



Communications
Security
Establishment
Commissioner

Annual Report

2002
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2003



Canada

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Communications Security
Establishment Commissioner



The Honourable Claude Bisson, O.C.

Commissaire du Centre de la
sécurité des télécommunications

L'honorable Claude Bisson, O.C.

June 2003

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 2002-2003 annual report on my activities and findings, for your submission to Parliament.

Yours sincerely,

A handwritten signature in black ink that reads "Claude Bisson". The signature is written in a cursive style with a large, decorative flourish on the left side. Below the signature is a horizontal line.

Claude Bisson

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INTRODUCTION

This is my seventh and final report as Commissioner of the Communications Security Establishment (CSE), as my appointment will terminate in June 2003. It is also the first time since my initial appointment in 1996 that my review of CSE's activities and my annual report have been guided by legislation.

In my last report I pointed out that after more than a decade of debate about the pros and cons of enabling legislation for CSE, the tragic events of 11 September 2001 precipitated the introduction and passage of the omnibus *Anti-Terrorism Act* by Parliament. The resulting amendments to the *National Defence Act*, which came into effect on 24 December 2001, created a legislated mandate for CSE as well as for the CSE Commissioner. The new provisions of the *National Defence Act* enshrined in legislation the historical activities of CSE as well as the activities I had been carrying out since 1996, but they also introduced new elements. These are described more fully in the next section.

Much of this past year has been taken up with assessing the implications of my new duties and making a start on meeting the requirements of the legislation. As a result, it has been a year of much challenge and change for both CSE and my Office as we move toward a common understanding of our respective roles and responsibilities.

In this year's annual report I look back briefly on seven years of evolution and development in the Commissioner's role. I also report on the review activities and findings of my Office in 2002-03. These addressed CSE's two main programs (Signals Intelligence and Information Technology Security) as well as some of its other activities. Finally, I look forward to developments that are already on the horizon and to the appointment of my successor.

THE EVOLVING ROLE OF THE COMMISSIONER

Since I started as Commissioner in 1996, the highly complex environment in which CSE works has changed dramatically. So has the work of my Office and the expectations placed upon it.

One aspect of the change results from the technology-rich environment within which CSE works – and the technology involved has been advancing at an accelerating pace throughout this time. Another key element relates to changes in the intelligence environment that derive from evolving political, social and economic realities. These have led to new threats to Canada's security, defence and national interests and changes to the government's intelligence priorities. To address these challenges, CSE has expanded its role in the collection, analysis and reporting of information and intelligence. My staff and I have had to learn about the complex technologies involved and to stay on top of the rapid changes taking place in order to carry out the Commissioner's review role effectively and efficiently.

Throughout this period of dynamic change in technology, in the intelligence environment, and in CSE's activities, I have been guided by the principle that Canadians deserve the assurance that CSE, which must of necessity conduct most of its business in secret, does so in compliance with the laws of Canada. Providing this assurance has been my responsibility, and I have sought to fulfil it by maintaining the breadth, depth and credibility of my Office's review work, with a particular focus on those matters that could put the privacy of Canadians at risk.

The Commissioner's role, as it had developed under mandates set out in the June 1996 and June 1999 Orders in Council appointing me Commissioner, was confirmed and extended by Parliament in the *Anti-Terrorism Act* of December 2001. The most significant extension of my role arises from

provisions that allow the Minister of National Defence to authorize CSE's interception of the private communications of Canadians in specific circumstances and subject to several conditions set out in the legislation.¹ Section 183 of the *Criminal Code* defines private communications as

...any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada, and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it...

This new power of CSE to intercept private communications when authorized by the Minister is a significant development, bringing with it obvious risks to the privacy of Canadians. These risks are recognized in the legislation, which requires, among other things, that the Minister be satisfied that CSE has satisfactory measures in place to protect the privacy of Canadians. In addition, the legislation directs the Commissioner to review activities carried out under each ministerial authorization to ensure that they are indeed authorized, and to report annually to the Minister on the review. Based on experience to date, I anticipate that this will be a substantial and challenging aspect of the Commissioner's role in the future.

A further extension to the Commissioner's role was set out in the *Security of Information Act* (the former *Official Secrets Act*). This Act prohibits people bound by secrecy from communicating or confirming "special operational information", including special operational information about

¹ Before December 2001, CSE would have been in violation of privacy-related provisions of both the *Criminal Code* and the *Canadian Charter of Rights and Freedoms* had it intercepted communications without the certainty that, in doing so, it would not intercept private communications.

CSE's activities. A person would not be found guilty of an offence, however, if that person could establish that he or she acted in the public interest. A judge can consider a "public interest defence" only if the person involved has taken a series of steps set out in the legislation before disclosing the information. These steps may include bringing concerns about CSE's activities to the Commissioner and allowing a reasonable time for the Commissioner to respond. Although I am hopeful that this role will rarely be exercised, it is potentially an important one and is likely to be demanding when a concern is brought to the Commissioner's attention.

The legislative provisions setting out the mandate of the Commissioner of the Communications Security Establishment are included in Annex A.

2002-03 ACTIVITIES Classified Reports

Under the Orders in Council that set out my mandate from 19 June 1996 until 24 December 2001, my Office carried out a planned series of reviews of CSE's activities each year. These reviews were directed at areas where, in my opinion, the very nature of CSE's activities gave rise to risks relating to lawfulness. Because I was authorized to submit reports containing classified material to the Minister of National Defence at any time I considered advisable, I made it a practice to report the results of each of my reviews to the Minister in the form of a classified report.

The new legislation has introduced some important changes to my mandate. As described above, the Minister of National Defence may now authorize CSE to intercept the private communications of Canadians in some circumstances. Although I am still required to review CSE's activities generally to ensure that they are in compliance with the law, the legislation also directs me specifically to review CSE activities carried out under a ministerial

authorization to ensure they are authorized, and to report annually to the Minister on the review.

In other words, I no longer have a completely free hand in choosing subjects for review. Nor does my new legislated mandate specifically authorize me to submit reports containing classified material to the Minister whenever I consider it advisable. Nevertheless, in cases where I do choose the subjects for review, I believe it is sensible to continue the reporting practices established under my earlier mandate, as they have served well in the past.

During 2002-03 I forwarded four classified reports to the Minister, and another was nearing completion at the end of the year. These included reports mandated under the new legislation as well as reports on reviews of my own choosing. Annex C provides a list of all my classified reports to the Minister since my appointment in 1996.

As I have pointed out in the past, submitting a classified report to the Minister does not mean that I have identified any lack of compliance with the law or ministerial authority. It indicates only that the report contains material that requires classified handling. Indeed, I am pleased to say that none of the reviews on which my 23 classified reports are based (including the four reviews completed in 2002-03) identified incidents of unlawfulness or unauthorized activity.

Reviews of Activities under Ministerial Authorizations

Under sub-sections 273.65 (1) and (3) of the *National Defence Act*, the Minister of National Defence has authorized CSE, in writing, to intercept private communications for the purposes of obtaining foreign intelligence and protecting the computer systems or networks of the government from mischief, unauthorized use or interference. Because many of the activities carried out under

these authorizations were new to CSE, they gave rise to significant challenges relating not only to technology, but also to such matters as determining appropriate roles and responsibilities, developing policy and procedures to guide activities, and designing controls to ensure compliance with the conditions imposed by the legislation and the ministerial authorizations. CSE continues to address these challenges.

Information obtained from CSE indicates that the bulk of the communications intercepted under these authorizations are not in fact private communications (that is, they are not the communications of Canadians). Nevertheless, I believe that the unique focus of my review must be on private communications. Whatever else CSE may intercept, it is the interception of private communications that is specifically authorized by the Minister. Moreover, it is with respect to the interception, use and retention of private communications that issues of lawfulness and compliance with ministerial authority are most likely to arise. As a result, my Office devoted a significant part of its efforts during the past year to learning how CSE is acquiring, identifying, accessing, retaining and using such communications, as well as what kind of policy regime, procedures and management control framework it is putting in place. In doing so, my staff and I examined a variety of documents and correspondence, had several discussions with CSE officials, and attended briefings and information sessions. In addition, I asked CSE to take me through a specific tasking under one of the authorizations.

My Office completed a preliminary review of activities under one ministerial authorization. This authorized CSE to conduct activities from Canada relating to the interception of communications for the sole purpose of obtaining foreign intelligence

and, in doing so, to intercept private communications subject to conditions defined in the legislation and in the ministerial authorization. As required by the legislation, I reported the findings of this preliminary review to the Minister. Because of the focus of the ministerial authorization, and because the review was a first for my Office, my preliminary report related more to process and to the class of activities authorized than to CSE's compliance with authority. I anticipate that in future annual reports to the Minister under paragraph 273.65 of Part V.1 of the *National Defence Act*, the Commissioner will be in a position to address compliance issues more directly.

My reviews of activities under other ministerial authorizations in effect during 2002-03 were continuing at the end of the year and will be the subject of reports to the Minister in the near future.

Other Reviews

CSE's operational support to the Canadian Security Intelligence Service. The Canadian Security Intelligence Service (CSIS) is authorized to assist the ministers of National Defence and Foreign Affairs in collecting foreign intelligence within Canada. In carrying out its duties and functions, CSIS may, in turn, seek operational assistance and support from other departments and agencies, including CSE.

In 2002-03 my staff completed an examination of CSE's policies and practices in the context of a specific case where it provided operational support to CSIS. This examination found no evidence of unlawful activity on the part of CSE or any of its employees. Indeed, all the activities examined complied with CSE policies as well as relevant legal authorities.

My report did, however, make a number of recommendations designed to address weaknesses

in policy and practice that could lead to errors in handling sensitive information and to an inconsistent application of policy and law. CSE has started to take action to address the concerns I raised.

Information Technology Security. In earlier annual reports I discussed changes in the focus and complexity of activities undertaken by CSE under its Information Technology Security (ITS) program to protect government communications and communications systems. Among other things, the ITS program has shifted strategically toward a more open mode of doing business in the face of growing vulnerabilities as more and more government organizations adopt evolving technologies such as the Internet and electronic commerce.

To respond to a significantly expanded client base and greater demand for its services, the ITS program has actively sought cooperative partnerships and alliances with government and private sector organizations. These arrangements are usually formalized in written agreements between the parties. My Office reviewed formal agreements between the ITS program and external parties, as well as the policies, practices and procedures governing them, to identify issues and assess implications relating to lawfulness.

The review showed no evidence of unlawful activity on the part of CSE with respect to its arrangements with government and private sector organizations and the agreements arising from such arrangements. However, my report pointed to shortcomings in the administration of agreements as well as gaps in policy that created unnecessary risks in this regard. I have been informed that CSE is taking action to review and address my concerns and recommendations.

CSE's policies and procedures. One of my long-standing observations, based on several reviews carried out during my term as Commissioner, is that

CSE's internal policies and procedures have not always provided clear and consistent definitions and uses of key terms. I have found that policies and associated documentation were confusing at times, especially in instances where certain terms have multiple definitions.

As a follow-up to these observations, my staff compiled a lexicon of definitions of key terms from a number of different instruments, and I made that report available to the Minister and to CSE. In the course of this work, I learned that CSE is giving a high priority to the development and articulation of policies and procedures to guide operations under its mandate in the *National Defence Act*. This effort includes establishing new policies and procedures where necessary, as well as reviewing existing policies and procedures to ensure they are current and that they use accurate and consistent terminology.

I am encouraged by these developments at a time of expanded security and intelligence activity when, among other things, there are clear needs for CSE to retrain existing staff and to train and guide an anticipated influx of new employees. In these circumstances it is vitally important to ensure clear and consistent understanding and application of policy and procedures – including terminology used – throughout the organization. My Office will continue to monitor CSE's progress in this regard closely.

2002-03 Findings

Each year in this report I provide an overall statement on my findings about the lawfulness of CSE's activities based on the results of reviews my staff carried out during the year. Because of my new mandate under the *National Defence Act*, this is the first time my statement extends beyond lawfulness to compliance with ministerial authority.

I am able to report that the activities of CSE that my Office reviewed during the year complied with law and ministerial authority. In particular, while I found no evidence that CSE directed its activities at Canadians or any person in Canada, I did see evidence that CSE has measures to protect the privacy of Canadians in the use and retention of intercepted information.

Complaints and Concerns about CSE Activities

Paragraph 273.63 (2)(b) of the *National Defence Act* requires me, in response to a complaint, to undertake any investigation I consider necessary. During 2002-03, I received no complaints about CSE activities from any source.

Neither were concerns about CSE activities addressed to me under the public interest defence provisions of the *Security of Information Act*.

Review Agencies Conference

The third International Intelligence Review Agencies Conference was held in London, England, from 12-15 May 2002. Representatives of review agencies from Australia, Belgium, Canada, New Zealand, Poland, Slovakia, South Africa, and the United States met their United Kingdom counterparts to exchange views on issues of common interest in the historical setting of Lancaster House.

In addition to discussing review arrangements in our respective jurisdictions, we examined the issue of review from the perspectives of the agency being reviewed and the public, as well as in relation to changes in technology. I remain grateful to our hosts for their outstanding hospitality.

**THE
COMMISSIONER'S
OFFICE
Office Expenditures
and Staff**

My budget allocation for the 2002-03 fiscal year was \$921,950. Because the December 2001 amendments to the *National Defence Act* expanded my duties significantly, this allocation was 42 per cent greater than my budget in the previous year. The actual expenditures incurred in 2002-03 (see Annex B) were well within the budget.

During the year, my Office continued to consist of a small full-time staff. In addition, to help carry out my duties, I engaged the services of an independent legal counsel and several subject-matter experts on an ongoing basis.

Accommodation

My Office has occupied the same premises since my appointment in 1996, although by 1998 it was becoming evident that these premises offered insufficient accommodation for the staff and advisors I required to discharge my responsibilities. This situation became more acute following the additional responsibilities assigned to me by Parliament in late 2001.

In late 2002, I was advised that a larger office space was about to become available in the building that my Office has occupied since 1996. It was evident that this space would suit current requirements and also provide some flexibility for the future. My Office moved to its new location in May 2003.

**LOOKING
AHEAD
The Public Safety
Act**

In October 2002 the government introduced Bill C-17, the *Public Safety Act*, in Parliament. This bill, which replaced the earlier Bill C-55 (which in turn had replaced Bill C-42), was still under consideration as I was writing this report. Bill C-17 proposes legislative changes on a wide range of subjects, from transportation safety and immigration to biological weapons. Among the proposed changes are amendments to the *National Defence Act* that would confer significant new

responsibilities on the Commissioner of CSE for reviewing the lawfulness and compliance with ministerial authority of activities undertaken by the Department of National Defence or the Canadian Forces to protect their computer systems and networks, and for dealing with complaints arising from such activities.

I have informed the government of my concerns regarding the role proposed for the Commissioner in this Bill and its predecessors. Those concerns centre around the difficulties I can foresee in providing meaningful assurance of lawfulness and compliance with ministerial authority. In addition, however, I believe that assuming these new and potentially complex responsibilities would raise the question of whether the Commissioner's role could be carried out effectively on a part-time basis in the future.

In the meantime I have asked my officials to undertake a preliminary assessment of the review mandate envisaged in Bill C-17 so as to identify more clearly the systems that would be involved and the size of the sample of activities that would need to be reviewed for the Commissioner to give the assurances required. This will provide my successor with better information on the nature and extent of the work involved, and the possible impacts on this Office's resource requirements, should Parliament choose to confer these new duties on the Commissioner.

Appointment of a New Commissioner

My appointment as Commissioner expires on 19 June 2003.

Paragraph 273.63 (1) of the *National Defence Act* provides that the Governor in Council may appoint either a supernumerary judge or a retired judge of a superior court as Commissioner of the Communications Security Establishment. However, I am concerned that a supernumerary judge would face serious limitations in carrying out the full range of duties and responsibilities involved.

These limitations arise from the blurring of lines between the executive and legislative arms of government on the one hand, and the judiciary on the other, that would result from appointing a supernumerary judge. For example, a supernumerary judge would not be in a position to comment on proposed legislation – as I have had occasion to do from time to time. Similarly, a supernumerary judge ought not to appear as a witness before parliamentary committees. Although I am somewhat disappointed not to have been called as a witness before parliamentary committees to discuss my annual reports, as a retired judge I would at least have been able to do so.

Regardless of the Governor in Council's decision, I wish my successor well in this fascinating and challenging assignment.

Concluding Thoughts

Finally, I would like to take this opportunity to say that serving Canada and Canadians during the past seven years has been a source of great and enduring satisfaction for me. I am convinced that through the very existence of this external review function, through the assurances that I have been able to provide and the opportunities for improvement that reviews have identified, my Office has made an important contribution to strengthening the control and accountability of CSE.

I would also like to say goodbye and to thank those I have worked with for seven years. In particular, the skill, dedication and unfailing good cheer of my staff have helped me immeasurably and have guided me through some challenging times. But I am also grateful for the respect and courtesy that CSE and other government officials have consistently extended to me and my staff. Their cooperation has made our task much easier.

Mandate of the Commissioner of the Communications Security Establishment

National Defence Act - Part V.1

“**273.63** (1) The Governor in Council may appoint a supernumerary judge or a retired judge of a superior court as Commissioner of the Communications Security Establishment to hold office, during good behaviour, for a term of not more than five years.

(2) The duties of the Commissioner are

(a) to review the activities of the Establishment 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 and the Attorney General of Canada of any activity of the Establishment that the Commissioner believes may not be in compliance with the law.

(3) The Commissioner shall, within 90 days after the end of each fiscal year, submit an annual report to the Minister on the Commissioner’s activities and findings, and the Minister shall cause a copy of the report to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the Minister receives the report.

(4) In carrying out his or her duties, the Commissioner has all the powers of a commissioner under Part II of the *Inquiries Act*.

(5) The Commissioner may engage the services of such legal counsel, technical advisers and assistants as the Commissioner considers necessary for the proper performance of his or her duties and, with the approval of the Treasury Board, may fix and pay their remuneration and expenses.

(6) The Commissioner shall carry out such duties and functions as are assigned to the Commissioner by this Part or any other Act of Parliament, and may carry out or engage in such other related assignments or activities as may be authorized by the Governor in Council.

(7) The Commissioner of the Communications Security Establishment holding office immediately before the coming into force of this section shall continue in office for the remainder of the term for which he or she was appointed.

“**273.65** (8) The Commissioner of the Communications Security Establishment shall review activities carried out under an authorization issued under this section to ensure that they are authorized and report annually to the Minister on the review.”

Security of Information Act

“**15.** (1) No person is guilty of an offence under section 13 or 14 if the person establishes that he or she acted in the public interest.

“**15.** (5) A judge or court may decide whether the public interest in the disclosure outweighs the public interest in non-disclosure only if the person has complied with the following:

“**15.** (5) (b) the person has, if he or she has not received a response from the deputy head or the Deputy Attorney General of Canada, as the case may be, within a reasonable time, brought his or her concern to, and provided all relevant information in the person’s possession to,

(ii) the Communications Security Establishment Commissioner, if the person’s concern relates to an alleged offence that has been, is being or is about to be committed by a member of the Communications Security Establishment, in the purported performance of that person’s duties and functions of service for, or on behalf of, the Communications Security Establishment, and he or she has not received a response from the Communications Security Establishment Commissioner within a reasonable time.”

Budget and Expenditures 2002-03

Expenditures

Salaries and Wages	201,935
Transportation and Telecommunications	21,808
Information	11,378
Professional and Special Services	209,699
Rentals	157,708
Purchased Repair and Maintenance	223,737
Materials and Supplies	4,438
Acquisition of Machinery and Equipment	26,098
Other Expenditures	22
Total	\$856,823

Classified Reports, 1996-2003

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)

Classified Report to the Minister

- A study of the formal agreements in place between CSE and various external parties in respect of CSE's Information Technology Security (ITS) - August 21, 2002 (SECRET)

Classified Report to the Minister

- CSE's support to CSIS, as authorized by *** and code named *** - November 13, 2002 (TOP SECRET/CEO)

Classified Report to the Minister

- CSE's SIGINT activities carried out under the *** 2002 *** ministerial authorization November 27, 2002 (TOP SECRET/CEO)

Classified Report to the Minister

- LEXICON - 26 March 2003 (TOP SECRET/COMINT)