



Communications
Security
Establishment
Commissioner

Annual Report

2001
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2002



Canada

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Communications Security
Establishment Commissioner



Commissaire du Centre de la
sécurité des télécommunications

The Honourable Claude Bisson, O.C.

L'honorable Claude Bisson, O.C.

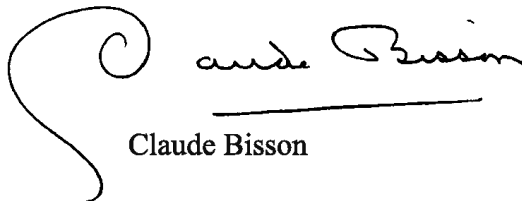
June 2002

The Honourable John McCallum, P.C.
Minister of National Defence
MGen G.R. Pearkes Building, 13th Floor
101 Colonel By Drive, North Tower
Ottawa, Ontario
K1A 0K2

Dear Mr. McCallum:

Pursuant to sub-section 273.63 (3) of the *National Defence Act*, I am pleased to submit to you my 2001-2002 annual report on my activities and findings, for your submission to Parliament.

Yours sincerely,



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INTRODUCTION

Since my last annual report was released in May 2001, the context in which Canada's security and intelligence community works has been transformed. Members of the Canadian Forces have gone into action in Afghanistan. Our closest neighbour is still recovering from the terrorist attacks of September 11. Police and intelligence officials are working across Canada and with their counterparts elsewhere to prevent further terrorist activity in this country and abroad.

This new environment has given Canadians a growing awareness of the contributions to our well-being that are made by the members of our security and intelligence community, as well as police, fire services, enforcement officials, and military forces. Canadians rely on them to detect threats to public safety and to stop those who want to harm us or our allies.

The agency I review – the Communications Security Establishment (CSE) – joined other security and intelligence organizations in responding to the events of the past nine months. CSE provides the government with foreign intelligence by collecting, analyzing and reporting on information such as electronic emissions and data it acquires from the global information infrastructure (signals intelligence). It also helps ensure that the Canadian government's electronic information and its infrastructure are secure from interception, disruption, manipulation or sabotage (information technology security).

In the immediate aftermath of September 11, CSE employees worked around the clock to contribute to the worldwide effort to identify those responsible for the attacks in the United States and to prevent additional attacks. Together with other members of Canada's security and intelligence community, CSE formed new partnerships in common cause against the threat of terrorism.

The Government of Canada quickly reaffirmed terrorism as a matter of national concern affecting the security of the nation. Noting that “the challenge of eradicating terrorism, with its sophisticated and trans-border nature, requires enhanced international cooperation and a strengthening of Canada’s capacity to suppress, investigate and incapacitate terrorist activity,”¹ the government introduced into Parliament last October its omnibus Bill C-36, the *Anti-terrorism Act*.²

To strengthen Canada’s ability to combat terrorism, and to respond to threats to Canadian lives and interests from terrorism, the Bill proposed several amendments to existing Acts. Of particular interest to me were the proposed amendments to the *Official Secrets Act* and the *National Defence Act*, the latter providing the legislative basis for both the activities of CSE and the role of the CSE Commissioner. Bill C-36, which was passed by Parliament and proclaimed on December 24, 2001, also introduced new elements to the roles of CSE and my Office.

In this year’s annual report, I describe those parts of the legislation that affect CSE and the Commissioner and the implications of the legislation. As required by my mandate I also report on the 2001-2002 activities and findings of my Office.

THE ANTI-TERRORISM ACT

The *Anti-terrorism Act* is a major piece of legislation with numerous elements affecting many areas of government activity. Despite concerns expressed about the haste with which the legislation was drafted and debated, I know with certainty that those parts of the legislation that deal with CSE and

¹ From the preamble to Bill C-36, the *Anti-terrorism Act*, S.C. 2001, c. 41.

² The *Anti-terrorism Act*: An Act to amend the Criminal Code, the *Official Secrets Act*, the *Canada Evidence Act*, the *Proceeds of Crime (Money Laundering) Act* and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism.

the CSE Commissioner benefited from years of discussion within government long before September 11.

More than a decade of debate

As long ago as 1990, the House of Commons Special Committee on the Review of the *Canadian Security Intelligence Service Act* and the *Security Offences Act* recommended that Parliament establish CSE by statute. Although the government chose not to act on the recommendation at that time, it did indicate that it was “considering providing the Minister of National Defence with some additional capacity for review of CSE.” This ultimately led to my appointment in 1996 as the first Commissioner of CSE.

The issue of legislation for CSE arose again in 1996 when the Privacy Commissioner completed his examination of CSE. He concluded that, to the extent it could be established through his audit, CSE operated in compliance with the *Privacy Act* and the principles of fair information practices. However, he too recommended the enactment of enabling legislation for CSE.

Later that year, the Auditor General of Canada tabled a report on the Canadian intelligence community in which he called on the government to consider the advantages of an appropriate legislative framework for CSE. He reiterated this view in a short 1998 follow-up report.

Similarly, in 1999, the Senate Committee on Security and Intelligence, chaired by former Senator William Kelly, recommended that CSE have its own Act of Parliament and that the legislation provide for a permanent and separate review body for CSE.

In four of my annual reports, I raised the matter of legislation for CSE. I expressed the view, in these

reports and elsewhere, that legislation would be an appropriate development that would put CSE on a firm footing by articulating its mandate and powers and its relationships with Parliament, the government, and the Minister of National Defence.

Suddenly and unexpectedly, what had been discussed for many years became a reality. The government accepted the advice of its independent observers and agreed that, in the context of the omnibus Bill C-36, the time was right to introduce legislation for CSE and the CSE Commissioner.

In my view, the passage of legislation dealing with CSE and the Commissioner is a welcome development. Moreover, I believe the legislation appropriately takes into account the critical balance between the needs of the state to collect information to protect its citizens and the individual rights of those citizens to privacy.

The parts of the Act that relate to CSE and the Commissioner are described below.

Communications Security Establishment mandate

The *Anti-terrorism Act* provides a legislative base for CSE by amending the *National Defence Act*. The new section 273.64 of the *National Defence Act* states:

- (1) The mandate of the Communications Security Establishment is
 - (a) to acquire and use information from the global information infrastructure for the purpose of providing foreign intelligence, in accordance with Government of Canada intelligence priorities;
 - (b) to provide advice, guidance and services to help ensure the protection of electronic information and of information infrastructures of importance to the Government of Canada;and

(c) to provide technical and operational assistance to federal law enforcement and security agencies in the performance of their lawful duties.

(2) Activities carried out under paragraphs (1)(a) and (b)

(a) shall not be directed at Canadians or any person in Canada; and

(b) shall be subject to measures to protect the privacy of Canadians in the use and retention of intercepted information.

These provisions have the effect of enshrining in legislation the historical activities of CSE.

Ministerial authorization

The *National Defence Act* also allows the Minister of National Defence to authorize CSE to intercept private communications in specific circumstances, by issuing a written Ministerial authorization. The Minister may, for the sole purpose of obtaining foreign intelligence, issue an authorization if satisfied that:

- (a) the interception will be directed at foreign entities located outside Canada;
- (b) the information to be obtained could not reasonably be obtained by other means;
- (c) the expected foreign intelligence value of the information that would be derived from the interception justifies it; and
- (d) satisfactory measures are in place to protect the privacy of Canadians and to ensure that private communications will only be used or retained if they are essential to international affairs, defence or security.

In the past, CSE was prohibited from intercepting any communication in which one of the participants in the communication was in Canada – even if the target of the interception was outside Canada. This new provision allows the Minister of National Defence to authorize such interceptions in circumstances defined in the authorization. An example might be a communication in which a person of foreign intelligence interest in another country contacts a counterpart in Canada.

The new legislation also allows the Minister to issue authorizations to intercept private communications “for the sole purpose of protecting the computer systems or networks of the Government of Canada from mischief, unauthorized use or interference.” Section 273.65 (4) of the *National Defence Act* sets out the conditions for such an authorization:

- (a) the interception is necessary to identify, isolate or prevent harm to Government of Canada computer systems or networks;
- (b) the information to be obtained could not reasonably be obtained by other means;
- (c) the consent of persons whose private communications may be intercepted cannot reasonably be obtained;
- (d) satisfactory measures are in place to ensure that only information that is essential to identify, isolate or prevent harm to Government of Canada computer systems or networks will be used or retained; and
- (e) satisfactory measures are in place to protect the privacy of Canadians in the use or retention of that information.

The legislation directs the CSE Commissioner to review the activities carried out under Ministerial authorizations to ensure they are authorized and to report annually to the Minister on the review.

The Commissioner's mandate

In addition to assigning responsibility for reviewing CSE's activities under Ministerial authorizations, the *National Defence Act* now sets out the duties of the Commissioner's office as follows:

- (a) to review the activities of the [CSE] to ensure that they are in compliance with the law;
- (b) in response to a complaint, to undertake any investigation that the Commissioner considers necessary; and
- (c) to inform the Minister [of National Defence] and the Attorney General of Canada of any activity of the [CSE] that the Commissioner believes may not be in compliance with the law.

In effect, the mandate I have been fulfilling since 1996 by Order in Council is now entrenched in law.

Public interest defence

The *Anti-terrorism Act* also made significant changes in the former *Official Secrets Act*, now called the *Security of Information Act*. The Act now prohibits people bound by secrecy from communicating or confirming "special operational information", which is defined to include information about the kinds of activities CSE lawfully undertakes.

A person would not be found guilty of an offence under this part of the Act, however, if that person could establish that he or she acted in the public interest by communicating or confirming special operational information. The Act states that a person acts in the public interest if the person's purpose is to disclose "an offence under an Act of Parliament that he or she reasonably believes has been, is being or is about to be committed by another person in the purported performance of that person's duties and functions for, or on behalf of, the Government of Canada." The public interest in

disclosure must outweigh the public interest in non-disclosure. This is why it is called a public interest defence.

A judge or court can consider a public interest defence only if the person involved, before disclosing special operational information, brought his or her concerns to the attention of the institution's deputy head or the Deputy Attorney General of Canada. If a person with a concern about CSE's activities does not receive a response from the deputy head or Deputy Attorney General within a reasonable time, he or she must then bring the concern to the CSE Commissioner and must allow a reasonable time for the Commissioner to respond. Failure to do so precludes that person from using the public interest defence.

Implications for the Commissioner

It will take some time to fully assess the implications of the *Anti-terrorism Act* for my work. The responsibility of reviewing CSE activities under Ministerial authorizations is a significant one. These authorizations will extend CSE's activities into new areas, and I will want to ensure that CSE has appropriate policies and procedures in place, and that it applies them, to protect the privacy of Canadians as it implements this expanded mandate.

The Commissioner's role in public interest defence cases is comparable in some ways to my continuing responsibility to consider complaints about CSE, and I anticipate that the measures I have in place to address complaints will allow me to respond quickly and appropriately to any concerns raised about CSE's activities under the *Security of Information Act*. Very few complaints about CSE have been brought to me since I took office in 1996. It remains to be seen whether the new public interest defence provisions will generate additional activity.

With the Commissioner's mandate now clearly established in law, I will no longer need to debate the theoretical merits of one arrangement for reviewing CSE over another. However, the Commissioner's new status as an ongoing institution of government raises a host of practical administrative issues that must now be addressed. For one thing, I will need to ensure my Office is sufficiently resourced to review CSE's expanded activities. Other issues, such as the Office's place in government, must also be explored in coming months.

2001-2002 ACTIVITIES

Anti-terrorism legislation

As Parliamentarians considered the *Anti-terrorism Act* last autumn, they sought my views on the parts of the legislation dealing with CSE and the CSE Commissioner. I appeared in October 2001 before the Special Senate Committee on the Subject Matter of Bill C-36, and in November I submitted a brief to the House of Commons Standing Committee on Justice and Human Rights. The texts of my opening remarks to the Senate Committee and my brief to the House of Commons Committee are available on my Office's website at <http://csec-ccst.gc.ca>.

Since the passage of the legislation, my staff and I have focused on my new responsibilities. Most significantly, I began preparations early in 2002 to launch my first review of CSE's activities under Ministerial authorization issued by the Minister of National Defence. I will be reporting the results to the Minister later this year.

Between the passage of the legislation and the end of the 2001-2002 fiscal year, I received no requests to consider concerns about the activities of CSE from persons seeking to establish a public interest defence under the *Security of Information Act* as it relates to the disclosure of special operational information.

Classified reports

My mandate authorizes me to submit classified reports to the Minister about CSE's activities. Since my appointment in 1996, I have submitted 19 such reports, including two in 2001-2002, and two others were nearing completion at year's end. The inquiries I made to produce these reports revealed no evidence of unlawful activity by CSE. A complete list of the classified reports I have submitted to the Minister can be found in Annex B.

Complaints

During 2001-2002, I received one complaint from a member of the public concerning CSE. I reviewed this complaint and determined that no further action was required.

2001-2002 findings

Each year in this report I state my findings about the lawfulness of CSE's activities based upon the results of a series of reviews. These reviews include, but are not limited to, an examination of the legal authorities under which CSE conducts its activities as well as related policies and practices.

I am able to report that I am satisfied that those CSE activities examined during the period under review complied with law and existing policy. Further, I found no evidence that CSE targeted the communications of Canadian citizens or permanent residents.

THE YEAR AHEAD The Public Safety Act

In April 2002 the government introduced Bill C-55, the *Public Safety Act*. Still under consideration by Parliament as I write this, the Bill is a companion piece to the *Anti-terrorism Act* passed in December 2001. Bill C-55 proposes legislative changes on a wide range of subjects, from transportation safety and immigration to biological weapons.

Of particular interest to me is a proposed amendment to the *National Defence Act* that would confer a new responsibility on the Commissioner of CSE for reviewing activities undertaken by the Department of National Defence or the Canadian Forces to protect their computer networks and systems.

Over the coming months, I will review this new legislative provision and the impact it may have on my office.

Budget and staff

During the 2001-2002 fiscal year, my budget allocation was \$647,150. I can report that actual expenses incurred were well within budget.

My office consists of full-time staff, several subject-matter experts whom I engage on a part-time basis, and an independent legal counsel. I benefit from this arrangement, which allows me to bring on board people whose backgrounds are well-suited to conducting specialized work in an evolving and technically challenging field.

Resource requirements for the coming year are under review, given additional responsibilities conferred on the Commissioner through amendments to the *National Defence Act* and the *Security of Information Act*.

Commissioner's reappointment

Although the position of Commissioner of the Communications Security Establishment is now established in law, the appointment of the individual to fill the office is still made by the Governor in Council for a specified term. My current appointment is for a three-year term that expires in June 2002, and I have been reappointed for a further year to June 2003.

Review agencies conference

The third international Review Agencies Conference was scheduled to take place in Washington, D.C., in mid-October 2001, following on conferences in Canberra (1997) and Ottawa (1999). Following the events of September 11, the Washington conference was cancelled. My colleagues and I convened in London, England, May 12-14, 2002, to exchange knowledge and experiences and to renew acquaintanceships.

LOOKING AHEAD Safeguarding the privacy of Canadians

Last year, I concluded my report by observing that CSE must constantly progress to keep pace with technological advances. Only by doing this can CSE improve its ability to screen out Canadian communications and safeguard the privacy of Canadians.

Despite the enormity of events since my last report and the pressures now on Canada's security and intelligence community to provide information and produce results, to my mind the issue of privacy remains paramount.

CSE's additional powers under Ministerial authorization are new and important tools in the fight against terrorism. At the same time, however, they must be used judiciously and in a manner consistent with the letter and the spirit of the law. This will require conscientious effort on the part of all parties as we establish and implement appropriate procedures to discharge our legislated duties.

I am also well aware of the challenges these new powers present for the review of CSE's activities. I intend to fulfil my responsibilities in the year ahead vigilantly, with this fact firmly in mind.



CANADA

PRIVY COUNCIL • CONSEIL PRIVÉ

P.C. 1999-1048

June 8, 1999

His Excellency the Governor General in Council, on the recommendation of the Minister of National Defence, pursuant to Part II of the *Inquiries Act*, hereby authorizes the Minister of National Defence (in this order referred to as "the Minister")

(a) to re-appoint the Honourable Claude Bisson of Montreal, Quebec, for a period of three years, as a commissioner ("the Commissioner") to review the activities of the Communications Security Establishment ("CSE") for the purpose of determining whether those activities are in compliance with the law;

(b) to authorize the Commissioner to commence that review on his own initiative or at the request of the Minister;

(c) to authorize the Commissioner to investigate any complaint, concerning the lawfulness of CSE activities, made by any individual who is a Canadian citizen or a permanent resident of Canada;

(d) to authorize the Commissioner not to investigate complaints for which, in the Commissioner's opinion, other avenues of redress are established by statute;

(e) to specifically authorize the Commissioner to inform any complainant of the results of his investigation, ensuring that no classified information is disclosed to the complainant;

(f) to direct the Commissioner to inform the Minister and the Attorney General of Canada of any CSE activity that the Commissioner believes may not be in compliance with the law;

.../2

ANNEX A

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(g) to direct the Commissioner to submit to the Minister, once each year and in both official languages, a report on the Commissioner's activities and findings that are not classified, which report the Minister will table in Parliament;

(h) to authorize the Commissioner, at any time the Commissioner considers it advisable, to submit a report containing classified information to the Minister;

(i) to direct the Commissioner, before submitting any report to the Minister, to consult with the Deputy Secretary to the Cabinet (Security and Intelligence) at the Privy Council Office for the purpose of ensuring compliance with all security requirements and the preservation of the secrecy of sources of security and intelligence information and of the security of information provided to Canada in confidence by other nations;

(j) to direct the Commissioner and all persons engaged on his behalf take an oath of secrecy and comply with all applicable government security requirements;

(k) to authorize the Commissioner to engage the services of any staff, advisors and counsel that he considers necessary to assist him in the performance of his duties and functions at such rates of remuneration and reimbursement as may be approved by the Treasury Board;

.../3

- 3 -

(l) to fix the remuneration of the Commissioner at the per diem rate set out in the annexed schedule, which rate is within the range of \$400 to \$500; and

(m) to authorize that the Commissioner be paid reasonable travel and living expenses incurred by him in the performance of his duties and functions while absent from his ordinary place of residence, in accordance with Treasury Board travel directives;

effective June 19, 1999.

CERTIFIED TO BE A TRUE COPY—COPIE CERTIFIÉE CONFORME



CLERK OF THE PRIVY COUNCIL—LE GREFFIER DU CONSEIL PRIVÉ

ANNEX A

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Classified Reports, 1996-2002

Classified Report to the Minister - March 3, 1997 (TOP SECRET)

Classified Report to the Minister

- Operational Policies with Lawfulness Implications - February 6, 1998 (SECRET)

Classified Report to the Minister

- CSE's Activities under *** - March 5, 1998 (TOP SECRET Codeword/CEO)

Classified Report to the Minister

- Internal Investigations and Complaints - March 10, 1998 (SECRET)

Classified Report to the Minister

- CSE's activities under *** - December 10, 1998 (TOP SECRET/CEO)

Classified Report to the Minister

- On controlling communications security (COMSEC) material - May 6, 1999 (TOP SECRET)

Classified Report to the Minister

- How We Test (A classified report on the testing of CSE's signals intelligence collection and holding practices, and an assessment of the organization's efforts to safeguard the privacy of Canadians) - June 14, 1999 (TOP SECRET Codeword/CEO)

Classified Report to the Minister

- A Study of the *** Collection Program - November 19, 1999 (TOP SECRET Codeword/CEO)

Classified Report to the Minister

- On *** - December 8, 1999 (TOP SECRET - COMINT)

Classified Report to the Minister

- A Study of the *** Reporting Process - an overview (Phase I) - December 8, 1999 (SECRET/CEO)

Classified Report to the Minister

- A Study of Selection and *** - an overview - May 10, 2000 (TOP SECRET/CEO)

Classified Report to the Minister

- CSE's Operational Support Activities Under *** - follow-up - May 10, 2000 (TOP SECRET/CEO)

Classified Report to the Minister

- Internal Investigations and Complaints - follow-up - May 10, 2000 (SECRET)

Classified Report to the Minister

- On findings of an external review of CSE's ITS Program - June 15, 2000 (SECRET)

Classified Report to the Minister

- CSE's Policy System Review - September 14, 2000 (TOP SECRET/CEO)

Classified Report to the Minister

- A study of the *** Reporting Process - Phase II *** - April 6, 2001 (SECRET/CEO)

Classified Report to the Minister

- A study of the *** Reporting Process - Phase III *** - April 6, 2001 (SECRET/CEO)

Classified Report to the Minister

- CSE's participation *** - August 20, 2001 (TOP SECRET/CEO)

Classified Report to the Minister

- CSE's support to ***, as authorized by *** and *** - August 20, 2001 (TOP SECRET/CEO)