data*, at para. 2

[23] FISC Rules of Procedure, Title VIII, Rule 45, citing Rule 45. Standard for Hearing or Rehearing En Banc, citing 50 U.S.C. § 1803(a)(2)(A)

[24] Segal Report, p. 41

Another way to encourage greater coherence but without the logistical burdens imposed by convening all 14 designated judges *en banc* would be to give the Court the option to sit in panels. Although unusual, it is not unknown for judges to sit as a panel at first instance, to hear evidence and decide issues of fact and law. In Canada, for example, appeals to the former Pensions Appeals Board (the Board) were heard by one, three or five superior court, Federal Court or Federal Court of Appeal judges.[25] Despite being called "appeals", the hearings before the Board proceeded as trials *de novo*, with panels, usually of three, judges receiving testimony from sworn witnesses, and other evidence.[26] Ultimately, as noted above, it is within the Court's discretion to decide how the Court should be composed in any situation.

If the suggestions in this section were thought desirable, the Department of Justice should consider suggesting to the Government any rules or legislative changes that might be required to enable the changes.

Related practice matters

A number of related procedural and operational details need to be ironed out. What format for the periodic status report would best serve the needs of the Court? To whom should the LSU send the report? It is recommended here that the LSU should update the report semi-annually; is this acceptable to the Court?

Accountability

One person needs to be responsible within the LSU for responding to the Court on all the matters dealt with in this section of this Report, and for overseeing the work being undertaken within the LSU to respond to judicial concerns.

In my view, the Senior General Counsel, or her senior designate, should be given this specific responsibility.

Tracking legal issues of potential concern to Court (Chap. VIII)

Segal Report Analysis & Recommendations

The principal finding of this chapter of the Segal Report is that

> CSIS and Justice need to be better at perceiving and acting upon emerging issues that are likely to attract the Court's attention and concern. … This involves high-level coordination between Justice (acting through CSIS LSU) and the Service.[27]

In order to achieve this, Mr. Segal makes a number of findings and recommendations, including:

[25] *Canada Pension Plan*, R.S.C. 1985, c. c-8, s.83(6) (as amended)
[26] *CPP*, s. 84(1)
[27] Segal Report, p. 52

- the identification of issues potentially ripe for disclosure should be a regular agenda item at high-level meetings at which the LSU is represented

- there should be a dedicated committee of senior CSIS LSU counsel to be principally responsible for "flagging" emerging issues of potential concern

- the Service needs to be more attuned to seeing emerging operational issues through the lens of their possible interaction with the warrant process

- because the need-to-know culture of CSIS may curtail what counsel knows about relevant matters, there needs to be a heightened consultation mechanism between the Service and counsel at an appropriately high level to ensure that both sides know which operational issues have potential legal significance for the duty of candour

- training may be needed in this regard

- there should be an ability on the part of counsel to request an *en banc* session to address a disclosable issue that is relevant to multiple applications.

Implementation

I agree with the main ideas set out in this chapter. It is imperative that the Department of Justice and the Service improve their ability to identify and act on issues that ought to be disclosed to the Court in a timely manner, and Mr. Segal has proposed some thoughtful and practical ways of achieving this.

In my view, the recommendations raise two main questions:

- How may issues be identified that should be disclosed to the Court pursuant to the duty of candour? and
- Once identified, how can these issues be brought to the attention of the Court?

How to identify issues

The first challenge in implementing the proposals in this chapter is to develop a procedure to identify issues that need to be disclosed to the Court. This mechanism needs to be systematic, comprehensive, timely, and rigorous.

This part of the Report should be read together with the earlier chapter dealing with implementing the duty of candour, starting at page 10, and in particular the section on establishing a joint protocol on the duty of candour, starting at page 11.

It should be emphasized that some disclosures are easy to identify. Where, for example, CSIS has failed to observe the terms of a warrant, the Court must be promptly informed. Similarly, where an oversight body is examining an issue that may affect warrant practice, the Court must be advised promptly.

Joint responsibility

Mr. Segal is right to emphasize that identifying issues for disclosure must be a joint responsibility of the Service and Justice. They each have a responsibility and a role to play in meeting the duty of candour. Neither side can do it alone; each must bring its specialized knowledge and information to the table.

High level management of process

This cooperation should start at the top. First, it sends an important signal to both organizations if the leadership is visibly supporting and actively engaged in this exercise. Secondly, when it comes time to disclose information to the Court, there needs to be department-wide awareness and buy-in.

Accountability

Mr. Segal suggests that a dedicated committee of senior LSU lawyers be made principally responsible for flagging emerging issues of potential concern. I think the critical idea in this recommendation is where to place accountability.

My own advice would be to hold individuals, accountable for this work, not a committee. Since it is a joint responsibility of the two organizations to identify disclosable issues, one person should be held accountable for the Justice share of this responsibility, and another person for the Service's portion.

Within Justice, I would recommend that the Senior General Counsel (SGC) be charged with this responsibility. Both the advisory and litigation lawyers in Legal Services need to contribute to identifying disclosable issues and, from a management perspective, these two streams come together at her level. Moreover, she also has ready access to the senior management of the Service: she sits as a member of the CSIS Executive and may sit on the Operations Committees, which should facilitate this task. In short, making the SGC accountable is both commensurate with the importance and priority that should be accorded to this exercise and a practical way to ensure good coordination with CSIS.

The SGC will need to establish a dedicated committee within Legal Services to help undertake this work. She will no doubt need and want senior LSU lawyers to be part of it, but she should not be restricted if she wants to include colleagues at other levels for their insights and knowledge, or for other purposes such as training.

I note, but do not make any substantive comments in this regard, that the Service will need to consider how to organize itself, too, to undertake this work.

Preliminary identification of issues

Conceptually, at least, there are two stages to identifying issues to take to the Court. First, in light of the experience in the *Associated Data* case, an inventory of all programs and activities (including technical developments) related to CSIS operations that could *potentially* trigger a duty to disclose to the Court needs to be put together. Then, the

outcome must be analyzed more closely to determine if any of these meet the criteria for *actual* disclosure. In this section of this report, we consider what can be done as a preliminary step to find candidates for the initial inventory of issues.

The idea at this stage is to be more inclusive, not less so. That is, the threshold for putting an issue on the list for preliminary consideration should be lower than the test that will be applied later when deciding whether the issue is one that must actually be disclosed. If in any doubt whatsoever, the issue should be in the inventory.

It will be important for this stage of identifying issues to have a Joint Protocol on the duty of candour: see discussion above starting at page 11. It is difficult to imagine how officials could decide whether a program or activity should be in the inventory or not without a tool to help them. They need a succinct statement of the duty of candour and of the factors that should guide their decision-making.

First stage assessment in CSIS

Accompanied by the Senior General Counsel, I met with the top CSIS official responsible for all technical operations of the Service, for a preliminary discussion on how to implement this part of the Segal Report. This official envisages a two-part approach. First, he would draw up an inventory of all technologies that may be used by CSIS today, to establish a baseline of all existing investigative methods that have already been disclosed, or that must be reviewed for possible disclosure, to the Court. Secondly, he would initiate a process whereby all future project plans for the use of new technologies would include a step requiring a legal risk assessment. This would ensure, in Mr. Segal's words, that the Service stays

> … attuned to seeing emerging operational issues through the lens of their possible interaction with the warrant process – and, therefore, their potential ripeness for disclosure to the Court.[28]

For step one of this approach, the CSIS official has a plan in mind for systematically identifying all technical tools and investigative procedures that could raise candour issues. He is confident that this review will be comprehensive.

Once he has drawn up the list of all technologies that may be used by CSIS, the CSIS official and his team would work with LSU counsel to identify which elements would warrant closer examination and legal assessment as part of the duty of candour obligations.

Having CSIS and the LSU work together in this fashion on operational and technological issues would help achieve another critical objective recommended by Mr. Segal, namely, developing

> … a heightened consultation mechanism – ensuring a proper flow of information between CSIS LSU counsel and the operational side of the Service, always with the duty of candour in mind …

[28] Segal Report, p. 52

Simple in concept, his approach may nevertheless require considerable effort to execute. The Service is aware of the importance and urgency of conducting this review. Over the short period, it will therefore prepare and implement a work plan to do this assessment as quickly as possible.

Second stage assessment of issues

Having made an inventory of all the issues that meet the preliminary threshold for identifying disclosable issues, it remains to conduct a final assessment of those issues to determine if any of them are ripe for disclosure to the Court.

Deciding whether and how to disclose

For many of the issues identified by the process described above, the decision whether to disclose once CSIS has decided to use a given technique or rely on a new program will be straightforward. The duty of candour will either clearly apply, in which case the issue must be fully revealed to the Court, or it will not. Examples of such issues are set out immediately below. In a certain number of other situations, however, what to do may be less clear. These will be examined using a hypothetical scenario as a starting point.

As discussed above at pages 8, in making these decisions, counsel and CSIS should always err on the side of disclosure.

Legal questions, not legal advice

It is not my mandate to give legal advice to the Department of Justice or CSIS in this matter. In what follows, therefore, I will not do so. What I will endeavor to do from time to time in this part of my report is to identify legal issues that I respectfully recommend to the Deputy Attorney General for his consideration.

Intercepting communications — duty applies

If the Service wants to use a technological device to intercept private communications, a warrant is obviously required. Under the authority of warrants issued by this Court, the Service has been conducting interceptions of private communications for a number of years. Where the technology or program identified in the first stage assessment described above relates to existing warrants, I would therefore expect that CSIS will already have informed the Court.

If a new device is developed and impacts privacy differently from traditional devices, the Service would have to disclose and describe the intended use of this device in an application to the Court under section 21 of the *CSIS Act*. All relevant facts must be revealed as reiterated in the Segal Report: what the device is capable of, how it will be used, what the potential privacy implications are, and so on. The judge will then be able to decide whether to grant the warrant, and what powers and conditions to include. The Court may also, in an appropriate case, appoint an *amicus* to argue part of the issue.

Information relates to a warrant — duty applies

In a second category of cases, it may be that the Service uses a technology, not to intercept private communications, but otherwise to collect intelligence as part of a

threat investigation. This technology may have been used in the first instance without a warrant, but if the information thus obtained is later used as supporting evidence in a warrant application, then the duty of candour clearly applies. The Service must inform the Court about how information used in the affidavit has been obtained, which would include providing relevant information about the technology.

Having brought the warrantless use of this technology or method clearly to the attention of the Court, the duty of candour is satisfied. If the Court accepts this, then that ends the matter. If, on the other hand, the judge questions the use of this equipment without a warrant, then counsel are free to make whatever submissions they deem appropriate as to relevance, materiality or legality. Counsel would present arguments, in this example, as to why no warrant was required to use this particular technology in the first instance to collect the information in question. If the Court agreed, then the information derived from its use would remain in the affidavit. If the Court disagreed, then that information would be found to have been improperly obtained and the designated judge could excise it from the affidavit. The warrant application would have to proceed with whatever evidence remained: *R. v. Grant*.[29]

Hypothetical example

The previous two examples are straightforward. In other circumstances, however, whether and how to inform the Court of a CSIS activity may be more complicated.

Let us take a hypothetical example of one such difficult question. Let us imagine that CSIS uses, or is considering using, a particular investigative tool in circumstances where the law is not settled. At issue is whether this requires a warrant or not. In the totality of the circumstances under consideration, for example, does the subject have a reasonable expectation of privacy that engages the protections of section 8 of the *Charter*?

In this hypothetical, appeal courts across Canada have reached contradictory conclusions and the matter will have to reach the Supreme Court of Canada for the LSU to be provided definitive guidance. LSU lawyers consider and weigh the factors enumerated in *R. v. Spencer*[30] and other relevant principles. The Senior General Counsel discusses the legal and constitutional issues with her Assistant Deputy Minister, who in turn consults with her colleagues, the Assistant Deputy Minister of Public Law and the Assistant Deputy Attorney General, Litigation. After due deliberation, Justice concludes, on balance, that, based, in particular on the degree of intrusion involved in the search and the impact of the search on the privacy of the target, they believe that no warrant would be required.

Faced with this situation, must the Service disclose the intended use of this investigative method to the Court, and if so, how?

[29] *R. v. Grant*, [1993] 3 S.C.R. 223
[30] *R. v. Spencer*, [2014] 2 S.C.R. 212, 2014 SCC 43

Query duty to inform the Court

The first legal question for the Deputy Attorney General's consideration is this. Section 21 of the *Canadian Security Intelligence Service Act* (the Act) confers jurisdiction on the Federal Court to hear applications from the Service where the Director or a designated employee believes on reasonable grounds that a warrant is required to investigate a threat to the security of Canada.

In the hypothetical situation before us, the use of the investigative technique is not related in any way to a CSIS warrant that has already been issued, and the Service does not believe on reasonable grounds that a warrant is required now. The question for the Deputy is whether, in his view, the duty of candour applies in these circumstances, and whether Justice or the Service has a duty to inform the Court.

Seeking Court's guidance

Even if it has no duty to inform the Court, however, and cannot be compelled to do so, the Service might still wish to have legal certainty about the constitutionality of using this new investigative tool since it intends to use the tool to gather information that might form grounds for a warrant application sometime in the future. The Service might feel, for example, that the *Charter* uncertainty is too great, and therefore be unwilling to use this effective investigative method. Is there some procedure available to put the question before a judge for a ruling?

Applying for a warrant

Even if CSIS is not *required* to seek a warrant, is it nevertheless open to the Service voluntarily to bring an application to the Federal Court for a warrant so that any doubt about the constitutionality surrounding the new investigative method can be dispelled?

As indicated above, subsection 21(1) of the Act imposes conditions before the Service can make an application for a warrant. The first is that the Director or the employee designated for the purpose must "believe, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate … a threat to the security of Canada".

In the hypothetical scenario we have been examining, however, the Director does *not* believe a warrant is necessary. Based on the legal advice he has received, his sincere belief is that he can use this investigative tool lawfully, without warrant, although he also knows there is a risk that this may someday prove to be wrong.

The next legal question for the Deputy Attorney General's consideration, therefore, is whether, in his opinion, the Service can apply for a warrant in these circumstances, where the Director desires and expects the Court to dismiss his application. In other words, can the Director ask for a warrant and then argue that no warrant is required?

If the Deputy Attorney General's view is that a warrant application can proceed, then there is a second, related question for his consideration, as well. If the Court decides that a warrant is required before using this investigative tool, can the Service later appeal the very decision that it was ostensibly asking the Court to make?

A remote situation?

If the Deputy Minister concludes that the Service cannot apply for a warrant in the circumstances described above, it leaves CSIS in a legal and operational quandary. Before looking further for ways to obtain the Court's guidance, one should ask: how likely is such a dilemma to occur?

The particular mix of legal advice, *Charter* risk and operational context is probably very unusual. In the vast majority of cases, one would think the Director would be able to choose an option that avoided the quandary. He could decide to use or not to use the investigative tool, and take the associated legal risk. Or, he could find a legitimate way to argue that the use of this investigative tool was necessary to investigate a threat and make that part of a current warrant application.

In rare instances, however, that may not be the case, leaving the Service and the LSU looking for another way to seek the Court's guidance.

Section 18.3 — referring a question to the Court

Rather than ask for specific relief, what CSIS wants when faced with the hypothetical situation above is to find a way to refer a question of unsettled law to the Court for determination. Section 18.3 of the *Federal Courts Act* provides for the bringing of a reference in the following circumstances:

> **18.3 (1)** A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

Could CSIS rely on section 18.3 to seek the Court's guidance on a sensitive legal or constitutional issue related to warrants?

The answer to that question is not entirely clear.

On the one hand, the Deputy Minister will see that, in the early case law, the courts appear to have regarded section 18.3 and its predecessor section as being intended solely for circumstances that involve adjudication proceedings. See, for example, *Reference re Immigration Act*[31], or *Alberta (Attorney General) v. Westcoast Energy Inc.*[32] If references can only be brought in respect of "adjudications", then CSIS cannot avail itself of section 18.3.

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[31] *Reference re Immigration Act* (1991), 137 N.R. 64 at para. 2 (F.C.A.), [1991] FCJ. No. 1155

[32] *Alberta (Attorney General) v. Westcoast Energy Inc.* (1997), 208 N.R. 154 at para. 16 (F.C.A.), [1997] F.C.J. No. 77, cited and adopted in *In The Matter an Application for a Reference by Chief Brian Francis on behalf of the Abegweit First Nation Band Council and Abegweit First Nation of questions or issues of the constitutional validity of the custom rules governing elections for the Chief and Council of the Abegweit First Nation Band*, 2016 FC 750 at para. 14.

On the other hand, on a motion to strike heard in 2014, the prothonotary would not rule out the possibility that section 18.3 was intended to confer a broader jurisdiction.[33] She held it to be arguable that an *advisory* body such as the Information Commissioner could ask the Court to determine "issues of law that arise in the course of the performance of their duties" and that the requirements of section 18.3 are met if the question referred was "susceptible of determining how the Commissioner is to conduct herself". [34] At the hearing on the merits, objections to jurisdiction were abandoned and the trial judge held that he was satisfied that the Information Commissioner was entitled to pose a question under s. 18.3.[35]

A motion to strike is a thin reed on which to base statutory interpretation, but perhaps *Information Commissioner* opens the door to a broader interpretation of section 18.3 of the *Federal Courts Act*.

The question for the Deputy Attorney General, therefore, is whether, in his opinion, the Court today would entertain an application by the Service for a reference under section 18.3 of "an issue of law that arises in the course of the performance of its duties" — such as that raised by the hypothetical case described above — that, if settled, would "determine how the [the Service] is to conduct itself".

(If available, a reference under section 18.3 would still require a sufficiently concrete evidentiary foundation before the Court would entertain an application.)

If the Deputy Attorney General answers that question in the affirmative, he would need to consider other related questions. The Service would want applications involving such sensitive matters to be heard by a designated judge, but they are defined as being judges of the Federal Court "designated … for the purposes of this Act", *viz:* the *CSIS Act*. Could a designated judge hear an application brought, not under the *CSIS Act*, but pursuant to section 18.3 of the *Federal Courts Act*?

Other Federal Court Rules

The Federal Court Rules provide other mechanisms for making preliminary determinations in order to simplify or expedite the resolution of pending matters. Thus, in a proper case, rules such as those governing the trial of an issue, preliminary questions of law, or summary judgment or trial may be invoked.[36]

The question for the Deputy Attorney General is whether these or similar rules require the existence of an underlying court proceeding, or whether any of these procedures would be available to resolve the sort of hypothetical question being considered here.

Conclusion

For all the reasons developed at length in the Segal Report and expanded upon here, it is of critical importance for CSIS and the LSU to develop and implement a comprehensive

[33] *Information Commissioner of Canada v. Canada (Attorney General),* 2014 FC 133, on a « manifestly ill-founded » threshold.
[34] *Information Commissioner*, para 29
[35] *Canada (Information Commissioner) v. Canada (Attorney General)*, 2015 FC 405 at para. 5.
[36] See Rules 107, 220, 213-219

and reliable system for identifying issues that need to be disclosed to the Court. I believe that the approach outlined in this chapter suggests a practical way of achieving this.

In most instances, one would expect that deciding whether the duty of candour applies or not will be straightforward. The obvious way to test any uncertainty in this regard is to put such issues before the Court by mean of a warrant application under section 21 of the *CSIS Act*.

Depending on the answers to the legal questions identified above, however, it may be that, in some rare cases, another vehicle may be required.

From a policy perspective, it is certainly desirable to envisage a mechanism that would allow the Court to give guidance to the Service and Justice on sensitive legal or constitutional issues related to the performance by CSIS of its official duties.

It may be that this issue is a worthy item for inclusion on an early agenda of the proposed Bench and Bar Committee. If the topic is too substantive for that forum, the Committee may nevertheless have suggestions as to where to address it.

Depending on the outcome of any possible discussions with the Court, consideration might also be given to a legislative solution to this question.

Consideration should also be given to the possibility of making practice rules pursuant to section 28 of the *CSIS Act* applicable to warrant hearings, and of amending section 28 itself if the current enabling provision does not allow for the desired regulations.

Bench and Bar Committee (Chap. IX)

Segal Report Analysis & Recommendations

Noting that there is currently no forum less formal than an *en banc* hearing where counsel and judges can discuss issues of common concern relating to the national security practice area, Mr. Segal recommends the creation of a "bench and bar" committee to fill this void. Membership would include "but not necessarily [be] limited to those who participate in CSIS warrant applications". The Committee's mandate would be to address process and practice issues of the kind that might be the subject a practice directive from the Court, but not contentious issues that arise on a particular application.

The author's expectation is that, through regular consultations, both the Court and the Service would gain greater awareness of practice issues of concern to the Court, the Service and *amici* alike. He believes it could improve the relationship of trust between counsel and the Court, and lead to better relations between counsel on different sides.

To ensure judicial independence and transparency, protections and safeguards would be required. In particular, there would need to be substantial participation of non-government lawyers from the private bar who have experience in national security matters.

Mr. Segal also recommends the production of a yearly report to the Court on practice issues that have arisen and the efforts made to address them. Not only would such a report help ensure that no issue is overlooked, but it would also help keep designated judges apprised of efforts made in response to inquiries from their colleagues with respect to matters not actually addressed in an *en banc* hearing.

Implementation

The LSU welcomes this proposal. It shares the view that such a forum would foster a dialogue that is impossible today, but which is essential if each stakeholder in the national security practice area is to become aware of the others' perspectives on important issues. Without awareness, it is difficult to build the trust, mutual respect and strong relationships that are needed among the key players who must cooperate in the administration of justice.

The Deputy Minister of Justice has written to the Chief Justice to propose that such a bench and bar committee be created. If the Court agrees, then the task is to establish the terms of reference. The LSU is ready to offer its suggestions with respect to membership, administrative and logistical matters, and any other issues that must be addressed before the committee can meet.

To start a reflection on possible membership, I propose that the bench and bar committee might comprise two designated judges, two lawyers from the LSU, one retired judge or other knowledgeable person such as a former member of SIRC who is legally trained, and one security-cleared member of the private bar knowledgeable about warrant issues.

The process by which the new committee is to be established must itself respect the independence and transparency of the judiciary. The critical step in this regard is to invite involvement by a suitable member of the private bar from the very outset.

The LSU also agrees that producing an annual report to the Court on practice issues is a helpful suggestion. Although related, this idea should not be confused with the proposal that the LSU report periodically on the status of its work in responding to concerns raised by the Court; see discussion at page 16 above.

In recommending the annual report, Mr. Segal was primarily focused on how accounting for the LSU's efforts over the year to address judicial concerns would increase transparency and foster mutual understanding. These are important considerations. But, the LSU also identifies practice issues from time to time that it would like to bring forward for the consideration of the Court. An annual report would also be an excellent vehicle for conveying the LSU's perspective on certain important practice issues.

As Mr. Segal writes, a written report is "not a full substitute for ongoing dialogue through a committee". It is greatly to be hoped that, as this practice takes root, the production of the annual report could be made to coincide with the annual meeting of the bench and bar committee so that the Court could discuss the report, or a draft of the report, with the LSU.

Expanded role for Independent Counsel (Chap. X)

Segal report analysis & recommendations

It is a missed opportunity, Mr. Segal says, to limit counsel of the National Security Group (NSG) to "facting" CSIS affidavits. Without giving up their vital role in scrutinizing factual assertions in the affidavit, NSG counsel have "a wealth of relevant experience" that they could apply to other aspects of warrant work. Recent problems have not come from factual inaccuracies but from CSIS's "failure to appreciate what the Court needs and wants to know, often at the operational and policy level". The Report therefore recommends expanding the NSG role to include the scrutiny of legal and policy issues arising from warrant applications. It also recommends that Independent Counsel (IC) be empowered to recommend to Senior General Counsel that a request for the appointment of an *amicus* be made to the Court. It concludes that the selection criteria for IC might need to change based on this expanded role.

Implementation

NSG counsel do have knowledge and experience in national security matters that could indeed be deployed productively in areas beyond their current mandate. In talking with NSG counsel, they feel themselves well placed to begin offering broader advice now on certain aspects of warrant applications. For example, they are knowledgeable about the powers requested by CSIS in these applications. They should therefore be provided with the draft warrants so that they can give advice in this regard. They can also help assess whether the information as presented contains sufficient details to inform the judge on the powers sought. I agree with NSG's assessment.

In other areas, they are more cautious, and I share that hesitancy. It is not entirely clear to me that, from their vantage point outside the Service, NSG would be well placed to flag emerging issues or operational concerns of the kind that have arisen in the recent past. They are not present in the section 21 courtroom to hear what the judges are saying or what issues are troubling them. Nor, does NSG have direct access to CSIS discussions on emerging operational or technological innovations, or on policy. Finally, I do not see great value at this point in empowering NSG to recommend the appointment of an *amicus*.

On the other hand, I could anticipate that, from their work in the national security area more broadly, NSG might have valuable insights into emerging legal issues that they could share with the LSU.

For these reasons, I would recommend that the LSU and NSG take these proposals one step at a time. NSG's mandate should be expanded immediately to include advising on warrant powers. If the IC can also spot emerging legal issues during this process, NSG should be encouraged to bring these forward, too. As the ICs' experience grows in this domain, NSG will no doubt see other opportunities where they can contribute.

In the meantime, I think the remaining parts of this proposal merit further study and consideration. The central thrust of this chapter of the Segal Report is to equip the IC to play a bigger role so that they can provide another check against failures in the CSIS

warrant process. Within the spirit of these recommendations, NSG and the LSU should meet to explore ways to achieve this goal.

The CSIS LSU Team (Chap. XI)

Segal report analysis and recommendations

Mr. Segal is very complimentary about what he sees as the highly skilled and dedicated counsel working in the LSU, a team, moreover, that he believes takes very seriously its national security responsibilities and which is very concerned about repairing its damaged relationship with the Court. Despite these strengths, the Report nevertheless identifies two main areas of potential concern facing the LSU. The first is the "insular context" in which the group operates, and the second has to do with the negative aspects of acting exclusively for "a powerful single client — and one with such a challenging and significant mandate".

The Segal Report finds that the LSU lawyers may have less day-to-day interaction with other lawyers, whether within Justice or in private practice, than most of their Justice colleagues. CSIS counsel have a reasonably diverse set of legal backgrounds, but tend to stay in the unit for relatively lengthy periods of time. The risk inherent in this situation is that counsel will have less exposure than is desirable to different ideas and fresh perspectives from elsewhere.

As for the second challenge, lawyers who act only for a single client are prone to "client capture". Mr. Segal reports that the Court has sometimes viewed the LSU as lacking sufficient distance from CSIS, despite the best efforts of counsel to carry out the Minister of Justice role with the expected objectivity.

Mr. Segal proposes certain measures to offset this perception. To make up for the isolation, he proposes more frequent secondments of LSU lawyers to other units in the DOJ or to the PPSC. Although the current mix among LSU lawyers is good, he encourages the managers to try to recruit more former prosecutors, and to get advice on novel points of law from outside experts more often than may now be the case. It could be useful, for example, to identify a short list of senior federal Crown counsel with experience in wiretap and national security matters to be available when needed.

The perception of client capture should be mitigated, in part, he believes with better responsiveness and transparency in respect of concerns raised by the Court.

Implementation

The cautions raised by Mr. Segal about the particular challenges faced by the LSU at CSIS are apposite. DOJ managers are well aware of the risks inherent in isolation and potential client capture, and have taken many of the measures recommended in the Report. They agree, however, that continuous effort and innovation are required to deal with these challenges and therefore remain open to these and other suggestions for how to deal with them.

Intellectual diversity

The LSU has tried, or is considering, a number of ways of enhancing counsel's exposure to new ideas and fresh perspectives. Some solutions are permanent or longer term; others are temporary or short term.

Recruitment

As the Segal Report notes, the LSU now enjoys a reasonably good mix of legal skills and experience among its counsel. The Senior General Counsel (SGC) has made, and continues to make, an effort to recruit people with varied backgrounds. Over several years, she has tried unsuccessfully to hire lawyers from the PPSC to join the LSU on an indeterminate basis. This year, she has brought in a retired former senior prosecutor from the PPSC on a casual contract[37] to boost the group's criminal law capacity.

Last year, the SGC brought in an experienced lawyer from the Human Rights Law Section (HRLS) of the Public Law Sector to strengthen the team's capacity in Charter and human rights law.

More broadly, the SGC has usually drawn candidates for employment in the LSU from litigation positions in the Department of Justice or from outside the Public Service, and from Departmental Legal Services Units in DOJ.

Secondments and Mentoring

The LSU recognizes the benefits to be derived from secondments and mentoring, and has made it a priority to encourage its counsel to take such opportunities when they present themselves. In any given year, there are always some LSU lawyers working in other offices. Last year, for example, four counsel were either on secondments or on an extended study leave.

Much shorter term mentoring agreements with outside partners can also be beneficial. Thus, the SGC is in discussions with the PPSC to organize a "shadowing" arrangement, in which LSU counsel would work with, or observe, a PPSC mentor in some phase of an organized crime file, for example. Shadowing for a day, or even just a few hours, at a time can be instructive.

Organizing secondments and mentoring opportunities, of course, is not entirely within the control of the LSU. There needs to be a willing partner at the other end to host the CSIS lawyer, and potential partners do not always have room to accommodate such arrangements. It is easier to organize a secondment with another sector of the DOJ than with the PPSC or a provincial ministry of the Attorney General, but even within DOJ spots are not always available. In some circumstances, it may be that help will be required from the Deputy Minister to facilitate the mobility necessary to ensure appropriate diversity within the LSU.

[37] Under section 50 of the *Public Service Employment Act*, the period of employment of a casual worker may not exceed 90 working days in one calendar year in any particular department or other organization.

Bringing outside counsel in

Another way to expose LSU counsel to fresh perspectives is to invite outside counsel to be part of a team litigating a CSIS warrant application. This has already happened more than once. The Chief General Counsel, for example, has led on at least three warrant matters recently. This presents a learning opportunity for LSU counsel, who get to work with and observe first-hand the skills and judgment of the government's top civil litigator.

In addition, the SGC would like to find a way to have other senior litigators from the Civil Litigation Branch with suitable experience act as co-counsel on selected warrant applications. At the same time, consideration might be given to allowing LSU counsel with appropriate experience to act from time to time as counsel or co-counsel on discrete matters in the Civil Litigation Branch, such as on an application for judicial review.

She would also be interested in exploring opportunities for counsel from the PPSC, or possibly from a provincial ministry of the Attorney General, spending time with the LSU team, to share their perspectives on wiretap and other related law and procedure, and to discuss the LSU's approach to CSIS warrants.

Consulting other experts

LSU counsel participate in a number of fora with outside experts. One of the senior counsel, for example, sits on the PPSC National Wiretap Expert Group. Other lawyers are members of various practice groups and work groups within Justice.

Mr. Segal recommends drawing up a list of senior PPSC prosecutors upon whom the LSU can call when help is needed. In fact, the SGC has always been able to go directly to the most senior levels of the PPSC for advice on matters concerning CSIS warrants.

The LSU lawyers also seek advice regularly from the Justice experts at HRLS on complex *Charter* and human rights law issues. When the need arises, they also deal with the experts in the Constitutional, Administrative and International Law Section of Public Law.

Isolation and capture

The LSU is very conscious of the perception, and of the potential reality, of client capture. They have a number of tools available to counter this challenge, including the following:

Responsiveness and transparency

As explained at some length above, starting at page 12, the LSU has laid the foundation for, what it expects will be, a robust ability and commitment to responding to judicial input, commentary and concerns.

Governance

A number of factors tend to isolate the LSU from the rest of the Department of Justice (geography, the secrecy of its work, the *sui generis* nature of the practice) but it is also bound by a web of governance mechanisms that operate powerfully to overcome that isolation.

The Senior General Counsel (SGC) reports hierarchically to the Assistant Deputy Minister (ADM) who heads the Public Safety, Defence and Immigration Portfolio. The ADM meets bilaterally with the SGC every three weeks and discusses substantive legal issues arising at the LSU. The ADM reviews LSU legal opinions on significant matters and, on occasion, brings in other senior lawyers with expertise in national security matters for their advice. When circumstances warrant, the ADM also confers with her colleague the ADM of Public Law to get her views on important *Charter* issues arising at CSIS.

The SGC also reports functionally to the Assistant Deputy Attorney General, Litigation (ADAG). He is responsible, *inter alia*, for all litigation conducted by or against the Crown and heads a network of litigation committees across the country that oversee all significant government litigation. The General Counsel, Litigation Operations is a member of the regional litigation committee, which reports in turn to the ADAG's national litigation committee. The LSU has recently taken steps to ensure that they can participate regularly at the regional committee.

Turnover of LSU counsel

As indicated in the Report, there is a balance to be struck between "experience and continuity on the one hand and fresh perspectives and diversity of experience on the other". It is always a judgment call to decide whether managers have found the sweet spot, or whether more movement of staff would be desirable. The goal is not to achieve turnover as an end in itself, but to ensure sufficient intellectual diversity.

It is true that some counsel tend to stay in the unit for a relatively long period of time, but the office also experiences a steady churn of employees. Over the last seven fiscal years, 33 lawyers joined the office (some on secondments), and 28 left indeterminately.

Training and Continuing Education (Chap. XII)

Segal report analysis and recommendations

The Report finds that the training materials used in the training of CSIS employees and counsel are comprehensive and of high quality, but that the training and continuing education are very insular. Mr. Segal believes that counsel and CSIS officers would benefit from exposure to experienced outsiders. Time spent with both prosecutors and non-government "defence-oriented" counsel would help give them the insights, broad perspectives and flexibility of mindset critical to identifying "the full contours of relevance in the *ex parte* context". While the CSIS warrant context is unique in some respects, the Report concludes that there is considerable overlap in the skills and knowledge required in both the criminal law and national security worlds, so that lessons learned training with prosecutors or police would be common and "portable" to the CSIS

realm. Mr. Segal also recommends including *amici* in this training, as well as the judiciary, if suitable ways can be found to avoid impairing judicial independence.

Implementation

These recommendations will all strengthen the high quality training already in place within the LSU. CSIS lawyers can clearly derive great benefit from more exchanges with members of the criminal law bar, both prosecution and defence, who have experience in wiretap cases. Such experts are not only a source of knowledge and skill but they also bring fresh eyes and new perspectives, an ability to challenge set ways of thinking and a new approach to problems that will inevitably add value. Intellectual diversity is crucial in any workplace that seeks to achieve excellence.

Warrant practice training, January 2017

The LSU has already begun acting on this set of recommendations. In mid-January, 2017, the LSU held a two-day training session related to its warrant practice, attended by some 45 to 50 people. This included all the LSU lawyers and paralegals, three very senior PPSC prosecutors with long experience in wiretap law, an RCMP sergeant, three Directors General from CSIS, the DOJ Chief General Counsel, and Mr. Segal. (A private sector counsel who has acted as *amicus* was able to attend briefly as an observer, and plans to participate more fully the next time such training is offered.)

Presenters included Mr. Segal, the Chief General Counsel, the PPSC prosecutors, the RCMP officer, and several LSU counsel and paralegals.

The presenters all had very relevant perspectives to contribute. Two of the Crowns, for example, had prosecuted anti-terrorism cases where, in the early stages of the criminal investigation, the RCMP had relied on information from CSIS obtained from section 21 warrants. The subsequent *Garofoli* applications to quash the CSIS warrants had given these counsel a first-hand look at CSIS affidavits and warrant practice. Likewise, the RCMP sergeant had had special training to act as an affiant in wiretap applications and years of experience in doing so.

The presentations covered a wide range of topics, from the latest developments, trends and challenges in wiretap law; to the duty of full, fair and frank disclosure; the legal implications of a variety of technological issues, and an assortment of subjects related to CSIS warrants, including substantive and practice issues following the latest *en banc* proceedings.

The final evaluations of the conference have not yet been completed but comments from attendees immediately after the event were uniformly very positive, although some would have liked more time to discuss the panel's scenarios on full, fair and frank disclosure. Counsel all recognize the benefits of this type of training, and are asking that the panel discussion / workshop format be repeated regularly.

In-house training

As valuable as the talks by these outsiders were — and the broadly held view of those in attendance was that they were of very high quality —certain significant differences remain between applications for a warrant under the *CSIS Act* and applications for a

search warrant or wiretap authorization under the *Criminal Code*. For example, the scope of relevance and test for materiality on a section 21 CSIS warrant dealing with threats to the security of Canada are broader than for a wiretap authorization in respect of a criminal offence under the *Code*.

As the Segal Report says:

> While these consultations [with senior prosecutors and police officers with experience under Part VI of the *Criminal Code*] yielded some valuable insights, it became increasingly clear to me that the *sui generis* nature of the national security context in general – and the CSIS warrant application process in particular – rendered external guidance of limited assistance.[38]

There will always be a need, therefore, for high quality in-house training for LSU counsel. The LSU already holds one-hour meetings of all counsel involved in warrant work about twice a month. The focus here is on day-to-day practice issues. The meetings provide an opportunity for a *tour de table*, where counsel have a chance to be brought up to date on recent practice and operational development affecting their files. One would not normally regard these meetings as "training" events, although they clearly include a learning component.

In addition, however, the LSU also holds *ad hoc* sessions, approximately monthly, that are often organized thematically. Attendance is voluntary for everyone in the office, but mandatory for lawyers. In these monthly meetings, counsel may, for example, debate a legal issue in greater depth than is possible in the short biweekly meetings, or try to reach consensus on an opinion, or sometimes hear a presentation on a new technology. This is a good practice and should be continued and built upon. It is important to set aside longer periods from time to time to work through issues that are too complex to deal with in the normal course of business.

Variously described in the literature as study groups, practice groups, communities of practice, peer learning sessions, and so on, meetings where professionals come together to share information and experiences and to learn from each other are widely recognized and accepted as a valid and important method of continuing education and training.[39] In a context where the LSU counsel are themselves the leading experts on much of CSIS warrant law and practice, there is no other avenue open for them to sharpen their skills and knowledge on many aspects of their practice. They should therefore ensure that they are aware of the best practices followed by groups that engage in this kind of training so that they can adopt the most effective methods.

Groups can take a wide spectrum of approaches to running such study groups, with varying degrees of formality or informality. Many resources are available to draw on in deciding which model would best fit the LSU's circumstances, including learning from colleagues elsewhere in Justice who already do extensive in-house training. The

[38] Segal Report, p. 8

[39] See, for example, "Learning from others at work: communities of practice and informal learning", Doub, Middleton (2003), Journal of Workplace Learning, Vol. 15 Iss: 5, pp.194 – 202; Lave & Wenger, *Situated Learning* (Cambridge University Press, 1991); Wenger, *Communities of Practice: Learning, Meaning, and Identity* (Cambridge University Press, 1999)

Continuing Legal Education Program in the Legal Practices Sector can also offer advice and support.

A key condition of any successful learning program is to establish the learning objective or desired outcome before the training begins. In general terms, what do DOJ lawyers need to know to be able to perform their duties effectively and professionally in respect of CSIS warrants? More particularly, what do they need to know to do their job well in the next 12 months? Having a clear understanding of what the team needs to know, the LSU can then map out specific learning objectives for the group, and determine where to get the best training, whether from their own or outside experts, or from a mix of the two.

One of the big Portfolios in the DOJ starts planning for its in-house training by setting learning objectives, consulting widely before doing so. They ensure alignment with government and client priorities, and then block out a yearly calendar of training events, held about once a month, excluding the summer. Many topics are set in advance, but they ensure sufficient flexibility in the plan to accommodate important issues that arise during the year. They almost always invite clients and outside experts to attend. They also follow up after every training event with an evaluation, typically a short four-question survey, to monitor if they are making progress towards the learning objectives.

While the resources of a big Portfolio likely exceed the capacity of what it is feasible for the LSU to undertake, this approach is scalable and could be adapted to suit the smaller LSU. One important lesson to take from this example would be for the LSU to include, whenever feasible, participation in its in-house training of colleagues from the PPSC, NSG, CSE, Public Safety and GAC, and of the Service and possibly of *amici*. In addition to the training, participants from this broader community of national security practitioners would also have an opportunity to meet, network and build relationships.

An effort should be made to establish, if possible, a reciprocal arrangement between DOJ and PPSC about training. The LSU plans to invite PPSC counsel to participate in its training. In return, it would like its lawyers to get more exposure to criminal prosecution work. It would also like even more access to some of the activities already made available, such as, for example, the PPSC's renowned School for Prosecutors.

The LSU has begun laying the foundation for a renewed learning program, by drafting a competency profile for the LSU counsel. The profile attempts to define the knowledge, skills and values expected of every lawyer engaged in CSIS warrant work, and is the starting point for systematic training. Some priority should be given to completing this work.

In my view, the LSU should schedule another workshop on the duty of candour at an early date. The panel discussion at the January conference was an excellent beginning, but there is an appetite for a longer, deeper analysis of the issues than was possible on that occasion. At least a half day should be set aside, and the LSU should include CSIS affiants and one or more *amici* among other invitees.

I also believe that the LSU's learning plan should include a module on the role of the Attorney General. Mr. Segal has a good discussion in Chapter IV of his Report of the unique responsibilities of the Attorney General in our constitutional framework. In the

very particular context of the LSU practice, getting the balance right of the AG's different AG roles (involving the public interest, a duty to the client minister, and the duty owed to the court) is unusually nuanced. A periodic refresher for counsel is therefore important, and it is absolutely essential for any new counsel joining this office.

Conclusion

The Department of Justice and the Service have both acknowledged the urgent need to address serious concerns raised by the Court relating to the CSIS warrant process, and both have committed to taking all the steps necessary to redress these problems.

In his insightful Report, Mr. Segal identifies many issues that need particular attention. His many observations and recommendations lay out a roadmap for making achievable improvements

The purpose of this report is to help Justice counsel acting in CSIS warrant applications to implement these ideas. It is my hope that, working with input from LSU counsel and CSIS, what I have proposed offers practical and effective ways to carry out Mr. Segal's suggestions.

I am convinced that all Justice counsel and all CSIS officials engaged in the CSIS warrant process want this reform effort to succeed, and that they will continue to build on the ideas and approaches that have been discussed here in the years to come. I am optimistic that they will be able to carry this through successfully.