



Office of
the Intelligence
Commissioner

Bureau du
commissaire
au renseignement

P.O. Box/C.P. 1474, Station/Succursale B
Ottawa, Ontario K1P 5P6
613-992-3044, Fax 613-992-4096

~~TOP SECRET//CEO~~

File: 2200-A-2023-07

INTELLIGENCE COMMISSIONER

DECISION AND REASONS

**IN RELATION TO THE DETERMINATION OF A CLASS 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***

JUNE 21, 2023

TABLE OF CONTENTS

I. OVERVIEW 1

II. CONTEXT 2

III. STANDARD OF REVIEW 3

IV. ANALYSIS 4

 i) Summary of Intelligence Commissioner’s March 2023 Decision 4

 a) *Lack of rational chain between the conclusions and connection [REDACTED] in certain offences* 4

 b) *Lack of intelligibility with regards to the limitations of the Justification Framework* 5

 c) *Lack of consideration of the impact on Canadian fundamental institutions*..... 5

 ii) CSIS’ Response to the Intelligence Commissioner’s March 2023 Decision..... 6

 iii) The revised Class [REDACTED] 7

 iv) The Minister’s conclusions are reasonable 8

V. REMARKS 9

 i) CSIS’ continued operation under Class [REDACTED] approved by the former Intelligence Commissioner in July 2022..... 10

 ii) Validity period of the Intelligence Commissioner’s approval of a ministerial determination..... 11

 iii) Minimally Intrusive Collection..... 15

VI. CONCLUSIONS 15

I. OVERVIEW

1. The *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (*CSIS Act*) allows Canadian Security Intelligence Service (CSIS or the Service) employees or persons acting under their direction to lawfully commit acts or omissions that would otherwise be contrary to the law.
2. To benefit from this Justification Framework, the act or omission must fall within an approved class, which means a class determined by the Minister of Public Safety (Minister) that must be approved by the Intelligence Commissioner. Pursuant to the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*), 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. The act or omission must also respect the limitations set out in the legislation.
3. On March 15, 2023, I, as Intelligence Commissioner, approved seven of eight classes of acts or omissions that would otherwise constitute offences that the Minister had determined (File 2200-A-2023-02). I did not approve Class [REDACTED] as I was of the view that the Minister's conclusions were not reasonable with respect to certain acts or omissions that would fall within the class.
4. In response to the specific concerns raised in my decision, CSIS prepared a revised Class [REDACTED]. On June 7, 2023, the Minister determined the revised version of Class [REDACTED] and on the same day, the Office of the Intelligence Commissioner (ICO) received the Minister's Determination for my review and approval.
5. Pursuant to paragraph 20(3)(b) of the *IC Act*, the Minister requested that I render my decision by June 22, 2023, which is less than the normal 30-day statutory time limit. The Minister based this request on CSIS operational requirements and, in light of his interpretation, to prevent the expiry of the previous Class [REDACTED] approved by the former Intelligence Commissioner. I agreed to render my decision by the requested date.

6. Following my review and for the reasons below, I am satisfied that the Minister's conclusions in relation Class [REDACTED] are reasonable. In accordance with paragraph 20(1)(a) of the *IC Act*, I approve the Minister's Determination dated June 7, 2023.

II. CONTEXT

7. In my March 2023 decision, I set out the legislative context of the Justification Framework. For the sake of brevity, I am not repeating that context here except to say that invoking the Justification Framework provides legal protection to the person committing the otherwise unlawful act or omission. However, it does not place them above the law or the safeguards guaranteed by the *Canadian Charter of Rights and Freedoms (Charter)* as stipulated subsection 20.1(22) of the *CSIS Act*. Criminal sanctions may be brought against those operating outside of the limits of the framework.
8. Further, subsection 20.1(18) of the *CSIS Act* sets out six specific categories of acts or omissions 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;
 - 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.
9. In accordance with section 23 of the *IC Act*, the Minister confirmed in his cover letter that he provided me with all information when determining the class of acts of omissions. The record before me is composed of:

- a) Briefing Note from the Director of CSIS to the Minister dated May 10, 2023 (Director's Briefing Note) which includes 9 annexes that can be grouped into the following categories:
 - i. CSIS overview defining and describing amended Class ■
 - ii. *Intelligence Commissioner – Decision and Reasons*, March 15, 2023, File 2200-A-2023-02;
 - iii. CSIS Operational Policies; and
 - iv. Ministerial Directions for Operations and for Accountability.
- b) Briefing Note from the Deputy Minister of Public Safety to the Minister dated May 29, 2023;
- c) Summary Record of Ministerial Briefing dated June 6, 2023; and
- d) Minister's Determination of the revised Class ■ dated June 7, 2023.

III. STANDARD OF REVIEW

10. The Intelligence Commissioner's jurisprudence establishes that the reasonableness standard, as applied to judicial reviews of administrative action, applies to my review.

11. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 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.

12. Relevant factual and legal constraints can include, for example, the governing statutory scheme, the impact of the decision and principles of statutory interpretation. 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*.

13. A quasi-judicial review by the Intelligence Commissioner will be informed by the objectives of the statutory scheme as well as the roles of the Minister and the Intelligence Commissioner. I am to carefully consider and weigh the important privacy and other interests of Canadians and persons in Canada as well as to ensure that the rule of law is fully respected in the determination under review – in this case, the determination of a class of acts or omissions that would otherwise constitute offences.

IV. ANALYSIS

14. Given that Class [REDACTED] was revised to respond to the concerns outlined in my March 2023 decision, it is useful to review my reasons provided in the decision.

i) Summary of Intelligence Commissioner's March 2023 Decision

15. In my March 2023 decision, although I approved seven of eight classes determined by the Minister, I was of the view that the Minister's conclusions in relation to Class [REDACTED] were not reasonable with regards to certain acts or omissions that would be included in that class. Pursuant to subsection 20(1) of the *IC Act*, I may not carve out problematic types of acts or omissions from an otherwise reasonable class. I therefore refused to approve the entire class.

16. I did not approve the class for the following three reasons.

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

17. First, the definition of Class [REDACTED] stated that the actions included [specific acts] [REDACTED] and the Minister's conclusion emphasized the [REDACTED] However, some of the offences that

would be included in the class were qualitatively different than [the specific acts] [redacted] while others did not so much deal with [redacted] As a result, I was of the view that the Minister's conclusions did not provide justification for including them in the class. These included offences related [description of offences] [redacted] [redacted] [redacted].

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

18. Second, the Minister's conclusions and the record as a whole did not demonstrate how offences [redacted] could respect the statutory limitation provided in paragraph 20.1(18)(b) of the *CSIS Act*, which prohibits willfully attempting in any manner to obstruct, pervert or defeat the course of justice. For a class to be approved, it must respect the six limitations of acts or omissions set out in the *CSIS Act* that could never be justified to be undertaken. It is 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 class. I found that the record was not clear whether any of [redacted] offences could in fact be committed without necessarily contravening the limitations, and therefore, inclusion [redacted] was not supported by the Minister's conclusions.

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

19. Third, I found that 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. I was of the view that the conclusions before me did not reflect the impact on Canadian fundamental institutions. This applied, for example, to [description of specific acts or omissions] [redacted]

[REDACTED]
[REDACTED] I was of the view that appropriate ministerial conclusions are therefore needed to justify offences interfering with [REDACTED]

20. I specified in my decision that different conclusions could properly delineate the class and address my concerns, but that the Minister's conclusions before me were unreasonable with respect to certain offences that could fall within Class [REDACTED]

ii) CSIS' Response to the Intelligence Commissioner's March 2023 Decision

21. In the Director's Briefing Note, he wrote that CSIS accepted the Intelligence Commissioner's decision and reasons. He also wished to "reaffirm that invoking any class of the justification framework is subject to all the limitations imposed on the use the justification framework as specified in the *CSIS Act*."

22. Further, the Briefing Note from the Deputy Minister of Public Safety to the Minister explained "that [CSIS] has never committed any of the offences found to be problematic by the IC, nor did it ever intend to do so."

23. I accept without difficulty that when the Service proposed Class [REDACTED] to the Minister for his determination, the Service was not attempting to obtain legal cover to commit the acts that I found particularly concerning in my March 2023 decision. Nevertheless, Class [REDACTED] as it existed, allowed for the commission of those offences. The Service's comment highlights the importance of clearly delineating the boundaries of each class to obtain a common understanding of where they lie, which I highlighted in my March 2023 decision.

24. For example, in the Director's Briefing Note, he explains that "nothing justifies the commission of an act or omission that would infringe a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms*. Offences under [a specific legislative provision] for example, would therefore be excluded, by design." When I raised a concern in relation to

[this specific legislative provision], I recognized that the offence of [a particular act that would constitute an offence under the specific legislative provision] would necessarily be excluded from the Justification Framework given its effect on section [redacted] of the *Charter*. However, I was not satisfied that the record before me demonstrated that [other acts that would fall under the specific legislative provision] necessarily infringed a *Charter* right. Such offences would therefore not automatically be excluded from the Justification Framework, even if they raised important privacy interests. That is why I was concerned that [this specific legislative provision] would be included in Class [redacted]. The issue is now moot given that the revised Class [redacted] explicitly excludes offences under [this specific legislative provision]. However, the difference of opinion between the Director and myself on whether [this provision] would automatically be excluded from the Justification Framework underlines the importance of clarity in delineating a class.

iii) The revised Class [redacted]

25. The revised Class [redacted] determined by the Minister has the same title as the previous Class [redacted]
[redacted]
[redacted]

26. Nevertheless, as he did in the record in relation to my March 2023 decision, the Minister indicates that the 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 Briefing Note. I have conducted my review on this basis.

27. CSIS made the following amendments to Class [redacted] in response to my March 2023 decision:

a) The definition of the class specifically excludes acts or omissions that constitute:

[description of specific acts or omissions]
[redacted]

[REDACTED]

b) The definition of the class explicitly states that it may include acts [description of particular acts or omissions] [REDACTED]

[REDACTED]

[REDACTED] CSIS also provides new examples to support its request in relation to what would otherwise be [REDACTED]

c) In response to my remark concerning the provision of information to the Intelligence Commissioner, CSIS included its policy framework on the Justification Framework as well its policies [REDACTED]

[REDACTED] which make references to internal procedures [REDACTED]

[REDACTED] These documents more fully outline the limits placed on designated CSIS employees when making use of the Justification Framework than what was before me in March 2023.

28. In response to my remark that delineating a class defined in relation to [REDACTED] was challenging given its inevitable breadth, the Minister concluded that “this breadth is reasonable given [REDACTED] that CSIS is likely to encounter in the course of its operations, making a restrictive definition counterproductive.”

iv) The Minister’s conclusions are reasonable

29. When considering the record as a whole, I am satisfied that the Minister’s conclusions in relation to Class [REDACTED] are reasonable. First, 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 identified in the class 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 under section 16 of the *CSIS Act*. The conclusions reveal that the Minister understands the broad purpose of the amended class, why it is necessary for CSIS' mandate, and what types of acts and omissions fall within the class.

30. Second, the revised version of Class ■ included specific elements to respond to the concerns I raised in my March 2023 decision. They have been addressed to my satisfaction.
31. I also find that the Minister's conclusions are consistent with the title and the definition of the class and that the class is properly and clearly defined.
32. As a result, I find that the Minister's conclusions provide the required justification and intelligibility in relation to the determination of the revised Class ■

V. REMARKS

33. Although this decision stands on its own, it is beneficial to read it jointly with my March 2023 decision. This serves, I think, as an important reminder: given the role of the Intelligence Commissioner, my decisions are intended to be made public. Indeed, the public release of these decisions enhances transparency and contributes to strengthening public trust in activities carried out by CSIS. Timely public release is important in this context. Prior to being made public, it may be necessary for CSIS to propose redactions to some information the release of which would cause injury to Canada's national security, defence or international affairs. The ICO will continue to work with CSIS to facilitate the public release of my decisions.
34. I made four remarks in my March 2023 decision. CSIS notes that it addressed my remark regarding the need to provide all documents referred to in its application and my remark regarding the challenges relating to a class of acts or omissions ■■■■■ I understand that my other remarks will be addressed by CSIS in the next annual authorization

of classes of acts and omissions. They concern the inclusion of greater specificity with respect to limitations included in Class [REDACTED] and the suggestion that CSIS provides updated examples of operational activities included in a class.

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

i) CSIS' continued operation under Class [REDACTED] approved by the former Intelligence Commissioner in July 2022

36. In his Briefing Note to the Minister, the Deputy Minister of Public Safety indicates the following :

The IC's rejection of Class [REDACTED] came before the expiry of the Class [REDACTED] approved by the preceding IC. Given that CSIS [REDACTED] CSIS has continued to operate under the old Class [REDACTED] until such time as a new Class [REDACTED] is approved by the IC or the old Class [REDACTED] expires.

37. The previous Intelligence Commissioner approved the "old" Class [REDACTED] on July 27, 2022. The identical Class was before me in March 2023, which I did not approve based on its own different record.

38. My statutory mandate as Intelligence Commissioner does not include reviewing whether CSIS is operating under a valid class of acts or omissions that would otherwise constitute offences. That said, the validity of the "old" class could raise legal and compliance issues and I trust that CSIS will provide the Federal Court with this context if any information or intelligence derived from activities that could fall within the "old" Class [REDACTED] collected between the period of my March 2023 decision and this decision, is relevant to an application before it.

ii) Validity period of the Intelligence Commissioner's approval of a ministerial determination

39. In the Ministerial determination that was received by the former Intelligence Commissioner on June 28, 2022, the Minister indicated the following:

If approved by the Intelligence Commissioner (IC) under section 20(1)(a) of the *Intelligence Commissioner Act*, each of the above-noted classes are to be in effect for a duration of one (1) year, starting on the day of the IC's approval of my determination. The seven classes approved by the IC on November 4, 2021, remain in effect unless and until the IC approves the new submission containing the proposed eight classes, as determined by this order.

40. In approving the Minister's determination, the former Intelligence Commissioner did not refer to the validity period in his decision.

41. This "old" Class ■ was determined by the Minister on June 23, 2022, and approved by the former Intelligence Commissioner on July 27, 2022.

42. The Minister's position with respect to the validity period of a class has changed in the Determination before me. At present, according to the Minister, the "old" Class ■ would lapse one year from the date of the Minister's determination of the class rather than one year from the date of the former Intelligence Commissioner's approval. The validity period of a ministerial determination would therefore be shorter, and necessarily always less, than one year. Having taken the position that the "old" Class ■ was still in effect, the Minister requested that I render my decision by June 22, 2023 to avoid a gap in the validity of Class ■

43. The record before me does not include a rationale for this change of position. The interpretation of the validity period of ministerial determinations has also not been addressed in past decisions of the Intelligence Commissioner.

44. I note, however, that this new position effectively means that in past years, when the previous Intelligence Commissioner approved classes after the one-year anniversary of the Minister's

determination, there would have been a period with no valid classes. I also note that this new position, and its past effects, would also apply to the determination of classes of Canadian datasets, where the applicable statutory language mirrors the statutory language of the determination of the classes of acts and omissions.

45. I am not convinced that reviewing how the Minister interprets the *CSIS Act* with respect to the validity period of approvals made by the Intelligence Commissioner falls within my review of the Minister's conclusions. Section 19 of the *IC Act* requires that I review the "conclusions – made under subsection 20.1(3) of the [*CSIS Act*] and on the basis of which a class of acts or omissions is determined – are reasonable." (In French: *conclusions formulées au titre du paragraphe 20.1(3) de la Loi sur le Service canadien du renseignement de sécurité sur lesquelles repose la détermination de catégories d'actes ou d'omissions sont raisonnables*).
46. However, my role as Intelligence Commissioner is not limited to reviewing the Minister's conclusions. My statutory authority also includes approving the classes. Indeed, section 12 of the *IC Act* states the Intelligence Commissioner is responsible for two actions: "reviewing" the conclusions (s 12(a), *IC Act*) and if the conclusions are reasonable, "approving" the authorizations, amendments and determinations (s 12(b), *IC Act*).
47. While my "reviewing" authority may not cover analysing how the Minister interprets validity periods of determinations of classes of acts or omissions or of Canadian datasets, I am of the view that my "approving" authority grants me the jurisdiction to interpret how my approval applies.
48. Subsection 20.1(3) of the *CSIS Act* specifies that the Minister shall, "[a]t least once every year" determine classes of acts or omissions that would otherwise constitute offences. The *CSIS Act* does not specify the validity period for the ministerial determination of classes of acts or omissions.

49. Similarly, the *IC Act* is silent with respect to the validity period of the approval of a ministerial determination of classes of acts and omissions.
50. Given that the Minister must determine classes “at least once every year”, and that it is the only reference to a time period, I am of view that the text and the context of legislation lead to the interpretation that ministerial determinations are to be valid for one year. Indeed, with no reference to an alternate or a maximum validity period, the “at least once every year” indicator constitutes not only the strongest, but the sole indicator of the intended validity period.
51. Having established the period, it is now necessary to determine when it begins. A determination is not valid until it is approved by the Intelligence Commissioner (ss 20.1(5) and 20.1(17), *CSIS Act*). This entails that the one-year validity period runs from the date the determination is approved by the Intelligence Commissioner.
52. The scheme of the Act supports this interpretation. The *IC Act* states that the Intelligence Commissioner must provide his decision “within 30 days” of receiving the determination, or “within any other period that may be agreed on by the Commissioner and the person, in any other case.” Although exemption from the 30-day period is possible, it is not the norm. Indeed, there must be agreement to that effect.
53. I do not believe it could have been Parliament’s intent that there would have to be an agreement every year to avoid any gaps in the validity of classes. As a result, if the validity period ran from the date of the Intelligence Commissioner’s approval only until the date of the one-year anniversary of the Minister’s determination, as the Minister now suggests, the Minister would always have to make his determination 30 days earlier than the preceding year’s determination. For example, given that the Minister made his determination June 7 this year, he would have to make next year’s determination on May 7 to ensure that the Intelligence Commission has the normal 30-day period in which to render his decision.
54. Effectively, then, the ministerial determination would never be valid for one year.

55. On the contrary, if the determination is valid one year from the date of the Intelligence Commissioner's approval, the Minister must only make his determination "at least once a year", instead of "at least once every 11 months."
56. The legislative provisions of the *CSIS Act* in relation to the ministerial determination of classes of Canadian datasets also supports this interpretation. As a reminder, the Minister has the similar obligation to determine classes of Canadian datasets "at least once every year" (s 11.03(1), *CSIS Act*). When a Canadian dataset has been collected and CSIS wishes to retain it, an application for judicial authorization must be prepared, which requires the approval of the Minister. Subsection 11.12(2) states that when the Director requests the Minister's approval, the Director must indicate to the Minister (a) the approved class to which the Canadian dataset belongs; and (b) the date on which the Commissioner approved the Minister's determination of the class.
57. The rationale for indicating the approval date is to confirm that the class is valid, namely that it has been approved by the Intelligence Commissioner and that its validity period has not lapsed. The fact that the provision references the date of the Intelligence Commissioner's approval, rather than the date of the Minister's determination, supports the interpretation that the one-year period runs from the time of that approval.
58. Given the above, I am of the view that the validity period of a ministerial determination of a class of acts or omissions that would otherwise constitute offences is one year from the date of the Intelligence Commissioner's approval.
59. In the Determination, the Minister does not specify his requested validity period or state when the validity of his Determination shall end. In approving the Determination for one year from the date of my decision, I am not therefore amending the Minister's conclusions of his Determination, and consequently not overstepping my statutory authority.

iii) Minimally Intrusive Collection

60. The overview of Class [REDACTED] contains examples of activities that would be included in this class of acts or omissions. With regard to section 12 of the *CSIS Act*, the overview describes examples where the collection of information and intelligence would be assessed as “minimally intrusive” and therefore would not require the Director or a designated CSIS employee to obtain a judicial warrant pursuant to section 21 of the *CSIS Act*.
61. Warrantless searches are presumptively unreasonable and contrary to the protection in section 8 of the *Charter* against unreasonable searches. Nevertheless, the *CSIS Act* does not necessarily require CSIS to obtain a warrant when it seeks to gather information relating to national security even when a person’s reasonable expectation of privacy is at stake. Courts have found that there are a range of minimally intrusive activities CSIS can carry out under section 12 without a warrant (see for example *X (Re)*, 2017 FC 1047).
62. Subsection 20.1(21) of the *CSIS Act* explicitly states that the Justification Framework does not relieve CSIS from the requirement to obtain a warrant in accordance with section 21. I understand from the examples where there is “minimally intrusive” collection that a section 21 warrant would not be required as the collection of information would not include [REDACTED]. These examples nevertheless highlight the importance for CSIS employees involved at every step of the decision making process not to lose sight of the difference between an act or omission that may be conducted under the Justification Framework, and an act or omission that requires a warrant issued by the Federal Court.

VI. CONCLUSIONS

63. Based on my review of the record submitted, I find that the Minister’s conclusions on which amended Class [REDACTED] is determined are reasonable.
64. In accordance with paragraph 20(1)(a) of the *IC Act*, I approve the Minister’s Determination of Class [REDACTED] dated June 7, 2023 for a period of one year from the date of this decision.

65. 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.

June 21, 2023

(Original signed)

The Honourable Simon Noël, K.C.
Intelligence Commissioner