~~TOP SECRET//[...]//CEO~~

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INTELLIGENCE COMMISSIONER

DECISION AND REASONS

IN RELATION TO AN AUTHORIZATION FOR
THE CANADIAN SECURITY INTELLIGENCE SERVICE
TO RETAIN THE FOREIGN DATASET
[...]
PURSUANT TO SECTION 11.17 OF
THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT* AND
SECTION 17 OF THE *INTELLIGENCE COMMISSIONER ACT*

AUGUST 8, 2024

Canada

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I. OVERVIEW

1. This is a decision reviewing the conclusions of the Director of the Canadian Security Intelligence Service (CSIS or Service) authorizing CSIS to retain the [...] (Foreign Dataset) pursuant to subsection 11.17(1) of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (*CSIS Act*).

2. The dataset regime set out in the *CSIS Act* provides CSIS with the ability to collect, retain and analyse personal information that is not directly and immediately related to activities that represent a threat to the security of Canada.

3. CSIS may collect a foreign dataset if it is satisfied that the dataset – information stored as an electronic record, containing personal information as defined in section 3 of the *Privacy Act*, RSC, 1985, c P-21, and characterized by a common subject matter (s 11.01, *CSIS Act*) – is relevant to the performance of its duties and functions under sections 12 to 16 but cannot be collected or retained under those sections. CSIS must also reasonably believe that the information predominantly relates to non-Canadians who are outside Canada.

4. Following collection by CSIS, the Minister of Public Safety, or his designate, must authorize its retention, which must subsequently be approved by the Intelligence Commissioner. The Director was designated by the Minister on September 11, 2019, to authorize the retention of foreign datasets.

5. CSIS obtained the Foreign Dataset prior to the establishment of the dataset regime. It is therefore deemed to have been collected on July 13, 2019, when section 96 of the *National Security Act, 2017* came into force. On October 11, 2019, CSIS requested that the Director issue an authorization for its retention. On July 15, 2024, the Director issued the authorization (Authorization).

6. On July 19, 2024, the Office of the Intelligence Commissioner received the Authorization for my review and approval under the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*).

7. Having completed my review, I am satisfied that the Director's conclusions relating to the retention of the Foreign Dataset are reasonable. Consequently, I approve the Authorization to retain the Foreign Dataset pursuant to paragraph 20(2)(a) of the *IC Act*.

8. On June 20, 2024, amendments to the dataset regime of the *CSIS Act* came into force. Therefore, in conducting my review, I relied on the current version of the *CSIS Act*.

II. CONTEXT

9. Information on the Foreign Dataset, including its origin and a description of its contents, and the steps taken during its evaluation, can be found in the classified annex to this decision (Annex A). I am including this information in a classified annex for two reasons. First, it will prevent the redaction of a significant portion of text of this decision thereby rendering its public version easier to read. Second, it will ensure that the nature of the facts that were before me, which otherwise would only be available in the record, are included in the decision.

10. The dataset regime set out in sections 11.01 to 11.25 of the *CSIS Act* provides CSIS with the authority to retain a foreign dataset that contains personal information. While this information is not directly and immediately related to a threat to the security of Canada, it must nevertheless be relevant to the performance of CSIS' duties and functions (s 11.01, *CSIS Act*).

11. Pursuant to subsection 11.17(1) of the *CSIS Act*, the Director, as the designated person, may authorize CSIS to retain a foreign dataset when he concludes that i) the dataset meets the definition of a foreign dataset, namely that the personal information it contains predominantly relates to non-Canadians or non-Canadian corporations who are outside of Canada; ii) its retention is "likely to assist" CSIS in the performance of its duties and functions under sections 12 (investigations of suspected threats), 12.1 (measures to reduce threats), 15 (investigations for security assessments or advice to ministers) or 16 (collection of information concerning foreign persons and states in Canada); and iii) CSIS has complied with its obligations set out in section 11.1 of the *CSIS Act*. These obligations require CSIS to

take reasonable measures to ensure the deletion of any information in respect of which there is a reasonable expectation of privacy that relates to the physical or mental health of an individual, as well as the removal of any information from the dataset that by its nature or attributes relates to a Canadian or a person in Canada.

12. The authorization to retain a foreign dataset is only valid once approved by the Intelligence Commissioner in a written decision. Following this approval, designated CSIS employees can query or exploit the foreign dataset – and retain the results – for the purposes of sections 12, 12.1, and 15 to the extent that it is strictly necessary, and for the purposes of section 16 if required to assist the Minister of National Defence or the Minister of Foreign Affairs. The query and exploitation of the dataset allows CSIS to make connections, detect patterns and trends that would not otherwise be apparent with traditional means of investigation.

13. In accordance with section 23 of the *IC Act*, the Director confirmed in his cover letter that he provided me with all information that was before him when issuing the Authorization. He notes that when the request to retain the Foreign Dataset was received from CSIS in [redacted], the following information was included:

    i. Draft of the Director's authorization, dated October 11, 2019;
    ii. Memorandum to the Director from CSIS, dated October 11, 2019, requesting that the Director issue an authorization to retain the Foreign Dataset, with appendices (CSIS Memorandum);
    iii. Briefing note to the Director describing how CSIS manages and maintains section 11 datasets for backup and recovery purposes, dated October 11, 2019;
    iv. Designation of the Director by the Minister pursuant to section 11.16(1) of the *CSIS Act*, dated September 11, 2019; and
    v. Ministerial Direction to CSIS on the Government of Canada's Intelligence Priorities for 2019-2021.

14. The Director indicates that supplemental documents were subsequently added to the record following his order to the Service to take into account the concerns and comments of the

former Intelligence Commissioner. He notes that these documents, although helpful in informing his conclusions, do not modify the original request:

vi. Briefing Note to the Director describing how CSIS manages and maintains section 11 datasets for backup and recovery purposes, dated December 19, 2022;

vii. […];

viii. […];

ix. Presentation Deck: Section 11 Ministerial Authorization of Foreign Datasets – December 10, 2019;

x. Briefing Note to the DG […] addressing how […] information contained in certain datasets remains "likely to assist", dated November 10, 2022;

xi. Briefing Note to the Deputy Director Operations regarding the removal of Canadian-related records from the Foreign Dataset, dated May 9, 2022 (Briefing Note regarding the removal of Canadian-related records); and

xii. Intelligence Requirements Charts pursuant to the 2023-2025 Canadian Intelligence Priorities and Outcomes.

III. STANDARD OF REVIEW

15. Pursuant to section 12 of the *IC Act*, the Intelligence Commissioner conducts a quasi-judicial review the conclusions on the basis of which a ministerial authorization is made to decide whether they are reasonable.

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

17. 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 (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 79). In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 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.

18. Relevant factual and legal constraints can include 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 legislative environment 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*.

19. A review of the *IC Act* and the *CSIS Act*, in addition to the 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 respect for the rule of law and the rights and freedoms of Canadians. To maintain that balance, I consider that Parliament created my role as a gatekeeper. While reviewing the Minister's conclusions, I am to carefully examine whether the important privacy and other interests of Canadians and persons in Canada were appropriately considered and weighed as well as to ensure that the rule of law is fully respected.

20. With respect to an authorization to retain a foreign dataset, when the Intelligence Commissioner is satisfied (*convaincu* in French) that the Director's conclusions at issue are reasonable, he "must approve" the authorization (s 20(2)(a), *IC Act*). Conversely, where unreasonable, the Intelligence Commissioner "must not approve" the authorization (s 20(2)(c), *IC Act*). The Intelligence Commissioner can also approve the retention of a foreign dataset with conditions if satisfied that the conclusions would be reasonable once the conditions are attached (s 20(2)(b), *IC Act*).

IV. ANALYSIS

21. Section 17 of the *IC Act* requires that I review the Director's conclusions made under subsection 11.17(1) of the *CSIS Act* and on the basis of which the Authorization was made to

conclude whether they are reasonable. Subsection 11.17(1) sets out three mandatory criteria that the Director must be satisfied have been met:

i. the dataset is a foreign dataset;
ii. the retention of the dataset is likely to assist the Service in the performance of its duties and functions under sections 12, 12.1, 15 or 16; and
iii. the Service has complied with its obligations under section 11.1 to take reasonable measures to ensure the deletion of information relating to the physical or mental health of an individual and the removal of Canadian-related information from the dataset.

A. Are the Director's conclusions reasonable?

i. The dataset is a foreign dataset

22. A foreign dataset must predominantly relate to individuals who are not Canadians and who are outside Canada, or corporations that were not incorporated or continued under the laws of Canada and that are outside Canada (ss 11.01 and 11.07(1)(c), *CSIS Act*).

23. After the collection of a dataset and during the evaluation period (which was 90 days at the time the Foreign Dataset was collected, and has been increased to 180 days since amendments to the *CSIS Act* came into force in June 2024), designated CSIS employees have the responsibility to confirm whether a foreign dataset predominately relates to non-Canadians outside of Canada. Given the volume of records in most datasets, the evaluation generally uses a combination of manual and automated processes. Although the evaluation seeks to identify Canadian-related information, certain records, by their nature, may not include sufficient indicators that would allow a designated CSIS employee to confirm whether they relate to Canadians or persons in Canada. As I mentioned in Decision 2200-A-2024-03, the evaluation may not lead to absolute certainty that there are no Canadian-related records (para 47). Rather, the purpose of the evaluation is to be able to confidently confirm whether the information in the dataset, as a whole, predominantly relates to non-Canadian individuals or to non-Canadian corporations not in Canada. Given the longer evaluation period since the June 2024 legislative amendments – an amendment I supported to allow

CSIS to more effectively meet its obligations – I expect the evaluation of datasets to be thorough.

24. After determining that the Foreign Dataset contains personal information, the Director concludes that the dataset satisfies the definition of a foreign dataset on two principal grounds. First, he relies on the general nature of where the personal information originates: [...], and the information [...]. Second, the Director relies specifically on the evaluation of the dataset carried out by designated CSIS employees, which revealed that relatively very little information was identified as being potentially Canadian-related, and subsequently deleted.

25. I am satisfied that the record justifies the Director's conclusion that the dataset meets the definition of a foreign dataset. Although the nature of the information does not exclude with certainty the possibility that personal information related to Canadians or persons in Canada may be included, it supports the conclusion that the vast majority of it will not be Canadian-related. Further, I am of the view that the steps taken to identify and remove Canadian-related information, as described below, were sufficiently robust. These steps demonstrated that even before the removal of the identified Canadian-related information, the dataset predominantly related to non-Canadians outside of Canada.

ii. The retention of the dataset is likely to assist CSIS

26. The record includes an explanation setting out that the "likely to assist" threshold entails that there is a reasonable probability that the retention will assist the Service in any of its duties and functions under sections 12, 12.1, 15 or 16 of the *CSIS Act*. It is a threshold that is higher than a mere possibility, but lower than the standard of balance of probabilities.

27. The Director's conclusions do not specifically refer to the explanation in the record, although he mentions that the documentation prepared for him informed his decision.

28. To support that the retention of the Foreign Dataset is likely to assist CSIS, the Director first refers to CSIS' explanation that certain activities of the foreign state from which the information in the dataset originates relate to the 2019-2021 Intelligence Priorities – which

were in effect at the time the CSIS Memorandum was prepared. The Director explains that the Intelligence Priorities for 2023-2025 also include the specific 2019-2021 priorities to which the Authorization relates, even if not structured in the same manner. Having thoroughly reviewed both versions, I find the Director's explanation on this issue reasonable.

29. The Director then relies on information in the CSIS Memorandum to explain that the Foreign Dataset is likely to assist CSIS in the performance of duties and functions under sections 12, 12.1, 15 and 16. For each legislative provision, the Director explains how the Foreign Dataset will be useful, [...]. Taking into account the nature of the information in the Foreign Dataset, I am satisfied that the Director is justified in claiming that the Foreign Dataset will likely assist CSIS in this manner.

30. The Director mentions in his cover letter that the Foreign Dataset remains useful even though it was collected prior to the coming into force of the dataset regime in 2019 because some of the information it contains does not change over time. The record also includes a briefing note with additional reasons for which the information in the Foreign Dataset remains relevant. Although it would have been preferable for the Director to address the issue in his conclusions, I accept that he considered it and find his rationale reasonable.

31. The Director does not discuss whether he is satisfied that CSIS had grounds to believe that the Foreign Dataset was relevant when it was collected. Given the explanation in the CSIS Memorandum of how the Foreign Dataset was acquired as well as its origins, I understand that the Director had no reason to raise particular concerns about its collection. For future authorizations, I note that it would be preferable for the Director to include a comment to that effect in his conclusions.

32. The Director's conclusions establish a logical nexus between the information in the Foreign Dataset on the one hand, and CSIS' duties and functions on the other. The conclusions also establish a clear link with the Intelligence Priorities. As a result, I am satisfied that the Director's conclusions are reasonable that the Foreign Dataset is likely to assist CSIS.

iii. CSIS has complied with its continuing obligations under section 11.1 of the CSIS Act

33. Pursuant to subsection 11.1(1) of the *CSIS Act*, CSIS has two continuing obligations in respect of a foreign dataset. It must take reasonable measures to ensure that:

    a) information in which there is a reasonable expectation of privacy that relates to the physical or mental health of an individual is deleted; and
    b) information that by its nature or attributes relates to a Canadian or a person in Canada is removed.

34. When Canadian-related information that is removed from a foreign dataset, pursuant to subsection 11.1(2), CSIS must either destroy it, collect it as a Canadian dataset, or add it as an update to an existing Canadian dataset.

35. Prior to the June 2024 legislative amendments, the text of subsection 11.1(1) indicated that CSIS "shall" delete or remove this information from a dataset. The new text states that CSIS "shall take reasonable measures to ensure" its deletion or removal. In setting out the subsection 11.1(1) requirements, the CSIS Memorandum as well as the Director's conclusions still reflect the previous text. The record does not address the legislative changes. As mentioned earlier, given that the amendments are in force, I must conduct my review using the current version of the legislation.

36. The object of the review must now focus on the measures taken by CSIS rather than the results of the evaluation. I am of the view this legislative amendment lowers the applicable threshold as the text no longer requires certainty that the information at issue has been deleted or removed. Thus, if the Director's conclusions were reasonable under the previous text, I consider that they will be reasonable under the current legislation.

37. Nonetheless, I am not convinced that the amendments have actually changed CSIS' obligations under subsection 11.1(1). Indeed, in past authorizations, the Director relied on the measures taken by CSIS to find that the subsection 11.1(1) obligations were satisfied. The Intelligence Commissioner's jurisprudence also recognized that to give effect to the obligations, it was necessary to examine those measures:

> The fact that the legislative provision calls for a "continuing" obligation, and requires that CSIS notify the National Security and Intelligence Review Agency when Canadian-related information is removed from the dataset, entails, in my mind, that the process should be serious, comprehensive and effective, but that it does not require perfect results. (Decision 2200-A-2023-04, para 56)

38. I will return to the issue of legislative amendments in my remarks.

a) Obligation to take reasonable measures to ensure the deletion of any information related to the physical or the mental health of an individual – paragraph 11.1(1)(a)

39. […]. CSIS examined […] taking into consideration the nature of the dataset to determine whether they contained information related to the physical or mental health of individuals. CSIS assessed that […] qualified as including possible health-related information. […], CSIS concluded that the Foreign Dataset did not contain any health-related information.

40. It also appears from the record that designated CSIS employees did not identify any personal information that is not relevant to the performance of its duties and functions and could be deleted without affecting the integrity of the dataset (s 11. 07(6), *CSIS Act*).

41. The Director explains that he is satisfied with the steps taken by CSIS to identify health-related information. The Director acknowledges the continuing nature of CSIS' obligations to delete any information related to the mental or physical health of an individual from the Foreign Dataset.

42. I find that the Director's conclusions to that effect are reasonable. The steps taken by CSIS were both logical and clear. Indeed, given the manner in which the information is organized in the Foreign Dataset as well as the assessment that the information […] accurately reflects […], the Director's conclusion that CSIS has met its obligations under paragraph 11.1(1)(a) of the *CSIS Act* is well supported and articulated.

b) Obligation to take reasonable measures to ensure the removal of any information that by its nature relates to a Canadian or a person in Canada – paragraph 11.1(1)(c)

43. As defined in section 11.01 of the *CSIS Act*, a "Canadian" in the context of the dataset regime means a Canadian citizen, a permanent resident or corporation incorporated or continued under the laws of Canada or of a province.

44. The Director relies on the process described in the CSIS Memorandum to conclude that CSIS has complied with its obligation to remove Canadian-related information from the Foreign Dataset. Although the CSIS Memorandum describes the process, I note that the Briefing Note regarding the removal of Canadian-related records dated May 9, 2022, provides additional details on the process in response to the Director's request, in December 2019, to outline the methodology used by the Service. There is no information in the record explaining the considerable delay between the request and the Briefing Note.

45. The CSIS Memorandum and the Briefing Note explain that CSIS has developed automated processes to apply to datasets to identify Canadian-related information within certain categories of information. The Foreign Dataset did not contain […]. However, a […] review of the Foreign Dataset identified […] that contained categories of information that could potentially be identified as Canadian-related. Designated CSIS employees used an […] process to search […]. Canadian-related information was identified with respect to two categories of information: […]. This information was removed and deleted from the Foreign Dataset.

46. I note that even though the Briefing Note provides additional information on the process followed by CSIS to identify Canadian-related records, some of the information it contains is contradictory. Paragraph 5 of the note explains that "[t]he "other" category […] which, […] was assessed by the designated employee as also conducive to the identification of Canadian data subjects." Later in the same paragraph, however, the note states that "[…] – those not assessed as conducive to the identification of potential Canadian data subjects – were tagged as "other"." The contradiction contributes to a lack of clarity with respect to whether the "other" category is being used for […] that could potentially contain Canadian-related data,

or for [...] that have been assessed as not containing Canadian-related data. I note, however, that paragraph 11 of the Briefing Note suggests that [...] tagged as "other" are those conducive to identifying Canadian-related data, somewhat palliating the lack of clarity.

47. Further, I am of the view that the statistics provided in the Briefing Note could be presented more clearly. The table included in the Briefing Note shows that [...] have been included in the "other" category. Yet the briefing note only refers to [...] that have been identified as possibly containing Canadian-related information [...]. The facts in the record do not explain which information in the other [...] warranted their inclusion in the "other" category.

48. Despite the lack of clarity in the Briefing Note, the Director finds "the steps outlined by CSIS to identify this information were reasonable" to conclude that the Service's obligations under paragraph 11.1(1)(c) and subsection 11.1(2) were met. As I mentioned earlier, even though the obligation was set out using the previous subsection 11.1(1) text ("shall"), the Director makes his finding using the language of "reasonable steps" – similar to the "reasonable measures" found in the current version. This again suggests that the amendments to subsection 11.1(1) do not constitute a substantive change, and instead more appropriately reflect the manner in which CSIS can practically fulfill its obligation to remove Canadian-related information.

49. Taking into account the nature of the information in the dataset, I find that the Director's conclusions relating to CSIS' obligation to remove Canadian-related information reasonable. Indeed, despite the lack of clarity in the briefing note, I am of the view that the description in the record allows the Director to understand that CSIS took the measures that could be taken to identify Canadian-related information – and his conclusions were therefore reasonable.

iv. The update provisions are reasonable

50. The *CSIS Act* requires the authorization to retain a foreign dataset to specify the manner in which CSIS may update it. Even though the *CSIS Act* does not explicitly state that the Director's conclusions concerning how a foreign dataset could be updated is subject to the Intelligence Commissioner's review, it nevertheless forms part of the reasonableness review. As stated in the Intelligence Commissioner's jurisprudence, CSIS cannot have *carte blanche*

to modify and update a dataset after its authorization has been approved. Reviewing the reasonableness of the Director's conclusions related to proposed update provisions ensures that these will not change the nature of the authorized dataset and that the updates will satisfy the threshold of "likely to assist" CSIS in the performance of its duties and functions.

51. The Director approved an update comprising of information corresponding to all or some of the existing [information]. Effectively, then, […] would allow for additional collection of the same type of information. The Director does not provide additional explanation for the update provisions.

52. Given the nature of the update provisions, I find the Director's conclusion reasonable, even in the absence of additional explanation. Indeed, any update to the Foreign Dataset would likely assist CSIS in the same manner as the existing information in the Foreign Dataset, as it would constitute the same type of information. Therefore the rationale for the update is the same as for the retention of the Foreign Dataset.

V. REMARKS

53. I would like to make the following two remarks which do not alter my findings regarding the reasonableness of the Director's conclusions.

A. Continuing obligations

54. Both the Director and CSIS recognize in the record that CSIS has an ongoing obligation to delete information related to a Canadian or a person in Canada if it is identified at a later time. Indeed, subsection 11.25(b) of the *CSIS Act* requires CSIS to notify the National Security and Intelligence Review Agency (NSIRA) when it removes such information and of the measures that have been taken in respect of that information.

55. Given that this particular dataset […], I think it is useful to note that this continuing obligation is not limited to instances where CSIS queries or exploits a dataset and identifies Canadian-related records. The obligation also applies should there be any technological development or new information that would allow CSIS to identify previously unidentifiable Canadian-related records.

56. As mentioned in the decision, there may be records in a dataset for which it may not be possible to confirm with certainty – at this time – that they are not Canadian-related. However, with the passage of time, CSIS may acquire new information or develop novel methods to evaluate a dataset. Where applicable, I am of the view that the continuing obligation under paragraph 11.1(1)(c) entails that CSIS has the obligation to apply the new information or novel method to identify any further Canadian-related information in existing foreign datasets.

B. Legislative amendments

57. The legislative amendments to the dataset regime in the *CSIS Act* did not interfere with the reasonableness of the Director's conclusions in relation to the Foreign Dataset. Nevertheless, legislative changes or developments in case law that may be relevant to an authorization – including to CSIS policies and practices – should be reflected in the record before the Director and myself, if only to demonstrate that there has been no impact. Indeed, as the decision maker, it is the Director's responsibility to interpret how the changes may impact CSIS' activities. There is no doubt the Director was familiar with these particular legislative changes – as evidenced by testimony before public parliamentary committees. However, the authorization regime set out in the *CSIS Act* requires that the Director's conclusions be supported by the information in the record, which is also what I review when approving, or not, certain CSIS activities. I expect that future records will reflect that legislative changes, or developments in case law, have been considered by CSIS and the Director.

VI. CONCLUSIONS

58. Pursuant to section 17 of the *IC Act*, I am satisfied that the Director's conclusions made pursuant to subsection 11.17(1) of the *CSIS Act* and on the basis of which the retention of the Foreign Dataset was authorized are reasonable.

59. Therefore, pursuant to paragraph 20(2)(a) of the *IC Act*, I approve the Director's authorization to retain the Foreign Dataset.

60. The amendments to the *CSIS Act* increased the maximum period of an authorization to retain a foreign dataset from five to 10 years. The Director authorized the retention of the Foreign Dataset for a five-year period. As a result, pursuant to subsection 11.17(3) of the *CSIS Act*, this authorization expires five years from the day of my approval.

61. As prescribed in section 21 of the *IC Act*, a copy of this decision will be provided to NSIRA 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.

August 8, 2024

(Original signed)
The Honourable Simon Noël, K.C.
Intelligence Commissioner