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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 7, 2025

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I. OVERVIEW

1. This is a decision reviewing the conclusions of the Minister of Public Safety (Minister) in relation to his determination of nine classes of acts or omissions that would otherwise be offences.
2. The *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (*CSIS Act*), allows Canadian Security Intelligence Service (CSIS) employees designated by the Minister, or other individuals acting under CSIS' direction, to lawfully commit acts or omissions that would otherwise constitute offences. Set out in section 20.1 of the *CSIS Act*, this is referred to as the justification framework (the Framework).
3. To benefit from the Framework, the acts or omissions that are committed must fall within an "approved class" determined by the Minister and approved by the Intelligence Commissioner pursuant to the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*). To approve a class, the Intelligence Commissioner must be satisfied that the Minister's conclusions on the basis of which the class is determined are reasonable. The *CSIS Act* requires the Minister to determine classes at least once a year.
4. On February 6, 2025, pursuant to subsection 20.1(3) of the *CSIS Act*, the Minister determined, by order, nine classes of acts or omissions that would otherwise constitute offences (Authorization).
5. On February 7, 2025, the Office of the Intelligence Commissioner received the Authorization for my review and approval under the *IC Act*.
6. Based on my review and for the reasons below, I am satisfied that the Minister's conclusions for Classes 1, 2, 3, 4, 5, 6, 7, 8 are reasonable. In accordance with paragraph 20(1)(a) of the *IC Act*, I must approve the Minister's Authorization dated February 6, 2025, of Classes 1 to 8.

7. As for Class 9, 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 9.

II. CONTEXT

8. A detailed legislative context of the Framework is set out in past decisions. In summary, the Framework provides legal protection to the CSIS designated employees, or persons directed by them, committing the otherwise unlawful act. The Framework recognizes that in the context of information and intelligence collection, these individuals may be required to commit limited unlawful activity to carry out effective investigations in order to gain trust, maintain credibility, and develop access to threat-related information, notably in contexts where individuals are working covertly.
9. Misapplying the Framework could lead these individuals to commit an unlawful act that is not legally justified and therefore attract criminal liability. Indeed, no act or omission that would infringe a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms (Charter)* can be committed (s 20.1(22), *CSIS Act*). Further, the *CSIS Act* sets out the following six specific categories of acts or omissions that cannot be justified by the Framework (s 20.1(18), *CSIS Act*):
 - 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.

10. Once a designated CSIS employee is satisfied that the activity falls within a class approved by the Intelligence Commissioner, to commit or direct a person to commit an otherwise unlawful act, the employee must be engaged, in good faith, in an information and intelligence collection activity, and must believe on reasonable grounds that the commission of the act or omission, as compared to the threat, is reasonable and proportional in the circumstances, having regard to such matters as:
- i) for activity under section 12 of the *CSIS Act*: the nature of the threat, the nature of the act or omission and the reasonable availability of other means for performing the information and intelligence collection activity (ss 20.1(11) and (15), *CSIS Act*); or
 - ii) for activity under section 16 of the *CSIS Act*: the nature of the act or omission, the nature of the objective to be achieved and the reasonable availability of other means to achieve the objective (ss 20.1(11) and (15), *CSIS Act*).
11. In accordance with section 23 of the *IC Act*, the Minister confirmed in his cover letter that he provided me with all information that he was provided with when determining the classes of acts or omissions. The record is therefore composed of:
- a) Memorandum from the Deputy Minister of Public Safety to the Minister dated February 5, 2025;
 - b) Memorandum from the Director of CSIS to the Minister dated January 8, 2025, which includes enclosures that can be grouped into the following categories:
 - i. CSIS overview defining and describing the nine classes (Overview);
 - ii. Statistical breakdown of the use of acts and omissions per class;
 - iii. Intelligence Commissioner Decisions – March 11, 2024, March 15, 2023, and June 21, 2023;
 - iv. Ministerial Directions for Operations and for Accountability;
 - v. CSIS operational policies and training materials; and
 - vi. Interim Directive on the non-warranted collection of IP Addresses updated June 25, 2024; and
 - c) The Authorization.

III. STANDARD OF REVIEW

12. The *IC Act* requires the Intelligence Commissioner to review whether the Minister's conclusions are reasonable. The Intelligence Commissioner's jurisprudence establishes that the reasonableness standard, as applied to judicial reviews of administrative action, applies to my review.

13. As indicated by the Supreme Court of Canada, when conducting a reasonableness review, a reviewing court is to start its analysis by examining the reasons of the administrative decision maker. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraph 99, the Court 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.

14. Relevant factual and legal constraints can include the governing statutory scheme, the impact of the decision and principles of statutory interpretation. The governing statutory scheme found in the *IC* and *CSIS Acts*, as well as legislative debates show that Parliament created the role of the Intelligence Commissioner as an independent mechanism to ensure that government action taken for the purpose of national security and intelligence was properly balanced with the respect of the rule of law and the rights and freedoms of Canadians.

15. The Intelligence Commissioner's jurisprudence has established important elements for assessing the reasonableness of the Minister's conclusions related to the Framework.

16. The first element, linked to the hallmarks of reasonableness, requires that the proposed classes of acts or omissions be sufficiently well defined. While the Minister is not required to provide an exhaustive list of offences included in a class, his conclusions must nonetheless show both that he has a good understanding of which acts or omissions fall within the class, and that designated employees will be able to confirm that a contemplated act or omission

actually falls within an approved class. A clearly defined class helps ensure the Minister's conclusions are justified, transparent and intelligible.

17. The second element stems from the requirement of justifying the decision in light of the constraints imposed by the governing statutory scheme. The Minister's conclusions must be clear as to how they respect the limitations in the *CSIS Act* set out in subsections 20.1(18) and 20.1(22) pertaining to a *Charter* right or freedom. Acts or omissions that contravene these limitations cannot be justified. Where an act or omission might conceivably escalate or otherwise lead to contravening the limitations or infringing a *Charter* right or freedom, its inclusion may require a more robust justification, including how such contraventions or infringements will be avoided.
18. The third element concerns the impact of the proposed class on interests important to Canadians, such as the impact on Canadian fundamental institutions, which must be justified in the Minister's conclusions. As explained in a previous decision relating to classes of acts and omissions, these impacts are important contextual elements for my reasonableness review (CSIS-2023-02).
19. When the Intelligence Commissioner is satisfied (*convaincu*) that the Minister's conclusions at issue are reasonable, he "must approve" the authorization (s 20(1)(a), *IC Act*). Conversely, where not so satisfied, the Intelligence Commissioner "must not approve" the authorization (s 20(1)(b), *IC Act*).

IV. ANALYSIS

20. To determine a class, the Minister must conclude that the commission or the directing of the acts or omissions within that class 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 (s 20.1(3), *CSIS Act*).

21. Pursuant to sections 12 and 19 of the *IC Act*, in carrying out the independent oversight role of the Intelligence Commissioner, I must conduct a review of the Minister's conclusions to determine whether they are reasonable.

A. The classes

22. In the matter before me, the Minister determined the following nine classes of acts or omissions that designated CSIS employees may be justified in committing or directing another person to commit. While Classes 1 to 8 are the same as those I approved last year, Class 9 is new. The classes are as follows:

Class 1 – [REDACTED]
Class 2 – [REDACTED]
Class 3 – [REDACTED]
Class 4 – [REDACTED]
Class 5 – [REDACTED]
Class 6 – [REDACTED]
Class 7 – [REDACTED]
Class 8 – [REDACTED]
Class 9 – [REDACTED]

23. Since the Minister's conclusions pertaining to Classes 1 to 8 are similar to those I found reasonable last year, I will start by reviewing these classes.

24. I note that approval of classes with the same or similar ministerial conclusions in a previous year does not entail that the classes will automatically be approved again. There are legal requirements that have to be satisfied for the Minister to determine the classes and for the Intelligence Commissioner to find his conclusions reasonable. Indeed, every ministerial authorization is distinct and is reviewed on its own record.

25. The Minister must be provided with the best available information when determining whether to authorize the classes of otherwise unlawful acts or omissions. This means that the information in the authorization, as well as supporting materials, must be updated to reflect the current operational activities undertaken by designated CSIS employees and persons

directed by them. The information should also show what classes have been used by designated employees and the acts that have been committed pursuant to the Framework. How acts or omissions of a class have been undertaken in the past may be a factor in determining whether the conclusions relating to a class are reasonable.

26. There may be authorizations where it will be important for the Minister's conclusions to demonstrate how past remarks by the Intelligence Commissioner have been addressed. Similarly, where the classes have not changed from the prior year, the Minister's conclusions may nevertheless have to address developments in legislation or jurisprudence, or how the Minister's understanding or position on an issue has evolved.

B. Updated record

27. The record contains new information that addresses the remarks I made in my 2024 decision (CSIS-2024-01).
28. My first remark underscored the extraordinary responsibility of designated CSIS employees to administer the Framework in a manner that respects the rule of law. The employees must not only confirm that a proposed act falls within an approved class, but must also understand and apply the legal requirements to any decision to invoke the Framework – for example, by confirming that the commission of an act is reasonable and proportional in the circumstances. Further, I commented on the importance of overall measures being in place to guide designated employees while also noting that the Minister could consider whether the Framework will be applied by CSIS employees in a way that respects the rule of law when concluding that the commissions of acts or omissions is reasonable. The record before me includes additional information on how CSIS trains employees and implements the Framework, including operational policies.
29. My second remark concerned the impact of a recent judicial decision (*R v Bykovets*, 2024 SCC 6) on the activities of CSIS, which I raised given one of the scenarios of operational use set out in the record. Any impact the judicial decision may have had was not addressed in that record. This remark has been addressed by providing information on how the judicial

decision is currently being applied by CSIS. Given the broad implications of the judicial decision for the Government of Canada and CSIS, I understand from the record that guidance was requested from the Federal Court, which is still pending. I look forward to the outcome of this consultation being included in future authorizations where relevant.

30. My third remark highlighted the need for additional information to be provided to the Minister to offer a complete picture of how the Framework is being used. In response, CSIS has provided more information on its procedures, including information on the internal approval process and the requirement for employees to attest that they considered the legal limitations of the Framework. Finally, CSIS provided examples of activities that are more akin to an “omission” in order to address my comment that the activities falling within the approved classes seemed to constitute only acts and not omissions.
31. I am pleased with the responses to my remarks. I am of the view that the Minister can fulfill his role more fully using this additional information provided by CSIS.

C. Classes 1 to 8 – the Minister’s conclusions are reasonable

32. With his conclusions, the Minister seeks to delineate the boundaries of each class while authorizing a broad range of investigative activities within the parameters of each class. For each class, the Minister sets out i) the title of the class; ii) a definition of the class that includes a broad description of the types of acts in the class as well as the main legislative provisions under which the acts would otherwise be found to be unlawful; and iii) conclusions, in which he briefly outlines why it is necessary for CSIS to be able to commit, or direct the commission of, the acts within the particular class.
33. The Minister also explains that when making his determination of the classes, he considered the Overview of the classes prepared by CSIS; the Director’s and the Deputy Minister’s memoranda; and CSIS’ operational policies and procedures provided by the Director, including measures to reinforce the subsection 20.1(18) *CSIS Act* limitations and the respect of rights and freedoms guaranteed by the *Charter*.

34. The Overview prepared by CSIS includes the following:

- a) a definition of the proposed class, which consists of a broad description of the class, a list of the main offences that would be included, as well as specific examples of activities that would constitute offences included in the class;
- b) a rationale for the class, which outlines the threat or object that investigations seek to address, as well as a general overview of why the offences would have to be committed in the context of an investigation;
- c) scenarios of operational use, which outlines potential situations where an otherwise illegal act could be committed, as well as additional specific examples describing situations where an act falling within the class has actually been committed; and
- d) a recommendation to the Minister to determine the class.

35. In his conclusions, the Minister states that he is relying on CSIS' information with respect to the types of otherwise unlawful acts or omissions that would be operationally useful. He took into account the overall measures that support the Framework to ensure that it is applied in a way that respects the rule of law. This includes CSIS's training, reporting and operational policies and procedures. Finally, the Minister indicates that he adopts as an integral part of his own conclusions the definitions of each class and the rationales found in the Overview prepared by CSIS.

36. On the basis of the information before him, the Minister concluded that the classes were reasonable in accordance with the legal requirements set out in subsection 20.1(3) of the *CSIS Act*. I find that the Minister's conclusions are reasonable for the following reasons.

37. First, the Minister explains that the acts and omissions identified in the classes are rationally connected to CSIS' information and intelligence collection duties and functions in securing Canada's national security. The rationale set out in the Overview prepared by CSIS and relied on by the Minister explains in broad but intelligible strokes how committing offences can further CSIS' section 12 and section 16 investigations. Additionally, the examples of specific acts or omissions that could be, and have been, committed provide concrete

situations that illustrate the link between the otherwise unlawful act, CSIS' investigation, and the threat being investigated.

38. Second, I find that the updated examples bolster the understanding of the scope of the classes. The Minister's conclusions, in addition to CSIS' Overview of the classes adopted by the Minister, provide justification for why the classes are useful. The explanation and the specific examples provided on the nature of the threat, or the object of the investigation show the commission of at least some of the otherwise unlawful acts or omissions is more than a hypothetical occurrence.
39. Third, I am satisfied that the classes and the Minister's supporting conclusions are properly and clearly defined. They allow designated CSIS employees to have access to clear guidance with respect to which acts or omissions are included and excluded from the approved classes.
40. Finally, I am satisfied that the Minister's conclusions that *Charter* rights will be respected and that the subsection 20.1(18) limitations will not be breached are reasonable. The record is clear that designated CSIS employees must confirm there will be no infringement when the otherwise unlawful acts are carried out and shows that they receive mandatory training to ensure they can meet their responsibilities. Based on the information before him, the Minister was justified in being satisfied that measures in place, if applied appropriately, would lead to an implementation of the Framework that respects the *Charter* and statutory limitations.

D. Class 9 – the Minister's conclusions are not reasonable

41. Similar to Classes 1 to 8, in Class 9 the Minister sets out the title of the class as well as a definition of the class with examples of activities that would be included. The Minister also provides conclusions showing that he understands the broad purpose of the class and why the acts and omissions are necessary for the fulfillment of CSIS' mandate as it pertains to the subject matter of the class. While I find that the Minister's conclusions are reasonable with respect to the inclusion of some of the acts and omissions in the class, they are unreasonable in relation to certain offences in the class.

- i. *Preliminary issue – Minister’s jurisdiction to pre-emptively include [...] offences*

42. As indicated by the Minister, Class 9 was created to allow designated CSIS employees or persons acting under their direction to engage in acts or omissions that would otherwise constitute [description of offences].
43. No past authorizations have included acts or omissions that would constitute offences that [are not in force]. Their inclusion in Class 9 raises a preliminary issue: does the *CSIS Act* allow the Minister to pre-emptively include in a class offences that [are not in force]?
44. Subsection 20.1(3) of the *CSIS Act* provides that “[a]t least once every year, the Minister shall, by order, determine the classes of acts or omissions that would otherwise constitute offences” (emphasis added). My role is to determine whether the Minister’s interpretation of his statutory jurisdiction is reasonable in light of his conclusions.
45. The Minister’s conclusions do not address or explain how he interpreted his jurisdiction. Nevertheless, the record is clear that [the offences are not in force]. Given that the Minister determined the class with the awareness that the [...] offences were not in force, he – at least implicitly – interpreted his jurisdiction as allowing him to do so (*Vavilov*, at para 123).
46. Considering the text, context and purpose of the Framework, and taking into account the facts before the Minister, I am of the view that it was reasonable for the Minister to determine a class which includes offences that [are not in force].
47. With respect to the text of subsection 20.1(3) and the corresponding context, although the [...] offences [are not in force], they are not merely hypothetical. The offences are known and defined. [Description of how the offences are known and defined].
48. Even more importantly in my view, the pre-emptive inclusion of the [...] offences in the class avoids any potential gap in the fulfillment of the Framework’s purpose. Indeed, as stated in the Minister’s conclusions relating to the class, CSIS has been investigating threats to Canada or Canadians posed by [a specific type of threat] since its creation. [...] new

offences that impact the legal framework in which CSIS operates. As designated CSIS employees and persons directed by them are not justified to commit an act or omission unless it falls within a class approved by the Intelligence Commissioner, there may be situations where the delay in obtaining such approval may place them in a situation where they could not benefit from legal immunity, or could limit their ability to continue investigating the threat covertly. There would therefore be the need for the Minister's authorization to include offences [pre-emptively].

49. By way of example, [description of example]. This gap could expose ongoing operations and certain sources' association with CSIS.

50. I find the Minister's implicit interpretation of subsection 20.1(3) of the *CSIS Act* as enabling him to include [pre-emptively] offences represents a reasonable approach given that it is reasonably foreseeable that the [offences will become enforceable] and "given the consequences and the operational impact of the decision" (*Vavilov* at para 93). Now that I have determined that the Minister had jurisdiction to determine the class, I will review the reasonableness of his conclusions with respect to how the class is delineated.

ii. *The Minister's conclusions do not support the inclusion of all the acts and omissions in Class 9*

51. Having found the Minister's conclusions reasonable with respect to the inclusion of certain offences [pre-emptively], I nevertheless find that the inclusion of certain offences in the class is not supported by the Minister's conclusions.

52. More specifically, I am not satisfied that the Minister's conclusions regarding the inclusion of certain offences [...] are reasonable. This is because the conclusions fail to address how the acts that would constitute these offences are consistent with the limitations set out in the *CSIS Act*, and do not address the impact these offences would have on interests important to Canadians, including on Canadian fundamental institutions.

53. As stated in the jurisprudence of the Intelligence Commissioner, simply repeating the statutory language that a class does not include acts or omissions that violate the statutory limitations or that infringe a *Charter* right or freedom is insufficient for defining a class (*Vavilov* at para 102). To render a justified decision, and to provide meaningful guidance to designated employees, it is necessary for the Minister's conclusions – and therefore the class definition – to actually apply these general limitations to the specific offences or types of offences being contemplated. This application of the limitations may result in the total exclusion of an offence where it would necessarily contravene the limitations in the *CSIS Act*, or it may result in additional conditions to circumscribe the scope of the acts or omissions so that they respect the limitations. An example of this is the enumeration in the definition of Class 9 of specific acts or omissions not included in that class because they would violate the limit on obstructing, perverting or defeating the course of justice.
54. This application of the limitations and additional definition of the class not only provides direct guidance to designated employees by explicitly identifying acts or omissions that cannot be justified by the class, but also additional guidance by helping delineate the outer-bounds of the class. This, in turn, may assist with identifying analogous activities that cannot be justified under the Framework.
- a) Lack of intelligibility with respect to the limitations relating to certain offences
55. The Minister's conclusions did not sufficiently consider how the *CSIS Act* statutory limits would be respected in relation to certain offences included in Class 9.
56. [Reference to a specific provision of an act of Parliament] provides that every person commits an offence [...]. [Reference to another specific provision of the same act of Parliament] is in substance the same except that it [...]. Given their similarity, my analysis focuses on [the specific provision], but equally applies to [the second specific provision].
57. Given that these offences involve [description of an act], I am concerned that their inclusion necessarily contravenes the statutory limitation of section 20.1(18)(a) of the *CSIS Act* that

nothing justifies “causing, intentionally or by criminal negligence, death or bodily harm to an individual” (emphasis added). This issue is neither identified nor addressed in the Minister’s conclusions.

58. The definition of bodily harm in the *CSIS Act* mirrors the definition in section 2 of the *Criminal Code*: “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.” Case law holds that this is a low threshold that can capture “indisputably minor injuries” (*R v Barton* 2024 ABCA 34 at para 183, leave to appeal to SCC dismissed 41154 (8 August 2024); *R v Kooner*, 2023 BCCA 8 at para 50, leave to appeal to SCC dismissed 41109 (15 August 2024); *Saulis v R*, 2020 NBCA 36 at para 13).
59. The definition of proposed Class 9 states the general restriction that it does not include acts or omissions “when it is reasonably foreseeable that doing so would contravene any of the limitations provided in s 20.1(18).” I am of the view that [description of an act] could be such an act. At a minimum, it is reasonably foreseeable that [description of an act] may lead to either minor or potentially more serious injuries, either of which constitute “bodily harm”, thus contravening the limitation in paragraph 20.1(18)(a).
60. If the commission of an offence will necessarily contravene a limitation, it cannot be included in a reasonable class; the limitation represents a specific legal constraint on the decision maker that they must respect (*Vavilov* at para 108). Similarly, if it is possible to commit an offence in a way that could contravene a limitation, a reasonable decision requires the Minister’s conclusions to clearly indicate how the limitation will be respected.
61. The Minister’s conclusions do not engage with these important considerations in relation to [the specific legislative provisions]. As stated earlier, I am of the view that repeating the general statutory language that the section 20.1(18) limitations will be respected is not sufficient to confirm whether these offences are included in the class or not, and if so, whether the limitations will be respected given the nature of the offences. Consequently, I am

not satisfied that the Minister's conclusions with respect to the inclusion of these offences in the class are reasonable.

62. In addition to engaging the *CSIS Act* limitation against causing bodily harm to an individual, the inclusion of these offences raises a similar issue of whether acts pursuant to them short of physical violence could constitute infringements of the *Charter* section 7 right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Similarly to the limitation against causing bodily harm, the only manner in which *Charter* protections are addressed in the Minister's conclusions are through the general re-stating of the *CSIS Act* statutory limit that the class does not include acts or omission that would infringe a *Charter* right or freedom. It is not clear if the offences in question would therefore be excluded from the class, or whether the Minister intended them to be included.

63. Given my other conclusions I do not find it necessary to conduct a full analysis of whether acts or omissions pursuant to [the specific legislative provisions] might infringe section 7 of the *Charter*. I simply note that the section 7 right to security of the person is generally given a broad interpretation and protects both the physical and psychological integrity of the individual (see e.g. *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 125). I also note that the assessment of this issue could be impacted by the Minister's interpretation of what constitutes "infringing" a *Charter* right – an issue I return to in a remark.

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

64. I am of the view that the Minister's conclusions are also unreasonable because they fail to sufficiently consider the effect of a particular act in the class on interests important to Canadians, namely on Canadian fundamental institutions (*Vavilov* at para 133).

65. [Reference to a specific provision of an act of Parliament] provides that:
[...].

66. Given that the commission of this offence could impact [...], Canadian fundamental institutions could be impacted. Indeed, I note that under the Ministerial Direction for Operations included in the record, Canadian fundamental institutions are defined as including (but not being limited to) “government and political institutions” and “academia”. Moreover, the same Direction indicates that [...]. Some of the hypothetical operational scenarios put forward by CSIS would therefore also appear to involve Canadian fundamental institutions.
67. In Decision CSIS-2023-02, relying on *Vavilov*, I stated that where acts in a proposed class may have an impact on an interest important to Canadians, the inclusion of that act should be appropriately justified by the Minister's conclusions (para 64). I added that justifying offences that interfere with Canadian fundamental institutions “requires clear, specific and robust ministerial conclusions” (para 65).
68. The same reasoning applies here. The Minister’s conclusions do not address any potential impacts on Canadian fundamental institutions, despite the inclusion of [the specific legislative provision] in Class 9. As a result, I am not satisfied that his conclusions with respect to the inclusion of this particular act in the class are reasonable.
69. I note that since the offence can also involve [...], important interests in relation to section [...] of the *Charter* may additionally be engaged. The purpose of section [...] has been held to be to “[...]. The Supreme Court of Canada has held it must therefore be interpreted broadly [...].
70. Importantly for our purposes, [...] is not limited to [...] but also includes the opportunity to [...]. This further entails a [...]. This [...] could be directly engaged if [the specific legislative provision] is included in the proposed class. Both the specific example and potential scenarios described in the record seem to suggest this also.
71. Indeed, in its Overview, CSIS included, as a potential example, the act of [...]. The Overview seems to suggest that [...].

72. Similarly to the limitation against causing bodily harm, the Minister's conclusions reiterate the statutory limitation against infringing a *Charter* right or freedom. While section [...] is used as an example of such *Charter* rights, no further consideration is given as to how this limit applies to the acts or omissions captured by the class definition (including [the specific legislative provision]).
73. I therefore find the Minister's conclusions with respect to the potential impact on section [...] of the *Charter* to be unreasonable. The Minister's conclusions do not engage the issue of whether this activity could be undertaken without limiting section [...] rights, and in so doing cause doubt as to whether the offence – or parts of it – fall outside the class.
74. For the above reasons, I am not satisfied that the Minister's conclusions in regards to the inclusion of acts and omissions that would constitute offences pursuant to [the specific legislative provision] are reasonable.
75. As set out in a previous decision (CSIS-2023-02), 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 the Minister's conclusions are reasonable with respect to some of the acts or omissions that would fall within proposed Class 9, given I am not satisfied they are reasonable with respect to some of the other acts or omissions I must not approve the determination of Class 9.

E. Improving Class 9

76. Despite finding that the Minister's conclusions do not support all of the acts and omissions included in Class 9, I am of the view that amended ministerial conclusions could support the class. To that effect, I wish to make a few comments with respect to other elements in the Minister's conclusions that, although not sufficient to render the Minister's conclusions unreasonable, could nevertheless benefit from additional clarity.

i. Additional clarity that specific acts cannot obstruct the course of justice

77. Pursuant to [specific provisions of an act of Parliament], it will be an offence [description of an offence]. Similarly, pursuant to [specific provision of an act of Parliament] it will be an

offence to [description of an offence]. These offences are included in the class. Pursuant to [specific provision of an act of Parliament], [...]. The offence [description of an offence] – which would be justified pursuant to Class 9 – could not be justified in the context of [...]. [Carrying out the offence in a specific context] would, in my view, constitute a willful attempt to obstruct, pervert or defeat the course of justice, and therefore would be unjustifiable under the Framework (s 20.1(18)(b), *CSIS Act*). The same analysis would apply to the offence of [description of an offence]. While I understand that a designated CSIS employee or a person directed by them may need [to carry out an offence, in a specific context, the offence], would constitute a “red line” that cannot be breached and would be unjustifiable under the Framework.

78. The absence of specifying this limitation does not render the Minister’s conclusions unreasonable; the offences under [a specific act of Parliament] can be committed without contravening the limitation and I am of the view that the CSIS employees can understand up to what point these acts and omissions can be carried out to stay within the boundaries of the limitations. Nevertheless, I am of the view that a class that includes offences under [a specific act of Parliament] would benefit from additional specificity with respect to the applicability of the limitations set in section 20.1(18) of the *CSIS Act*.

ii. Greater specificity with respect to offences included in the class

79. The definition of Class 9 described it as including acts or omissions that “would otherwise constitute offences [...]”. While the title of the class and context of the Minister’s conclusions clearly imply an intention to capture only [a type of] offences [...], the reference made [...] as a whole captures a series of other serious offences [...].
80. Some of the other offences do not have [the specific type of offence] as their object. Nevertheless, they could hypothetically be carried out in the context of [...]. A class including offences [...] should include clear ministerial conclusions concerning whether all offences [...] would be included.

V. REMARKS

81. I would like to make the following remark to assist with the consideration and drafting of future determinations of classes of acts or omissions.

A. Interaction of classes with the *Charter*

82. Public Safety's memorandum to the Minister includes legal considerations which raise fundamental issues regarding infringements of *Charter* rights and freedoms. While I appreciate that Public Safety officials provided this important information to the Minister, I am of the view that the record does not give the Minister or myself a clear understanding of the issues [...] and raises some concerns regarding the interaction of the proposed classes and the *Charter*.

83. Subsection 20.1(22) of the *CSIS Act* states that: "Nothing in this section justifies the commission of an act or omission that would infringe a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms*" (emphasis added). The memorandum indicates that the word "infringe" could be interpreted in two different ways. The first interpretation is that the classes cannot give rise to any limitation of rights and freedoms, even if it would be justifiable. The second interpretation – the one recommended by CSIS and Public Safety officials to the Minister – is that the classes could include activities that limit *Charter* rights in a justifiable way. [...].

84. [...]. Thus, under the first interpretation, certain acts included in Class 8 would not respect subsection 20.1(22) of the *CSIS Act*. Although the memorandum recommends that the Minister adopt the second interpretation, it is unclear from the record whether he turned his mind to this issue, let alone made a decision as to which interpretation to adopt. Indeed, the recommendation section of the memorandum signed by the Minister refers only to the determination of the proposed classes, and not the *Charter* interpretation issue.

85. This proposed interpretation and issues raised in Public Safety's memorandum are novel. In no previous record have CSIS, Public Safety or the Minister referenced interpreting

“infringe” in subsection 20.1(22) to mean that *Charter* rights could be justifiably limited. By contrast, in Decision CSIS-2023-07, I observed that a CSIS Memorandum to the Minister advanced a seemingly expansive view of the prohibition on infringing a *Charter* right by concluding that subsection 20.1(22) would by design exclude all offences under [a specific provision of an act of Parliament].

86. Not only is the proposed interpretation novel, it is also significant. The interpretation raises whether constitutional rights can be limited. The Minister must have a full understanding of the limits of the class. In this instance, the issue is only summarily included in a record and subsequently not addressed in the Minister’s conclusions.
87. The novel interpretation of the *CSIS Act* could have an impact on the classes of acts and omissions. First, the interpretation given to “infringe” could modify the delineation of a class by permitting the commission of acts that justifiably limit *Charter* rights. As this interpretation would impact how the class is defined, it would constitute an element that the Minister should address in his conclusions. Indeed, a decision maker must consider the constraints on the exercise of the powers they are delegated (*Vavilov* at para 108), especially so when the exercise of the powers engages *Charter* rights or values (*Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at paras 65-66). Yet there is no record of which interpretation the Minister has adopted, or, importantly in the context of adopting a novel legal position, any justification supporting the novel position.
88. Second, the interpretation being advanced by Public Safety and CSIS would impact how the classes would be operationalized. I reiterate in this context my previous remarks respecting the immense responsibilities placed on designated CSIS employees, and the corollary importance of establishing well-defined classes of acts or omissions. Adopting the novel interpretation would mean that these employees would find themselves not only weighing the proportionality of their proposed action, but also whether it would represent a justifiable limit on a *Charter* right. There is no information on how the employees are, or would be trained, and how decisions would be made, documented, and whether there would be any oversight.

89. I accept that legal positions may change, including regarding how legislative provisions are interpreted. However, to determine whether the Minister's conclusions incorporating a new legal position were reasonable, the change would need to be fully addressed and supported in the record. Given the absence of any consideration of the issue by the Minister in his conclusions, I approved again this year Classes 1 to 8 with the understanding that the activities cannot limit rights or freedoms under the *Charter*. For greater certainty, I read the Authorization as providing that no infringements or limitations to *Charter* rights are permitted by it, even if these infringements or limitations were ultimately justifiable pursuant to the *Charter*.
90. Specifically with respect to Class 8 – [...] – I note that in the examples provided in the record, [a specific action cannot be taken without CSIS first reviewing and approving it]. I believe that this review, along with my above statement, will allow CSIS to respect the limitations specified in the *CSIS Act* with respect to this class. That being said, given that the issue of the *Charter* has been raised specifically to this class, I would expect future ministerial conclusions to engage more fully with the issue, which will allow my reasonableness review to also more fully engage with the issue.
91. Should CSIS be of the view that this prevents it from carrying out certain activities it considers useful, it is open to it to seek the Minister's determination of a new class or classes, and for the Minister to fully address the issue in his conclusions.
92. In the event that the Minister may be interested in adopting the interpretation of subsection 20.1(22) of the *CSIS Act* advanced by Public Safety and CSIS, I encourage the parties to give consideration to how best to support the Minister in his decision in a manner that takes into account the legislative framework in which this decision is made and the subsequent Intelligence Commissioner's review occurs. The issue raises a novel and significant legal question in the absence of an opposing party. Canadians have an interest in knowing that all important and relevant issues have been put forward for the decision maker's consideration.

VI. CONCLUSIONS

93. Based on my review of the record submitted, I find that the Minister's conclusions on the basis of which Classes 1, 2, 3, 4, 5, 6, 7 and 8 are determined are reasonable.
94. In accordance with paragraph 20(1)(a) of the *IC Act*, I approve the Minister's Determination dated February 6, 2025, of Classes 1 to 8.
95. With regard to Class 9, 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 9.
96. 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 it 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 7, 2025

(Original signed)

The Honourable Simon Noël, K.C.
Intelligence Commissioner