



BALANCING NATIONAL SECURITY INTERESTS WITH PRIVACY, THE CHARTER AND RULE OF LAW: BUILDING CHECKLISTS INTO OPERATION PLANNING

Date: November 17, 2023

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KEY EVENTS

On November 17, 2023, Justin Dubois, Executive Director and General Counsel of the Office of the Intelligence Commissioner, presented *Balancing National Security Interests with Privacy, the Charter and Rule of Law: Building Checklists into Operation Planning* for this year's West Coast Security Conference. The presentation was followed by a question-and-answer period with questions from the audience and CASIS Vancouver executives. The key points discussed were the Intelligence Commissioner Act, the role of the Intelligence Commissioner in providing quasi-judicial review of certain activities of intelligence agencies, and the Intelligence Commissioner's use of the principles of necessity, proportionality, and reasonableness to guide its decision-making process.

NATURE OF DISCUSSION

Mr. Dubois outlined the reasoning behind the Intelligence Commissioner Act, and how the Intelligence Commissioner operates in practice. The relationship between the Intelligence Commissioner and the Minister of National Defence, the Communications Security Establishment (CSE), the Minister of Public Safety and the Canadian Security Intelligence Service (CSIS) was detailed. The influence of principles of necessity, proportionality, and reasonableness and how they shape the Intelligence Commissioner's review process was outlined.

BACKGROUND

Presentation

Mr. Dubois explained that the Intelligence Commissioner Act was passed to increase transparency and accountability regarding matters of national security, stating that the Intelligence Commissioner must be a retired judge of a superior

court and is appointed for a term of five years. The Intelligence Commissioner engages in quasi-judicial review and approves, or does not approve, certain activities regarding national security conducted by CSIS and CSE. The Intelligence Commissioner provides quasi-judicial review of authorizations made by the Minister of National Defence for the activities of the CSE and the Minister of Public Safety for the activities of CSIS.

Mr. Dubois stated that accountability still rests with the minister who authorizes the agencies to conduct national security and intelligence activities, while the Intelligence Commissioner ensures that the conclusions of said authorizations are legally sound. Only with approval from the Intelligence Commissioner can the agencies carry out the activities set out in the ministerial authorization. A minister's authorization takes into account the principles of necessity, proportionality, and reasonableness of a security organization's actions to help protect the privacy rights of Canadians; where a security organization's activities may break the law, the process of review ensures violations are minimal and that activities are inline with said principles. Mr. Dubois explained that this process of review emphasizing said principles was created because the activities of security organizations would otherwise often be illegal. Applications for CSE activities to the Minister of National Defence reviewed by the Intelligence Commissioner include those related to Foreign Intelligence and Cybersecurity. Applications for CSIS activities to the Minister of Public Safety reviewed by the Intelligence Commissioner include classes of acts or omissions that would otherwise be unlawful as well as the collection, retention, and search of classes of Canadian and foreign datasets.

Mr. Dubois stated that the Intelligence Commissioner's decisions must be justified, transparent, and intelligible, providing decisions are issued in written form. They may either approve or disapprove an authorization, with the exception that an approval subject to limited conditions may be issued for the retention of a foreign dataset.

Question and Answer

What is the background of people you hire, especially in regards to analysts?

A background in law tends to be sought out. The Intelligence Commissioner operates in the era of 'slow thinking' and ensuring the Intelligence Commissioners conclusions are right the first time.

With every presentation mentioning the concept of "reasonableness", is there consensus on a definition?

Unlike review bodies, the Intelligence Commissioner issues decisions that are binding. In law there is an accepted definition of reasonableness, though in reality it is not applied in the same way universally. Reasonableness in the context of quasi-judicial review, is different from reasonableness in regard to an activity.

KEY POINTS OF DISCUSSION

- The Intelligence Commissioner Act was passed to increase transparency and accountability regarding matters of national security.
- The Intelligence Commissioner provides quasi-judicial review to conclusions made by the Minister of National Defence and Minister of Public Safety on activities of the CSE and CSIS respectively.
- The principles of necessity, proportionality and reasonableness shape the Intelligence Commissioner's review to ensure that violations of the law by the CSE and CSIS are both minimal and in line with said principles, where their activities would otherwise often be illegal.

FURTHER READING

ICO. (2023). 2022 Annual Report. *Office of the Intelligence Commissioner*.
<https://www.canada.ca/content/dam/oic-bcr/2022%20ICO%20Annual%20Report.pdf>



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