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**Chair**

**Mr. Paul Zed**

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Wednesday, June 15, 2005

•(1535)

[English]

**The Chair (Mr. Paul Zed (Saint John, Lib.)):** I call the meeting to order.

Good afternoon. We're pleased to welcome Antonio Lamer and Joanne Weeks from the Office of the Communications Security Establishment Commissioner.

I understand you have an opening statement, so please proceed.

**Right Hon. Antonio Lamer (Commissioner, Office of the Communications Security Establishment Commissioner):** Thank you, Mr. Chair, vice-chairs, and committee members. It is a pleasure for me to be here today to participate in the work of this special committee reviewing the Anti-terrorism Act.

As you mentioned, I am accompanied today by Ms. Joanne Weeks, who is my executive director; and by Maître Colette D'Avignon, who is my in-house legal counsel.

I see that all of you except one are lawyers, and probably the one who's not a lawyer knows as much law as anyone else.

[Translation]

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Only three of us are lawyers.

**Right Hon. Antonio Lamer:** Only three? I beg your pardon.

[English]

That makes things better.

The Anti-terrorism Act that you are examining introduced an amendment to the National Defence Act. This amendment established in law the mandate and activities of the Communications Security Establishment, as well as that of the Office of the Communications Security Establishment Commissioner, the position that I occupy.

Prior to this, the CSE Commissioner had been created in 1996 by order in council pursuant to part II of the Inquiries Act. The legislation continued the commissioner's powers under the Inquiries Act and gave him further duties under the Security of Information Act.

[Translation]

Let me state at the outset that review is a fundamental component of ensuring that the intrusive powers granted to certain organiza-

tions, that must out of necessity operate in secret, are used as Parliament intended.

[English]

I believe review agencies such as mine strive to make an important contribution to the security and intelligence community.

I have observed that a popular approach to security and privacy these days is to present them as almost mutually exclusive principles, as if it were a matter, in the first instance, of assigning precedence to one over the other. In my opinion, that is a simplistic approach. The issue involves, on the one hand, the democratic rights and freedoms of the individual, privacy being one of them, and on the other, society's collective right to security from terrorism or other threats. Both are essential values of an open and democratic society such as our own, and they must coexist. The trick is to find the appropriate balance in particular circumstances.

The issue of competing interests arises when society is under threat. Then a decision must be made about the extent to which individual democratic rights must yield in favour of the collective security of the country as a whole. This decision establishes the appropriate balance between individual and collective rights, and it is made by legislators and through public discourse.

In 2001, Parliament made that decision with the passage of Bill C-36, the omnibus Anti-terrorism Act. Given the circumstances, and under the clear threat to collective security that existed at the time, Parliament acted not rashly, but quickly. It based its decisions on the best information available and on all the advice from the public and the policy-makers that time permitted.

In its wisdom, Parliament also determined that the balance established by the act ought to be reviewed—for the aforementioned reason—more fulsomely three years after its passage. It is in this context that I appear before you today.

•(1540)

[Translation]

The law you are examining has been enforced for almost four years. While it is not my place, nor is it my intention, to comment on the other parts of the Anti-Terrorism Act, I can comment on the National Defence Act amendment resulting from the omnibus bill four years ago. I can say without reservation that it was essential in all its aspects.

[English]

This amendment gave CSE new powers to intercept private communications, with a special authorization from the Minister of National Defence. It is important to note, however, that the legislators of the day set clear conditions on that power. One of my duties is to review the private communications intercepted by CSE under ministerial authorizations and to report to the minister on the lawfulness of the interceptions. I will return to this topic in greater detail later. Now, however, I would like to turn to my general mandate.

I review CSE's activities "to ensure that they are in compliance with the law" and that CSE protects the privacy of Canadians. When discharging this aspect of my mandate, I make every effort to ensure I do so in a manner that does not impede CSE's operations. I also investigate complaints, and I inform the minister and the Attorney General of Canada of any activity of CSE that I believe to be unlawful. To date, complaints have been resolved informally and neither I nor my predecessor, the former Chief Justice Bisson, the former Chief Justice of Quebec, has had to make any report of unlawful activity to the Attorney General.

How do I go about reviewing CSE's activities? Under my authority and direction, my staff employs many of the standard practices used in reviewing an organization. I approve a three-year work plan, which is revised as appropriate. I always give priority to those areas or programs of CSE that may implicate the privacy of Canadians. Through my Inquiries Act powers, my staff has access to all premises, documents, files, and personnel at CSE. They conduct thorough file and document reviews, interview personnel, and perform what I might describe as spot checks, which may include sitting with CSE analysts as they perform electronic searches, and asking them questions. This approach may also include accessing databases to ensure that information has been collected lawfully and that the privacy of Canadians is protected as required by law.

On completion of a review, I provide a classified report to the minister and include any recommendations that I determine to be appropriate.

[Translation]

Let me focus now on my review of CSE's activities conducted under ministerial authorizations that I referred to a few minutes ago. Legislation requires me to review the activities under each authorization and report to the minister on an annual basis.

On May 19, 2005, the minister tabled my annual report to Parliament. In that report, I observed that for a jurist, who is accustomed to dealing with warrants issued by a judge, a ministerial authorization is a strange sort of creature. However, one must keep in mind that when CSE collects information under a ministerial authorization, it does so, according to legislation, as a complementary subset of its main foreign intelligence collection mandate.

• (1545)

[English]

A ministerial authorization is necessary in those instances where the foreign intelligence collection activity poses a risk of intercepting private communications, always targeting—I emphasize, always targeting—a foreign entity outside Canada, where a warrant issued

by a Canadian court has no jurisdiction. Under the Criminal Code, any communication that touches Canada is defined as a "private communication", including those where the foreign end is the target of the interception. A ministerial authorization is a unique solution to an equally unique set of circumstances. This has taken me some time to understand, but I've come to understand it. This could occur when the communications of a foreign entity being targeted by CSE lead into or flow out of Canada.

With a ministerial authorization in place, CSE may retain and use such communications, but only if they meet the criteria established in the act. The ministerial authorization provision of the legislation also provides for an exclusion to part VI of the Criminal Code. This means that part VI of the Criminal Code does not apply in relation to CSE's interception of a communication under a ministerial authorization or to the communication itself. Therefore, CSE's interception and retention of that private communication is not a criminal offence. My duty in this regard is to examine those private communications intercepted and retained by CSE to ensure that they were authorized by the minister and are therefore lawful, and that they were essential to the international affairs, defence, and security of Canada.

[Translation]

In my exchanges with the minister, I have expressed to him my view of my duties, particularly those respecting my review of activities conducted by CSE under ministerial authorizations. It is an area that I continue to assess and interpret with great care, as I am mindful of the importance of the work CSE performs on behalf of the Government of Canada.

I am equally mindful of the importance of providing assurance that CSE discharges its responsibilities in a manner that ensures that the basic rights of our democratic society, including the rule of law, are protected.

[English]

Thank you for the opportunity of appearing before you today. I wish you well in your deliberations.

[Translation]

I would be pleased to answer any questions you may have.

[English]

**The Chair:** Thank you very much, Judge Lamer.

Mr. MacKay.

**Mr. Peter MacKay (Central Nova, CPC):** Thank you, Mr. Chair.

My Lord, it's a great honour to see you here. I greatly appreciate your presence.

**Right Hon. Antonio Lamer:** His lordship is dead.

[Translation]

Long live the commissioner!

**Mr. Peter MacKay:** Long live the commissioner! Absolutely.

• (1550)

[English]

In any event, we welcome you and your officials today.

**Right Hon. Antonio Lamer:** Thank you, sir.

**Mr. Peter MacKay:** I understand that as commissioner you review these ministerial authorizations, and in practical terms, looking over the information that I have—and that includes your latest annual report—I see you've submitted five reports to the minister, two of which were a general review, while the remainder were specific to ministerial authorizations. So I understand there were three that dealt specifically with this type of authorization.

In your capacity as commissioner, do you look at ministerial authorizations only after the fact, or are you ever consulted in the drafting phases—if you will—before the granting?

**Right Hon. Antonio Lamer:** After the fact.

**Mr. Peter MacKay:** After the fact.

I understand that the chief of the CSE, Mr. Coulter, who was here in May, said in response to questions about the ability to have a ministerial authorization withdrawn—that is, an intervention when one is in place—that if you wanted to, based on evidence and based on what you had observed, you could do so. I think the words he used were that you could have it withdrawn “within a heartbeat”.

Is it your understanding that you have the authorization to demand a ministerial authorization be withdrawn? Is that within your mandate?

**Right Hon. Antonio Lamer:** Yes, of course. I could, if I saw something uncouth in the process, but that has not occurred. I have made some reports of a corrective nature, with suggestions, and I've been informed by my executive director that these problems were ironed out before there was a need to send in a report.

**Mr. Peter MacKay:** Okay.

In terms of a process question, if it came to light that you did make such an authorization, and you were, in essence—for lack of a better word—trumping that authorization, and the minister refused, would there be another recourse? If you come into conflict with the minister, what dispute resolution mechanism exists? Or is your authority final?

**Right Hon. Antonio Lamer:** It is a secret report. If the minister is remiss in his duty, I think then he's answerable to Parliament, and not to me.

**Mr. Peter MacKay:** Okay.

I guess my concern—

**Right Hon. Antonio Lamer:** CSE is answerable to me.

**Mr. Peter MacKay:** But if this process is secret, how would Parliament know?

**Right Hon. Antonio Lamer:** I'm reminded by my executive director that if I saw that the minister...and I don't think the

honourable minister would do such a thing, but if that were to happen, I would advise the Attorney General. Now, if the Attorney General covers it up, well, then I don't know. We'd be in deep trouble.

**Mr. Peter MacKay:** So it would be done internally then, in ministerial departments. It wouldn't actually be reported to Parliament?

**Right Hon. Antonio Lamer:** If I felt that there was a cover-up, that the Minister of National Defence was not doing things properly even though I had attracted his attention to it and then reported to the Attorney General that nothing was being done, then I guess I would seriously consider resigning. Then, depending on the nature of the animal, I'd go public. But there are certain conditions under the whistle-blower legislation that I'd have to meet.

But for God's sake, I hope we're not going there. I don't think, considering the quality of the members of our Parliament and of our government, that's the type of thing that would happen in our country.

• (1555)

**Mr. Peter MacKay:** Sure.

In the same vein, on this issue of whistle-blowing, you would be aware that the whistle-blowing legislation doesn't apply to members of CSE?

**Right Hon. Antonio Lamer:** But I'm not a member of CSE.

**Mr. Peter MacKay:** No, I understand, but that led to my question as to whether you perhaps felt there needed to be changes to the act to cover employees of CSE.

**Right Hon. Antonio Lamer:** The Security of Information Act sets out a series of steps that such a person must take prior to disclosing special operational information. With respect to information about CSE, consulting the commissioner is one of the steps. As far as the commissioner is concerned, the Security of Information Act is silent.

I think your question is a very good one, and it raises an issue that maybe, though that's not the act we are revisiting today, something should be done in response to the kind of situation you've just raised.

**Mr. Peter MacKay:** I'm not trying to ask leading questions here, but as for there being concerns about the need to protect whistle-blowers, it doesn't appear, at least on first reading, that there is sufficient protection for them.

My last question deals with the National Defence Act itself, which outlines the ministerial authorizations and the renewal of those authorizations. Are you aware in your capacity, Mr. Commissioner, of any renewals? And could a ministerial authorization in fact become a permanent authorization? That is to say, could they be constantly renewed, or is there some point in time where we should say, enough is enough; this has been renewed three or five times? Should there be an arbitrary cut-off?

**Right Hon. Antonio Lamer:** This is of an operational nature, and with your permission, Chair, I would call upon my executive secretary to answer that question, if you don't mind, Mr. MacKay.

**Mr. Peter MacKay:** Thank you very much.

**Ms. Joanne Weeks (Executive Director, Office of the Communications Security Establishment Commissioner):** Mr. MacKay, would you mind repeating your question?

**Mr. Peter MacKay:** The question is about the renewal process for ministerial authorizations. My reading of the act, as it is currently set out, is that by virtue of having a never-ending renewal process, it can become essentially a permanent authorization, and I wonder whether statutorily we should be looking at remedying the act so that there is a period of time after which these renewals will no longer be granted. If after 10 years there hasn't been anything disclosed, it should be ended, and the process perhaps needs to be renewed if the evidence then comes to light.

I am a little troubled by the fact that in legal terms this is like a never-ending warrant that is just granted and can be renewed from time to time in perpetuity.

**Ms. Joanne Weeks:** Mr. Chair, Mr. MacKay, in actual practice it doesn't work that way, and I hope you will take comfort in the fact that the process requires CSE to reapply and make a base case for it. We don't even call them renewed ministerial authorizations; they are all, in fact, new ministerial authorizations. The point I would also like to add is that we have observed increasing rigour in this process and in the justification for a ministerial authorization. They are only getting better.

**Mr. Peter MacKay:** Okay, thank you.

**The Chair:** Thank you.

Before I ask Mr. Ménard to question, I'd like to seek a clarification on something Mr. MacKay raised, if I could.

Mr. Commissioner, could you not, if you had seen something you didn't like or that was inappropriate, file it in your annual report?

**Right Hon. Antonio Lamer:** It depends on what I saw. If it's of a top secret nature, of an operational nature that would reveal operational methods, then it would go to the minister in a top secret report.

**The Chair:** If there were a practice, as I hear from Mr. MacKay's question there might have been, something—

**Right Hon. Antonio Lamer:** If it were a practice that, let's say, lent itself to being conducive to a breach of the law—there's no breach of the law yet, but the practice makes the organization vulnerable to the occurring of something unlawful—then this is what I was referring to when I was referring to complaints. I was also referring to our settling things informally. My executive director or whoever is the person who has the expertise in the field in question would go to meet with his or her alter ego at CSE and say, this is not acceptable; why don't you fix it? I must say, I think this has occurred on a couple of occasions, and matters were settled without any need for me to go any further.

I'm happy to say there has been good cooperation in that regard between CSE and OCSEC.

• (1600)

**The Chair:** Okay.

**Right Hon. Antonio Lamer:** We call ourselves OCSEC, the Office of the Communications Security Establishment Commissioner.

[Translation]

**The Chair:** Thank you.

Mr. Ménard.

**Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ):** Good afternoon, Mr. Commissioner.

**Right Hon. Antonio Lamer:** Good afternoon.

**Mr. Serge Ménard:** I'm very honoured to have you here. In all honesty, I'm a little embarrassed to have to ask you questions.

Could you remind us how long you have been in this position?

**Right Hon. Antonio Lamer:** Two years this month. I do not remember the exact date of my appointment.

**Ms. Joanne Weeks:** June 19.

**Right Hon. Antonio Lamer:** Ms. Weeks is telling me that it was June 19.

**Mr. Serge Ménard:** During this time, have you received any complaints? Have people complained about the organization's activities?

**Right Hon. Antonio Lamer:** I will ask my director of operations to answer your question.

**Mr. Serge Ménard:** All right.

If I understand correctly, you are telling me that you did have complaints.

**Right Hon. Antonio Lamer:** If you are referring to legal complaints, the answer is no. If you're talking about people who have complained, because we use the same word, yes, we have had some. These complaints were resolved informally, because they weren't really complaints based on evidence.

I will ask Ms. Weeks to answer your question, because she looked after these complaints. After discussing the issue with me, she decided that they weren't really the type of complaints provided for in the legislation, ones which call for an investigation on my part.

**Mr. Serge Ménard:** In all honesty, I do not see how someone who may be aggrieved would know it, since he is being monitored secretly. So how could you get any complaints?

I understand that the complaints received by both you and your predecessor have been resolved informally. What type of complaints are these?

**Ms. Joanne Weeks:** Mr. Chair, Mr. Ménard, the answer is very brief. Our target is always located outside the country. So if there was a complaint, it would come from a foreign country, which is not really reasonable.

**Mr. Serge Ménard:** Yes. However, you are now authorized to intercept conversations originating from abroad with Canadian citizens in Canada.

**Ms. Joanne Weeks:** Yes, but the target is always...

**Mr. Serge Ménard:** That may also involve Canadian citizens who are communicating with someone outside the country.

**Ms. Joanne Weeks:** Personal communications are always of secondary importance with respect to the communication, because the target is always outside of the country. Interception is done outside of the country.

●(1605)

**Mr. Serge Ménard:** Theoretically, the interception is secret.

**Ms. Joanne Weeks:** Yes, and it is done outside of the country.

**Mr. Serge Ménard:** So I do not see who would complain.

**Ms. Joanne Weeks:** That is true. You are right.

**Mr. Serge Ménard:** But you have in fact received some complaints.

**Ms. Joanne Weeks:** We have received...

**Mr. Serge Ménard:** I would like to know what type of complaints you investigate.

**Ms. Joanne Weeks:** As the commissioner stated, we did receive some complaints that were, to some extent, frivolous.

**Mr. Serge Ménard:** Yes.

**Ms. Joanne Weeks:** Others did not pertain to the CSE mandate. They were more about human rights, employment or official languages.

**Mr. Serge Ménard:** Okay.

If I have properly understood the way that you carry out your mandate, the authorizations, like the practice of CSE, do not go beyond its mandate and do not unduly violate individual rights. You are limited to random checks and observations made on site.

The bottom line is that you do not have any way of knowing whether the monitoring has been abusive or has targeted matters other than international affairs, defence or antiterrorism.

**Ms. Joanne Weeks:** The primary purpose of the office of the commissioner is to conduct investigations of the establishment to monitor legality. That is the main activity of the office.

If, in examining the activities of the establishment, we discover communications that, in our opinion, or according to the act, the CSE should not have in its possession, the commissioner takes note of the matter. Consequently, we do not need to have a complaint to ascertain whether or not the CSE is operating legally. We can also determine this based on our own observations and inquiries.

**Mr. Serge Ménard:** Mr. Commissioner, in reading your presentation, I see that your staff always receives full cooperation when it goes to the CSE in order to access any document or look at any procedure that it wishes to examine.

**Right Hon. Antonio Lamer:** If ever I were denied access to any document whatsoever, I would send a subpoena. Part II of the Inquiries Act gives me this authority and I would send a *subpoena duces tecum* requiring the production of the documents to which we have been refused access.

**Mr. Serge Ménard:** However, you still would have to know that these documents exist.

**Right Hon. Antonio Lamer:** I'm surrounded by many experts. Moreover, when we require expertise that my personnel does not have, we hire outside experts to deal with the specific requirements. If you were to review the work history and knowledge of my employees, you would see that they know where to look.

When it comes to investigating policing, nobody knows better than a former police officer where to look.

●(1610)

**Mr. Serge Ménard:** We were informed of another matter when we were preparing for today's meeting. You have a role to play with respect to persons seeking to avail themselves of the public interest defence. I was unaware of this and it intrigued me. The Privacy Act provides that certain individuals who have information that must be kept secret may feel that such information should be divulged in the interest of the public.

We were told that the act authorizes you to determine whether or not this public interest defence applies to these individuals.

Have you had to deal with such cases?

**Right Hon. Antonio Lamer:** No.

**Mr. Serge Ménard:** But you do have this power.

**Right Hon. Antonio Lamer:** I do have this power.

**Mr. Serge Ménard:** Up until now, no one has used this provision.

**Right Hon. Antonio Lamer:** No.

**Mr. Serge Ménard:** All right. Thank you.

[English]

**The Chair:** Thank you.

Mr. Comartin, please.

**Mr. Joe Comartin:** Thank you, Mr. Chair.

Thank you, Mr. Commissioner, for being here.

Just to finish up on that, were any of those types of applications for the public interest defence received? Were any of those ever received since the CSE existed?

I'm addressing this question to Ms. Weeks, because I'm guessing she's going to know better.

**Right Hon. Antonio Lamer:** I guess it has to be Ms. Weeks, but I can say that I've never had any.

**Mr. Joe Comartin:** I understand.

**Ms. Joanne Weeks:** Mr. Chair, and Mr. Comartin, the amendment to the Security of Information Act, or the creation of the act, as you know, was part of the omnibus anti-terrorism legislation, so in fact it didn't take effect until December 2001. And no, from December 2001 to this day, we have not been approached by anybody who is permanently bound to secrecy who wishes to avail himself or herself of the public interest defence.

**Mr. Joe Comartin:** And there wasn't a somewhat similar provision before? I may be wrong on that, but I thought that was there.

**Ms. Joanne Weeks:** That would have been the old Official Secrets Act. I don't believe there was anything like it, and that was part of the problem with the Official Secrets Act.

**Mr. Joe Comartin:** Mr. Commissioner, with regard to the ministerial authorizations, Mr. Cotler was here recently—and I'm sorry, I didn't bring notes on this—and he said authorizations had been sought and had been granted a number of times. Can you tell us how many times they were granted?

**Right Hon. Antonio Lamer:** I'll give you the exact numbers. There are two types of ministerial authorization, and I'll give you a breakdown.

We received 23 ministerial authorizations during the period from January 2002 to March 31, 2005. Of these, eight ministerial authorizations have been reviewed, two authorizations are under review, nine MAs are to be reviewed, and four MAs are active.

ITSs—that's the other type of authorization, for the protection of our computer systems—are the other type of ministerial authorization; there are 12, and five have been reviewed. There are 11 foreign intelligence authorizations, and three have been reviewed. We're working on it.

**Mr. Joe Comartin:** Can I go back for a second, Mr. Commissioner? When you finished with the initial list of ministerial authorizations, you said four were active. They're still ongoing, so you would not do a review of those, from what you said to Mr. MacKay, until they were completed.

I didn't add up the numbers, but I think it's accurate.

So you would review every single one. You either have reviewed, are in the process of reviewing, or will review every single one that's been authorized.

**Right Hon. Antonio Lamer:** Yes, sir.

**Mr. Joe Comartin:** I didn't understand the ITS. Could you explain that to me?

**Right Hon. Antonio Lamer:** If you look at the act, you'll see there's a second type of ministerial authorization.

**Mr. Joe Comartin:** Is this the Anti-terrorism Act you're referring to?

**Right Hon. Antonio Lamer:** Yes.

You will see that we are authorized.... We first get an invitation from the head of the department to go and check his or her computer system to see if there's a hacker, to see if it's secure. When I say "we", I mean CSE. CSE is invited, because of its sophisticated expertise in this extremely complex field of telecommunications, to go in and have a look at the system. Don't ask me what they do, but they do their thing. They check to see if the system has been invaded or is safe, and they will make recommendations, if the system isn't safe, as to how it could be made safe and so on. We call them ITSs.

I'm sorry. I hate acronyms myself. I have to know them in both languages.

**Mr. Joe Comartin:** We'll go back to the initial 23 authorizations. I think you may have said this to Mr. MacKay, but I just want it confirmed. You indicated there were two you had some concerns about, and you expressed your concern to the agency and they were rectified. Did I understand that correctly?

**Right Hon. Antonio Lamer:** Yes.

• (1615)

**Mr. Joe Comartin:** In terms of those concerns, would they show up in a report anywhere?

**Right Hon. Antonio Lamer:** There was no need because they were rectified. This was beforehand; this was not afterwards. I was asked if I had looked at certain things beforehand. My staff looks at

certain things beforehand and says, hey, wait a minute; don't go ahead with this; you have to add that or change this. We take a proactive approach.

Even though I look at MAs after the fact, after they've been obtained, our staff, in the course of checking to see if things are being done lawfully, will sometimes identify a flaw in what is being done. Rather than not say a word and let them go ahead and then take the baseball bat out and whack them over the head because they did it wrong, they'll say, look, don't do it that way; we think that's not the right way of doing it. So it's preventive.

**The Chair:** Last question, please.

**Mr. Joe Comartin:** Mr. Commissioner, before the material goes to the minister for his or her approval, would you or your office have the opportunity to see that material—the brief, in effect—that's going to the minister, justifying the authorization?

**Right Hon. Antonio Lamer:** No.

**Mr. Joe Comartin:** So it's always some stage after that when you would see it.

**Right Hon. Antonio Lamer:** Yes.

**Mr. Joe Comartin:** Thank you, Mr. Chair.

**The Chair:** Thank you, Mr. Comartin.

Mr. Wappel, please.

**Mr. Tom Wappel (Scarborough Southwest, Lib.):** Thank you.

Mr. Chairman, allow me to take this opportunity to apologize to the next set of witnesses. I have to leave at 4:30 for another meeting, and I apologize to those people because I'm not likely to be able to return.

Commissioner, thanks for coming.

I have just a few questions, following up on some of the questions that were asked earlier.

Let me start with this. We're here reviewing the Anti-terrorism Act, and insofar as it relates to you and your office, do you have any comments, criticisms, or suggestions to this committee with respect to that part of the Anti-terrorism Act that deals with you or your office?

**Right Hon. Antonio Lamer:** At this point in time I have nothing earth-shaking, but obviously I didn't expect to be before you so soon.

I will be continuing Thursday. I had to suspend my review on Monday for the Senate and today for you gentlemen, but I am in the course of reviewing. I told the Senate Monday I would be writing in about things I have discovered in the act where I think there can be improvement.

I feel for the people who had to draft this act in such a hurry, and I also feel for those who had to vote the act in such a hurry. At this point in time I haven't discovered anything earth-shaking—that's the word I used with the Senate—but I might somewhere down the line. I don't know. You certainly will be informed of it, and I undertake to inform you of it in writing. I'll be sitting down with lawyers.

If you want an example, I can give you one.



•(1620)

**Mr. Tom Wappel:** No, because I only have 10 minutes, Mr. Commissioner, and I have a few other questions.

The act was drafted in about five weeks after 9/11, a mammoth undertaking. But that was four years ago, so there have been four years to look at it line by line, word by word, by everybody concerned, and that's why I was asking.

Do you feel the wording of the legislation permits you to be reappointed?

**Right Hon. Antonio Lamer:** Well, I'm appointed for three years. The maximum appointment is for five years, but apparently it can be renewed.

**Mr. Tom Wappel:** I don't see anything in here that says it can.

**Right Hon. Antonio Lamer:** But one has to be realistic about it. I'll be 72 in three weeks. Mr. Bisson, my predecessor, was appointed at a much younger age than I was, and his appointment was renewed for about eight years. I don't think you'd want me around for eight years, and I don't think I'd want to be around for eight years—or I'd want to be around, but not here.

**Voices:** Oh, oh!

**Mr. Tom Wappel:** One of your duties is to respond to complaints, and we were talking about complaints. What do you think Parliament had in mind when it legislated that you are to respond to complaints? Who would complain?

**Right Hon. Antonio Lamer:** If somebody discovered that their private communications were being intercepted, and they asked me to check to see if there was the proper ministerial authorization to so do, and I responded with no, there wasn't, that person wouldn't have to make a complaint, because I would, *proprio motu*, by myself, raise the matter.

If I find out about an unlawfulness, I don't wait for a complaint. I do it myself, as the commissioner.

**Mr. Tom Wappel:** Yes, but my question is, who would complain?

Maybe Ms. Weeks can help us here.

**Right Hon. Antonio Lamer:** The person who found out that—

**Mr. Tom Wappel:** It would have to be a foreigner, would it not?

**Right Hon. Antonio Lamer:** No. I would be very surprised if the foreign entity who's being targeted, whose conversations are being intercepted, would complain to a Canadian commissioner about it.

**Mr. Tom Wappel:** I understand that, but what I'm getting at is that since the activities of CSE can't be directed at Canadians anywhere, or at any person in Canada, they would therefore be directed at non-Canadians outside of Canada.

**Right Hon. Antonio Lamer:** Yes.

**Mr. Tom Wappel:** So I'm trying to figure out who would complain.

**Right Hon. Antonio Lamer:** It's because when you target...

It's very difficult for me to explain this without getting into the operational aspects of CSE. This is a no-no for me. I cannot explain how they go about doing things.

**Mr. Tom Wappel:** I'm not asking that.

Perhaps I could ask you to consider that, then, and give us a written response with a "for instance", something of that nature, after you've had an opportunity to consider it.

**Right Hon. Antonio Lamer:** Ms. Weeks can give you an answer on that one.

**Ms. Joanne Weeks:** Mr. Wappel, there's history here, going back to the first order in council.

I'm the inaugural executive director, so I walk around with this stuff in the back of my head.

**Mr. Tom Wappel:** So you're the corporate memory.

**Ms. Joanne Weeks:** We share it.

In the original order in council that appointed the Honourable Claude Bisson, the inaugural commissioner, there was no complaints mechanism. This proved to be problematic, because he did get complaints, even though they were complaints that were not founded in relation to CSE's mandate; they were human rights complaints, Public Service Commission complaints. He did not have the authority to answer the complainants.

Through an amendment to the second order in council, and after a lot of discussions, a mechanism was put in place, again through order in council, so that he could respond to a complaint, even to say that he was not going to investigate it, or that he had referred it to a more appropriate body. That order in council was ported into the legislation.

**Mr. Tom Wappel:** Who would complain? What kind of complaint? Would it be a complaint by a subordinate against the head of CSE, that kind of thing, or...?

•(1625)

**Ms. Joanne Weeks:** There were a couple of complaints in the past about people who were overlooked for promotion. There were a number of complaints that would fall into the naïve, vexatious category.

Security and intelligence organizations attract a certain number of complainants who are, for lack of a better term, poor souls who think they are being pursued.

**Mr. Tom Wappel:** I've had a few of those in my constituency office.

**Ms. Joanne Weeks:** That would be the nature of the complaint. But the office has not had the type of complaint that would trigger a quasi-judicial process as envisaged by the legislation.

**Mr. Tom Wappel:** How am I doing on time, Chair?

**The Chair:** You're actually over, sir. But you may ask one last question, if you want to.

**Mr. Tom Wappel:** I have one last question, then.

Commissioner, do you feel you have all the powers that you require under part II of the Inquiries Act, or do you feel you need more powers? If so, what would they be and why do you need them?

**Right Hon. Antonio Lamer:** No. I think I have awesome powers under part II of the Inquiries Act. I should use them sparingly, but use them if need be.

**Mr. Tom Wappel:** Thank you, sir.

Thank you, Chair.

**The Chair:** Mr. Sorenson has a question, but I wanted to ask you something that came out of this.

On the access to cabinet documents, do you access cabinet documents when you do reviews of ministerial authorizations? Could you advise the committee of that? Do you have access to cabinet documents?

**Right Hon. Antonio Lamer:** I have access to all the documents CSE has.

This is the kind of question where I'd like to be able to have half an hour to look into matters before answering. It's the kind of question you'd ask a lawyer, and he'd send you a \$10,000 bill with his response. But off the top of my head, I don't think I have access to cabinet documents.

**Ms. Joanne Weeks:** This is an area, Mr. Chair, that has not been tested. I don't know.

**Right Hon. Antonio Lamer:** But I'd be inclined to say no. I oversee CSE. That's my job, to see that they act lawfully. I cannot see using this power to start going into cabinet documents and the like.

**The Chair:** Currently, if you're looking to review a ministerial authorization, you don't think you have the jurisdiction?

• (1630)

**Right Hon. Antonio Lamer:** Oh, I do have the jurisdiction for ministerial authorization.

**The Chair:** But you've never used it, never exercised it.

**Right Hon. Antonio Lamer:** No, no. For ministerial authorizations, yes; but I can't have access to, I don't know, cabinet discussions about whether they want to change the format of the review process or things like that.

**The Chair:** Okay.

**Right Hon. Antonio Lamer:** I'm strictly the watchdog. But as I reminded somebody, I'm your watchdog; I'm not your house pet.

**The Chair:** Okay. Thank you very much.

Mr. Sorenson.

**Mr. Kevin Sorenson (Crowfoot, CPC):** Thank you, again, Mr. Commissioner.

I just have two fairly quick ones.

First of all, when Mr. Wappel was asking the questions with regard to the complaints that come forward to you, it was because I think we're trying to get a grasp on them. When we had the Commission for Public Complaints here from the RCMP, they said that basically nobody even knows about the avenue they have to lodge complaints. She said there are times when they've almost gone out and given seminars at mosques and other places so that people know there's an avenue to complain.

We heard the same concerns, or frustrations maybe, when SIRC came before us and said they hadn't received very many complaints. But it was the same deal; people don't know about the avenue for complaints.

When you make reference to the complaints that may come forward being very general complaints from the humanitarian side, perhaps more concerned with the parameters of what the government does, I think that's what we're trying to grasp. What types of complaints would come forward? That's my first question.

The second one is this. This March you were part of a round table discussion, a symposium, at the University of Ottawa. During that discussion, or during that symposium, Supreme Court Justice Ian Binnie, when he was talking about September 11 and terrorism and Canada's role in legislating to make sure we're safe from terrorists, said that Canadians may have to revisit whether they still buy the legal maxim that it is better for ten guilty men to walk free than for one innocent man to be punished.

He went on and talked about the rule of law. He said that the greatest risk to the rule of law is this whole idea of terrorism, so it's absolutely necessary for our courts to show deference to state agencies because they have more expertise, they have more information, and they have more resources on these matters than do the judges. He also questioned how much deference is too much.

Now, you're going to be doing a little bit of a review of Bill C-36 and you're going to be responding in writing. I'm wondering, do you buy into the idea that Judge Binnie made reference to, perhaps recognizing that terrorism is a threat to the rule of law? Do you buy that?

**Right Hon. Antonio Lamer:** That it's a threat to the rule—

**Mr. Kevin Sorenson:** No, no, when he says that Canadians may have to re-address this idea that it is better for ten guilty men to walk free than for one innocent man to be punished. He said that because of terrorism and what one act of terrorism may do to the whole institution of the rule of law, that idea has to be re-addressed.

**Right Hon. Antonio Lamer:** To re-address it is one thing. To move away from the 10:1 ratio is another thing. I think our system of justice is convicting enough innocent people right now.

I'm just back from Newfoundland, where I was looking into three wrongful convictions. In Newfoundland, where they have very few murders—some years they don't even have one murder—I'm looking into three wrongful convictions. We have Guy Paul Morin, we have Sophonow, we have Milgaard, we have Marshall, we have others. So I think that the actual system, inevitably, is fallible.

The safeguards that are in place, I think, are adequate. Unfortunately, we nevertheless are witness to the fact that there are wrongful convictions. So we must be very careful about starting to relax the safeguards we have in place.

I don't know what Mr. Binnie said. I don't know what the context was. I don't know if he meant that in the field of terrorism we should have a reversal of this clause or something. You might want to have him as a witness to explain what he meant by that. I don't know what he meant. Did he mean relaxing our traditional protections—our presumption of innocence, the rule of reasonable doubt, and so on and so forth? With all due respect, he's a great jurist and a good friend.

I'll go to your first question. It's a short answer, Chair.

•(1635)

**Mr. Kevin Sorenson:** Yes.

**Right Hon. Antonio Lamer:** It's a short answer. It's on our website.

**The Chair:** My Lord, I'm sorry, I have to interrupt. We have two other interventions and we have witnesses waiting, and we have 5:30 bells, so I'm going to try to marshal forces really quickly.

Mr. Cullen has the floor. We will have a short question from Mr. MacKay, and colleagues, if we can, keep it to five minutes or less, please.

**Hon. Roy Cullen (Etobicoke North, Lib.):** Thank you, Mr. Chair.

Commissioner Lamer and Ms. Weeks, thank you for coming.

We have other witnesses waiting, so I'll keep my remarks short.

I was interested, Commissioner, in whether the enactment of Bill C-36 has affected at all the scope of your work, your workload, or the focus of your work in your office?

**Right Hon. Antonio Lamer:** Yes, it has, because the focus moved more towards anti-terrorism than prior to the enactment of the anti-terrorism law.

**Hon. Roy Cullen:** Could you be more specific, or is that going to get into areas that you can't get into?

I have one question while you're thinking about that. What is the total complement of your office in terms of people and resources? I'm just curious.

**Right Hon. Antonio Lamer:** Eight people—eight experts—plus a certain number of people I referred to previously who have a special expertise, who are hired on contract to do specific jobs.

**Hon. Roy Cullen:** Can you be more specific about how the additional emphasis on terrorism has impacted what you do and what you focus on, or is that going to get us all into trouble?

**Right Hon. Antonio Lamer:** No, we focus on what CSE does, and I don't know to what extent CSE has a greater focus on anti-terrorism. I'm assuming they are having a greater focus on it, so therefore, we sort of follow them and check to see if they're acting lawfully.

**Hon. Roy Cullen:** Okay, I see.

There was a gentleman who came to see me in my riding a few years ago. He was from a country that was reputed to be somewhat of a police state, and he swore that this country was bugging his house and in fact, it was interfering with his garage door opener and his TV and stuff like that. I think if he went to you people, I'm guessing you would say it's not your mandate. But could he go to the CSE and ask them to see if they were tapping his apartment or his home remotely, or is that something that would be outside the scope of the CSE as well?

**Right Hon. Antonio Lamer:** There are private enterprises that offer services for checking these things. If you were to come with a report by a reputable private enterprise that said, yes, his phone is being tapped, I probably would have someone on my staff ask the chief of CSE whether it's CSE that's doing it, and if so, to show us the MA. It's not CSE that would be doing it if it's in Canada. It would

be a conversation that CSE would be hearing at the foreign end. CSE never intercepts anyone in Canada—I'm talking geographically. That's the law.

•(1640)

**The Chair:** I'm going to have to jump in, sir.

Mr. MacKay, a short intervention, please.

**Mr. Peter MacKay:** Mr. Commissioner, there are members of Parliament who should be searched for bugs, in the current atmosphere, it seems.

**Some hon. members:** Oh, oh!

**Mr. Peter MacKay:** I just have a very brief question on the overall role of parliamentarians plugging into the oversight of security agencies, of which you represent one as well. Do you see a role for a parliamentary committee, not unlike this one, to oversee some of the same activities as your office does, essentially? Is there a role for parliamentarians, in your opinion, in the overall security envelope of which CSE is part?

**Right Hon. Antonio Lamer:** I'll give you a very personal opinion on that.

**Mr. Peter MacKay:** Please do.

**Right Hon. Antonio Lamer:** I can tell you that it's a view not shared by others, or by no more than one.

I would welcome a parliamentary overview of our activities, but it very much depends on what kind of animal you're going to put in place, taking into account the fact that the members of the overview body are all members of Parliament who have staff of five, six, or seven persons, multiplied by the number of people. We're talking about highly sensitive information. The more people who are involved in this type of activity, the more prone it's going to be to leaks.

**The Chair:** I'm going to have to jump in there, sir.

Thank you very much to you and your colleagues for appearing today.

We're going to take a very short recess of literally two minutes to switch witnesses. We'll come back in a moment.

Thank you.

•(1642)

(Pause)

•(1646)

**The Chair:** I call the meeting to order. Thank you very much.

Colleagues, I'm pleased to welcome the Canadian Human Rights Commission. I believe that we have Mary Gusella, Robert Ward, Ian Fine, Fiona Keith, and Kathleen Fawcett.

Welcome.

Madam Commissioner, you have an opening statement. Welcome.

**Ms. Mary Gusella (Chief Commissioner, Canadian Human Rights Commission):** Yes, thank you and good afternoon.

[*Translation*]

It's a pleasure to be here with you this afternoon.

[English]

I have provided a statement to the clerk. I think that it rather thoroughly addresses a number of areas that I believe may be of interest to this committee. But in order to reserve as much time as possible for your questions, I will very briefly summarize the main points of that statement.

As some of you may be aware, over the past two years, the Canadian Human Rights Commission has engaged in a significant change process that is transforming its business model to better serve Canadians. The indicators of the success of this process are many, and others continue to emerge.

For instance, we have reduced the average age of complaints within the system from 25 months to 10 months. An increase of 70% in the number of final decisions made by the commission indicates that productivity has substantially improved as a result of more efficient decision-making. Simply put, we're now able to process more cases in less time, and that permits the commission to free up resources to engage in other important areas of its mandate.

Looking ahead, the commission's plans and priorities for this year include instituting a human rights research program. A strengthened research and policy capacity will permit the commission to examine the human rights impact of government initiatives such as the anti-terrorism measures.

Of course, our work is guided by our mandate, and our human rights analysis is grounded in our mandate. The commission deals with the statutory human rights established by the Canadian Human Rights Act. These are the 11 grounds enunciated in section 3 of the act.

In contrast, I think you will note that when people talk about human rights, they do so more generally. They usually talk about a wider set of concepts and principles. However, these wider civil and legal rights, many of which underlie the human rights analysis of the Anti-terrorism Act, do not fall within the Canadian Human Rights Commission's mandate.

[Translation]

The document that I have tabled deals with three main themes.

[English]

Let me touch briefly on each of these three areas, and if you want to ask follow-up questions, we can go into that in a bit more depth.

First of all, as you know, the two agencies that deal with matters that are involved when human rights complaints engage in national security issues are the Canadian Human Rights Commission and the Security Intelligence Review Committee, or SIRC. Of course, both agencies have a role to play. I believe there is some ambiguity in how these roles should be coordinated.

The commission interprets the legislation to say that it should deal with the human rights investigation and SIRC should deal with the national security matters. SIRC takes a different view and has been carrying out human rights investigations. We're trying to work this out operationally, but the legislative provisions appear to bear more than one legal interpretation and may in fact need to be amended. This is important because oversight provisions need to be

coordinated in order to ensure that all of the relevant interests, including human rights and national security, are dealt with in a consistent and an effective fashion.

I also want to advise you of the work being done to ensure that human rights are respected at border crossings. Since the events of September 11, the commission has seen an increase in the number of complaints alleging discrimination on the basis of race in what is called the secondary screening process. The numbers are small. There have been 12 signed complaints from September 11, 2001, to the present, and half of that number in the four-year period prior to September 11, 2001.

• (1650)

[Translation]

The biggest change in this area is the agreement reached with the Canadian Border Services Agency, in consultation with the African Canadian Legal Clinic. The agency agreed not to use security check criteria based on race, colour, ethnic or national origin and gender, which are all unlawful sources of discrimination. Customs officers will be receiving anti-racist training and the agency will conduct a pilot project to compile statistics on referrals to secondary screenings based on race, colour, national or ethnic origin and gender.

[English]

I think this is a very good example of how techniques of dispute resolution can be used to resolve difficult human rights issues, even when national security interests are at play.

Finally, as I believe you know, the Anti-terrorism Act amended section 13 of the Canadian Human Rights Act to make it clear that the Internet is a form of telephonic communication. Since then, the commission has in fact dealt with 25 cases relating to hate on the Internet. The commission believes that section 13 is working well.

We're also looking at ways to combat hate outside the complaint process, while working with Internet service providers to develop what might be called acceptable use of policies. This would in fact be very helpful because it would provide those Internet service providers with a basis for playing a role in preventing and combating hate on the Internet.

[Translation]

In summary, those were the key points examined in the document.

[English]

I would, of course, be very happy to answer your questions.

Thank you, Mr. Chair.

**The Chair:** Thank you very much, Madam Commissioner.

Mr. Sorenson, please.

**Mr. Kevin Sorenson:** Thank you for coming, and we're sorry for postponing. We got started a little late. Hopefully we don't have to leave right at 5:30, so we'll get to hear you a little longer. We have votes coming up.

Three or four weeks ago in the *National Post*—I think it was the *National Post*, it might have been the *Ottawa Citizen*—I came in, in the morning, and across the front page were pictures of 15 or so of Toronto's most wanted people. The article went on to say that finding these people was very difficult without racial profiling, given the fact that the blacks were a smaller population in Toronto and yet a high percentage of them were among the city's most wanted.

We've been talking a fair bit in this committee about profiling. Some of the concerns are that certain groups are being racially profiled in perhaps indiscriminate ways. But I guess the crux of the story in the *National Post* was that law enforcement should be allowed to consider race, they should be allowed to consider ethnicity, and certainly when they're doing their investigations they should be allowed to consider gender.

Then the other night when I turned on the television I saw this story on someone who was being charged. He was a member of the Ku Klux Klan in the United States. I got to thinking about this profiling and the tremendous horror there must have been within the black communities in the southern states during those times of American history. Yet when it came to law enforcement, they weren't investigating blacks as perpetrating these crimes against blacks, because they knew they were caucasians who were doing it.

When we look at the last five years of terrorist acts, Bill C-36 came out of the biggest terrorist act the world has probably has ever seen. We know the ones who carried out that terrorist attack were militant fundamentalist Muslims. We know that's who carried out the 9/11 attacks. Yet there seems to be this huge concern that we may be racially profiling them. All the commercial airlines I know of that have been blown out of the skies in the last ten or fifteen years have been attacked by the same types—militant fundamentalist Islamists. They give a bad name to all Muslim communities.

How do we build a Bill C-36...? We keep hearing especially from human rights groups—and I thank you for coming—and they bring this up all the time. If we have stretched resources to our law enforcement agencies, how do you safeguard doing it? How do you safeguard that type of profiling? What additional measures could we put in place? When does describing the suspect end and racial profiling begin? Law enforcement understands who they're looking for by race or ethnicity, but in your opinion, when does that describing of suspects end and racial profiling begin?

• (1655)

**Ms. Mary Gusella:** That's an extraordinarily difficult question. First, let me say that anti-terrorism activity is fundamentally in support of human rights. In a free and democratic society, having a capacity to protect one's population is in fact a protection for their human rights. I'm not the first person to say this. I'm sure you've heard the Minister of Justice say similar things. It's a fundamental touchstone. Terrorism jeopardizes everybody's rights—the right to life and all other human rights. It's not security or rights, one or the other; it's how we organize our security systems so that they are not based on discriminating between persons by virtue of an ethnic or other attribute that is protected under the Human Rights Act.

I'll give you an example. We have done some work with the Canadian Border Services, the agency, as a result of a settlement. It was a pre-9/11 settlement of an individual whose name is public now

because the settlement is a public settlement, a Mr. Pieters. This is a black individual, and he alleges that in the secondary screening he was targeted because of his colour and national origin.

Since this settlement, we have been working with the Border Services Agency. We want to ensure that they develop statistics that allow them to better understand how their front-line people are referring for secondary examination and how these referrals are made. It is important that there be transparency, to the extent possible, in the triggers for these referrals. So we have in this situation the difference between profiling and racial profiling.

I'm not an expert in police matters, but I'm sure you could have police experts identify to you how they do criminal profiling. It stops short of racial profiling, because racial profiling would take race as a starting point for identifying an individual.

That's where the work with the Canadian Border Services is important. It does not use screening criteria that discriminate on these grounds. That's not to say that individuals who come from certain countries may not be screened—quite the contrary. It means they have screening criteria, based on risk assessment, that are wide enough to pick up threats without resorting to grounds prohibited under the act.

• (1700)

**Mr. Kevin Sorenson:** How many complaints of racial profiling have come before the commission? What is the status of them? What do you do once you've researched it a little bit? Who do you send it all to?

**Ms. Mary Gusella:** Since 9/11, we have had 12 profiling complaints at border crossings, and many of them refer to racial profiling. That's the basis of these numbers. Prior to that, between 1997 and 2001, we probably had only six complaints. That's a comparable period, before and after 9/11. In one sense, you could say, well, it's a doubling. In a more significant sense, the numbers are very small.

What do we do with them? We investigate them. We work hard on alternative dispute resolution. We want to achieve settlements that not only address the issues for the individual, but also put in place preventative measures to ensure that these things don't happen again. This settlement is a good example. One of the things that have come out of this settlement is a commitment to gather statistics. In fact, the border agency is considering making these statistics public on an annual basis, to show how the linkage between race and national ethnic origin compares with referrals to secondary screening.

**The Chair:** Thank you.

**Mr. Kevin Sorenson:** Thank you.

**The Chair:** Mr. Ménard, please.

[Translation]

**Mr. Serge Ménard:** Thank you for coming.

We are under the impression that you would be the one to know whether or not there have been any abuses in enforcing the Anti-terrorism Act; however, in reading the document that you have submitted, I see that you have not received many complaints.

However, you have made much about the jurisdictional disputes between SIRC and yourselves. Could you give us an example of a complaint that may lead to a jurisdictional dispute between you and SIRC?

**Ms. Mary Gusella:** In fact, we have had several disputes. It is quite difficult to discuss these matters specifically since these are protected files, but I can speak a bit about one case in particular.

I will continue in English, in order to be more clear.

•(1705)

[*English*]

Groups of individuals who were collecting intercept data have made complaints on the basis of how they were remunerated, as opposed to what languages they spoke. Of course, in intercept work the languages have to be non-official languages. That caused SIRC to hold a series of hearings about this. So that was on the basis of national or ethnic origin, because of course we do not have jurisdiction in our act over language.

So that is the kind of complaint, but there have been a number of them over the years. As I say, what happens

[*Translation*]

is that the agency decides to conduct the inquiry itself with respect to human rights. Then, it comes back to us and we have to determine what is appropriate. Sometimes we have to redo the inquiry because it was not done with due respect for the fundamental human rights principles.

**Mr. Serge Ménard:** I understand that one of the advantages of filing a complaint with you is that you have the authority to rectify the situation and obtain compensation.

I will give you another example. Let's say we are talking about an engineer who works for a big Canadian corporation such as Bell Canada; this engineer has travelled a great deal in the world but he is Palestinian, and his name shows this. If he were to file a complaint with you that every time he arrives at the border, he is subjected to maximum security measures systematically, whereas the people accompanying him, who do not have Palestinian or Arab names, cross the border easily, what would you do for him?

**Ms. Mary Gusella:** First of all, we try to come up with a solution through negotiation. If that is not possible, we conduct an investigation to check the facts. The facts are never the same, but if the investigation shows that there was no justification for referring the person to secondary screening—and it is not uncommon for us to discover a discrimination problem—we refer the matter to the tribunal. The tribunal studies all of the facts, asks everyone involved to appear and makes a decision.

**Mr. Serge Ménard:** So, to whom do you turn if it is happening systematically in Toronto, Montreal, Ottawa and Vancouver? Do you investigate each time? How do you determine whether what he is saying is true? He is Palestinian, and he is always referred to secondary screening. What remedy can you provide in a case like that?

**Ms. Mary Gusella:** If a solution can be found through negotiation, the person might get monetary compensation. We can also ask the Canada Border Services Agency to change its criteria.

In the aftermath of the Pieters case, an anti-racism training program was developed. That training is provided quite regularly to customs officers regionally. The need to provide this kind of training is one of the most important aspects raised by the Pieters case.

•(1710)

**Mr. Serge Ménard:** And to resolve your conflict with the SIRC, you requested a legal opinion. Are you willing to share that with us?

**Ms. Mary Gusella:** I can certainly get that to you.

**Mr. Serge Ménard:** You implied that legislative amendments might be necessary. Could you tell us what kind of amendments you have in mind?

**The Chair:** This will be the last question.

**Ms. Mary Gusella:** We would like it to be something clear, that provides for coordination. We would like to be able to avoid having to deal with the same case twice. So we are talking about eliminating the duplication. That is the basic principle. We can always discuss the ways and means, but what is important to us is the principle.

**Mr. Serge Ménard:** You want clear legislation? You think that is possible in Ottawa? Good luck!

[*English*]

**The Chair:** Merci.

Mr. Comartin, please.

**Mr. Joe Comartin:** Thank you, Mr. Chair.

Thank you, Madam Commissioner, for being here.

I can't let Mr. Sorenson's comments go unchallenged. It's that type of knee-jerk stereotyping that we have to be so careful of. When I think of the experiences we had—the Michigan militia was behind the Oklahoma bombing; the Sikh-Hindu conflict was behind the Air India disaster; the problem we have with the Tamil Sri Lankan community in Canada—none of those had anything to do with the Muslim or Arab population. We just have to be really careful of that.

That said, on page 4 you talk about legal opinion. Do you have a written opinion from SIRC as well, or do you just have yours?

**Ms. Mary Gusella:** I'm going to ask the secretary general to address that.

**Mr. Robert W. Ward (Secretary General, Canadian Human Rights Commission):** There is a legal opinion that was done by the Department of Justice. It is their property. We certainly have done ours, and it can be made available to the committee.

**Mr. Joe Comartin:** So you can't give us the Justice one because—

**Ms. Mary Gusella:** It's not ours.

**Mr. Joe Comartin:** Perhaps you could forward that opinion to the clerk.

On the border crossing—and I'm going with your text, Madam Commissioner—did you have some concern that there were systems, policies, or methodologies based on racial profiling in the one case? I don't know if that was the Pieters case.

**Ms. Mary Gusella:** That is the case I was referring to. The allegation on the part of the complainant was there was discrimination on the basis of race, in terms of how he was referred to secondary inspection. That case led to a very comprehensive and far-reaching settlement that now allows for...

Go ahead.

**Mr. Joe Comartin:** I'm sorry. We're really tight on time. I don't mean to cut you off.

In the course of your work on that file, did you come to any determination as to whether the border agency was using racial profiling as a regular methodology?

**Ms. Mary Gusella:** We never got to that determination, because it was settled before.

**Mr. Joe Comartin:** I want to go back to Mr. Ménard. I spent last Friday at the Arar commission. They were dealing with a number of experts on the issue. The day before, they had dealt with all the complaints.

Did you have somebody at the Thursday or Friday session?

**Mr. Robert W. Ward:** No, we didn't.

**Ms. Mary Gusella:** No.

**Mr. Joe Comartin:** One of the experts is a law professor at my university law school. She was stopped at the border. I didn't know this until I got back to Windsor and it was on the front page of the paper. They clearly were directing everybody who appeared to be Arab or Muslim off to one line, and then dealing with them separately, with other, non-stereotypical people going through with the rest. She challenged. She's Palestinian in origin, a Canadian citizen now, and was immediately, as soon as she questioned, sent to secondary inspection.

Would you deal with a complaint like that?

• (1715)

**Ms. Mary Gusella:** If she made a complaint, if she's a Canadian resident, and it happened in Canada, absolutely.

**Mr. Joe Comartin:** The other thing that came out at the Arar commission on Thursday and Friday was just the absolute refusal by that community of any sense of obtaining justice in Canada, to the point where they don't even think of laying complaints. They don't lay complaints to any of the agencies they feel have discriminated against them; whether it's RCMP or CSIS doesn't matter.

Do you have any comments on whether that's the reality with your agency?

**Ms. Mary Gusella:** In fact, it's one of the reasons I'm so careful about using the numbers. In my statement I talk about the fact that I don't think we can conclude on the basis of those numbers that there either is or isn't a problem, because there are a variety of reasons for which people may choose not to come forward. This in a way doesn't surprise us. We know that among certain communities there is less of a tendency to come forward with a complaint.

**Mr. Joe Comartin:** Just to jump topics quickly—because I think I'm about to be out of time—to the amendments to section 13, the result of the anti-terrorism legislation, at the full justice committee we just went through some work on child pornography. One of the

methodologies they're using there is to in effect ask people who use the Internet to act as a screening resource for police agencies.

Do you know of any place internationally where anybody else has done that, specifically toward hate crime types of material on the Internet?

**Ms. Mary Gusella:** No. In fact, section 13 of the Canadian Human Rights Act is unique in human rights legislation. We are doing some proactive work in this respect with Internet service providers to see whether we can get them to act through a set of practices, preferably preventative, but also so we're able to move more quickly to get things off. We've had about 25 cases, I think, under section 13 to date.

**Mr. Joe Comartin:** Let me just finish, Mr. Chair. I'm suggesting you make contact with those police forces that are using that methodology. England started it, Manitoba was next here, and now I think we're pretty well going across the country using that methodology. I think it might work with the hate crimes material.

Thank you.

**The Chair:** Thank you.

Mr. Cullen, please.

**Hon. Roy Cullen:** Thank you, Mr. Chair.

Commissioner Gusella, Mr. Ward, Mr. Fine, you might be interested to know that there are some policy initiatives under way at the Canada Border Services Agency as well that are going to more effectively deal with the implementation of zero tolerance for racial profiling at the borders. There'll be more on that in the next while.

You talked about the complaints from people responding at the border. Have you had any complaints about the way people have been treated by CSIS or the RCMP? If so, have you referred any of those to the tribunal? And what is the disposition of those cases, do you know?

**Ms. Mary Gusella:** I'm going to turn that over to Mr. Ward.

**Mr. Robert W. Ward:** Thank you, sir.

We have, I think, maybe half a dozen cases that have been referred to SIRC for disposition in the last four or five years.

**Hon. Roy Cullen:** To SIRC?

**Mr. Robert W. Ward:** We're required under our act to refer cases to SIRC when a ministerial letter is sent to us advising us of national security issues. We refer the case to SIRC for preliminary assessment of the security issues. That's our interpretation of why we send it to them.

**Hon. Roy Cullen:** Is this touching on some of the potential overlap you see in terms of your roles?

**Ms. Mary Gusella:** Yes.

**Mr. Robert W. Ward:** That's correct, yes.

**Hon. Roy Cullen:** You talked about legislative change as a possible solution. What legislation would change if your assumption and your thesis is correct?

**Ms. Mary Gusella:** We would like to see a clarification of whether in fact Parliament intended that we would do the human rights analysis or whether it intended SIRC to do it. Our interpretation of our act is that Parliament intended for SIRC to deal with the security issue within the 45-day limit in the act and then send it back to us for the human rights analysis.

Clarity is what we're seeking. It may well be that some type of an oversight agency could in fact accomplish both. We don't have any difficulty with looking at new possibilities, at an integrated review of security and human rights in, say, a new oversight agency. Those are possibilities that we'd certainly be very open to. We don't require that we be the only ones who do human rights analysis. We would rather see it done in a coordinated and effective way.

• (1720)

**Hon. Roy Cullen:** You didn't mention the RCMP. Is that handled through the complaints commission, or have there been no complaints to you with respect to the RCMP on the basis of human rights?

**Ms. Mary Gusella:** We have had complaints. We handle them pretty much in the normal way to the extent that they are within the mandate of the RCMP complaints commission. We ask people to exhaust that avenue of redress before coming to us. Then we would take it in only if we could see an outstanding discrimination issue remaining on the face of the complaint. But we prefer to have these issues dealt with as close to the point of conflict as possible.

**Hon. Roy Cullen:** You talked about solutions. Presumably these are mediated solutions. But failing any kind of agreement on a solution, you would then refer it to the tribunal. Is that correct?

**Ms. Mary Gusella:** Yes.

**Hon. Roy Cullen:** It might be useful for us to know, if you could profile them for us, about the number and the nature and the disposition of complaints—some may be in progress still—since 2001. That would be particularly interesting.

In terms of solutions—let's say before it goes to the tribunal—are these mostly in terms of compensation? If CBSA, for example, agrees to put in a slightly different regime, might a complainant be satisfied with that as a solution, if there is a meeting of the minds at some point, or is cash always involved?

**Ms. Mary Gusella:** No, in fact, cash is not always involved. As I review each settlement, I am often struck by the fact that complainants put a huge amount of stock in receiving an apology and in actually knowing that they've been heard, in having had the opportunity to air their complaints to the people who are responsible for perhaps implementing solutions.

Obviously there frequently is compensation, but the settlements we strive for are the ones that build in the public interest, which is what our act requires us to do; and serving the public interest, in our view, means building into a settlement provisions that would prevent this kind of problem from arising in the future—things like more training and better policy framework. Those are the kinds of things that we think, in the longer term, will have greater human rights impact.

**Hon. Roy Cullen:** If you come up with compensation, do you provide the compensation yourself, or do you go to the agency or the department that would be responsible?

**Ms. Mary Gusella:** They are accountable, and they are, in fact, a participant in the negotiations, so it's up to them to accept or not accept to provide compensation.

**Hon. Roy Cullen:** Right.

Okay, thank you.

**The Chair:** Thank you very much.

Perhaps you could return to the legal opinion question. We would very much like to have the legal opinion, and the chair would request it.

Mr. Comartin, do you want to add something to this?

**Mr. Joe Comartin:** No, just that Mr. Cullen may be able to be of some assistance in getting it for us. This is the one from the justice department.

**Hon. Roy Cullen:** We can try to do that, yes.

**The Chair:** Okay, Mr. Comartin.

**Mr. Joe Comartin:** You talked about expanding your policy and research capacity. How large is your agency now?

**Ms. Mary Gusella:** We have about 190 people in the organization. That includes the regional offices.

**Mr. Joe Comartin:** What additional number of staff would you put onto this?

**Ms. Mary Gusella:** It's all found from within.

**Mr. Joe Comartin:** Okay.

**Ms. Mary Gusella:** Yes, we're not asking for any additional dollars.

**Mr. Joe Comartin:** I'm sorry, Mr. Chair. I have one quick question.

**The Chair:** Go ahead.

**Mr. Joe Comartin:** I'm from Windsor, and the racial profiling on the U.S. side of the border is phenomenally worse than it is on the Canadian side.

I saw it on Saturday. He was stopped with his three children. They were put aside in a room. The oldest was only 12, and the younger ones were, I think, six and seven. They were kept for three hours and then turned back. It was only about the fact that he was of Arab background.

Do you have any contact at the border areas with the U.S. side in terms of the kind of work you're doing to resolve this?

• (1725)

**Ms. Mary Gusella:** We really don't have any mandate to speak to organizations that....

The Canada Border Services Agency certainly has contact, but we don't have any direct contact with the U.S. border service or anything like that.

**Mr. Joe Comartin:** What about your counterparts on the U.S. side, at either the state or federal level?



**Ms. Mary Gusella:** At the federal level, they're organized a little differently in the U.S. There is EEOC, the Equal Employment Opportunity Commission. They tend to focus only on a very small number of cases, and the rest of the cases go directly into the normal court system.

**Mr. Joe Comartin:** Thank you, Mr. Chair.

**The Chair:** Mr. Cullen, last question.

**Hon. Roy Cullen:** Thank you.

Commissioner, do you engage in any outreach-type activities with respect to, let's say, the Muslim community or ethnic communities that seem to be expressing some concern around human rights violations by the CBSA, or CSIS, or the RCMP?

One thing we've heard in other testimony—not to single out the people of the Muslim faith—is that there is often a certain reticence for them to come forward. So the ones you're seeing may not represent all of it. Do you have any outreach activities where you try to dialogue with these people to find out what's really going on?

**Ms. Mary Gusella:** I'm going to ask the secretary general to outline that for you.

**Mr. Robert W. Ward:** Thank you, sir, for the question.

In fact, we are doing outreach with Muslim and other communities. I met with a number of Muslim community

representatives last year, and as a result of that meeting, we invited them to a conference we were hosting with other human rights organizations in Canada. They were participating on a panel. I know our regional offices are doing outreach in their communities as well.

The issue is, is that enough? The answer is no. We have to do more of that.

As the chief commissioner was mentioning, we are reorienting more of our internal resources, through reallocation, to research and policy-type work, and we think this will facilitate improved relationships with these communities.

**Hon. Roy Cullen:** Thank you.

**The Chair:** Okay, thank you very much.

Madam Commissioner and staff, thank you.

Colleagues, I believe today exhausts our work with the government agencies category. If we're still here next Wednesday, which I expect we will be, we'll have a planning meeting, if that would be agreeable to everybody, to begin to sort of lift the skirt for the future as to how it might go.

Thank you very much.

We're adjourned.

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