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File: 2200-A-2023-02

INTELLIGENCE COMMISSIONER

DECISION AND REASONS

IN RELATION TO THE DETERMINATION OF CLASSES OF
ACTS OR OMISSIONS THAT WOULD OTHERWISE CONSTITUTE OFFENCES
PURSUANT TO SUBSECTION 20.1(3) OF THE
CANADIAN SECURITY INTELLIGENCE SERVICE ACT AND
SECTION 19 OF THE *INTELLIGENCE COMMISSIONER ACT*

MARCH 15, 2023

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I. OVERVIEW

1. The *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (*CSIS Act*) establishes a legal framework in which employees of the Canadian Security Intelligence Service (CSIS), in specific circumstances and with the required approvals, may lawfully act or direct another person to act in a way that is otherwise contrary to the law.
2. The Intelligence Commissioner is responsible for granting one of those required approvals. For an act that is contrary to the law to be justified, it must fall within a class of acts or omissions determined by the Minister of Public Safety (the Minister) and subsequently approved by the Intelligence Commissioner.
3. On February 13, 2023, pursuant to subsection 20.1(3) of the *CSIS Act*, the Minister determined, by order, eight classes of acts or omissions that would otherwise constitute offences (the Determination).
4. On February 14, 2023, the Office of the Intelligence Commissioner received the Determination for my review and approval under the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*).
5. Based on my review and for the reasons below, I am satisfied that the Minister's conclusions for classes [REDACTED] are reasonable. In accordance with paragraph 20(1)(a) of the *IC Act*, I must approve the Minister's Determination dated February 13, 2023, of classes [REDACTED]
[REDACTED]
6. As for Class [REDACTED] I find that the Minister's conclusions are not reasonable with respect to the determination of certain acts or omissions that fall within the class. As a result, pursuant to paragraph 20(1)(b) of the *IC Act*, I must not approve Class [REDACTED]

II. LEGISLATIVE CONTEXT

7. In July 2019, *An Act respecting national security matters* (known as the *National Security Act, 2017*) came into force and reshaped Canada's national security framework. It created a new quasi-judicial role in the realm of national security and intelligence accountability – the Intelligence Commissioner – to be held by a retired judge of a superior court.
8. Amendments were also made to modernize the *CSIS Act* and provide CSIS with additional tools to investigate threats to the national security of Canada and to advise the Government accordingly. As a result, section 20.1 of the *CSIS Act*, which establishes a limited national security justification regime (Justification Framework) was added to the *CSIS Act*. The Justification Framework is modeled after the Canadian law enforcement justification regime set out in sections 25.1–25.4 of the *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*), which was proclaimed on February 1, 2002. It is, however, narrower in scope and adapted to the national security context.
9. In the context of information and intelligence collection and within strict parameters, the Justification Framework allows for the commission of acts or omissions that would otherwise constitute offences. Thus, invoking the Justification Framework not only provides legal immunity to the person committing the otherwise unlawful act or omission, but may also effectively render lawful the collection and retention of any information and intelligence that results from the otherwise unlawful act or omission. I discuss this more at length in my remarks at Part V of this decision. The Justification Framework is critical to CSIS' operations given that intelligence collection with respect to threats to the security of Canada may occur in settings and situations outside of the boundaries of the law.
10. The acts or omissions that would otherwise be unlawful can be committed by CSIS employees who have been designated by the Minister or by persons acting under their direction. To benefit from the Justification Framework, the act or omission must fall within an approved class, which means a class determined by the Minister that must be approved by the Intelligence

Commissioner. The Intelligence Commissioner must approve the class if he is satisfied that the Minister's conclusions, on the basis of which the class is determined, are reasonable.

11. Subsection 20.1(2) of the *CSIS Act* sets out the principle underpinning the Justification Framework:

It is in the public interest to ensure that employees effectively carry out the Service's [CSIS] information and intelligence collection duties and functions, including by engaging in covert activities, in accordance with the rule of law and, to that end, to expressly recognize in law a limited justification for designated [CSIS] employees acting in good faith and persons acting under their direction to commit acts or omissions that would otherwise constitute offences.

12. Prior to the Justification Framework, CSIS employees engaged in national security information and intelligence gathering, or those directed by them, relied on Crown immunity for protection from criminal liability for unlawful acts committed in the course of their activities.¹ When invoked and applied pursuant to the legislation, the Justification Framework now ensures legal protection. Nonetheless, it does not place designated CSIS employees and persons directed by them above the law or the safeguards guaranteed by the *Canadian Charter of Rights and Freedoms* (*Charter*). Criminal sanctions may be brought against those operating outside of the limits of the Justification Framework.

13. Specifically, subsection 20.1(18) of the *CSIS Act*, sets out six specific categories of conduct designated CSIS employees, or persons directed by them, could never be justified in committing. They are as follows:

- a) causing, intentionally or by criminal negligence, death or bodily harm to an individual;
- b) willfully attempting in any manner to obstruct, pervert or defeat the course of justice;
- c) violating the sexual integrity of an individual;

¹ As discussed in *Canadian Security Intelligence Services Act (Re)*, 2020 FC 616, the Department of Justice's position on the applicability of Crown immunity to CSIS employees and unlawful acts committed by CSIS employees in the course of operations lacked clarity and was inconsistently understood within the Department and CSIS.

- d) subjecting an individual to torture or cruel, inhuman or degrading treatment or punishment, within the meaning of the Convention Against Torture;
- e) detaining an individual; or
- f) causing the loss of, or any serious damage to, any property if doing so would endanger the safety of an individual.

14. Further, subsection 20.1(22) of the *CSIS Act* states that nothing in this section justifies a designated CSIS employee from committing an act or omission that would infringe a right or freedom guaranteed by the *Charter*.

15. The *CSIS Act* and the *IC Act* establish measures to ensure that the Justification Framework is applied in a manner that is reasonable, proportional, transparent and accountable.

i) Determination of Classes of Acts or Omissions – Minister of Public Safety

16. The first step in giving effect to the Justification Framework is taken by the Minister. Pursuant to subsection 20.1(3) of the *CSIS Act*, at least once a year, the Minister shall, by order, determine the classes of acts or omissions that would otherwise constitute offences and that designated CSIS employees may be justified in committing or directing another person to commit.

17. In determining the classes, the Minister must conclude that the commission or directing of those acts or omissions is reasonable, having regard to: (a) CSIS' information and intelligence collection duties and functions, and, (b) any threats to the security of Canada that may be the object of information and intelligence collection activities or any objectives to be achieved by such activities. The Minister's conclusions are effectively the reasons that led him to conclude that a certain class should be determined and that the proposed class meets the legal test and statutory intent of the Justification Framework.

18. Once the Minister determines the classes of acts or omissions that would otherwise be unlawful, the Intelligence Commissioner is notified for the purposes of his review and approval pursuant to subsection 20.1(5) of the *CSIS Act*.

ii) Quasi-Judicial Review of the Minister's Conclusions – Intelligence Commissioner

19. Pursuant to sections 12 and 19 of the *IC Act*, the role of the Intelligence Commissioner is to conduct a quasi-judicial review of the Minister's conclusions to determine whether they are reasonable.

20. To allow for a proper review by the Intelligence Commissioner, the Minister is required by law to provide all information that was before him as decision maker (section 23 of the *IC Act*). As established by the Intelligence Commissioner's jurisprudence, this also includes "any verbal information reduced to writing", including ministerial briefings.²

21. The only exclusion to the Intelligence Commissioner's right of access are Cabinet confidences as set out in section 26 of the *IC Act*.

22. The Intelligence Commissioner reviews the entire record submitted by the Minister to determine whether it is complete. Once this has been confirmed, the Intelligence Commissioner proceeds with his review.

23. In accordance with section 23 of the *IC Act*, the Minister confirmed in his cover letter that all information that he was provided to arrive at his decision has been provided to me. Thus, the record before me is composed of:

- a) a *Memorandum to the Minister of Public Safety* from the Director of CSIS, dated January 16, 2023, requesting that the Minister determine eight classes of acts or omissions that would otherwise constitute offences (Director's Memorandum);

² *Intelligence Commissioner - Decision and Reasons*, July 27, 2022, File 2200-A-2022-02, page 10.

- b) a *Memorandum for the Minister of Public Safety* from the Deputy Minister of Public Safety, dated February 1, 2023, recommending that the Minister review the memorandum from the Director and if the Minister concurs, determine the eight proposed classes; and
- c) the Minister's Determination, dated February 13, 2023.
- d) the *Intelligence Commissioner – Decision and Reasons*, July 27, 2022, File 2200-A-2022-02.

III. STANDARD OF REVIEW

24. The *IC Act* instructs that the Intelligence Commissioner must review whether the Minister's conclusions are reasonable.
25. The term 'reasonable' is neither defined in the *IC Act* nor in the *CSIS Act*. However, this standard is well understood in administrative law jurisprudence in the context of the process of judicial review of administrative decisions.
26. In accordance with subsection 4(1) of the *IC Act*, the Intelligence Commissioner must be a retired judge of a superior court. However, a decision of the Intelligence Commissioner is not a decision of a court of law. Review by the Intelligence Commission is not, strictly speaking, a 'judicial review'. Rather, the Intelligence Commissioner is responsible for conducting a 'quasi-judicial review' of the Minister's conclusions, who is acting as an administrative decision maker.
27. As established by the Intelligence Commissioner's jurisprudence, when Parliament used the term 'reasonable' in the context of a quasi-judicial review of administrative decisions, it intended to give to that term the meaning it has been given in administrative law jurisprudence. As such, I will apply the standard of reasonableness to my review, while also relying on the objectives set out in the *IC* and *CSIS Acts*.

28. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], at paragraph 99, succinctly describes what constitutes a reasonable decision:

A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.

29. In this matter, the relevant factual and legal constraints include the governing statutory scheme and the impact of the decision. Indeed, to understand what is reasonable, it is necessary to take into consideration the context in which the decision under review was made as well as the context in which it is being reviewed. It is therefore necessary to understand the role of the Intelligence Commissioner, which is an integral part of the statutory scheme set out in the *IC* and *CSIS Acts*.
30. A review of the *IC Act* and the *CSIS Act*, as well as legislative debates, shows that Parliament created the role of the Intelligence Commissioner as an independent mechanism by which to ensure that governmental action taken for the purpose of national security was properly balanced with the respect of the rule of law and the rights and freedoms of Canadians. With respect to the Justification Framework, I consider that Parliament created my role as a gatekeeper and as an overseer of ministerial determinations to ensure that balance.
31. This means that a quasi-judicial review by the Intelligence Commissioner in this matter must take into consideration the objectives of the statutory scheme, the roles of the Minister and the Intelligence Commissioner, as well as the interests of Canadians that may be reflected by the decision under review.
32. In conducting a reasonableness review, I am reminded that I must begin with the principle of judicial restraint and demonstrate a respect for the distinct role of the Minister, who is the administrative decision maker. Nonetheless, as indicated by the Supreme Court of Canada,

while on one hand the legitimacy and authority of administrative decision makers within their proper sphere must be respected, on the other hand the decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be “justified to citizens in terms of rationality and fairness” (B. McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1998), 12 CJALP 171, at p 174 cited in *Vavilov* at paragraph 14).

33. Where the Intelligence Commissioner is satisfied the Minister’s conclusions at issue are reasonable, the Intelligence Commissioner “must approve” the determination (paragraph 20(1)(a) *IC Act*). Conversely, where unreasonable, the Intelligence Commissioner “must not approve” the determination (paragraph 20(1)(b) *IC Act*).

34. I am of the view that with respect to ministerial determinations of classes made pursuant to subsection 20.1(3) of the *CSIS Act*, the Intelligence Commissioner is legally bound by the statutory regime set out in subsection 20(1) of the *IC Act*. As a result, I must either approve an entire class or not. The Intelligence Commissioner may not carve out problematic types of acts or omissions from an otherwise reasonable class as determined by the Minister. This particular issue may be considered at the upcoming legislative review of the *National Security Act, 2017*.

35. The Intelligence Commissioner’s decision may be reviewable by the Federal Court of Canada on an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

36. I will now proceed with my analysis of the Minister’s conclusions.

IV. ANALYSIS

37. In the matter before me, the Minister determined the following eight classes of acts or omissions that designated CSIS employees may be justified in committing or directing another person to commit (the classes have not been made public):

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

38. The Minister indicates that each class is defined not only by its title, but also by reference to its definition, which is an integral part of his determination. He also indicates that he adopts as part of his own conclusions the definitions and the rationales found in the Director's Memorandum. I have conducted my review on this basis.

39. I note that the Minister's Determination has adopted the classes of acts or omissions that were included in the overview of the eight classes included in the Director's Memorandum. In this overview, the Director sets out a list of the main offences that would constitute unlawful acts or omissions for each proposed class and explains that the lists are indicative and non-exhaustive; other offences could fall within the class depending on the specific situation. I accept that the Minister is not required to exhaustively list offences that make up a proposed class. However, I note that it is helpful to include specific offences when delineating a class.

40. The Minister's stated intent "is to delineate the boundaries of each class while authorizing a broad range of investigative activities within the parameters of each class." The Minister also indicates that additional detail included in the definition sections of the eight classes "provides

CSIS employees with guidance as to the acts or omissions that form part of the classes. This will help ensure the conduct of CSIS operations in accordance with the rule of law.”

41. I agree with the Minister and emphasize that designated CSIS employees who rely on the classes must have confidence in deciding what acts or omissions are included in each class. Part of the Intelligence Commissioner’s role is to participate in the framework seeking to provide that confidence, through the review of the Minister’s conclusions.
42. Indeed, when determining whether an unlawful act or omission may be justified pursuant to the Justification Framework, a designated CSIS employee must be able to ascertain that the contemplated act actually falls within one of the approved classes.
43. For that reason, it is crucial that the classes are clearly defined and understandable. This does not mean that there is a single correct way to determine a class. Rather, it means that the Minister’s conclusions must correspond and be consistent with how the class is delineated.
44. In light of the above, and when considering the record as a whole, I am satisfied that the Minister’s conclusions in relation to classes [REDACTED] are reasonable. I am of the view that they demonstrate, in accordance with subsection 20.1(3) of the *CSIS Act*, that the commission or directing of the acts or omissions in the identified classes are connected to CSIS’ information and intelligence collection duties and functions, as well as to threats to the security of Canada and foreign intelligence collection objectives. The conclusions reveal that the Minister understands the broad purpose of each class, why they are necessary for CSIS’ mandate, and what types of acts and omissions fall within each class.
45. I also find that the Minister’s conclusions are consistent with the title and the definition of the classes and that these classes are therefore properly and clearly defined.
46. As such, I find that the Minister’s conclusions provide the required justification, transparency and intelligibility in relation to the relevant factual and legal constraints that bear on the decision.

47. With respect to Class [REDACTED] I am also satisfied that the Minister's conclusions are reasonable with respect to the determination of certain acts or omissions included in the class – but not all of them – which I explain below.

i) Class [REDACTED]
[REDACTED]

48. As indicated by its title, Class [REDACTED] captures [a category of acts or omissions]. The definition also indicates the following:

[The definition includes specific acts or omissions]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

49. In effect, the Minister has determined that [a category of acts or omissions] that fall within the parts of the [REDACTED] cited above may be justified. The Minister's conclusions indicate that there may be situations, for example, where [a particular act or omission] [REDACTED] may facilitate intelligence collection or maintain credibility with a target.

50. My review of [REDACTED]
[REDACTED] reveals that it includes offences [REDACTED]
[REDACTED] such as [REDACTED]
[REDACTED]
[REDACTED]

51. Other offences [REDACTED] set out in the class definition include [specific acts or omissions] [REDACTED]

52. In my view, certain offences [REDACTED] raise grounds for which their inclusion in Class [REDACTED] renders the Minister's conclusions not reasonable.

a) Lack of rational chain between the conclusions and connection [REDACTED] in certain offences

53. The Minister's conclusions are silent as to how certain offences are included in the definition of the class. There is therefore a lack of justification for their inclusion in the class.

54. The definition of Class [REDACTED] states that actions in the class "include [REDACTED] [REDACTED]" where those acts constitute an offence. Most offences [REDACTED] would certainly be included in this encompassing definition. However, a review of the Minister's conclusions indicate that the broad purpose of the class is to protect designated CSIS employees or those directed by them when they [REDACTED] [REDACTED] for the purpose of increasing or maintaining credibility with, or access to, a target.

55. Not all offences included in the definition involve [REDACTED]
The offences involving [REDACTED]
[REDACTED]
[REDACTED] are clearly different; it is the acts [REDACTED] that are unlawful.

56. Similarly, the offences [REDACTED]
[REDACTED] do not deal with [REDACTED], but rather with [a specific act]
[REDACTED]
[REDACTED] I note that the Minister's

conclusions also make no mention of [this specific act] which I find qualitatively different than the acts of [REDACTED]

57. I therefore find that the inclusion of these offences in the definition does not correspond to the Minister's conclusions. That is not to say that different conclusions could not properly delineate the class. Nevertheless, while the Minister's conclusions before me make the link between the broad purpose of the class and other offences – for example, [REDACTED]
[REDACTED]
– there is no rational chain with respect to [certain offences in the class]
[REDACTED]

b) Lack of intelligibility with regards to the limitations of the Justification Framework

58. It goes without saying that for a class to be approved, it must respect the six limitations of acts or omissions that could never be justified as set out in subsection 20.1(18) of the *CSIS Act*. Further, I note that in his Determination, the Minister relies on CSIS policy that directs employees to instruct human sources not to act as 'agents provocateurs' who encourage the performance of criminal acts. I am of the view that this important statement applies to all classes. It establishes a "red line" that designated CSIS employees and persons directed by them cannot cross when they determine whether an act or omission falls within the definition of one of the approved classes. Respecting these limits is paramount in ensuring conformity with the rule of law and *Charter* rights and freedoms.

59. I am of the view that the Minister's conclusions, and the record as a whole, do not demonstrate how [certain offences in the class] can respect the limitations set out in the Justification Framework at paragraph 20.1(18)(b) of the *CSIS Act*. This provision states that nothing justifies "wilfully attempting, in any manner to obstruct, pervert or defeat the course of justice" [REDACTED]
[REDACTED]
[REDACTED] Paragraph 20.1(18)(b)

does not limit the “course of justice” to judicial proceedings. Further, jurisprudence teaches us that the terms should be interpreted broadly.³

60. It appears at first view that [certain offences in the class] contravene paragraph 20.1(18)(b). Indeed, it is not clear on the record and in the Minister’s conclusions that there can exist circumstances where such offences could be committed while respecting the limitation found at paragraph 20.1(18)(b).

61. Furthermore, the record does not show that the Minister turned his mind to this issue. As established by Intelligence Commissioner’s jurisprudence, the Minister must have a good understanding of which acts or omissions fall within a class.⁴ I cannot be satisfied that the Minister’s conclusions are reasonable with respect to [certain offences] found in Class [REDACTED] if it remains unclear whether such offences [REDACTED] can be committed pursuant to the Justification Framework. For the sake of clarity, I am not finding that [these offences] could potentially not form part of Class [REDACTED] or another class for that matter, but rather that their inclusion based on the Minister’s conclusions and the record before me is not justified.

62. In making this finding, I recognize that at the time a designated CSIS employees is deciding whether to commit or direct an act or omission that would otherwise constitute an offence, the limitations at paragraph 20.1(18) of the *CSIS Act* apply. However, I am of the view that these limitations must also be considered in my review of the Minister’s conclusions: if an act or omission will necessarily contravene the limitations, it cannot be included in an approved class.

c) Lack of consideration of the impact on Canadian fundamental institutions

63. In explaining the contextual considerations that may have to be considered in conducting a reasonableness review, the majority decision in *Vavilov* wrote the following at paragraph 133:

Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on

³ [REDACTED]

⁴ *Intelligence Commissioner - Decision and Reasons*, September 27, 2019, File 2200-A-2019-002 at page 6.

an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

64. Adapted to the context of the Justification Framework and the Intelligence Commissioner's role as set out in the *CSIS Act* and the *IC Act*, I consider an important contextual element in a reasonableness review to be the impact of the proposed class. A proposed class, or the inclusion of specific acts or omissions in a proposed class, that may have an impact on an interest important to Canadians should be appropriately justified by the Minister's conclusions. As the decision maker, the Minister should be able to demonstrate with his conclusions that a class that includes an offence or offences that impact such an interest should be approved. He has not done so in his conclusions.

65. As indicated previously, the Intelligence Commissioner serves as a gatekeeper for the rule of law and the rights and freedoms of Canadians. [certain offences in the class] consist of offences that interfere with the course of justice. The institutions of justice – not just courts of law, but all bodies and procedures whose goal is to ensure the respect of rules that have been legally established – are fundamental to the rule of law, which is of central importance to Canadians. Justifying offences that interfere with such institutions requires clear, specific and robust ministerial conclusions.

66. My analysis is also applicable to [a specific legislative provision] which creates an offence for [redacted]
[redacted]
[redacted] Appropriate ministerial conclusions are needed to justify offences interfering with such privacy interests. I note that the offence of [redacted]
[redacted] could not be justified pursuant to the Justification Framework given its effect on rights protected by section [redacted] of the *Charter*.

67. When considering this context, and in particular the potential impact on the administration of justice and the perception of the administration of justice and the potential impact on privacy

rights, as well as the grounds described above, I find that the Minister's conclusions with respect to Class [REDACTED] are not reasonable.

68. As explained previously, I am legally bound by the statutory regime set out in subsection 20(1) of the *IC Act* to either approve an entire class or not. While I am of the view that the Minister's conclusions are reasonable with respect to the majority of the acts or omissions that would fall in Class [REDACTED] pursuant to paragraph 20(1)(b), I must not approve the determination of Class [REDACTED]

69. I note that the identical definition of Class [REDACTED] was approved by my predecessor on July 27, 2022. I do not consider this as an impediment to my own conclusions as that decision was based on its own, different record.

V. REMARKS

70. I would like to make four additional remarks to assist in the consideration and drafting of future determinations of classes of acts or omissions.

i) Challenges relating to a class of acts or omissions involving [REDACTED]

71. My conclusions regarding Class [REDACTED] highlight specific challenges in determining and giving effect to a class of acts or omissions involving [REDACTED]. This class is extremely broad, at least partly because the term [REDACTED] is not defined. A broad class may require more elaborate ministerial conclusions.

72. A proposed class involving [REDACTED] also raises complex legal issues in relation to the collection of information and intelligence activities of CSIS as raised in the Minister's conclusions where he explains that "in urgent circumstances", a designated employee could accept [REDACTED] in order to determine next steps. The Minister notes that in these situations the requirements of sections 12 and 16 of the *CSIS Act* would need to be met.

73. I would add that sections 12 and 16 need to be considered in other situations where offences involve [REDACTED]. The Justification Framework cannot [REDACTED] into lawful

intelligence or a lawful source of intelligence. For example, if a source is directed to [commit an offence] to maintain credibility with the target of a CSIS investigation pursuant to the Justification Framework, [a specific related offence] must be allowed under a legal authority other than the Justification Framework – namely sections 12, 16 or 21 of the *CSIS Act*.

ii) Additional specificity with respect to limitations - Class [REDACTED]

74. In his November 2021 decision, my predecessor made a remark regarding [specific offences]

[REDACTED]

[REDACTED] He was of the view that given the very specific [REDACTED] nature of the offences, the determination should include a condition requiring that the Minister be notified in the event that any those offences are committed.

75. In response, in his 2022 determination, the Minister accepted the creation, proposed by the Director, of a new class – Class [REDACTED] – for [REDACTED] offences to improve operational effectiveness, compliance and relevance as well as to allow the commission of such offences [REDACTED] On July 27, 2022, Class [REDACTED] was approved by my predecessor.

76. I echo my predecessor's concern in relation to [REDACTED]

[REDACTED] To that effect, I note that the Minister's Determination does not expressly make it clear that the acts or omissions listed in Class [REDACTED] are subject to the six limitations found in the statutory scheme – namely those at subsections 20.1(18) and (22) of the *CSIS Act*, the latter which specifies that nothing in the Justification Framework can justify the commission of an act that would infringe a right or freedom guaranteed by the *Charter*.

77. As previously noted, I am mindful that these statutory limitations apply to designated CSIS employees. However, as explained, the Minister and I both agree on the importance of the definition of a class as a clearly delineated guide for the designated CSIS employees who have the important and weighty task of determining whether a potential act or omission falls within a class and whether there are reasonable grounds to believe that the commission of the act or

omission is reasonable and proportional. It is in the interest of the public and effective information and intelligence collection that a designated CSIS employee has as clear of a blueprint as possible.

78. For example, [REDACTED] which is one of the offences specifically cited by the Minister in the definition of Class [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

79. In an operational setting where committing the offence [REDACTED] would be useful for information and intelligence collection purposes, a designated CSIS employee would have the legal obligation to determine whether [the act] would likely [REDACTED] in a way that is contrary to paragraph 20.1(18)(f) of the *CSIS Act*. If the determination is explicit as to how limitations apply and fit within the decision-making process of a designated CSIS employee, the Intelligence Commissioner will have greater confidence that decisions flowing from the determination are bound to be easier to make, and more likely to respect the Justification Framework.

80. I make these remarks in the context of Class [REDACTED] but I am of the view that they could apply to other classes as well, and trust that they will be considered by the Minister.

iii) Provision of information to the Intelligence Commissioner

81. In his cover letter, the Minister confirmed that he provided me with all information that was before him when making the determination of classes of acts or omissions.

82. My review of the record reveals that the Director's Memorandum refers to "Ministerial Directions for Operations and for Accountability" and the "CSIS policy framework." In addition, the Minister notes in his conclusions under Class [REDACTED] that he understands that "CSIS policy directs its employees to instruct human sources not to act as '*agents provocateurs*' who encourage the performance of criminal acts." He further notes that "under public Ministerial Direction" he is required to be "notified by CSIS of all activities that are high risk, where risk is considered in legal, operational, reputational, and foreign policy terms."
83. I recognize based on the Minister's cover letter that the documents in question were not physically before the Minister when rendering his determination, as he may already have had knowledge of their content.
84. As set out in subsection 23(1) of the *IC Act* and mentioned in Intelligence Commissioner's jurisprudence, the quasi-judicial review of the Intelligence must be on the basis of all the information, or record, which was before the Minister. In fact, the record provided in support of a review must stand on its own.
85. Just as verbal information falls within "all information that was before" the decision maker, pursuant to subsection 23(1) of the *IC Act*, unwritten corporate or operational information of which a decision maker is aware of and was considered must also be provided to the Intelligence Commissioner. Providing the document or its relevant pages is the preferred method to respect the legislative provision.
86. Knowing that the Minister considered information from documents that were not provided in the record causes me concern, and they should have been provided. Exceptionally, I accept in this instance, that it is reasonable to consider the Minister's description of the information as sufficient to satisfy subsection 23(1) of the *IC Act*.
87. I trust that in the future, all information considered by the Minister will be appropriately provided, as statutorily required.

iv) Updated examples of activities included in the class

88. The Director's Memorandum contains examples of activities that would be included in each class of acts or omissions. It is important, however, that they be constantly updated to reflect the current operational activities undertaken by the designated CSIS employees and persons directed by them.
89. In his Memorandum to the Minister, the Director of CSIS indicates for example that in 2021–2022, designated CSIS employees committed or omitted acts in 41 instances pursuant to the Justification Framework. Further, senior designated CSIS employees authorized acts or omissions in 172 instances, and acting on those authorizations, designated CSIS employees directed the commission or omission of acts in 117 instances. Being provided with recent and tangible examples may not only bolster the Minister's conclusions, it would assist him and myself to determine that the acts or omissions of each class are carefully defined and respect the statutory limitations.
90. I have been informed that designated CSIS employees undergo mandatory training on the use of the Justification Framework to ensure that they understand the scope and limitations of the eight classes as well as to implement it in a fully informed and compliant manner. Obtaining scenarios of operational use wherein CSIS can rely on the Justification Framework and the mechanisms in place to ensure reasonable and proportional use of it would be useful.
91. I am of the view that such information would be of assistance to the Minister in demonstrating that committing or directing of the acts or omissions in the identified classes are reasonable.

VI. CONCLUSIONS

92. Based on my review of the record submitted, I find that the Minister's conclusions on which classes [REDACTED] are determined are reasonable.

93. In accordance with paragraph 20(1)(a) of the *IC Act*, I approve the Minister's Determination dated February 13, 2023, of classes [REDACTED]
94. With regard to Class [REDACTED] I am not satisfied that the Minister's conclusions are reasonable with respect to the determination of certain acts or omissions that fall within the class. Therefore, pursuant to paragraph 20(1)(b) of the *IC Act*, I do not approve Class [REDACTED]
95. As prescribed in section 21 of the *IC Act*, a copy of this decision will be provided to the National Security and Intelligence Review Agency for the purpose of assisting the Agency in fulfilling its mandate under paragraphs 8(1)(a) to (c) of the *National Security and Intelligence Review Agency Act*, SC 2019, c 13, s 2.

March 15, 2023

(Original signed)

The Honourable Simon Noël, K.C.
Intelligence Commissioner