Intelligence Collection and Accountability:
Getting the Balance Right
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Presented by: J. William Galbraith – Executive Director
Office of the Communications Security Establishment Commissioner

Thank you.

We are in a new environment -- since June! With much attention on, and discussion about, the Communications Security Establishment (CSE) and the CSE Commissioner's office. This is not a bad thing.

In years past, when it came to public awareness polling, the intelligence review bodies were within the "margin of error" in those polls!

I will not be commenting on whether there should be more review or oversight, particularly of the Communications Security Establishment. That is a higher policy discussion for my co-panelists, all of whom have written on the theme to one degree or another.

I will, however, comment on what the current situation is, and try to clarify a number of points and dispel some information before myths become too firmly entrenched, that relate to the Commissioner, his mandate and to certain CSE activities.

To that end, I have six points I would like to touch on briefly.

This past Saturday, a lengthy article about CSE in *The Ottawa Citizen* included a reference to the watchdog office being criticized for its own secrecy, which is a good place to start with my **first point**: the **unique positioning of the review body.**

You are familiar with the two principal intelligence review bodies in Canada -- the CSE Commissioner and the Security Intelligence Review Committee (SIRC) -- both are within the "security fence" as it were, with security clearances to allow full access to the holdings, facilities and personnel of the intelligence agency. This was the explicit intention of legislators when the *Canadian Security Intelligence Service Act* was passed, creating CSIS and SIRC, in 1984, after the scandals of the RCMP Security Service.

When the CSE Commissioner's office was established in 1996 by Order-in-Council, the same principle was followed, and then continued in legislation in December 2001.

Concomitant with this access to the intelligence agency, however, is the legal obligation that the review body has to protect the information in its possession from the agency it is reviewing. The *Security of Information Act* and government security policies bind all individuals handling that information.

For the review body to be outside the security fence and adversarial might create a lot of sound and fury, but would not necessarily result in effective review.

There is what I describe as a healthy tension in our relations with CSE, and there are disagreements.

Last June, Commissioner Décary pushed CSE hard, and succeeded in having CSE agree to greater disclosure when the Commissioner issued his unprecedented statement on June 13th, referring to metadata, and other subjects. Some of that information had been classified top secret.

Some disagreements between the Commissioner and CSE may end up with the Minister of National Defence who is responsible for CSE – I'll give an example in a minute – and this leads to my **second point**: **the independence of the review body.**

The CSE Commissioner and SIRC are independent and external. We are at arms-length from government. Legislation requires the review body to submit, to the minister responsible for the intelligence agency, a public annual report that the minister must table in Parliament. Classified reports prepared by the review body are also forwarded to the responsible minister.

This is our system of government – the concept of ministerial responsibility. There does seem to be not a little ignorance about this very fundamental point, when some commentators suggest that <u>because</u> review reports go to the same minister who is responsible for the intelligence agency, the review body is somehow not independent.

Who would ensure that a recommendation from the Commissioner is implemented, if not a responsible minister in the government? Let me give an example that speaks to this point, as well as the one about disagreements ending up at ministerial level, to demonstrate the Commissioner's effectiveness.

Two years ago, Commissioner Décary made a couple of recommendations, one of which was that CSE "report to the minister certain information relating to privacy", which would support the minister in his responsibility for CSE.

The minister initially replied that he supported CSE's rejection of the recommendation. The Commissioner re-examined his recommendation, then determined he stood by it and so informed the minister. Ultimately, the recommendation was accepted by the minister and CSE was directed to implement it. If the Commissioner were not independent, the outcome would likely be different.

A further point about independence: the CSE Commissioner is required by legislation to be a retired or supernumerary judge of a superior court.

A fundamental tenet of our justice system is independence of the judiciary. A judge's career is based on independence, impartiality, non-partisanship, and with a practice of determining conclusions based on facts. Commissioners, as former judges, take their independence very seriously.

My third point addresses the issue of CSE's Ministerial Authorizations vs judicial warrants.

The Commissioner is required by law to examine activities under ministerial authorizations, MAs for short. This is one area around which there is not a little confusion and misinterpretation.

The wording of the Act [273.65 *NDA*] confuses some people, who see only "intercept private communications" and not the context.

The law expressly prohibits CSE from directing its activities at Canadians; you've heard and read that repeatedly.

The foreign signals intelligence MA regime exists for the sole purpose of allowing CSE to collect foreign signals intelligence; but in doing so, it may intercept its target -- i.e. a foreign entity outside Canada -- communicating with an individual in Canada which is a "private communication" by definition of the *Criminal Code*. Before the legislation in 2001, CSE could not retain or use that interception.

The MA regime was intended to fill that gap, giving CSE an exemption from the *Criminal Code*, but imposing specific conditions. CSE is not targeting a Canadian.

A judicial warrant, on the other hand, does target a Canadian individual or group. When, for example, CSIS or the RCMP seek such powers, they must convince a judge of their case.

In Commissioner Décary's June 13 statement, he made reference to ministerial authorizations and referred to "the small number of private communications unintentionally intercepted by CSE". That "small number" is small enough that the Commissioner's office can examine all of them, which we are doing this year. Most private communications are destroyed.

It is important to note as well that CSE has, as with other government departments, a legal services section provided by the Department of Justice.

Point 4: size of the review body relative to intelligence agency.

Since the focus on CSE last June, a question has been raised: Can a retired judge with a small staff effectively review the activities of a large organisation like CSE? Will it surprise you to hear that Commissioners frequently ask themselves the same question?

The short answer I'll give to that question is framed within the current mandate of examining for compliance with the law. If people have questions about what the law permits, or what the government directs, those are questions to be directed at another level. I have a job to do for the Commissioner.

So, with that, the short answer is yes, the office has the resources to effectively review CSE. We can go into details during discussion if you wish.

A quick note: CSE has grown and so has the Commissioner's office. The Commissioner has a staff of eleven – up from eight, five years ago. In addition, the Commissioner has a number of subject-matter experts, two of whom also conduct reviews and one of them having been engaged in the past two years.

You will find roughly similar proportions for other review bodies and agencies being reviewed.

So, my **5th point**: **what is the impact of review,** that is, of CSE being held to account?

CSE has accepted over 90 percent of Commissioners' recommendations. We follow up on all recommendations. This is a fundamental point for the integrity of the review process and for the credibility of the Commissioner.

There are many examples I see of review working. Let me give one.

In the past, the Commissioner has raised questions about certain activities of CSE and whether it was appropriate to conduct those activities under its foreign intelligence collection mandate, or more appropriately under its mandate to assist federal law enforcement or security agencies.

As a direct result of this questioning and other related reviews, CSE suspended the activities – a not inconsequential decision on their part – re-examined the activities, then made significant changes to related policies, procedures and practices.

CSE has also demonstrated transparency to the Commissioner, by raising issues with him; issues that gave CSE itself cause for concern, even to the point of suspending activities on its own in order to sort them out – and keeping the Commissioner, as well as the minister, informed.

Lastly, **point 6,** a very brief comment about **the scope of the Commissioner's mandate and his authority.**

You are aware that the Commissioner's mandate is to review the activities of CSE to ensure they comply with the law. Changes to the scope of that mandate would have resource implications.

But there is more that can be accomplished within the current scope. One of the key areas here was Commissioner Décary's initiative more than two years ago, based on a discussion paper we wrote, in the context of operational co-operation between CSE and CSIS, was to explore co-operation with SIRC within existing legal limits.

When reviews by the Commissioner of certain CSE activities involve CSIS and which the Commissioner cannot follow up, he has forwarded questions to the Chair of SIRC to follow-up as deemed appropriate. That can work in reverse also. The Commissioner's most recent annual report described two examples. SIRC's annual report deals with some CSE-CSIS issues.

As to meaningful authority, you have to know that if a retired judge, with all the powers of the *Inquiries Act*, including the powers of subpoena, did not think he had sufficient authority to examine, to investigate, activities of CSE – in essence to fulfill his mandate – he would make that known; as Commissioners have made known their views about ambiguities in the legislation relating to CSE activities.

THANK YOU.