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Communications Security
Establishment Commissioner



The Honourable Charles D. Gonthier, Q.C.

Commissaire du Centre de la
sécurité des télécommunications

L'honorable Charles D. Gonthier, c.r.

May 2007

Minister of National Defence
MGen G.R. Pearkes Building, 13th Floor
101 Colonel By Drive, North Tower
Ottawa, Ontario
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Dear Sir:

Pursuant to subsection 273.63 (3) of the *National Defence Act*, I am pleased to submit to you my 2006–2007 annual report on my activities and findings, for your submission to Parliament.

Yours sincerely,

A handwritten signature in black ink that reads "Charles D. Gonthier".

Charles D. Gonthier

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INTRODUCTION

This is my first report as Communications Security Establishment (CSE) Commissioner, since my appointment effective August 1, 2006. I have a three-year mandate that expires in August 2009.

My own background includes 30 years' experience on the bench, most recently as a Supreme Court Justice from 1989-2003. I believe there are strong parallels between the role of a judge and that of the CSE Commissioner. A judge's fundamental concern is to ensure fair trials and protect personal liberty, while maintaining peace and security. Correspondingly, the CSE Commissioner's fundamental concern is to balance the right to privacy with the need for information to protect national security. The similarity between these roles is reflected in the legislation specifying that the Commissioner be a supernumerary judge or a retired judge of a superior court.

The CSE Commissioner's fundamental concern is to balance the right to privacy with the need for information to protect national security.

There is, however, an important difference in context. While secrecy issues do arise in court proceedings in certain instances, for the most part the judicial process takes place in public. Secrecy, on the other hand, is at the very heart of foreign intelligence collection. Nevertheless, the balancing principles are the same. I see the role of my office as providing Canadians with the assurance that the CSE's critical intelligence work is being carefully examined by an impartial authority to ensure it is lawful, and that their rights are being protected, without compromising the secrecy required to protect national security.

In October 2006, I was presented with an exceptional opportunity to attend the International Intelligence Review Agencies Conference in Cape Town, South Africa. One of the conference themes was the need to balance the traditional rights and liberties of citizens with the need for increased powers to meet threats to national security. It was a remarkable experience to meet with the practitioners in security and intelligence review from 14 countries, including my own, and to hear from them first-hand about the challenges we all face. I remain grateful for this

opportunity because it provided an occasion for me, as the new CSE Commissioner, to become totally immersed in topics of mutual interest in the company of experts.

During the early days following my appointment, I met the Minister of National Defence and the Chief of CSE. I was also provided with extensive briefings and tours, many of them at CSE, and I am particularly grateful to my briefers for their comprehensive presentations. As time progressed, I had the opportunity to meet other federal government officials, including the Auditor General of Canada and the Privacy Commissioner, the Chairs of the Security Intelligence Review Committee and the Commission for Public Complaints Against the RCMP, the Deputy Minister of National Defence, and the National Defence Ombudsman.

Most important, of course, has been the time I have spent involving myself in the work of my office, and familiarizing myself with the activities and preoccupations of my predecessors, which will be discussed later in this report.

THE REVIEW ENVIRONMENT

A number of key issues helped shape the environment in which this office carried out its work over the past year. Some of these have been described and commented on by my predecessors in past Annual Reports. Below, I draw attention to some themes that have not been mentioned before, as well as some new developments in ongoing issues.

Legal interpretations

Since the omnibus *Anti-Terrorism Act* was proclaimed in December 2001, the persons who have occupied the position of CSE Commissioner have faced a persistent dilemma arising from the amendments this Act introduced to the *National Defence Act*. Particularly troublesome has been the Commissioner's duty to review the activities of CSE conducted under ministerial authorizations issued for the sole purpose of obtaining foreign intelligence, given the lack of agreement on the interpretation of key provisions of the Act.

On the one hand, my predecessors and I have recognized the importance of CSE's work, and the benefit the Government of Canada derives from the foreign intelligence CSE provides, particularly during a time when the threat of global terrorism continues unabated, and the safety of our soldiers in Afghanistan remains at risk.

On the other hand, during our respective terms as Commissioner, each of us has been unequivocal in the position that the legal interpretation and advice regarding ministerial authorizations provided to CSE by the Department of Justice is not supported by a simple reading of the appropriate provisions of Part V.1 of the *National Defence Act*, and each of us so advised the Minister of National Defence of the day. In addition, my immediate predecessor, the Right Honourable Antonio Lamer and I both made our positions known to officials at the Office of the Attorney General of Canada.

When I am asked to consider whether an activity is lawful, I must first determine what the law states in respect of that activity. The relevant Act, then, is the yardstick by which the lawfulness of the activity is measured. The difficulty arises, in instances such as this, when there is a fundamental difference of opinion about what the Act states.

I do not question the role of the Department of Justice in the drafting of legislation, nor do I view my role as Commissioner as arbiter of statutory interpretation. However, as I have informed the Minister of National Defence and the Attorney General of Canada, the legislation lacks clarity and it ought to be amended, a view I share with both my predecessors.

*The legislation lacks clarity
and it ought to be amended.*

This matter has been under deliberation for some time, and I hope the government will make the required amendments at the earliest opportunity. I am confident that this will not be too onerous a task because other countries have successfully adopted and are applying legislation to meet similar requirements.

Legislation lagging behind technological advances

As time goes on, there is an ever-widening knowledge gap between the general public and evolving technologies. In a number of respects, Canada's laws have also not kept pace with technological advances. We need a more imaginative approach. Today, criminal and terrorist elements are masters of these complex technologies and, unlike democratic institutions, are unimpeded by legal constraints. Those involved in the legislative process need to avoid laws that are driven by the technology of the day, which will in short order be superseded by new developments. Instead, we must ensure our laws have a broad enough scope, and are so structured — be it by providing for regulations or otherwise — that they can accommodate new technologies, and continue to protect both our privacy and security.

Three-year review of the *Anti-Terrorism Act*

The *Anti-Terrorism Act* amended the *Official Secrets Act* and the *National Defence Act*, among other legislation. The amendments to the *National Defence Act* included a legislative basis for CSE and the CSE Commissioner.

The *Anti-Terrorism Act* required a review of its provisions and operation within three years of receiving royal assent, to be carried out by a designated or specially established committee of the Senate or the House of Commons, or of both chambers. A Subcommittee of the House of Commons Standing Committee on Public Safety and National Security was established for this purpose in autumn 2004. At the same time, the Senate established a Special Committee to carry out a comprehensive review of the Act. As described in the 2005-2006 Annual Report, my predecessor appeared before the Senate Special Committee on June 13, 2005, and two days later before the House of Commons Subcommittee. The Senate Special Committee reported on February 22, 2007, and the House Subcommittee reported on March 27, 2007.

Senate Special Committee recommendations

The Senate Special Committee made several recommendations concerning CSE as well as this office. As regards CSE, the Committee focussed primarily on ministerial authorizations, stating that it accepted the explanations as to why CSE needs to intercept private communications when undertaking its foreign intelligence and information technology security activities. It also accepted Commissioner Lamer's explanation that ministerial authorizations were the proper instrument to use for intercepting private communications, rather than prior judicial authorization, because warrants from Canadian courts have no jurisdiction outside Canada.¹ The Committee drew comfort from the fact that this office is required to review the lawfulness of CSE's activities, including the interception of private communications under ministerial authorizations. However, it remained concerned, as was Commissioner Lamer, that the standard required to satisfy the Minister that all necessary preconditions to intercepting private communications have been met is unclear. Accordingly, the Committee recommended that subsections 273.65(2) and (4) of the *National Defence Act* be amended to clarify whether these preconditions should be based on reasonable belief or reasonable suspicion.² This has been an issue of interest to my office, and a clarification would be welcome.

The Committee drew comfort from the fact that this office is required to review the lawfulness of CSE's activities.

Because the Committee wished to ensure that intercepted information is disposed of if it has been determined to be non-essential or when it is no longer essential, it recommended that CSE develop information retention and disposal policies, containing specific timeframes for the disposal of intercepted information, and that it make these policies publicly available.³

¹ Special Senate Committee on the *Anti-Terrorism Act, Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act*, February 2007, p. 77.

² *Ibid.*, Recommendation 18, p. 78.

³ *Ibid.*, Recommendation 19, p. 79.

In the interests of accountability and transparency, the Committee also recommended that the Minister of National Defence or the CSE be required to report annually to Parliament on the number of ministerial authorizations issued during the year, the number still in force by the end of the year, and the general purpose for which each authorization was issued (i.e., to obtain foreign intelligence or to protect computer systems or networks).⁴

The *Anti-Terrorism Act* also amended the *Official Secrets Act*, and renamed it the *Security of Information Act*, known as SOIA. SOIA establishes a process that persons permanently bound to secrecy must follow if they wish to claim a public interest defence for divulging classified information. The Commissioner may receive classified information as part of the process (see Annex A). However, the *Security of Information Act* does not describe what should be done once the Commissioner receives that information.⁵ The Committee recommended that the Government specify the procedure to be followed in such cases.⁶ I should point out that my office does have internal policies and procedures in place to fill the gap that the Committee identified.

Lastly, the Committee discussed the oversight and review of Canada's national security and anti-terrorism framework. The Committee mentioned that this office is "generally perceived to be an effective oversight mechanism."⁷ The Committee recommended that a standing Senate committee be established to monitor and periodically report on Canada's anti-terrorism legislation and national security framework on an ongoing basis. In addition, the Committee called for a comprehensive parliamentary review of the provisions and operation of the *Anti-Terrorism Act* every five years.

⁴ *Ibid.*, Recommendation 20, p. 79.

⁵ To date, I have not received any information under the *Security of Information Act*.

⁶ *Supra*, footnote 1, Recommendation 26, p. 94.

⁷ *Supra*, footnote 1, p.116.

