REVIEW OF CSIS WARRANT PRACTICE

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I. The current circumstances

On November 3, 2016, Justice Simon Noël – the senior Designated Judge for national security matters on the Federal Court – released the public version of his Judgment and Reasons in a case arising from a CSIS warrant application.[2] As part of his Judgment, Justice Noël declared that:

> The CSIS has breached, again, the duty of candour it owes to the Court.

This was a remarkable finding which has no doubt given many people pause. As surprising as it may have been to many, however, it did not come out of the blue.

As suggested by Justice Noël's use of the word "again," this declaration has a significant and concerning back story. Indeed, by the time Justice Noël's judgment was released, first in Top Secret and then in public form, I had already been retained to assist the Department of Justice in identifying ways to ameliorate the shortcomings in its *ex parte* practice before the Federal Court. Those shortcomings had been pointed out by other judges in previous cases, stretching back several years. Justice Noël's disquieting conclusion was no doubt a wake-up call. To the credit of the Department of Justice and the Service, however, the gist of his message had already been received. Work was already underway on how to ensure that the failings identified by Justice Noël would not be repeated.

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[2] The public reasons are indexed as 2016 FC 1105. For ease of reference, I will refer to it as the Associated Data case.

Earlier in 2016, following the release of the Annual Report of the Security Intelligence Review Committee, the Chief Justice of the Federal Court had expressed a more general concern about CSIS's transparency with the Court and its general approach to the duty of candour.

How did we get to here?

Although it has sometimes been beset by challenges, the relationship between CSIS[3] and the Federal Court is a critical one for Canada's national security and civil liberties. Section 21 of the *Canadian Security Intelligence Service Act* empowers the Court to authorize, via warrant, a range of intrusive investigative techniques against people believed to constitute a threat to Canada's national security.[4] Several dozen times a year, the Service comes before designated judges[5] of the Court *ex parte*, seeking a warrant pursuant to s. 21. Once granted, those warrants allow CSIS to undertake intrusive investigative measures to gain intelligence on threats to Canada's national security and, in turn, assist in preventing those threats from materializing. Warrants can last for up to 12 months. Renewals, which require a full re-application, are not uncommon.

It has been said that judicial warrants are the Service's lifeblood. Only the designated judges of the Federal Court can issue them. And CSIS cannot carry out its intelligence-gathering mandate without them. Given the extreme sensitivity of the information involved, applications for warrants are heard *ex parte* and *in camera*,[6] thereby placing a profound responsibility on counsel acting for CSIS to inform the Court about anything and everything it needs in order to carry out its task. This responsibility is sometimes referred to as the duty of full, frank, and fair disclosure

[3] The Canadian Security Intelligence Service will be referred to interchangeably as "CSIS" and "the Service."
[4] It also authorizes warrants to be issued in order to allow CSIS "to perform its duties and functions under section 16," which relates to the defence of Canada and the conduct of international affairs. Warrants pertaining to threats to national security are more numerous and are the focus on my consideration here.
[5] "Designated judges" are judges of the Federal Court designated by the Chief Justice under the authority of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 (and other acts of Parliament dealing with national security) to preside over national security-related matters. Currently, the roster of designated judges numbers 14.
[6] *Canadian Security Intelligence Service Act*, s. 27

or the duty of utmost good faith. In the national security context, however, it has most often been referred to as the "duty of candour" and I adopt that terminology here.

Unlike warrants or orders issued in the course of criminal investigations, CSIS warrants never lead directly to a criminal prosecution. They do not result in disclosure to the accused. In the vast majority of cases, there is never any *ex post facto* adversarial litigation over their propriety or legality. Indeed, even though a CSIS warrant can authorize profound intrusions into a person's privacy, the target is never notified that he or she was ever a target.[7] The adversarial challenge mechanism that elsewhere helps keep state power in check is generally absent. In a very real sense, the *Court itself* is the final check on the exercise of that power in the vast majority of cases. All of this makes the CSIS warrant process *sui generis*. Importantly for our purposes, it places a 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.

CSIS has made mistakes in the past. Most famously, in 1987, CSIS' first director resigned in the wake of the court's finding that the Service had tendered a materially misleading affidavit. Periodically, the Service and the Department have commissioned studies or reports inquiring into how to improve their internal process in order to ensure that the final product – the warrant application – is as reliable as possible.[8]

More recently, the Court has found that CSIS has failed to live up to its duty of candour in a number of instances. Most significant, in my view, is Justice Mosley's judgment in *Re X*, 2013 FC 1275. The facts and circumstances of that case are complicated, but the Court's conclusion is not. Put simply, Mosley J. held that CSIS had breached its duty of candour in 2009 by "strategically omit[ting]" mention of the fact that it intended to seek the assistance of foreign partners in execution of the warrants.[9] Justice Mosley characterized the Attorney General's position as

[7] Contrast this with the *Criminal Code*'s detailed requirements for notifying people whose private communications were intercepted (s. 196) and returning or detaining things seized pursuant to a search warrant (s. 490).
[8] I have reviewed, and have been greatly assisted by, the reports prepared by Michael W. Duffy (2005), the Hon. George Addy (1992), and the team led by the Hon. Gordon F. Osbaldeston (1987).
[9] *Re X*, 2013 FC 1275, at para. 90

"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."[10]

The Attorney General appealed Justice Mosley's findings to the Federal Court of Appeal, maintaining that the withheld information was irrelevant to the statutory test for granting a warrant and therefore not subject to the disclosure duty. That court dismissed the appeal, affirming Mosley J.'s conclusion that the duty of candour compelled CSIS to disclose its intention to seek second-party assistance. The Attorney General sought leave to appeal to the Supreme Court of Canada. Leave to appeal was granted, but the Attorney General decided to abandon the appeal.[11] The result was that Mosley J.'s decision stood. CSIS' breach of the duty of candour was confirmed.

Importantly, the breach identified by Mosley J. only came to light because the issue of assistance by foreign powers was commented upon in the 2012-2013 Annual Report of the Commissioner of the Communications Security Establishment ("CSE").[12] It was this Report which caused Mosley J. to order the re-attendance of counsel to explain if and how the Commissioner's comments related to warrants issued pursuant to Mosley J.'s 2009 decision. The Court was understandably concerned that the Attorney General had itself not seen fit to bring the issue to its attention.

Likewise, the hearing that precipitated Noël J.'s recent finding of a breach of the duty of candour in the *Associated Data* case also arose from the report of an oversight body rather than CSIS' own explicit disclosure to the court. Specifically, it was only with the publication of the 2014-2015 Annual Report of the Security Intelligence Review Committee ("SIRC") that the Federal Court became aware that the Service was indefinitely retaining third-party associated data

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[10] *Re X*, *supra*, at para. 89

[11] It should be noted that the extraterritoriality issue that underlay the litigation was resolved by the enactment in 2015 of s. 12(2), which now provides: "For greater certainty, the Service may perform its duties and functions under subsection (1) within or outside Canada."

[12] The Communications Security Establishment ("CSE") is Canada's national cryptologic agency. It responsible, among other things, for acquiring and using information from the global information infrastructure for the purpose of providing foreign intelligence to the Government of Canada. The Commissioner's role is to provide independent external review of CSE activities to determine whether they comply with the laws of Canada. He reports to Parliament annually on his findings.

collected in the execution of warrants.[13] Subsequently, there was an *en banc* hearing of the designated judges at which certain proposed amendments to the warrant conditions templates and the collection and retention program were discussed.[14] Justice Noël's judgment finding another breach of the duty of candour on the part of CSIS was the eventual result.

There have been other incidents in the recent past in which the Court has learned about legal issues with their warrants from judicial proceedings in or decisions of other courts. In two instances that I examined, CSIS investigations indirectly resulted in criminal prosecutions. In both cases, the legal validity of the original CSIS warrant was litigated at trial, and in both instances justices of the Ontario Superior Court of Justice made adverse findings in respect of the affidavits used to obtain the warrants.

In other cases, the Court has expressed concern about the Service's failure to respond in a timely manner to issues raised by members of the Court on warrant applications. An impression appears to have been left that CSIS is insufficiently responsive to the Court.

This is by no means an exhaustive catalogue of the sources of the Court's dissatisfaction with CSIS. Nonetheless, it gives a flavor of the scope and seriousness of the problem. Put simply, the Court's trust in CSIS and counsel acting for it has been eroded. That would be a serious situation for *any* litigant to find itself in. But CSIS is no ordinary litigant. As Canada's domestic intelligence agency, CSIS is an indispensable part of Canada's national security apparatus and

[13] SIRC is the independent external review body responsible for reporting to Parliament on the operations of CSIS.

[14] Occasionally, the Court will convene *en banc* hearings of most or all of the designated judges in order to canvass important issues that have arisen (or are expected to arise) in multiple warrant applications. Although each designated judge retains absolute independence to decide individual applications as he or she sees fit, this *en banc* process is a useful way to avoid duplication in the presentation of evidence common to more than one warrant application and allows the designated judges to have the benefit of each other's perspectives. Some *en banc* hearings have arisen out of specific warrant applications while others have been geared toward allowing a more general exchange between the Court and Service on issues of concern to the Court. In most of these instances, the Court has appointed *amicus curiae* to participate in order to ensure the appearance and reality of a proper adversarial balance. Finally, there have also been *en banc* sessions to provide information to the Court on new technologies. In these instances, respected retired judges of a different court have been retained to review the material in advance and be present at the hearing in order to ensure that the Court's independence is in no way compromised.

warrants issued by the Federal Court are crucial to its ability to carry out its mandate. For its part, the Court bears the heavy burden of safeguarding the interests of both national security and civil liberties in challenging circumstances that necessarily lack the accustomed public transparency and adversarial balance. The Court needs to be able to trust the representations made to it by counsel acting on behalf of CSIS. It needs to be able to carry out its work secure in the knowledge that it has before it all the facts, law, and issues relevant to the crafting and issuance of s. 21 warrants. To carry out its own crucial work, CSIS needs to be able to consistently deliver this level of trust.

To be sure, *amicus curiae*, where appointed, perform a crucial function in providing balance and giving the Court a degree of comfort that it is hearing all sides of a particular issue or dispute. But *amicus* are not (and likely cannot be, in practical terms) involved in every warrant application. The possible appointment of *amicus* in certain cases in no way alleviates the necessity of CSIS earning and maintaining the Court's trust.

It seems clear to me that the Court's trust in CSIS has been strained by recent events. No doubt, a series of judicial criticisms about the conduct of CSIS on warrant applications could lead to a suspicion of some kind of bad faith on the part of CSIS and its counsel. However, as I will explain, my consultations with counsel and others involved in the process have shown them to be a dedicated group of professionals who take their responsibilities extremely seriously. I am convinced that CSIS and the Department of Justice are determined to do whatever is necessary to repair the necessary trust relationship with the Court. This means moving forward in a way that learns from past mistakes and incorporates practices and processes that can help insure against their repetition. In what follows, I offer my own analysis and recommendations intended to assist in this important work.

II. My mandate

When I was retained by the Department of Justice in July 2016, I was principally tasked with providing advices on "best practices" in *ex parte* matters, drawing on my own experience in the world of criminal investigations and prosecutions, and an anticipated survey of senior Crown counsel and police officers across Canada. The object was to give the Justice counsel working on

CSIS warrant applications fresh and authoritative insights on how to meet their obligations in *ex parte* proceedings.

Among other things, I was asked to:

- provide legal and practical advice regarding the legal duties of counsel and affiants/witnesses on *ex parte* and *in camera* hearings, including a review of best practices in other jurisdictions;
- assist with a draft policy on the legal duty of candour in *ex parte* and *in camera* proceedings that will govern the conduct of counsel and CSIS employees; and
- provide advice on management processes to facilitate meeting the legal standards on *ex parte / in camera* matters

My initial work involved getting up to speed on the recent developments that have precipitated this review, including the Federal Court and Federal Court of Appeal decisions in the *Re X* case and the *en banc* hearings before the Designated Judges of the Federal Court earlier this year. I obtained "Secret" level security clearance for this purpose. However, because a large portion of the materials in question are classified as "Top Secret", I was restricted to reviewing redacted, public versions of the relevant judgments, court filings, and transcripts. I return to the issue of security clearance below.

In August 2016 I travelled to Ottawa and met with a number of stakeholders. These included: the Senior General Counsel of the CSIS Legal Support Unit ("CSIS LSU"); CSIS employees involved in the warrant process; Justice counsel who have filled the role of Independent Counsel in the CSIS warrant application process; senior counsel at the Public Prosecution Service of Canada ("PPSC") with experience in national security work; and counsel at the Competition Bureau, which also conducts a steady stream of *ex parte* hearings before the Federal Court and was thought to be a potentially useful source of guidance for that reason. My objective was to gain an understanding of the context in which CSIS LSU lawyers work in order that I could provide contextually appropriate advice in respect of satisfying the duty of candour.

At the same time, in August, I was carrying out my cross-country survey of senior prosecutors and police officers on "best practices" for *ex parte* proceedings. These consultations

included in-person meetings in Ottawa and Toronto and phone discussions with individuals located elsewhere in Canada. All of the people I consulted have extensive experience handling sensitive *ex parte* applications in the criminal sphere – predominantly, applications to intercept private communications under Part VI of the *Criminal Code*.

While these consultations 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. I realized that I could not offer meaningful, targeted advice without a detailed grasp of the specific processes and subject matter with which CSIS LSU counsel work day in and day out. In particular, I became convinced that I could not gain an adequate understanding of the context in which CSIS LSU counsel operate – and therefore could not provide useful and practical advice – if I did not have Top Secret clearance. Without that clearance I could not read unredacted versions of the Federal Court decisions explaining the judiciary's concerns with CSIS's conduct; I could not speak freely with counsel and other participants about the sources and implications of the current difficulties; and I could not achieve a truly informed grasp of the process itself so as to be in a position to recommend meaningful changes. Given the gravity of the situation, the Department and CSIS do not need a list of bromides divorced from the factual context in which the problems have arisen. They need well-informed suggestions on how to do better.

To its credit, the Department of Justice was understanding of this position. They readily agreed to facilitate the necessary security clearance for myself and my colleague on an expedited basis. As a result, by October I was able to resume my work, now with full access to the Top Secret materials which form the substance and backdrop of the recent challenges.

When I made a second trip to Ottawa in mid-October, I was given wide-ranging access to relevant documents at CSIS headquarters. I was given ready access to key personnel, including counsel who act on warrant applications and a senior executive of the Service.

I also conducted a further round of meetings with other participants in the process. The Chief Justice of the Federal Court and two of his colleagues among the designated judges agreed to meet with me so that I could learn more about their perspectives and concerns. I met with two senior counsel from the private bar who have often acted pursuant to court appointments as *amicus*

curiae on national security matters, including CSIS warrant-related cases. I also met with past and present senior members of the Department of Justice with responsibility for national security law. All of these consultations were extremely helpful to me in coming to understand the nature of the current difficulties and the unique challenges of this work.

I have since followed up with visits to CSIS' secure facility in Toronto to conduct additional consultations and review additional documents. Everything I have asked to see, and everyone I have asked to meet, have been forthcoming. I am satisfied that I have gained a sufficiently detailed understanding of the CSIS warrant process to offer meaningful suggestions for how it can be improved.

III. CSIS warrants: a brief overview

CSIS is Canada's domestic intelligence agency. It investigates people and entities believed to pose threats to Canada's national security and furnishes the resulting information to the Government of Canada. The Service's core mandate is set out in s. 12 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23:

> The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.

Like any government body, CSIS operates within the rule of law. For that reason, it needs judicial authorization to undertake intrusive measures that would otherwise be illegal. Section 21 of the Act provides the framework under which warrant applications are made and adjudicated.

The Minister of Public Safety and Emergency Preparedness (the "Minister") must approve every warrant application. Pursuant to s. 21(2), each application must be supported by a detailed affidavit intended to establish reasonable grounds to believe that a warrant is necessary to

investigate a threat to the security of Canada.[15] The affidavit also must explain why other investigative procedures are unsatisfactory and must specify a range of information about the intrusive technique proposed and the anticipated target(s). Once issued, a warrant can be in effect for up to a year. It is not uncommon for successive applications to be brought, such that a particular target remains subject to a warrant for years at a time.

Internally, the team responsible for shepherding a warrant application from inception to the Federal Court consists of an affiant, an analyst, and legal counsel from the Department of Justice who comprise the CSIS LSU.[16] Both the affiant and analyst are CSIS intelligence officers. In general terms, the analyst is responsible for marshaling the entirety of the case file and will work with the affiant to distill the relevant portions of the file into narrative form. Throughout, the affiant retains responsibility for the affidavit and for "facting" the assertions to be relied on in the affidavit. Both the affiant and analyst would have been involved in the direction of the investigation prior to the decision to seek a warrant having been made.

The drafting process itself is a collaborative effort involving all three members of the warrant team. Of necessity, affidavits presented in support of warrant applications tend to be lengthy, because they need to give the court a sufficiently detailed understanding of the nature and background of the particular threat, the course of the investigation to date, and the purpose for which the intrusive powers are being sought. I understand that the drafting process is intensive and each affidavit typically goes through many drafts.

The internal approval process is extensive. Indeed, it has sometimes been described as byzantine, not entirely without justification. I will not review every procedural stage except to note that the entire process from the decision to seek a warrant until it is ready to go to court may go

[15] A warrant can also be sought if it is necessary for CSIS to perform its duties and functions under s. 16, which empowers CSIS to assist in the defence of Canada or conduct of international affairs by collecting intelligence on the capabilities, intentions, or activities of foreign states and foreign nationals. Because the large majority of CSIS warrant applications concern the Service's s. 12 mandate, my focus here is on those warrants.

[16] CSIS LSU consists of about 25 counsel and is led by a Senior General Counsel who reports to an Assistant Deputy Minister. The role of the group is unusual among Department of Justice divisions in that it provides both advisory and litigation services in-house to its client, CSIS. There are good practical reasons for this. However, it also presents certain challenges, which I discuss below.

from a very short timeline in true emergency situation to one that would take a number of weeks in more normal circumstances. Two stages within this process merit particular mention for my purposes.

Once the warrant is in a state the warrant team considers to be final, it is reviewed by an Independent Counsel ("IC") for factual accuracy. Instituted in the wake of the *Atwal* affair,[17] this is designed to constitute an independent challenge function, ensuring as far as possible that factual mistakes do not make their way into the materials submitted to the Court. IC are drawn from the ranks of the Department's National Security Group. They are separate, and in an independent reporting line, from CSIS LSU counsel. When the materials are ready for their review, the IC attends at CSIS headquarters and is provided with the affidavit and the "facting" documents. IC sits down with the warrant team and goes through the affidavit paragraph by paragraph, checking the factual assertions made against the source documents. Their role emphasizes challenging any assertion that appears inadequately supported, potentially misleading, or otherwise problematic. Notably, IC is *not* provided with a copy of the draft warrant itself. IC's function is very much confined to the facts; the challenge function does not extend to any *legal* issues that could be raised by the application. I return to this issue below.

The other stage of the internal approval process I wish to call attention to is approval by an interdepartmental committee of senior officials. This high-level committee meets to review each application before it goes to the Minister. It is a multi-disciplinary body acting independently of the operational branches of the Service, and includes representatives from Justice and Public Safety. Everyone on the committee reads the application materials and has the opportunity to ask questions of the affiant and the responsible counsel. The Director makes the decision on whether to proceed. If the decision is to proceed, the Deputy Minister is consulted and the Minister's

[17] In *Atwal v. Canada*, [1987] F.C.J. No. 901 (T.D.), "extensive and serious errors" were belatedly discovered by the Service and acknowledged as such to the Court. The Attorney General conceded that, but for those errors, the warrant could not have issued. As mentioned above, this episode led to the resignation of the Service's first Director. I understand that the role of Independent Counsel was created in the wake of *Atwal* as part of the effort to ensure that such mistakes were not repeated.

approval is sought. Both are statutory requirements of the Act.[18] If approval is granted, the application is brought before the Court. That is where the duty of candour comes into play.

Prior to the warrant application hearing, an application package is submitted to the court.[19] At the hearing, CSIS is represented by CSIS LSU counsel. Typically, the presiding judge asks questions of the affiant under oath. Questions are also very often directed at counsel in order, among other things, to clarify the rationale for the powers sought or the conditions proposed. On occasion, where a particular application raises new or recurring issues, an *en banc* hearing of the designated judges may be held in order to streamline the process.[20] Understandably, even an ordinary hearing tends to be an intensive process given the sensitivity and complexity of the subject matter and the high stakes involved.

IV. The duty of candour

The "duty of candour" applicable in *ex parte* proceedings is something of a misnomer because counsel in *all* proceedings, as officers of the court, are obliged to be candid in their submissions to the court in the sense of being accurate in stating the facts and the law. But as used in the *ex parte* context, the duty of candour means much more than the simple avoidance of untruth. Rather, the duty arises as a result of the extraordinary, exceptional nature of *ex parte* proceedings in our adversarial system. The system is predicated upon the belief that a full and fair airing of both sides of a dispute will enable a neutral arbiter to reach a just and accurate result. Sometimes the circumstances require a one-sided hearing, and when that happens the party availing

[18] Section 7(2) stipulates: "The Director or any employee who is designated by the Minister for the purpose of applying for a warrant under section 21, 21.1 or 23 shall consult the Deputy Minister before applying for the warrant or the renewal of the warrant." Further, pursuant to s. 21(1) of the Act, a warrant application can only be brought once the Service has obtained the Minister's approval.

[19] Although most applications are brought with significant advance notice to the Court, a designated judge is on duty 24 hours a day, 7 days a week, in order to deal with any urgent applications that may arise. The identity of the duty judge is not disclosed in advance, in order to avoid any possible perception of judge-shopping. See: Justice Anne Mactavish, "National Security, Human Rights and the Federal Court" (speech delivered before the International Commission of Jurists in Ottawa, on February 4, 2013), available at: http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Speeches/speech-discours-4feb2013

[20] 2016 FC 1105, at para. 2

themselves of this exceptional opportunity has a heavy burden to ensure that the opportunity is not abused. Counsel's normal adversarial zeal has no place in a hearing where the normal counterbalance is lacking. Rather, counsel must ensure that *both* sides of the dispute are put before the court, so far as is reasonably possible, even though only one side is actually present.

The definitive statement of counsel's duties comes from *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, where Justice Arbour stated for the Court:

> In all cases where a party is before the court on an *ex parte* basis, the party is under a duty of utmost good faith in the representations that it makes to the court. The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld: *Royal Bank*, *supra*, at para. 11. Virtually all codes of professional conduct impose such an ethical obligation on lawyers. See for example the *Alberta Code of Professional Conduct*, c. 10, r. 8.

The Court re-affirmed this formulation of the duty in *Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 S.C.R. 33, 2014 SCC 37, at para. 101, *per* McLachlin C.J.

Importantly, the duty is not exhausted by the mere inclusion of all relevant information. The presentation of the information must be fair as well. This means that an affidavit must be written and structured so as to ensure that adverse information has appropriate prominence. It cannot be "buried" in the footnotes or lost in a sea of extraneous detail. "Fair" is just as important as "full" and is not synonymous with it.

Likewise, transparency in distinguishing between facts and inferences is a key element of candour. There is an elementary but crucial difference between the fact that a car belonging to person "A" was at place "B" on a given day and the inference that person "A" was at place "B" on that date. The difference needs to be clearly and consistently reflected in the drafting of the affidavit if the duty of candour is to be fulfilled.

In the everyday world of litigation, an *ex parte* hearing – say, for an emergency injunction – is followed closely by full disclosure to the other side and an opportunity for opposing party to challenge the court's order. While this is no way relieves counsel of their duty to make full, fair, and frank disclosure, the prospect of review and challenge by the opposite party – together with

the threat of serious costs sanctions or damages if such challenge is successful – no doubt gives the issuing court a certain degree of comfort in relying on the representations of the applicant's counsel.

In this respect too, CSIS warrant proceedings are different. Not only is the target of the proposed order not represented at the hearing or notified of its existence; in the normal course, the target is *never* notified of the hearing of the warrant and never given the opportunity to contest its validity. This is by no means a criticism: it could hardly be otherwise. But in order to assess the contours of the duty of candour in this context, the truly exceptional nature of the proceedings must be firmly grasped. In no other context is counsel's compliance with the duty of candour more critical to the upholding of the rule of law. That is a weighty responsibility.

Finally, the special role and responsibilities of Crown counsel need to inform how the duty of candour is calibrated in this context. It cannot be forgotten that where counsel representing CSIS comes before the Federal Court seeking a warrant, he or she is representing the Attorney General and the Government of Canada. Special duties attach to the Crown that do not burden other parties. As the Supreme Court has stated:[21]

> The Attorney General is not an ordinary party. This special character manifests itself in the role of Crown attorneys, who, as agents of the Attorney General, have broader responsibilities to the court and to the accused, as local ministers of justice (see *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24, *per* Rand J.; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at pp. 191-92, *per* Lamer J.).

The Attorney General has unique, overriding obligations to the administration of justice that are deeply rooted in our constitutional traditions.[22] The Federal Court of Appeal has neatly

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[21] *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] 3 S.C.R. 3, 2013 SCC 43, at para. 37, *per* Karakatsanis J.

[22] While rooted in a different tradition, the American Bar Association's *Criminal Justice Standards for the Prosecutorial Function* (4th ed.) share some important common features with the duty I am describing here. See, in particular, Standard 3-1.4, "The Prosecutor's Heightened Duty of Candor," which provides, in part: "In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations. […] The prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a

captured this idea in speaking of the "traditional constitutional role of attorneys general as guardians of the public interest in the administration of justice."[23] The Court also confirmed that attorneys general are "constitutionally obliged to exercise their discretionary authority in good faith, objectively, independently, and in the public interest."[24]

In my view, these characterizations are by no means limited in their application to criminal prosecutions. Counsel acting for CSIS on warrant applications must fulfill the role of "minister of justice" in the truest sense of the term. This reality only further accentuates the heavy burden on counsel appearing *ex parte* on these warrant applications.

While no one disputes the basic ingredients of the duty of candour, it is apparent from the recent difficulties that CSIS has not always appreciated what it entails in practice. In my view, the *Re X* case is exemplary in many respects of the difficulty that has arisen. As alluded to above, the breach identified by Justice Mosley involved the failure of CSIS to disclose that it would be seeking assistance from foreign partners in intercepting the communications of individuals subject to a warrant. The issue was of particular significance because the original 2009 application before Justice Mosley engaged a novel legal issue about the ability of the Court to grant a warrant in respect of Canadians conducing threat-related activities abroad. In his evidence before Justice Mosley, the witness on behalf of CSIS indicated that the targeted communications would be intercepted by Canadian government equipment, and no reference was made to seeking assistance from foreign allies. Justice Mosley rejected the AG's position that the prospect of seeking such assistance was legally and factually irrelevant to the issuance of the warrant. He stated:

> …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

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court, lawyer, witness, or third party […] In addition, while seeking to accommodate legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder." Available at www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html .

[23] *Cosgrove v. Canadian Judicial Council*, [2007] 4 F.C.R. 714, 2007 FCA 103, at para. 51, *per* Sharlow J.A.

[24] *Ibid.*

> 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**. In the circumstances under consideration that would include matters relating to the prior history of attempts to have the Court authorize the collection of security intelligence abroad and the potential implications of sharing information about Canadian persons with foreign security and intelligence agencies.

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.[25] 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.

Using *Re X* as an example, whether or not the question of second-party assistance needed to be addressed as part of the "other investigative procedures" criterion in s. 21(2)(b) is an interesting legal question that can be and has been debated. 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. I return to this question below in formulating my recommendations for ensuring compliance with the duty of candour going forward.

No doubt, this is not always an easy exercise. CSIS counsel and affiants face challenges that do not have precise analogies in, for instance, the world of criminal investigations. The Service, understandably, operates on the "need to know" principle. While both counsel and affiants are taught that "need to know" has no application in the warrant context where it is supplanted by the duty of candour, the necessarily secretive world of CSIS operations poses special challenges for

[25] *Re X*, 2014 FCA 249, at para. 61

counsel needing to put the "whole story" before the Court. In everything I have reviewed and in all the consultations I have conducted, I have detected absolutely no indication of "bad faith" or willful disregard of the duty of candour or the Attorney General's special obligations. To the contrary, as already indicated, I am confident that counsel genuinely want to get this right. My recommendations, below, are intended to provide some guidance on how that might be accomplished.

V. Cross-jurisdictional survey of best practices

As recounted above, I was tasked with surveying "best practices" regarding *ex parte* and *in camera* proceedings in the non-national security world. To that end, I conferred with over a dozen senior prosecutors from across Canada, all of whom have significant experience with *ex parte* applications. Most of them are, or have been, Crown wiretap agents. I also spoke with a number of senior police officers with experience in the drafting and presentation of ITOs for wiretaps and other sensitive applications.

In each case, I provided the interviewee a brief summary of my mandate in advance so that they would have time to gather their thoughts in advance of our consultation and provide me with considered input. Although I did not specifically request it, I was pleased to learn that a number of my interview subjects had taken the time to consult with their own colleagues to supplement and refine the information and advice they provided to me.

While specific practices differ widely across jurisdictions and contexts, a number of common themes emerged.

At the outset I would observe that for prosecutors and police officers alike, the looming prospect of an adversarial challenge to their work was a powerful motivator to get it right the first time. All were conscious of the reality that, if things went well and charges were laid, their work in preparing and executing the judicial order would be exactingly scrutinized by defence counsel then ruled upon by a neutral arbiter having had the benefit of conflicting submissions from the prosecution and defence. Unsurprisingly, this prospect of *post facto* review provides a constant impetus to do things properly and not cut corners. In this way, the prospect of *inter partes*

proceedings reinforces the importance of complying with the special duties imposed by the *ex parte* context. To put it plainly, prosecutors and police are instilled with the healthy sense of someone looking over their shoulder – if not now, then soon.

That impetus is lacking in the CSIS warrant context. The possibility that a particular warrant will be reviewed by SIRC or end up down the road in litigation is substantially more remote than, say, the likelihood that a criminal wiretap authorization will be challenged in a "*Garofoli*" hearing.[26] This likely absence of review does not mean that CSIS LSU counsel seeking warrants will be consciously motivated to cut corners or shirk their responsibilities. In my consultation with CSIS LSU counsel, as I will detail below, I found the opposite to the case. But it does mean that an important check is usually missing and needs to be compensated for in other ways.

From my survey, the following themes may provide some guidance on what those "other ways" might look like.

The affiant should be experienced, authoritative, and independent

No single theme emerged more often than the importance of a high-quality affiant in producing an application package that will be of optimal assistance to the issuing court and hold up on subsequent review. The affiant is the person on whose sworn evidence the court acts. If that evidence is not fully accurate and complete, the ability of the issuing court to carry out its mandate is irreparably compromised. No amount of work from any other actor can compensate for an affiant's failure.

As one prosecutor put it, the affiant needs to have a "profound understanding" of what full, frank and fair disclosure means both in theory and in practice. The same prosecutor insisted that as an aspect of this understanding, the affiant needs to grasp that this is a *personal* obligation he

[26] Named after the Supreme Court's landmark decision in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, this is the term commonly used to refer to a pre-trial hearing in which the validity of a judicial authorization like a wiretap order is challenged by the defence as contrary to s. 8 of the *Charter* for the purpose of obtaining an order excluding the evidence thereby obtained.

or she owes to the court regardless of the affiant's place in the bureaucracy or chain of command. There is simply no room for a pass-the-buck mentality in this position.

An over-sensitivity to constructive criticism is also a disabling trait for an affiant to possess. Well before it goes to court, a wiretap affidavit will be thoroughly reviewed – and criticized – by a number of different pairs of eyes. Criticism may also come, eventually, from defence counsel and even the court. It was emphasized to me that a successful affiant needs to be able to learn from criticism without being personally discouraged by it.

Prosecutors and police officers were both highly critical of the phenomenon of the first-time, one-time affiant – the officer who has never been an affiant before and has no plans to ever occupy that role again. That is a recipe for substandard work. Although every affiant must obviously have a first time, that time should be at a point in their career when they already possess the knowledge and fortitude to fulfill the high expectations that accompany the role. And there should be every expectation that an affiant's first time will not be his or her last. Not only does an under-qualified affiant produce a lower-quality product in terms of clarity and readability, inexperience can actually compromise the affiant's compliance with his or her duties of full, fair, and frank disclosure. An insufficiently trained or experienced affiant on a complex matter can, according to the officers and prosecutors I spoke with, cause trouble by failing to reliably distinguish between the relevant and peripheral.

Independence was a quality almost universally mentioned as crucial in the course of my consultations. It is a quality strongly linked to stature and experience. The affiant is not simply a mouthpiece of the investigative team: he or she needs to exercise strong independent judgment in deciding whether and how the raw material of the investigation can meet the legal prerequisites for issuance. The affiant needs to feel comfortable in asking tough questions of her colleagues, challenging factual contentions where appropriate, insisting that the *whole* story be told, and pushing back when her inquiries meet with an evasive or incomplete response. Simply put, the role is not about mere "paperwork" – it is in many respects the fulcrum of the investigation. An affiant who fails to fulfill his role can do irreparable damage to the investigation itself and to the stature of the investigative agency more broadly. There is no substitute for an affiant who is appropriately skilled, trained, and independent.

Recommendation #1: **CSIS affiants need to be equipped with a thorough understanding of the duty of candour, and sufficient skill and experience to successfully implement it.**

Recommendation #2 : **CSIS affiants must exercise independence from the investigative team in ensuring that they fulfill their personal sworn obligation to make full, fair, and frank disclosure to the Court.**

Affiant should be a respected and coveted role within the investigative service

This point is related to the issue just discussed, but goes to the affiant's place within the organization rather than his or her own attributes and skill set.

From my own experience in the world of criminal investigations, I know that the role of affiant is very often considered a less than desirable position in the context of a complex investigation. My consultations confirmed this. The role is often considered to be mere "paperwork," less interesting and less prestigious than field investigation. For that reason, the role is often assigned to a junior member of the investigative team.

In my view, that approach is a serious mistake. Indeed, I learned in the course of my consultations that it is something that prosecution and police services alike are trying to correct. Some have already made great strides in that direction.

The Ontario Provincial Police ("OPP"), for example, has developed a dedicated unit of highly skilled officers who handle all Part VI applications. This is called the Technical Support Branch. All members of the team carry the rank of detective sergeant. They are totally independent from the investigative units. When an investigative unit wishes to apply for a wiretap authorization, they approach the Technical Support Branch and it does an independent review. If it thinks a wiretap is appropriate, it will step in and take over that part of the process. It will provide the affiant from its ranks of highly experienced officers who are all experts in drafting Part VI applications. Members of the Branch tend to stay in the unit for five years or more, so the benefits of continuity and institutional memory are available to newer members.

Several counsel I spoke with were vocal in their support for a more professionalized approach to the affiant role. Many of them have had positive experiences in recent years with the more sophisticated affiants put forward by agencies like the OPP and commented on the wide disparity between affiants of this calibre and those from services that lack the resources and case flow to develop this level of expertise. While perhaps not every agency will have the capacity to reach the level of professionalism in affidavit drafting achieved by some of the major police services, it seems to me that there is now little excuse for those with the capacity not to do so. The models are there to be emulated.

Admittedly, having a *dedicated* team of professional affiants is not necessarily viable for other investigative bodies, including CSIS. But the approach is instructive for how it demonstrates the benefits of investing the affiant role with prestige and authority. The experience of the OPP, among others, is that it leads to a better, more reliable product. And no doubt, it helps give the Court confidence in the investigative agency's commitment to producing high-quality applications whose contents can be relied upon. That it especially important, in my view, in the CSIS warrant context where a single investigative agency appears time and time again before a small group of judges. As recent events have demonstrated, the Court's confidence is a precious commodity that can easily be diminished. Later in this report I will elaborate how I think a heightened emphasis on the importance of the affiant role can help the Service win back some of the trust that has been compromised by recent missteps.

Recommendation #3: **CSIS should ensure that the role of affiant is a senior and respected role within the Service, and that affiants occupy that role on a recurring basis.**

Counsel needs to be the captain of the ship

While the affiant has a sworn duty to get the facts right and omit nothing of significance, counsel has an essential role to play in ensuring that the application is appropriately presented to the court. Counsel's responsibilities do not dilute the affiant's own duties; they complement them. As indicated above, most of the senior prosecutors I surveyed are or have been wiretap agents. I myself was a wiretap agent for many years earlier in my career. From my survey, and from my

own experience, I can attest to the seriousness with which counsel take this role, recognizing the high stakes brought about by the intrusive powers sought and the *ex parte* context in which they are granted.

It was observed more than once that there is a potential tension between the duty of candour and the obligation (emphasized in *R. v. Araujo*, [2000] 2 S.C.R. 992, at para. 46) to be clear and concise. Over-inclusion can be the enemy of clarity and concision. Taken to extremes, including *too much* in an affidavit can actually detract from compliance with the duty of candour, since part of being candid is helping the court distinguish the wheat from the chaff. Some affiants may believe that the "kitchen sink" approach is an appropriate way in which to guard against ever being accused of having left something out.

This is where clear-headed and authoritative guidance by counsel is especially important. Judgment is counsel's stock in trade. Even the most seasoned affiant is unlikely to possess experienced counsel's intuitive sense of what a court would need and want to know, and what would be better omitted. Counsel performs an essential function in ensuring not only that the legal requirements for issuance are addressed, but that the application is effectively and intelligibly framed. This naturally involves a lot of work. Wiretap agents I spoke with indicated that they typically spend many hours, often even days, with the affiant going over the application materials paragraph by paragraph before going to court. Although counsel is not the one under oath, he or she needs to be confident in every assertion contained within the application.

Counsel also serves as another independent check on investigative zeal. While the investigative team may for understandable reasons get caught up in the urgency of the particular investigation, counsel's role is to take a longer, more detached view. I heard from many of the prosecutors I consulted that this can require a thick skin. Counsel cannot be concerned with endearing themselves to the police and (like the affiant) must have both the authority and temperament to push back where necessary against investigative overreach. A wiretap agent, I was more than once reminded, is not counsel for the police; at all times he or she remains counsel for the Attorney General, with the independent responsibility that entails. Counsel should avoid getting too close or becoming "embedded" in the investigative team because such closeness can compromise the necessary objectivity and independence.

One of my interlocutors related that he always insists on meeting the affiant for a robust discussion *before* the affiant starts drafting. He asks the affiant to explain in his or her own words the investigative objectives, how the proposed wiretap is expected to produce evidence, and why the point of investigative necessity has been reached. In this prosecutor's experience, this approach assists the affiant in clarifying the thrust of the application at the outset and guarding against a situation where focus is lost in the complexity of a detail-intensive drafting process. To my mind, this seems like a fruitful approach.

The issuing court needs to be advised of what if anything is novel or unconventional about an application

Some aspects of wiretap practice are relatively routine, yet new challenges are constantly arising. New technologies for interception and surveillance must be grafted onto existing legal tests, at least until legislative action closes the gap. Courts need to understand precisely what they are being asked to authorize so that they can properly apply the statutory test. In particular, courts need to thoroughly grasp the ways in which new technologies trench on the privacy interests protected by the statutory regime and ultimately the *Charter*. Courts cannot fulfill this role if they don't sufficiently grasp the details of what is being proposed.

New technologies and techniques therefore pose challenges for affiants, agents, and courts alike. It would appear to be a fruitful area for collaborative education. From the prosecutors and police officers I spoke to, however, I learned that they rarely if ever participate in direct judicial education in respect of new interception technologies. (Judicial independence concerns may be one reason for this apparent reluctance.)

In any event, there was consensus about the need to properly educate the court about any novel technology in the context of a particular application before the court. The first step in this process is the affiant and agent educating themselves to ensure that they have a sufficiently deep understanding of the new technology and its implications to be able to explain it in plain language to the court. Reliance on jargon is often a mask for inadequate understanding. And in any event, reliance on jargon is completely inappropriate in a document meant to facilitate the court's ability to carry out its statutory mandate.

New technologies and intrusive techniques therefore need to be thoroughly and plainly explained on the assumption that the court has no prior knowledge of the particular technique in question. They also need to be clearly flagged as novel. Neglecting to highlight the novelty of a proposed technique can leave the misleading impression that it is established and routine, and therefore amount to misstatement by omission. A court needs to know if it is being asked to do something that has rarely or never been done before.

On this connection, prosecutors I spoke to were not unanimous on whether it would be appropriate to reference in an affidavit the fact that a particular new technique had been authorized in another case. Some thought it would be inappropriate, I think because another judge's opinion would not be relevant divorced from the record that was before him or her. The task is to convince *this* judge that issuance is appropriate based on this record. Apart from the question of whether a previous judge's approval is ever appropriate to raise on another application, I certainly agree that everything novel about the application in question needs to be clearly and candidly foregrounded for the issuing judge by way of affidavit or submissions.

Not all novel aspects of an application will be technological in nature. Some will simply be alterations to usual conditions or powers meant to be responsive to the demands of the particular investigation. Templates are widely used and are undoubtedly helpful to all involved; but they do not necessarily fit every fact scenario. Wiretap agents I consulted were in agreement that any significant changes to a standard clause or condition should be highlighted for the court and explained as part of the duty of candour. Otherwise, the issuing judge could miss the fact that she is being asked to approve something to which she has not actually turned her mind.

Recommendation #4: **Anything novel (e.g. technologically, legally) about a warrant application should be clearly foregrounded for the Court.**

Mistakes need to be recognized and dealt with immediately

What should counsel do if, after issuance, they discover a material mistake in the wiretap application materials while the order is still in force? Without exception, the prosecutors I spoke

to indicated that the very first order of business would be to shut down the interception and return to the court to disclose the mistake. The court would be provided a full explanation of the nature and extent of the mistake. Once such disclosure is made, the court would then be in a position to decide whether to re-issue the authorization in light of the corrected record. One counsel I spoke to was careful to note, correctly in my view, that the correction should be made in the form of a sworn addendum, so that the integrity of the original record is maintained for the purpose of later review.

By contrast, if the mistake is discovered only *after* the order is spent, there was a general consensus that the means by which to confess the mistake is by way of *Stinchcombe* disclosure rather than a return before the issuing judge.[27] Prosecutors and police officers were of the view that once the order is no longer in operation, the issuing judge has no further interest in the matter. Rather, it is the eventual trial judge who takes over the role of assessing police compliance with the law when the expected challenge is brought. The defence entitlement to bring such a challenge on a fully informed factual basis is guaranteed by faithful Crown and police compliance with their *Stinchcombe* duties.

Not all mistakes are created equal, of course. Inevitably, some information that the affiant reasonably believed to be true at the time the affidavit was sworn will turn out to be otherwise upon further investigation. Affiants are entitled to rely on reasonable belief, which is a long way from absolute certainty. In this sense, not every after-discovered mistake will compromise the integrity of the order: much of the point of the *Garofoli* review process is to distinguish those that do from those that do not. But in all cases, the later acquisition of contrary knowledge will form part of the disclosure provided to the accused so that defence counsel can exercise their professional judgment on the viability of a challenge.

CSIS does not have the luxury of falling back on *Stinchcombe* disclosure and the trial process to address subsequently-discovered mistakes in warrant applications. That is, it cannot rely on the assumption that any mistake will be evaluated and possibly remedied on a subsequent

[27] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, is the landmark decision in which the Supreme Court first recognized a general duty on the Crown to disclose all relevant information – often described as the "fruits of the investigation" – to the defence.

adversarial challenge. For all intents and purposes, the court itself is the final bulwark against the overextension of coercive state power. Therefore, much more so than in the criminal context, the court needs to be kept informed of material mistakes that are discovered at any point, regardless of whether or not the order continues in force. I will return to this point in my recommendations below.

Collaboration between experienced counsel and officers is key to developing and maintaining best practices

The wiretap world is relatively small. Prosecutors and police officers who handle wiretaps tend to be senior, and they tend to be repeat players. They have much to learn from one another and, by and large, they seem to do an excellent job of constructively sharing their expertise. I heard from many senior counsel about the importance of the work done by the National Wiretap Experts Group. This is a forum for senior Federal, Provincial, and Territorial wiretap experts, both prosecutors and police officers, to get together to discuss operational policy issues and potential legislative reform.

The RCMP's Legal Application Support Team ("LAST") is another valuable institutional mechanism for disseminating knowledge, experience, and best practices to people "on the ground." Units of LAST are stationed in RCMP divisions across the country. LAST units comprise officers with skill and experience in the preparation of court applications, including search warrants and wiretaps. While they do not supply affiants – in the RCMP, affiants are drawn from local investigative teams – LAST personnel are readily available to provide advice and assistance in formulating applications and drafting the materials. LAST is also heavily involved in providing training for officers in the mechanics of wiretap and other applications, and the responsibilities these applications entail.

In the course of my consultations I also learned about the Ontario Electronic Surveillance Operations Committee, a joint committee comprising representatives from the Ontario Ministry of the Attorney General, the PPSC, and a number of police services. Created about three years ago, one of its goals was to harmonize approaches to electronic surveillance between the two major prosecutorial authorities. The Committee now helps educate Crowns and police on common issues,

helping to create consistency in the legal advice given. New technologies can be especially important topics for timely and consistent legal advice. I am told that this Committee is a useful venue for addressing such issues.

I realize that CSIS warrants are very different from Part VI applications in a number of ways. But there are common challenges and concerns that confront institutions implementing electronic surveillance across these very different contexts. I know that CSIS LSU already participates in the National Wiretap Experts Committee. In my view, further opportunities for such collaboration should be explored and, where possible, exploited. I elaborate on this recommendation below.

Timely, regularly updated training is essential

Wiretap law and practice is a complex world. (In some ways, CSIS warrant practice is even more so.) It almost goes without saying that police officers need dedicated, specialized training in order to perform the affiant role with the requisite skill. In the course of my consultations I inquired about the nature and extent of the training provided by and for different police services. I was generally impressed with the apparent quality and comprehensiveness of the training provided.

By way of example, the RCMP recommends that officers take its wiretap course before acting as an affiant on a Part VI application. I was told that this is a 12-day comprehensive course, offered two or three times a year. Besides addressing the applicable statutory and case law in detail, an important part of the course involves preparation to testify in court. The training includes a module where a defence lawyer is brought in to do a simulated cross-examination on an affidavit. I understand that this assists the officers not only in learning how to conduct themselves in court, but also in learning to anticipate possible vulnerabilities and oversights in order to prevent them from arising in the first place.

Both the OPP and RCMP appear to maintain an appropriate focus on keeping training up to date. Because the law and technology are constantly evolving, continuing education is crucial. In the course of my consultations I learned about a bi-yearly seminar run by a senior OPP officer for both affiants and Crown agents to learn about and trade ideas on recent developments in the

wiretap world. I think it is especially important for affiants and agents from across Canada to be able to learn from one another, given that certain trends or developments may be unevenly distributed across Canada and may take years to crystallize in a Supreme Court decision or statutory amendment.

Although I discuss the training issue more fully below, I should note that this and other courses may provide useful opportunities for participation by CSIS affiants. There is enough overlap between the two worlds that CSIS personnel would gain useful insight by such exposure, and police personnel might likewise benefit from an exchange of perspectives.

Amicus curiae can play a useful role when contentious issues arise or are reasonably apprehended

I spoke with several prosecutors who have had recent experiences where *amicus curiae* has been appointed to assist the court in difficult *in camera* proceedings. In the criminal prosecution world, needless to say, *in camera* proceedings are very much the exception to the general rule that trials take place in public. But the open courts principle sometimes comes up against the all-but-absolute privilege protecting the identities of confidential police informers; and in those instances, openness must yield to the privilege. *In camera* proceedings are the result. Pursuant to Supreme Court authority like *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, 2007 SCC 43, the trial judge is duty bound both to protect the privilege absolutely *and* to ensure that the open courts and *Stinchcombe* disclosure principles are respected to the extent possible. The Supreme Court has recognized that in difficult cases, the appointment of *amicus* to assist the Court in this task will be appropriate: *R. v. Basi*, [2009] 3 S.C.R. 389, 2009 SCC 52, at para. 57.

Counsel I spoke with were generally positive about the contributions *amici* were able to make in these difficult cases. More than one senior prosecutor recounted having actually encouraged the trial judge to appoint *amicus* where a thorny privilege issue has arisen. Naturally, in these cases – unlike the CSIS warrant context – the defendant is normally already present and participating in the process with the assistance of counsel. *Amicus* becomes involved in order to provide adversarial balance and assistance in circumstances where neither the accused nor defence counsel are legally entitled to see the material forming the subject matter of the litigation.

Prosecutors with experience in this area indicated that mutual trust between the Crown and *amicus* is an important feature of this process. *Amici* tend to be selected from the ranks of experienced and respected defence counsel who already enjoy stellar reputations with the bench and can be counted upon to fulfill this tricky role in exemplary fashion. Because of the sensitive nature of the material, trusting cooperation between Crown and *amicus* is necessary for the process to function well, but this by no means derogates from *amicus'* responsibility to advocate zealously for positions that may diverge markedly from the Crown's.

Amici have participated in CSIS warrant cases on occasion, particularly where novel legal issues were raised. *Re X* is one example, as is the proceeding that culminated in Justice Noël's recent decision in the *Associated Data* case. In my recommendations below, I will have more to say about how *amici* might contribute to the smoother functioning of this process going forward.

Recommendation #5: **The appointment of *amicus curiae* should be recommended where a warrant application raises a novel and/or difficult legal issue.**

VI. Implementing the duty of candour

A Contextual Approach

I have already set out the general principles governing the duty of candour in *ex parte* matters and suggested some of the ways in which CSIS and its counsel are under a "super-added" duty given the role of the Attorney General and the unique context of s. 21 warrants. The most significant factor giving colour to the duty of candour in this context is the general absence of any *ex post facto* adversarial review. This means that the issuing court is, for all intents and purposes, the last bulwark against state overreach in this area.

Other factors contributing to a heightened duty include the special obligation of the Attorney General and her agents to safeguard the integrity of the administration of justice and the highly intrusive nature of the powers that can be authorized under s. 21. Additionally, as I will explain below, the duty is a continuing one extending potentially well beyond the life of the warrant itself. That temporal dimension distinguishes the duty of candour in this context from its

counterpart in the criminal prosecution arena, where counsel's duties generally shift from the issuing court to the trial court after the order is spent.

With all this in mind, CSIS LSU counsel are under a heavy duty to act with unimpeachable judgment. From my consultations, I know this is not one they take lightly. Of course, as in any human process, mistakes will be made. But it is clear from recent findings of the Federal Court that much more needs to be done to prevent the same kind of mistakes from recurring.

Ruby and its progeny set out the basic rule: all information relevant to the issue before the court needs to be fully and fairly disclosed. No "tilting" of the case in one's own favour is ever permissible. This is much more than a negative duty to avoid misrepresentation; it is an *affirmative* duty to place before the court all reasonably available relevant information.[28]

It could be said that the essential purpose of full, fair, and frank disclosure in *ex parte* proceedings is to preserve the independence of the decision-maker and thereby the integrity of the process. This is because a court that acts on an incomplete record tendered by the party seeking relief has unwittingly become captive to that party rather than truly independent. Conversely, a party that selectively shapes the record before the court on an *ex parte* proceeding – even with a good faith belief that its choices are legally defensible – has improperly arrogated to itself the role of decision-maker. Understood this way, the stakes could hardly be higher.

Fundamentally, it is for the court, not the party seeking relief, to determine which facts should be given effect. Obviously, counsel must always exercise judgment in deciding what is relevant and what is irrelevant; the "kitchen sink" approach neither assists the court nor amounts to proper compliance with the duty of candour. Evidence presented *ex parte* must be complete, but also must be clear and concise.[29] But when the dividing line of relevance is not clear, counsel must

[28] "[F]or the preauthorization procedure to be meaningful, 'for the person authorizing the search to be able to assess the evidence ... in an entirely neutral and impartial manner,' not only must frank disclosure of material facts be made, but so too must full disclosure": *R. v. Ling*, 2009 BCCA 70, 241 C.C.C. (3d) 409, at para. 40, *per* Bauman J.A. (as he then was). See also *D.K. c. R.*, 2009 QCCA 987, *per* Thibault J.A., which vividly illustrates why the duty is not fulfilled by a truthful statement that leaves out something important.

[29] *R. v. Araujo*, *supra*, at para. 46

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*:[30]

> 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.

Therefore, CSIS LSU counsel's guiding presumption should always be to err on the side of disclosure. A precondition to implementing this principle, however, is for counsel to be aware of any facts and issues that might be subject to the 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 need to be made, and several of my recommendations below are directed to that goal.

Recommendation #6: Counsel's guiding presumption should be to err on the side of disclosure.

Obviously, the duty of candour also applies where CSIS is appearing before the Court *ex parte* for reasons such as the amending of warrant templates.[31] In that context, compliance with the duty entails explaining to the Court the reasons for each proposed change and the reasonably anticipated consequences of the change in terms of the Court's principal concerns: most notably,

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[30] *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 This was a security certificate case but the formulation of the duty has equal application to the CSIS warrant context.

[31] Templates serve an important function in the world of judicial authorizations, and the CSIS warrant context is no exception. They contain standard form recitals, powers, and conditions, which can be modified to fit the circumstances of a particular case. The templates themselves are subject to an ongoing and collaborative process of modification involving both counsel and the Court. As Noël J. has helpfully explained, "Warrants are live documents that require continual review by designated judges with input from counsel for the CSIS and appointed *amici* (where thought to be necessary). Amendments are periodically brought to the warrant conditions templates in order to faithfully reflect the powers intended to be granted and their limits. The templates must be adapted to the evolution of technology, of investigative methods, of programs and means of communications, of case law, and of new laws or amendments to the *CSIS Act*": *Associated Data*, at para. 10.

the balancing of state and individual interests in the granting of intrusive powers pursuant to the Act.

CSIS also has a responsibility, pursuant to the duty of candour, to inform the Court of a change in its legal position on an issue before the Court, and to be transparent about the justification for such a change. Developments in technology and the law can both bring about justifiable re-evaluations of previously held positions – for instance, with respect to whether a warrant is or not required in a particular scenario. For the Court to be able to evaluate the Service's position comprehensively, it needs to know about how and why it has evolved. After all, understanding the evolution in a legal position can often help in evaluating its strengths and weaknesses, and in identifying possible objections to it.

Recommendation #7: **The Court should be informed when CSIS has changed its legal position in respect of an issue before the Court.**

Similarly, where CSIS is asking the Court to revisit, revise, or qualify a prior holding, it needs to be transparent with the Court about the nature and extent of its request. Although its conduct in *Re X* was later criticized by Mosley J., I do think that its initial approach to the extra-territoriality issue was proper: CSIS explained to the Court why and how the prior decision of Blanchard J. could be distinguished, and the new facts and legal theory justifying a different result were laid out in detail. (It was the failure to inform the Court fully about the prospective consequences of its new theory where CSIS ran afoul of its obligations.)

As discussed above, *Re X* and the *Associated Data* decision give important guidance about how to approach the duty of candour both in specific warrant applications and more generally. I think the following lessons can be drawn from those cases:

- **Merely "formal" compliance with the duty can amount to non-compliance**. Where an issue is potentially important, it needs to be brought to the Court's attention in a meaningful way, not presented in an inconspicuous manner: *Associated Data*, at paras. 102-103. The Court has limited time, and needs to be able to trust counsel's judgment in distinguishing between cosmetic or peripheral details on the one hand, and matters of substance requiring focused consideration on the other.

- **The Court's responsibility to balance privacy interests against the public good must inform the Service's approach to the duty of candour**: *Associated Data*, at para. 100. This means disclosing facts which may affect the degree of intrusion caused by the warrant even if those facts do not appear to be strictly germane to the test for issuance under s. 21. The Court will generally want to minimize the intrusion upon privacy brought about by the warrant, limiting it to that which is actually necessary to the investigative objectives.[32] It needs the information to enable it to do so.

- **The Court is entitled to be informed of actions CSIS intends to take as a direct result of obtaining a warrant, even if such actions are not explicitly authorized by the warrant itself**. That is, in issuing a warrant, the Court is entitled to know about probable consequences expected to arise from the warrant that bear on the "broader framework in which applications for the issuance of CSIS Act warrants are brought": *Re X*, at paras. 89, 117. It is not sufficient for the Court to be presented with merely a partial picture, even if an argument for such disclosure could be mounted based on a strict construction of the warrant issuance criteria.

- **"Strategic" omissions from a warrant application are impermissible, even if a good faith argument could be conceived of for the irrelevance of the omitted material**. The very notion of a strategic omission is antithetical to the duty of candour. The only reason for such an omission would be a recognition by CSIS that disclosure might draw a negative response to the Court. And in such a circumstance, the duty of candour compels disclosure – at which point CSIS is of course at liberty to attempt to persuade the Court that the fact is irrelevant.

I think it is clear from those two decisions, as well as from the other problematic episodes alluded to in the my introduction, that the real difficulties that have arisen are not due to the kind of straightforward factual errors that may have been a main concern in an earlier era. The internal

[32] In the criminal wiretap context, this important principle is referred to as "minimization." In *R. v. Doroslovac*, 2012 ONCA 680, at paras. 34-35, Watt J.A. helpfully explained: "Minimization clauses may take different forms. Some are linked to the places at which the communications to be intercepted take place. Interception of communications originating from or received at pay telephones, for example, may require live visual surveillance and live monitoring to confine interceptions to specified individuals. Other minimization clauses have to do with the nature of the device used in the communications or the manner in which interceptions are to be carried out. The power to impose minimization clauses is discretionary; however, the failure to include such a term may result in an authorization that is unreasonable." In the CSIS warrant context, minimization conditions can be set pursuant to s. 21(4)(f), which authorizes "such terms and conditions as the judge considers advisable in the public interest."

"facting" process is meticulous and both counsel and CSIS officers are well attuned to their responsibility to be both factually accurate and comprehensive.

In my view, the current difficulty lies in a tendency to sometimes lose the forest for the trees. Or, put another way, a failure to reliably identify the broader policy concerns flowing directly from the issuance of warrants which will be of concern to the issuing court. The retention of third-party associated data is a clear example of this: even though, as far back as 2006, it was identified as a matter about which the Court should be informed, for whatever reason the question was not pursued. When it was finally put before the court in 2011, it was done in a manner that did not clearly signal its importance.[33] It was not until the release of the 2014-2015 SIRC Annual Report in January 2016 that the Court finally understood that CSIS was indefinitely retaining third-party associated data collected as a result of warrants.

Why was it so important for the Court to have been informed about the retention of third-party associated data? I think a consideration of this question can assist in avoiding analogous errors in the future. Noël J. provides an answer in the form of a rhetorical question:

> 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?

In other words, 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. "Intrusions" can run the gamut from the obvious to the subtle, but the category clearly includes the retention of information collected as a result of a warrant. Seen this way, the non-disclosure put the Court at a disadvantage in carrying out its role.

In essence, counsel should try to put themselves in the shoes of the Court and consider: what would I want to know? This thought experiment needs to account for two crucial

[33] *Associated Data*, at paras. 12-14

considerations: (1) the Court is at a substantial informational deficit relative to counsel, since it only knows what counsel has chosen to convey in the application;[34] and (2) the Court is the institution with ultimate responsibility for the sound exercise of the exceptional privacy intrusions contemplated by the Act. Built into this responsibility is a constant concern for proportionality and a keen awareness that no further review is likely to take place.

In other words, 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?"

Answering this question accurately and reliably requires a coordinated effort between counsel with CSIS LSU and the Service itself. This needs to happen at a high level. CSIS LSU needs to be provided information enabling it to identify new or emerging issues touching on warrants (in the broadest sense) that may become ripe for engagement with the Court. It may be that a new joint Legal/Operations meeting should be regularly implemented to facilitate such information exchanges. Or it may be that a new agenda item should be added to the regular meetings already attended by Senior General Counsel. Either way, identifying these issues early on is crucial; collective judgment can then be applied to the question of when, and in what context, the issue is reasonably mature and suitable for disclosure.[35]

Recommendation #8: **A formal process should be implemented for identifying new or emerging issues touching on warrants that may become ripe for engagement with the Court.**

Recommendation #9: **In preparing a warrant application, counsel and the affiant should be guided by the following question: "what should the Court know in order to adjudicate this**

[34] As Noël J. has recently stated, CSIS has a "unique position as applicant and sole source of evidence to the Court": *Associated Data*, at para. 100.

[35] In that connection, where in an internal audit the Service itself has identified issues of concern in the warrant application process, the Court should be informed – assuming the concern identified has a material bearing on the product actually produced to the Court (i.e. the warrant application) and not merely the Service's internal processes.

particular warrant application in the context of its overall mandate to maintain a proper balance between state and individual interests under the Act?" This should include a consideration of the potential impact on other orders in force.

The Duty of Candour in Specific Scenarios

Obviously, the Court in both *Re X* and *Associated Data* was concerned with the peculiar facts before it. While the principles set out in them are of broad application, it may not always be obvious how the broad principles are to be implemented in the challenging and fast-paced world of CSIS warrant applications. I have therefore endeavoured to identify a number of scenarios which are likely to recur and on which guidance as to the Service's duty of candour might be useful. Needless to say, these scenarios do not come close to exhausting the situations in which challenges may arise in relation to the duty of candour. I hope they will assist, however, in providing some concrete guidance in reasonably anticipated situations, and also by analogy to those which may yet arise for the first time.

1) A material error is discovered in the application materials while the warrant is in force

Here I am speaking of a factual misstatement discovered in the affidavit tendered on the warrant application after the Court has issued the warrant, while the warrant is still in force. (I include in this category cases in which a renewal has been granted under s. 22, and a mistake is then discovered in the original s. 21 warrant application materials.)

It is important to distinguish at the outset between two different kinds of mistakes, since they potentially have different consequences for the duty of candour.

In the first category are facts as to which the affiant had a reasonable belief in their truth but which turn out to be false. For instance, the affiant says that Source A reported that Target X drives a blue car. Through further investigation, it is discovered that Target X actually drives a black car. However, in the circumstances, let us assume that there was nothing unreasonable about

the affiant entertaining a belief in the fact as reported by Source A. This is a "mistake" in one sense, but it is not the kind of mistake that is of primary concern for us here. An affiant swears to her reasonable belief in the facts alleged in the affidavit; as long as she is transparent about the sources of her belief (thereby allowing the court to assess its reasonableness), a purported fact that ultimately turns out to be inaccurate should not undermine the validity of the warrant or the integrity of the process.

The second category of mistakes are of more consequence for the duty of candour. Let us say that somehow the affiant misreported Source A having claimed that Target X drove a blue car when in fact he said it was black. And let us further suppose that the colour of the car is of some investigative significance in identifying the target or connecting him to the threat. We now have a real problem requiring a decisive response by counsel.

Alternatively, the mistake could lie not in the facts alleged in the affidavit but in the warrant itself. An example could be where an incorrect phone number or location is authorized by the Court for intrusive measures.

In general, the guidance received from my survey of senior prosecutors and police officers is apt and directly applicable: go back to the issuing judge immediately and disclose the error. Depending on the significance of the error, it may be necessary to shut down the interception pending correction of the mistake and renewed authorization from the court. CSIS would not want to continue to conduct an intrusive operation pursuant to an authorization known to be defective. Whether the mistake is sufficiently serious to require an immediate cessation is a difficult judgment call which should be made in consultation with the most senior counsel.

Obviously, as already suggested, some minimal threshold of materiality needs to be reached in order to trigger the duty in the first place. Simple typographical or clerical errors will not meet this threshold, assuming they do not somehow alter the factual contentions made by the applicant. But anything that could reasonably be thought to have *any* bearing on the Court's decision-making – not only on *whether* to grant the warrant, but also on what terms and conditions

to include – must be disclosed. This should be done immediately, by letter, to the Court; it would then be for the issuing judge to give further directions about the procedure to be followed.[36]

In cases where the error appears to be significant, implementation should be unilaterally ceased until further direction from the Court is obtained. In such circumstances, it might be that a fresh application with the error(s) corrected would need to be brought. But in any event, the crucial point is that the Court should be kept apprised, contemporaneously, of what the Service has learned about the error so that it is in a position to decide how to proceed, fully informed of the late-developing facts.

2) A material error is discovered in the application materials after the warrant is spent

On this issue, guidance from the criminal sphere is of more limited use. My survey of senior prosecutors and police officers indicated that they view later-discovered errors as a matter for *Stinchcombe* disclosure and eventual adjudication by the trial judge. They would not return to the issuing court to disclose the error because, in their view, the issuing court is no longer seized with the matter.

The CSIS warrant context is very different. Because there *is* no reviewing court (except in the unusual situations were a criminal prosecution indirectly results through disclosure to law enforcement, and even then only indirectly) the Federal Court remains seized of its warrants in a very real sense.

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[36] In my view, Rule 13 of the United States Foreign Intelligence Surveillance Court *Rules of Procedure* provides one useful formulation of the duty in this context. It provides:

> **(a) Correction of Material Facts**. If the government discovers that a submission to the Court contained a misstatement or omission of material fact, the government, in writing, must immediately inform the Judge to whom the submission was made of:
>
> (1) the misstatement or omission;
> (2) any necessary correction;
> (3) the facts and circumstances relevant to the misstatement or omission;
> (4) any modifications the government has made or proposes to make in how it will implement any authority or approval granted by the Court; and
> (5) how the government proposes to dispose of or treat any information obtained as a result of the misstatement or omission.

That can be seen in the procedural history of *Re X*, where Mosley J. reconvened the parties in 2013 in respect of warrants granted in 2009 as a result of information subsequently discovered by the Court through a CSEC report. Although the specific warrants originally granted by Mosley J. were of course no longer in operation, the extraterritoriality issue in respect of which CSIS made inadequate disclosure remained a live one for a whole class of warrants. It could therefore not be said that the non-disclosure had no ongoing significance to the warrant process. On a perhaps more fundamental level, the Court is entitled to know when it has been misled, even unintentionally, given the high sensitivity of this context and the lack of other avenues of review.

To be clear, CSIS owes a continuing duty of candour to the Court in respect of warrants, even expired warrants, insofar as the issues or practices raised therein remain live. That means that subsequently discovered errors which in counsel's best judgment might be of concern to the Court, should be reported to the Court in a letter. The disclosure should be reasonably detailed as to the nature of the mistake, the manner in which it was discovered, and its significance (if any) for warrants currently in force or before the court. The Court would then be able to decide what if any further steps ought to be taken.

3) Where a mistake is made in the execution of a warrant

Execution issues are not strictly related to the validity of the warrant itself. If a warrant is validly issued and a mistake is made in carrying it out, the integrity of the Court's process is not necessarily affected in the same way as if the error is in the warrant application itself. That is, there is no sense in which the *ex parte* representations caused the *court* to do anything wrong; the fault lies with CSIS operations. Improper execution of a warrant could amount to an illegality requiring a report to the Minister, the Attorney General, and SIRC pursuant to s. 20 of the Act. Therefore, in such cases, some after-the-fact review of the mistake is guaranteed, provided that the s. 20 disclosure obligation is carried out. Nonetheless, because the Court maintains jurisdiction over its own warrants, the Court would rightly expect to be informed of illegality in the execution phase. Even errors in execution can taint the integrity of the judicial authorization process; for the Court not to be informed about such matters would be unacceptable. As for timing, I see no reason why the report to the Court should not be made contemporaneously with the report to the Minister.

Other errors will not reach the threshold requiring a report under s. 20 but, in my view, should still be reported to the Court unless they are clearly trivial. The Court, as the venue of last resort in almost all of these matters, should be entitled to know about errors that arise in implementation because, again, after-the-fact review is highly unlikely to occur. On a practical level, informing the Court of implementation problems can help the Court be sensitive to potential pitfalls in either the wording or the process that might somehow have contributed to the error.[37]

4) Another judge has raised a concern about the validity or appropriateness of a particular term or condition

A warrant application may be heard by any one of the designated judges. While occasional *en banc* sessions can assist the Court and counsel in maintaining a consistent approach, it is simply unrealistic to expect that every designated judge will always be aware of what every other designated judge has said or done on a particular issue. This is where counsel have a duty to bridge the gap and inform the judge about concerns previously raised by another judge in respect of something arising on the warrant application.

For instance, consider the scenario in which the judge in application "A" has changed a standard term in order to minimize the intrusiveness of the power being authorized. On the facts of "A" this made sense because the more broadly-worded term was on close examination not necessary to CSIS' investigation and the amended term would do the job. On application "B", however, CSIS has good reason to believe that the more broadly worded term is necessary to properly fulfill its mandate. Counsel believes that application "A" can be distinguished on its facts

[37] Again, Rule 13 of the United States Foreign Intelligence Surveillance Court *Rules of Procedure* may be of assistance on this issue. Subrule (b) provides:

> **(b) Disclosure of Non-Compliance.** If the government discovers that any authority or approval granted by the Court has been implemented in a manner that did not comply with the Court's authorization or approval or with applicable law, the government, in writing, must immediately inform the Judge to whom the submission was made of:
>
> (1) the non-compliance;
> (2) the facts and circumstances relevant to the non-compliance;
> (3) any modifications the government has made or proposes to make in how it will implement any authority or approval granted by the Court; and
> (4) how the government proposes to dispose of or treat any information obtained as a result of the non-compliance.

from “B” and the broader, standard term is the appropriate one in these circumstances. It might be tempting for counsel to reason that the previous judge’s expressed concerns are not relevant because this is a different case and, besides, the term now requested has been used in several previously issued warrants.

In my view, however, counsel on application “B” must direct the judge’s attention to the concerns of the other judge on application “A” and go on to explain why the facts of the new case are meaningfully different. If such disclosure is not made, the judge may not be attuned to the concerns that caused the other judge to make the change; the Court would therefore be deprived of a meaningful opportunity to make its own independent determination of whether “A” and “B” are really distinguishable in the way counsel believes them to be.

I recognize that there are many warrant application and many designated judges. Keeping track of concerns raised and issued flagged by each judge, and cross-referencing them to cases in progress, can seem like a daunting task. (I address the subject of keeping tabs on the Court’s concerns in more detail below.) However, it is an inescapable reality of this practice that no warrant application is an island unto itself and issues spill over from one application to the next. CSIS is the only party obtaining the warrants. While each designated judge maintains absolute decision-making independence, the Court will naturally want to maintain as much adjudicative consistency as reasonably possible. And for each judge to contribute to that effort, each judge needs to know as much as possible about what his or her colleagues have already said about a particular point in issue. In my view, therefore, as an aspect of complying with the duty of candour, counsel needs to tell the court as much as it knows about concerns raised by other judges in respect of a point in issue. Only then can the presiding judge make a fully informed decision, consistent with both adjudicative independence and coherence.

At some juncture, 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. As discussed below, I think it would make sense for counsel to have the option of requesting an *en banc* session in such circumstances since the desirability of such a forum might be more apparent to counsel than to the Court.

5) Different judges have proposed a number of different wordings for a particular clause

This scenario is a bit different from the previous one. Here, the divergence of judicial opinion is with respect to the preferable wording of a particular clause rather than its substantive appropriateness. I recognize the line can sometimes be difficult to draw because form and substance are necessarily interrelated. Nonetheless, I think counsel can usually distinguish substantive concerns from those that go to optimal wording.

I do not believe that the duty of candour prescribes a firm rule for advising one judge about every other judges' preferences on a matter of wording. It may be helpful. It may not be. Counsel, I think, is well positioned to make a judgment call about when informing the Court about other preferences would assist the Court in its work. A clear rule that counsel must always inform the Court about each instance of another judge expressing a different wording preference would risk bogging the hearing down in minutiae. Again, the *en banc* procedure is one way in which cohesiveness can potentially be restored if the Court and counsel find that divergent approaches to particular provisions are causing undue confusion or consumption of time.

6) A particular form of warrant usually sought is *not* sought in a particular application, because CSIS thinks judicial authorization is unnecessary on the facts

In this scenario, a particular request that is usually made is absent from the application before the Court. The reason is that CSIS counsel have determined, based on an analysis of the law as applied to the facts, that the Service does not need judicial authorization to carry out the investigative technique in question. However, a number of other powers are sought. Should the "absent" request be flagged?

I think the answer is clearly yes. Again, this is part and parcel of putting the complete picture before the Court, including a comprehensive account of what consequences are expected to flow from the issuance of the warrant. It is also part of CSIS' obligation, discussed above, to inform the Court about a change in its legal position on a significant issue.

While an argument can be made that the Court is not implicated in whatever investigative technique CSIS pursues because it has not authorized it, this constricted view overlooks two key features of the scenario: (1) the Court *has* been asked to authorize the particular technique in the past on different facts, and may want to know what is different about the facts of *this* case to render judicial authorization unnecessary; and (2) the Court is being asked to issue a warrant in respect of this *individual*, just not this particular *technique*. In my view, the Court should be given the opportunity to decide whether it agrees with CSIS' new view that a warrant is not necessary. In other words, candour requires that the departure from usual practice be pointed out and explained.

Therefore, in my opinion, the Court should be informed of the "absent" request and the legal interpretation justifying the absence should be set out. The Court is then in a position to make an independent determination of whether CSIS is correct that judicial authorization is unnecessary on the facts.

7) A particular form of warrant usually sought is *not* sought in a particular application, because of resource limitations, technological limitations, or other reasons

In contrast to the scenario just discussed, here CSIS is actually *not* going to implement the technique at issue. It usually seeks authorization for this technique, but because of resource limitations (or for any number of other reasons) it decides not to do so in this particular application. Should counsel flag this omission to the Court?

I think it should, although this is not as pressing a matter in terms of the duty of candour as the previous scenario. A "missing" request of this kind will not actually burden anyone's privacy interests, since no intrusive power will be exercised in relation to it. Nonetheless, transparency with the Court about any unusual features of a given application is in my view a salutary objective. Keeping the Court informed about the existence of a deviation from the norm, and the reasons for it, will assist the Court in understanding the application as a whole. It also serves an educative function, better equipping the Court to understand the normal contours of an application and the reasons why CSIS may wish to depart from normal practice in given cases.

8) Information presented in the affidavit was gathered in a manner that may or may not engage s. 8 of the *Charter*

Here, CSIS believes that its pre-warrant investigative work was lawful; it did not engage s. 8 because, on the Service's reading of the governing case law, no reasonable expectation of privacy was at issue. However, the case law on this topic is not entirely settled. Some cases could be seen to pull in the other direction which, if true, would mean that some of the information relied upon by CSIS to justify the warrant may have been illegally gathered.

This kind of uncertainty can sometimes arise where, in light of evolving technology and social expectations, the law has yet to settle definitively on the existence (or extent) of an individual's reasonable expectation of privacy. To take a well-known recent example, consider the question of internet subscriber information. Prior to *R. v. Spencer*, [2014] 2 S.C.R. 212, 2014 SCC 43, it was believed by many that an individual had no reasonable expectation of privacy in such information; there, the police were entitled to obtain it from an internet service provider without a warrant. The Court's ruling in *Spencer* changed the landscape by recognizing a reasonable expectation of privacy and requiring judicial authorization.

The pre-*Spencer* situation with respect to internet subscriber information is just one illustration of a circumstance in which, based on the unsettled jurisprudence, it would be reasonable to entertain some doubt about whether a particular kind of warrantless information-gathering is *Charter*-compliant. Prior to *Spencer*, counsel considering the question would undoubtedly have had a good faith basis upon which to prefer, and argue for, either view. But the ultimate result was certainly not free from doubt. Where a circumstance like this arises and the legality of a particular information-gathering method is arguable, I think the duty of candour compels counsel to flag the issue for the Court and identify the authorities and arguments on both sides of it.

The doctrine of "excision," which applies on review of a warrant, states that information gathered illegally must be excised from the material in support of the warrant; the remaining information is then evaluated to see if issuance of the warrant could still be supported.[38] While the

[38] *R. v. Grant*, [1993] 3 S.C.R. 223, at para. 50. The doctrine was considered at length by Code J. in *Jaser*, *supra*, at paras. 24-33.

function of an issuing court and a reviewing court are very different, I think that the issuing court would want to be made aware of facts and circumstances that could potentially cause it to issue an invalid warrant. That is all the more so in the CSIS warrant context, where the potential for a reviewing court to make things right is so diminished.

Therefore, I think that counsel must make the Court aware where an argument could reasonably be made that the information presented in an affidavit was gathered in a manner not compliant with the *Charter*. As long as the issue is fairly presented, counsel is entitled to argue to the Court why the weight of authority supports its interpretation that no *Charter* rights were engaged. It is up to the Court, of course, to determine whether the issue is of such substance that the appointment of *amicus* would assist in its determination.

9) The validity of a warrant is being litigated in another forum

Information collected by CSIS may be disclosed to a law enforcement agency pursuant to s. 19(2) of the Act, where the criteria of that provision are met. When such disclosure is made, law enforcement will conduct its own investigation and a criminal prosecution will sometimes result. A number of recent examples are well known to the public.

When a criminal prosecution arises in this manner, the validity of the original CSIS warrant can become an issue at the criminal trial. This can happen, for instance, when the police have obtained a wiretap authorization or search warrant based in whole or in part on the information provided by CSIS. In such a case, the defence can argue that any illegality in the obtaining of the original CSIS warrant irreparably tainted the order(s) subsequently granted in the criminal process, resulting in a breach of the accused's s. 8 rights. That is what happened in *R. v. Jaser*, 2014 ONSC 6052, the terrorism prosecution involving the VIA Rail bomb plot.[39]

[39] Another recent example is *R. v. Alizadeh*, 2014 ONSC 1624, in which McKinnon J. granted defence counsel leave to cross-examine the CSIS affiant with respect to a perceived contradiction between the source material and the affidavit. Following cross-examination, McKinnon J. found that the apparently contradictory statement was made in good faith and the warrant was properly issued: *R. v. Alizadeh*, 2014 ONSC 1907.

I think the Service and its counsel are aware that the Court needs to be informed of such proceedings because they may lead to a finding that one of the Court's own warrants was improperly issued or that the underlying application was flawed in some reviewable way. In the criminal sphere, the issuing court will know about such findings through the process of review at trial and, later, on appeal. But the geographical and jurisdictional separation between the Federal Court and provincial criminal courts means that the Court's awareness of the fate of CSIS warrants would be left to chance if the Service did not proactively inform the Court of such cases. And if that were so, the Court would be at a serious disadvantage in that it would potentially remain in the dark about material problems with a warrant, some aspects of which might be replicated in current or future warrants.

CSIS will no doubt be aware of criminal prosecutions in which the validity of a CSIS warrant is expected to be challenged. The Service will have made the initial disclosure and will presumably keep tabs on the progress of the proceeding. They may have ongoing involvement, through *in camera* proceedings or s. 38 *Canada Evidence Act* litigation.

However, at this point the Service lacks guidance on precisely when and in what circumstances such disclosure should be made.

In my view, the logical time to make disclosure to the Court would be at the same time that CSIS is formally brought into the criminal process; ordinarily, this would happen when CSIS is served with a third-party records motion seeking production of warrant materials.[40] While the CSIS warrant could be discussed in some manner prior to a third-party records motion being brought, typically any finding or ruling with respect to the warrant would result from the CSIS materials having been brought before the criminal court via a third-party records motion. When such a motion is brought, CSIS will be on notice (at least in a general sense) of the issues the defence intends to raise, since these would have to be specified in the notice of motion.

[40] In *R. v. O'Connor*, [1995] 4 S.C.R. 411 and *R. v. McNeil*, [2009] 1 S.C.R. 66, 2009 SCC 3, the Supreme Court has established a procedure by which the accused in a criminal case can (where appropriate) obtain disclosure of records in the hands of "third parties" – i.e. individuals or bodies other than the prosecuting Crown and police service. CSIS is considered a third party for these purposes: *R. v. Jaser*, 2014 ONSC 6052, at para. 11.

Alternatively, Crown counsel could make inquiries of CSIS pursuant to his or her *McNeil* obligations, resulting in CSIS warrant materials being disclosed to the accused in some form. The resulting litigation could result in judicial findings.[41]

Either way, there is a point at which CSIS warrant material is provided to the Court or to the Crown for potential use in the criminal litigation. I think this is a sensible point at which to notify the Court, by letter, that the validity of the warrant is being litigated in another court. CSIS, through counsel, should supply the basic details – who, what, where, when – and indicate that it will keep the Court informed of any major procedural developments in the case and of any rulings made by the criminal court as soon as they are issued. The Court would then be in a position to indicate what if any further information it would like to receive. Such a process would ensure that the Court is not taken by surprise in learning of a problem identified in one of its warrants through some belated, collateral information source.[42]

10) An issue has been identified by an oversight body (e.g. SIRC) and is likely to be referenced in a report

In both the *Re X* and *Associated Data* cases, the Court first learned of the existence of potential disclosure problems through the reading of public versions of oversight reports. This is unacceptable. Oversight bodies have an essential role to play in Canada's intelligence regime; but they are by definition concerned with after-the-fact scrutiny of CSIS policies and operations. The Court, by contrast, is operating in real time with a steady flow of warrant applications, any number of which may touch upon issues being considered by the oversight body. By the time the issue is formally commented on by the oversight body in the public version of its report, valuable time will have been lost. Many related warrant applications may have been adjudicated in the time

[41] In *R. v. McNeil*, *supra*, the Supreme Court confirmed that in certain circumstances Crown counsel has a "duty to inquire" with other Crown agencies or departments who may be in possession of relevant information. This could require Crown counsel to make inquiries of CSIS in an appropriate case.

[42] For that reason, the Court should also be informed if the validity of a warrant arises in legal contexts *other* than a criminal trial – for instance, in the context of a freedom of information proceeding or an *Immigration and Refugee Protection Act* hearing. All of the circumstances in which this could arise are impossible to catalogue definitively, but I would not want to leave the impression that a criminal trial is the only event that might precipitate the need for disclosure.

between the initial flagging of the issue to CSIS and the publication of the report. For that reason especially, the Court is entitled to know about potential problems with its warrants before those problems become front-page news.

I understand that one reason advance disclosure to the Court may not have been made in the past is that SIRC findings and recommendations are subject to change until the point at which the report is tabled. But the tentative nature of such findings can be adequately addressed in the content of the Service's disclosure to the Court. There is in my view no reason why, once a concern touching on warrants has been identified by an oversight body, the Service should not inform the Court that the issue is being inquired into. CSIS should provide as much information as it can about the nature of the concern. The Court will then be in a position to decide whether it wishes to invite submissions from the Service or hold off further action pending the tabling of the report.

Creating and updating a duty of candour protocol

I think it would be helpful to formalize a joint Department of Justice / CSIS policy on implementing the duty of candour in the CSIS warrant process. I recommend that it be based largely on the observations above. It can start from the general principles established in *Ruby* and the later Federal Court case law, and move toward the more granular. Recognizing that no policy can anticipate and address all situations that may arise, I think the scenarios just discussed comprise a healthy proportion of the kinds of questions counsel will face and can therefore usefully be integrated into the official policy.

In my view, it would be appropriate to establish a regular timeline for reviewing and updating the policy. Much of my own work on this topic has been guided by recently arising fact scenarios. New factual situations requiring subtly different elaborations of the duty will undoubtedly continue to arise. For the policy to be fresh and optimally helpful to counsel, it needs to take account of lessons learned and insights gained. Accordingly, I think that the policy, once finalized, should be marked for review and revision every two or three years. Obviously, if the need for changes became obvious before that time, they could be made as necessary. But a horizon of two to three years for a mandatory review seems to me the right amount of time to gain some

experience working with the policy, applying it to concrete case realities, and then reflecting on any changes that this experience suggests would be helpful.

Recommendation #10: **The Department of Justice and CSIS should establish a formal joint policy on complying with the duty with candour in the CSIS warrant application process. It should be reviewed and revised as necessary at set intervals of two to three years (and earlier as necessary).**

VII. Responding effectively to judicial input, commentary, and concerns on warrant applications

Sometimes in the course of a warrant application, a designated judge will raise a concern with one of the recitals, powers, or conditions in the proposed warrant. It may be that a particular phrase seems vague or ambiguous. Or a particular condition may appear to take insufficient account of a potential contingency. When such concerns are raised, a frequent, and understandable, response from counsel is that they need to consult with the client and/or colleagues and will get back to the Court in due course.

Problems arise when judges of the Court feel that their concerns are not being addressed, or that they are not being advised reasonably promptly of the result of a particular review that counsel undertook to conduct. This has, at times, caused the Court to perceive that its concerns are not being addressed in an efficient or systematic manner; this, in turn, has the potential to damage the relationship of trust upon which the smooth operation of the warrant application process depends.

No one would dispute that warrant terms and conditions engage complex policy and operational considerations that are not always susceptible to rapid decision-making. I do not believe that the Court would be critical of CSIS on that score. However, it nonetheless appears to me that CSIS has not always been sufficiently prompt and responsive when such judicial feedback has been received.

As an example, I reviewed one recent transcript in which a judge expressed some frustrations that his or her previous comments about the potentially problematic wording of a particular warrant term appeared not to have been taken into account by the Service, since it was once again included in the draft order then before the court. The judge recalled being told several times that the matter was under review but had not received any definitive answer as to what the result of that review had been.

This was certainly a misstep. However, I consider this to be more a matter of responsiveness than of candour. Rather than a withholding of anything relevant, this (and similar situations) really amount to a failure to keep the Court informed reasonably promptly about work done and changes contemplated or made as a result of the Court's input.

There is admittedly some overlap between the "candour" and "responsiveness" categories: for instance, there may be circumstances in which candour would require a particular concern raised by one judge to be disclosed in the course of a similar application before a different judge. But the concern about responsiveness is, in my view, mainly about satisfying the Court that judicial feedback is receiving adequate and appropriately swift attention. It is more an issue of coordination than it is of candour.

Now, I should be clear that CSIS counsel are under no obligation to agree with a judge's comment or concern. Sometimes there may be a full answer that would satisfy the judge and allay any residual concern. Sometimes CSIS may simply disagree that the issue raised by the judge poses a problem, or that any other wording would be preferable. Good faith disagreement is not only permissible, it is sometimes inevitable. In such a case, CSIS has a choice: it can accede to the judge's suggestion, despite disagreement, or it can maintain its position and seek a ruling.[43] (Below, I explain why I think access to a full or "mini" *en banc* hearing should be more readily available where counsel think that a legal issue could benefit from the Court's collective consideration.)

With respect to judicial input, the key, in my view, is for counsel to be responsive and transparent. Judges simply need to know where CSIS stands on issues that have been flagged, so

[43] If the ruling is adverse, and results in a judgment, an appeal can theoretically be brought. Understandably, and with good reason, appeals in the warrant context are rare.

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.

I have observed a new system CSIS LSU has put in place to track issues in relation to warrants raised by the Court, CSIS, and other sources. This provides a useful way to ensure that issues are followed up on in a reasonably timely manner and that responsibility for doing so is clearly assigned and monitored.

In scenarios like the one mentioned above, where a judge has identified a potential concern with an aspect of a warrant and requested some follow-up, I think that counsel should write to the Court after the hearing to confirm that further review is being conducted. If there is an easy answer that can be given right away, so much the better. If it is something requiring further consideration or study, counsel should indicate that in the initial letter and advise the Court of its expected timeline for providing a substantive response. If the deadline is unsatisfactory to the judge, he or she can of course express that view in response. If an issue is persistent – for instance, one on which different judges have taken meaningfully different views, it could be ripe for consideration in an *en banc* session, a matter to which I return below.

Recommendation #11: **Where a judge has provided input or expressed concern about some aspect of a warrant application and asked for follow-up, counsel should write to the judge promptly after the hearing responding substantively or proposing a timeline for a substantive response.**

VIII. Tracking legal issues of potential concern to the Court

Most of the issues in the category just discussed would be relatively mundane, usually a matter of fine-tuning the warrant templates and their application in individual cases. On a larger scale, where issues of broad legal consequence are concerned, 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. The *Associated Data* issue is only the most recent example. This involves high-level coordination between Justice (acting through CSIS LSU) and the Service.

I have already identified the need for the identification of issues potentially ripe for disclosure to the Court to be a regular agenda item at high-level meetings at which CSIS LSU is represented. The Service needs to become more 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.

On that connection, I indicated earlier my view that there needs to be a coordinated effort between counsel with CSIS LSU and the Service itself to identify new or emerging issues touching on warrants (in the broadest sense) that may become ripe for engagement with the Court. It may also be advantageous to organize a dedicated committee of senior CSIS LSU counsel to be principally responsible for "flagging" emerging issues of potential concern. If so, the committee would need to have open lines of communication with the Service at an appropriately high level such that operational issues with potential legal significance are on counsel's radar. Service and legal personnel are well placed to determine how exactly this goal can best be achieved.

It is no secret that the intelligence community operates on the "need to know" principle. While affiants, analysts, and counsel are taught that "need to know" unequivocally yields to the duty of candour in the warrant application process, the general "need to know" culture of CSIS must still have an impact on counsel's ability to be on top of everything they ought to be apprised of. After all, if CSIS is not aware that a particular fact or practice is relevant to the warrant process, then counsel is unlikely to be made aware of it. This is why 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 – is in my view so critical.

Relatedly, it may also be the case that some education or training in respect of the warrant process should be offered to CSIS employees who are not directly involved in applications but whose work touches on investigations that may lead to warrants. I do not have sufficient knowledge of CSIS operations to make a firm recommendation in this regard, but I am convinced that everyone with a stake in the process should have a general understanding of its demands, including an appreciation of the kinds of things the Court expects to be told when being asked to grant warrants. To the extent that this awareness is lacking, I think it is ripe for improvement.

Finally, where an issue arises suitable for disclosure to the Court and applicable to multiple applications, I think there should be an ability on the part of counsel to request an *en banc* session to address it. To date, *en banc* sessions have been initiated by the Court when it has appeared efficient and desirable to have the designated judges consider a matter together. Obviously, it is always the Court's determination whether or not an issue or set of issues is suitable for *en banc* hearing, and given the inevitable logistical challenges involved, the Court would no doubt be loathe to make them a frequent occurrence. Nonetheless, it seems to me that there may well be occasions on which a matter not yet on the Court's radar appears to counsel for CSIS to be suitable for *en banc* consideration.

Recommendation #12: **Counsel for CSIS should have the ability to request an *en banc* sitting of designated judges when an emerging legal issue of broad concern is identified.**

Composition of *en banc* panels is a matter solely within the discretion of the Court. The Court may wish to consider holding a "mini" *en banc* – for instance, a three or five-judge panel to consider an issue of potential significance to the warrant practice. This could be akin to the process common in provincial courts of appeal for requesting a five-judge panel when a party intends to ask the court to reconsider and overrule one of its own precedents. The analogy is not perfect: in that other context, the enlarged panel request is seen as necessary to give one panel of the court legitimate authority to overrule another panel. Here, by contrast, we are concerned not so much with the authority to create new precedent as we are with the practical benefits of having multi-judge input on a novel and difficult issue that may end up recurring in future warrant applications. The option of holding a "mini" *en banc* may provide an attractive middle ground between the logistical challenges of convening a full *en banc* and the inefficiency of raising the same issue before several single judges.[44]

[44] Having the same issue adjudicated by a number of judges of coordinate jurisdiction is not unusual or problematic in itself. It happens all the time in the criminal and civil courts. The difference is that, in those contexts, the appellate courts can be expected to provide definitive guidance before long, erasing any untenable divergences that have arisen between the rulings of trial-level judges. In the CSIS warrant context appeals are unusual. Warrants are time-sensitive,

Recommendation #13: **Where the Court believes it appropriate, counsel should consent to holding "mini" *en banc* sessions of three or five designated judges where an issue of general concern to the warrant process is identified.**

IX. A Bench and Bar Committee?

There is currently no forum in which counsel and judges in this practice area can address issues relating to the practice in a context less formal than an *en banc* hearing. I think that the creation of such a forum – a kind of "bench and bar" committee for the national security practice area – would be a salutary development. The aim would be to provide a forum in which practice-related issues of mutual interest can be discussed and emerging area of concern can be addressed.

There are real issues of judicial independence and transparency that have no doubt played a role in hindering the development of any such forum to date. I would not want to minimize those concerns. The Court obviously cannot be seen to be having off-the-record, private meetings with a government body that is the sole litigant before it on these matters. With appropriate participation and safeguards, however, I think that such a committee – including, but not necessarily limited to those who participate in CSIS warrant applications – would be a useful and appropriate initiative. With those independence and transparency concerns in mind, the committee would need to be appropriately composed, with representation from outside the government. It would need to include substantial – i.e. much more than "token" – representation of security-cleared counsel in private practice with active involvement in national security matters.

In such a forum, both the Court and the Service could obtain a greater awareness of practice issues that are of concern to the Court, the Service, and *amicus* alike. They could be addressed so that any necessary adjustments could be made *before* the issue gives rise to suspicion on either

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after all, and appellate review in the criminal context almost always comes after trial. As I have emphasized several times, because CSIS warrants do not lead (directly) to prosecutions, after-the-fact review – including appellate guidance on the law – is rare. For that reason, there is more of a premium in maintaining some measure of consistency among the designated judges by way of processes like the *en banc*.

side. Properly implemented, I think it could improve the relationship of trust between counsel and the court, and also improve relations between counsel on different sides, further to the concern about collegiality expressed above.

Recommendation #14: **A bench and bar committee should be established, with representation from both "sides" of the national security bar.**

To be clear, I do not propose that contentious legal issues be addressed in such a forum. Those must be litigated on the record, in court. I am speaking here about the kind of process and practice issues that do not arise as contentious issues on a particular application but which might (in the criminal or civil context) be the subject of a practice directive from the court. An example might be the "responsiveness" concern addressed above. Through a committee, a more detailed protocol satisfactory to both the Court and counsel could be settled on – and, perhaps, amended from time to time as required. Regular consultation over such matters could be expected to yield practical solutions to problems that have the potential to annoy the Court if not addressed in a timely manner. Moreover, the process of consultation could help restore the culture of trust that has recently been compromised.

Another way to increase transparency and mutual understanding would be the production a yearly report from CSIS LSU to the Court on practice issues that have arisen and the efforts undertaken to address them. While this is not a full substitute for ongoing dialogue through a committee, a yearly report gathering in one place a brief summary of the back-and-forth with the Court on warrant-related issues – i.e. the matters which counsel agreed to look into and get back to the Court about – would help ensure that such matters do not fall through the cracks. It would also assist in keeping the designated judges apprised of efforts made in response to inquiries made by their colleagues, with respect to matters not actually addressed in an *en banc*.

Recommendation #15: **Consideration should be given to submitting an annual report to the Court on CSIS responses to judicial input on warrants.**

X. An expanded role for Independent Counsel

Independent Counsel – drawn from the ranks of the National Security Group of the Department of Justice – serves a crucial but tightly circumscribed role in the warrant application process. When the application materials are largely complete, the assigned IC receives a copy of the draft affidavit. After reviewing it, he or she attends at CSIS headquarters and participates in an intensive "facting" session with the affiant and analyst. This process is thorough: the affidavit is scrutinized paragraph by paragraph, and source documents are checked to ensure that each factual assertion is accurate and appropriately sourced.

As alluded to above, the role of IC was developed in the aftermath of the *Atwal* affair. In *Atwal*, serious factual errors were discovered in the affidavit materials put before the issuing court. The errors were serious enough to cause the Crown to concede that the warrant should be rescinded; it also led to the resignation of the Director.

Almost thirty years later, today's challenges are largely of a different nature. No doubt, factual accuracy continues to be a pressing concern. But it is not where recent difficulties have arisen. The "facting" process is thorough, up to and including the review and challenge function carried out by Independent Counsel. Recent problems have arisen not from factual inaccuracies but CSIS' failure to appreciate what the Court needs and wants to know, often at the operational and policy level.

Currently, however, IC only scrutinizes the *factual* assertions in the affidavit. They are not even given a copy of the draft warrant, and are therefore are in no position to scrutinize or challenge the powers sought, or to flag any latent or emerging legal issues.[45] I think this is a missed opportunity. The involvement of IC is the only stage – prior to court – at which an "outside" perspective considers the warrant application. Accordingly, I think that the IC function should be reformed to be responsive to the real challenges faced by CSIS and its counsel today. As we have seen, the most serious problems have been failures to identify facts, issues, and practices as

[45] The affidavit will contain a description of the powers sought, but not in the precise terms articulated in the warrant itself. In my view, it is not an appropriate substitute for ensuring that IC scrutinizes the warrant terms and considers any potential issues arising from them.

appropriate for disclosure to the Court. If properly equipped to do so, IC could provide another check against such failures recurring. Selection of IC should be geared toward a depth of relevant experience, and an appropriate skill set, for this expanded mandate.

It has been suggested to me that reluctance to include a legal component to the IC function may stem from an insistence that the Crown should have a single, consistent legal position. It would be unseemly, on this view, for one Crown lawyer (IC) to challenge a legal position taken by another Crown lawyer (CSIS LSU counsel). In my opinion, this criticism is not persuasive. There is nothing improper or even unusual about Crown lawyers exercising an internal challenge function. To be clear, this expanded function would *not* include appearing before the Court on warrant applications; the challenge function would be internal to the preparation of the application materials.

IC *could* play a role, however, in identifying those cases in which an adversarial presentation could assist the Court in resolving a legal issue arising on an application. That is, I think that one feature of an expanded IC role should be the authority to flag cases in which novel legal or factual issues arise, making the appointment of *amicus* appropriate. Although the decision to appoint *amicus* resides exclusively in the Court, it would make sense to empower IC to make such a recommendation to Senior General Counsel at CSIS LSU where appropriate. It would be expected that CSU LSU would then convey that recommendation to the court.

To be clear, such a recommendation would not be tantamount to an assertion that the CSIS position is legally wrong or otherwise objectionable: rather, it would be a judgment (made through the lens of the duty of candour) that the application involves a potentially contentious legal issue on which the Court would benefit from adversarial argument. In my view this is in no way incompatible with the role of the Crown; rather, it is part and parcel of the duty of candour and the Crown's overriding obligation to the administration of justice. Involving IC in such decisions provides one more significant assurance that the ultimate goal of the duty of candour – to put all relevant information before the court, fully and fairly – is successfully carried out.

I therefore recommend that the role of IC be expanded to include scrutiny of legal and policy issues arising in the warrant application process. The timing of IC's involvement will likely need to be adjusted to accommodate this expanded role. However, I understand that application

materials (but not the source documents) are already provided to IC in advance of the "facting" session. I see no reason why the draft warrant – and whatever other materials are relevant to this expanded role – could not likewise be provided in advance to allow IC sufficient time to make a meaningful contribution to the process. Obviously, as with everything in this process, exigent circumstances may require abridgment of ordinary timelines. The key, in my view, is that IC be provided with sufficient material and adequate time to make an informed and considered judgment about legal and policy issues raised by a warrant application, and to be in a position to make follow-up inquiries with CSIS LSU counsel as necessary.

Recommendation #16: **The role of Independent Counsel be expanded to include scrutiny of legal and policy issues arising from a warrant application.**

Recommendation #17: **Independent Counsel should be expressly empowered to recommend to Senior General Counsel that a request for the appointment of *amicus* be made to the Court.**

It may be that the selection criteria for IC will need to change based on the expanded role. I understand that in the past, IC have sometimes been former members of CSIS LSU. There are arguments for and against this: on the one hand, it could be seen to undermine the "independence" of the role; on the other, experience in CSIS LSU provides an invaluable insight into the warrant process that cannot be gained elsewhere. On balance, I am not inclined to make a firm recommendation about whether counsel chosen to act as IC should or should not have had experience as counsel in CSIS LSU. Maintaining a mix of skill sets and career experiences is likely the most effective solution.

XI. The CSIS LSU team

The unit currently comprises about 25 counsel. Warrant applications are a large, but by no means the only, part of the practice. Another large aspect of the practice is providing legal advice

to CSIS. I understand that in the course of any given year, the legal opinions provided to CSIS number in the hundreds. The work can be fast-paced and complex, and is inevitably demanding.

From my observation of counsel and their work, I believe they are of high calibre, both in terms of legal skill and dedication to their work. Counsel are acutely aware that their work engages profound consequences for national security as well as for persons affected by CSIS warrants. It is clear to me that they take these responsibilities extremely seriously. They are also profoundly concerned about the criticisms recently expressed by the Court and wish to do everything they can to repair the relationship and avoid repetition of past mistakes.

CSIS LSU counsel come from a reasonably diverse set of legal backgrounds. Many joined the unit from other branches of the Department of Justice, others came from private practice. While I think it might be desirable to have more counsel with a background in criminal prosecutions, I think that the contingent generally includes a good mix of professional experiences.

I have observed that counsel tend to stay in the unit for a relatively lengthy period of time. It is not uncommon for counsel to stay for a decade or more. This is not surprising: counsel need to acquire a great deal of specialized knowledge in order to carry out their role effectively, and abbreviated stints in the unit would generally be a poor use of human resources. There is also a great benefit to continuity with respect to warrant applications that continue from year to year. Institutional memory is one thing, but it is especially useful to have the same counsel who brought the original application dealing with a renewal application, likely the following year. All of which is to say that continuity has clear benefits.

Nonetheless, I do think that the insular context of CSIS LSU poses certain challenges. My sense is that CSIS LSU counsel have considerably less day-to-day interaction with other Justice counsel – let alone counsel in private practice – than do lawyers located in other units of the Department. This insularity can be to counsel's detriment, in terms of being exposed to different ideas and perspectives germinating elsewhere.

It is also a challenge for counsel to be acting for a powerful single client – and one with such a challenging and significant mandate. The risk of "client capture" is always real, despite the best efforts of counsel to carry out the Minister of Justice role as described above. It's fair to say

that the Court has sometimes viewed CSU LSU counsel as having insufficient distance from their client. And if that perception exists, I think that efforts need to be made to counteract it.

Partly, I think this can be accomplished through better responsiveness and transparency with the Court. My sense is that some of the Court's concerns about "client capture" may be rooted in the perception that when counsel indicate their intention to seek advice or instructions on a particular point they are often not as reliable in delivering a prompt response as the Court would like. It is understandable that where complex national security issues and investigations are involved, counsel may be reluctant to make commitments to the court "on their feet" in other than minor or routine matters. They may justifiably have less flexibility in this respect than would, say, Crown counsel before a judge *ex parte* in a criminal matter.

Relatedly, I think that CSIS LSU counsel should be better able to secure advice on novel points from outside the group in a timely manner. Senior PPSC counsel with extensive wiretap or search warrant experience – some of whom also have substantial experience in the national security world – would be an invaluable resource for knotty issues that arise in respect of warrant powers and conditions. My sense is that they are utilized too infrequently. It may be helpful to identify a short list of federal Crown counsel with experience in both wiretap practice and national security matters – and preferably with top secret security clearance – who could regularly act as outside resource persons whenever CSIS LSU counsel determine that a fresh perspective on a difficult issue would prove useful.

Recommendation #18: **Develop a short list of senior PPSC counsel with relevant expertise who are available on short notice to provide advice on difficult warrant issues.**

More frequent secondments from CSIS LSU to other branches of Justice and the PPSC would, in my view, be a positive initiative. 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. I think that temporary secondments of CSIS LSU counsel are one way in which the balance can be achieved.

Recommendation #19: **Secondments of counsel from CSIS LSU to other branches of the Department of Justice, as well as to the Public Prosecution Service of Canada, should be encouraged.**

XII. Training and Continuing Education

I have been provided with materials used in the training of both CSIS employees and counsel. From this I have learned that extensive and targeted training is provided for both counsel and Service members engaged in the warrant application process. It appears to be comprehensive and high-quality. The counsel principally responsible for developing and implementing the program has a strong depth of experience well suited to the task.

One of the things that struck me, however, is that this world of training and continuing education is, like the practice area more generally, very insular. I think that counsel and Service employees would benefit from more exposure to experienced counsel (and perhaps police officers and others) from other contexts. Perspectives from the judiciary, prosecution services, and the defence bar (including *amicus*) are also essential.

It should be kept in mind that while the CSIS warrant context is unique in many respects, what makes a good affidavit really does not vary from one context to another. Effective affidavit drafting is a portable skill. Moreover, it is essential to carrying out the duty of candour, since poor drafting can compromise the court's ability to grasp the facts and issues at stake. I see no reason why training in this area should be insular in nature. Participation in programs put on by law enforcement agencies, some of which I refer to above, may well be useful for CSIS affiants.

As for training geared toward counsel, a word about the involvement of the judiciary in such sessions is appropriate. This is a delicate issue because of the independence concerns that arise in this context. However, I think those concerns can be alleviated if security-cleared private counsel – presumably drawn from those who have acted as *amicus* or special advocates – are also involved as participants and/or instructors. I note that the Court has in the past convened *en banc* sessions in order to receive education on new technologies. In these instances, the services of

eminent retired judges (of a different court) have been retained to oversee the process and ensure that the appearance and reality of independence is maintained.

Recommendation #20: **The judiciary should be approached about participating – with appropriate independence safeguards – in warrant-related continuing education for CSIS employees and counsel.**

In the course of my consultations I spoke with a number of counsel who have acted as *amicus* on national security matters in the past. I was surprised to learn that none of them had been invited to participate in any kind of education or training sessions with CSIS counsel or employees. This is a missed opportunity, in my view. Participation of "defence"-side counsel in warrant-related continuing education for CSIS counsel and employees would have a number of benefits, in my view. Most obviously, it would provide the benefit of invaluable experience not enjoyed by those who have worked only on the government side, and along with it the benefit of a different perspective on issues and challenges in the warrant process.

Greater sensitivity to these other perspectives could, in my view, have real benefits for the duty of candour. If, as I have explained above, the recent problems have been mostly about a failure to recognize the full contours of *relevance* in the *ex parte* context, it seems natural that greater exposure to a non-governmental, "defence"-oriented perspective in continuing education could help mitigate such shortcomings in the future. Recognizing issues of potential concern to the Court – and knowing how and when to make appropriate disclosure – requires a certain flexibility of mindset which, in my view, could be cultivated through this kind of broader participation in training and education.

Recommendation #21: **Security-cleared counsel in private practice should be involved in the provision of warrant-related training for CSIS employees and counsel.**

Involving *amicus* and other non-CSIS personnel in training may also have benefits for the collegiality of the national security bar. My impression has been that the bar in this area is very

unlike the criminal bar, which is generally characterized by close working relationships (and strong collegiality) between counsel on opposite sides of the courtroom. Part of this is no doubt the inevitable result of a numerical imbalance: naturally, the large majority of counsel practicing in this area work for the government. The top-secret character of the work also plays an obvious role.

Nonetheless, I think that more can and should be done to promote collegiality in the bar, not just as something that is healthy in its own right, but also as a mechanism for learning and professional improvement. Outside involvement in warrant-related training and education is a natural place to start. Another potentially fruitful option is joint participation in a bench and bar committee, discussed above.

The national security practice has the benefit of extremely knowledgeable and capable counsel on both "sides" of the bar, not to mention a highly specialized and experienced judiciary. I think much more can be done to share the fruits of this expertise, for the benefit of all involved.

XIII. Conclusion

Earlier in this report I described a crisis in the relationship of trust between the Service and the Court. The release of Justice Noël's Reasons in the *Associated Data* case marked the latest, and arguably most serious, manifestation of that troubling development. I do not underestimate the seriousness of the Court's concerns nor the extent of the work that needs to be done to repair the relationship.

I am heartened, however, by the clear commitment on the part of CSIS LSU and the Service to make whatever changes are necessary to ensure that past mistakes are not repeated and, moreover, to create a more trusting relationship with the Court. I have been impressed by counsel's dedication to their work and their genuine determination to use the Court criticisms as a means to improve their practice and restore the Court's trust.

The observations and recommendations in this report are provided to assist in reaching that goal. Needless to say, achieving full compliance with the duty of candour and the broader obligations of the Crown in this challenging context is a continuous process. No set of policies or protocols will by themselves by sufficient to ensure success, but I believe they can assist in

reorienting the thinking of counsel and the Service to better equip them to meet the challenges that new circumstances will inevitably bring forth.

APPENDIX – SUMMARY OF RECOMMENDATIONS

Recommendation #1:

CSIS affiants need to be equipped with a profound understanding of the duty of candour, and sufficient skill and experience to successfully implement it.

Recommendation #2 :

CSIS affiants must exercise independence from the investigative team in ensuring that they fulfill their personal sworn obligation to make full, fair, and frank disclosure to the Court.

Recommendation #3:

CSIS should ensure that the role of affiant is a senior and respected role within the Service, and that affiants occupy that role on a recurring basis.

Recommendation #4:

Anything novel (e.g. technologically, legally) about a warrant application should be clearly foregrounded for the Court.

Recommendation #5:

The appointment of *amicus curiae* should be recommended where a warrant application raises a novel and/or difficult legal issue.

Recommendation #6:

Counsel's guiding presumption should be to err on the side of disclosure.

Recommendation #7:

The Court should be informed when CSIS has changed its legal position in respect of an issue before the Court.

Recommendation #8:

A formal process should be implemented for identifying new or emerging issues touching on warrants that may become ripe for engagement with the Court.

Recommendation #9:

In preparing a warrant application, counsel and the affiant should be guided by the following question: "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?" This should include a consideration of the potential impact on other orders in force.

Recommendation #10:

The Department of Justice and CSIS should establish a formal joint policy on complying with the duty with candour in the CSIS warrant application process. It should be reviewed and revised as necessary at set intervals of two to three years (and earlier as necessary).

Recommendation #11:

Where a judge has provided input or expressed concern about some aspect of a warrant application and asked for follow-up, counsel should write to the judge promptly after the hearing responding substantively or proposing a timeline for a substantive response.

Recommendation #12:

Counsel for CSIS should have the ability to request an *en banc* sitting of designated judges when a legal issue of broad concern is identified.

Recommendation #13:

Where the Court considers it appropriate, counsel should consent to holding "mini" *en banc* sessions of three or five designated judges where an issue of general concern to the warrant process is identified.

Recommendation #14:

A bench and bar committee should be established, with representation from both "sides" of the national security bar.

Recommendation #15:

Consideration should be given to submitting an annual report to the Court on CSIS responses to judicial input on warrants.

Recommendation #16:

The role of Independent Counsel be expanded to include scrutiny of legal and policy issues arising from a warrant application.

Recommendation #17:

Independent Counsel should be expressly empowered to recommend to Senior General Counsel that a request for the appointment of *amicus* be made to the Court.

Recommendation #18:

Develop a short list of senior PPSC counsel with relevant expertise who are available on short notice to provide advice on difficult warrant issues.

Recommendation #19:

Secondments of counsel from CSIS LSU to other branches of the Department of Justice, as well as to the Public Prosecution Service of Canada, should be encouraged.

Recommendation #20:

The judiciary should be approached about participating – with appropriate independence safeguards – in warrant-related continuing education for CSIS employees and counsel.

Recommendation #21:

Security-cleared counsel in private practice should be involved in the provision of warrant-related training for CSIS employees and counsel.