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

~~SECRET//CEO~~

File: 2200-A-2023-01

INTELLIGENCE COMMISSIONER

DECISION AND REASONS

IN RELATION TO THE DETERMINATION OF CLASSES OF CANADIAN DATASETS PURSUANT TO SUBSECTION 11.03(1) OF THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT* AND SECTION 16 OF THE *INTELLIGENCE COMMISSIONER ACT*

FEBRUARY 15, 2023

Canada

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I. OVERVIEW

1. On January 12, 2023, pursuant to subsection 11.03(1) of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, (*CSIS Act*), the Minister of Public Safety (the Minister) determined, by order, classes of Canadian datasets (the *Determination*).

2. On January 16, 2023, the Office of the Intelligence Commissioner received the *Determination* for my review and approval under the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*).

3. In accordance with section 23 of the *IC Act*, the Minister confirmed in his cover letter that he provided me with all information that was before him when making the *Determination* of classes of Canadian datasets for which collection is authorized.

4. In the *Determination*, the Minister made conclusions for the proposed four classes of Canadian datasets. Based on the information provided to him, the Minister concluded, pursuant to subsection 11.03(2) of the *CSIS Act*, that the querying or exploitation of any dataset in each class could lead to results that are relevant to the performance of CSIS' duties and functions set out under sections 12 (collection, analysis and retention of threats to the security of Canada), 12.1 (measures to reduce threats to the security of Canada) and 16 (collection of information concerning foreign states and persons in Canada).

5. CSIS may only collect Canadian datasets belonging to "approved classes" authorized by the Minister and approved by the Intelligence Commissioner.

6. I am of the view that my *raison d'être* as Intelligence Commissioner is to ensure the preservation of the required balance between national security interests on the one hand, and respect for the rule of law, the *Canadian Charter of Rights and Freedoms (Charter)*, as well as the quasi-constitutional privacy rights of Canadians and persons in Canada, on the other. This will be explained later.

7. It is through this prism, and with the guidance offered by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] that I conducted my quasi-judicial review to determine whether the conclusions of the Minister are reasonable.

8. Having completed my review, I find that the Minister's conclusions in determining the classes of Canadian datasets are not reasonable for the following two reasons:

    i) The breadth of scope of the four classes of Canadian datasets are overbroad. The classes lack some specificity and do not provide parameters that would allow me to better define which datasets are included and excluded.

    ii) Neither the Minister, nor the Director of CSIS, with the exception of general statements and references to the *CSIS Act* found in the record, have provided specific measures such as privacy protection techniques, CSIS policies, procedures or internal framework explaining how the privacy rights of Canadians are being protected.

9. Pursuant to paragraph 20(1)(b) of the *IC Act*, I do not approve the *Determination* of classes of Canadian datasets made by the Minister on January 12, 2023.

10. Consequently, the classes of Canadian datasets found in the *Determination* are not "approved classes".

II. BACKGROUND

11. On December 22, 2022, the Director of CSIS submitted by *Memorandum to the Minister* an *Application* for the determination of classes of Canadian datasets pursuant to subsection 11.03(1) of the *CSIS Act*.

12. In the *Memorandum to the Minister*, the Director indicates that the classes of Canadian datasets being submitted were unchanged from the Minister's previous determination of

January 13, 2022, and approved by my predecessor on January 25, 2022. [redacted]

13. On January 12, 2023, [redacted] the Minister issued his *Determination* authorizing the classes of Canadian datasets, that CSIS is authorized to collect, if deemed reasonable by the Intelligence Commissioner.

14. On January 16, 2023, the Office of the Intelligence Commissioner received the notice and the complete record, including the Minister's *Determination*, the Director of CSIS's *Memorandum to the Minister* and *Application*, as well as all other information that was before the Minister when he made his determination of the classes.

15. On that date, I started the quasi-judicial review of the matter before me, for which I must render a written decision approving or not the *Determination*.

16. Pursuant to paragraph 20(3)(b) of the *IC Act*, such decision must be rendered within 30-calendar days, which is February 15, 2023.

III. LEGISLATIVE CONTEXT

17. In July 2019, *An Act respecting national security matters* (known as the *National Security Act, 2017*) came into force and reshaped Canada's national security framework, as well as introduced new accountability measures.

18. As a result, amendments were made to the *CSIS Act* providing CSIS with the authority to collect, analyse and retain datasets in support of its duties and functions under sections 12, 12.1 and 16 of the *CSIS Act*.

19. This new legislative framework establishing the CSIS dataset regime applies only to datasets that contain personal information as defined in section 3 of the *Privacy Act,* RSC, 1985,

c P-21, and are not directly and immediately related to activities that represent a threat to the security of Canada.

20. The *National Security Act, 2017* also included the enactment of the *IC Act* which created a new quasi-judicial role in the realm of national security and intelligence accountability – the Intelligence Commissioner – to be held by a retired judge of a superior court.

21. The dataset regime is complex. To better understand how it relates to Canadian datasets in this instance, one must consider what is a dataset and what are the four main accountability steps required to enable the collection, retention and use of Canadian datasets. Finally, one must understand the key role of the various players involved, as established in both the *CSIS Act* and the *IC Act*.

22. As the following paragraphs indicate, the dataset regime contains explicit provisions for three types of datasets, which can assist CSIS in meeting operational requirements.

A. Definition of dataset

23. Section 2 of the *CSIS Act* defines a dataset as a collection of information stored as an electronic record and characterized by a common subject matter.

24. As defined in subsection 11.07(1) of the *CSIS Act*, there are three types of datasets:

i) *Publicly available dataset* – was publicly available at the time of collection;
ii) *Canadian dataset* – predominantly relates to individuals within Canada or Canadians (as defined in section 2 of the *CSIS* Act); and
iii) *Foreign dataset* – predominantly relates 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 who are outside of Canada.

25. That said, the matter before me relates only to classes of Canadian datasets. As indicated in the *Memorandum to the Minister*, Canadian datasets can be used, for example, [redacted] As the following will show, four main accountability steps are required to enable the collection, retention and use of Canadian datasets.

B. Accountability Steps

i) Determination of the Classes of Canadian Datasets – Minister of Public Safety

26. Prior to collection, CSIS must seek a ministerial determination of the classes of Canadian datasets. This is the first level of accountability.

27. Consequently, pursuant to subsection 11.03(1) of the *CSIS Act*, at least once every year, the Minister shall by order, determine classes of Canadian datasets for which collection is authorized.

28. In making his determination, the Minister must conclude in accordance with subsection 11.03(2) of the *CSIS Act*, that the querying or exploitation of any dataset in the class could lead to results that are relevant to the performance of CSIS' duties and functions as set out in sections 12 (collection, analysis and retention of threats to the security of Canada), 12.1 (measures to reduce threats to the security of Canada) and 16 (collection of information concerning foreign states and persons in Canada).

29. It is my understanding, that as the Minister, he must also ensure that proper safeguards consistent with the *Charter* are taken into consideration as reflected generally in the *Charter Statement – Bill C-59: An Act respecting national security matters*, June 20, 2017, (*Minister of Justice Charter Statement*) and more specifically in Part 4 – Datasets of the document. I am of the view that this responsibility of the Minister exists at the initial stage and throughout the determination process.

30. Once the Minister determines by order the classes of Canadian datasets, the Intelligence Commissioner is notified for the purposes of his review and approval under the *IC Act* (subsection 11.03(3) of the *CSIS Act*).

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

31. Pursuant to sections 12 and 16 of the *IC Act*, the role of the Intelligence Commissioner is to conduct a quasi-judicial review of the Minister's conclusions to determine whether they are reasonable.

32. To allow for a proper review by the Intelligence Commissioner, the Minister is required by law (section 23 of the *IC Act*) to provide all information that was before the decision maker in making his or her determination of classes of Canadian datasets. As established by the Intelligence Commissioner's jurisprudence, this also includes "any verbal information reduced to writing", including ministerial briefings.[1]

33. The only limit to the Intelligence Commissioner's right of access would be Cabinet Confidences as set out in section 26 of the *IC Act*.

34. The Intelligence Commissioner reviews the entire record submitted by the Minister to determine whether it is complete. Once this has been confirmed, the Intelligence Commissioner, guided by the Supreme Court of Canada in *Vavilov*, reviews the conclusions of the Minister using the administrative law review standard of reasonableness. I will further discuss the reasonableness standard in the section titled Standard of Review.

35. As reflected in the *Minister of Justice Charter Statement*, the role of the Intelligence Commissioner ensures an independent consideration of Canadians privacy rights and national security objectives. I will elaborate on this further in my analysis.

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

36. Following the quasi-judicial review, the Intelligence Commissioner will either determine that the conclusions were reasonable or not reasonable.

37. The determination of classes of Canadian datasets is only valid once it is approved by the Intelligence Commissioner in a written decision. This creates a further level of accountability regarding the types of Canadian datasets CSIS is authorized to collect under the dataset regime.

38. As such, if the Intelligence Commissioner finds that the conclusions of the Minister are reasonable, he or she issues a written decision approving the ministerial determination of the classes of Canadian datasets.

39. Once approved, each class of Canadian datasets becomes known as an "approved class". As defined in section 11.01 of the *CSIS Act*, an approved class "means a class of Canadian datasets, the collection of which is determined to be authorized by the Minister under section 11.03 and that has been approved by the Commissioner under the *Intelligence Commissioner Act*".

40. Should the Intelligence Commissioner find that the conclusions of the Minister are not reasonable, he or she then issues a written decision not approving the classes of Canadian datasets.

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

iii) Evaluation of the Canadian Dataset Collected – Designated CSIS Employee

42. Prior to collecting a Canadian dataset, CSIS must be satisfied that it is relevant to the performance of its duties and functions under sections 12, 12.1 and 16 of the *CSIS Act*, and that it belongs to an "approved class" as previously defined. Determining that a Canadian dataset falls within an "approved class" consists of another layer of accountability.

43. Furthermore, CSIS must evaluate a Canadian dataset within 90 days from the time of collection. Section 11.07 of the *CSIS Act* governs how a CSIS employee, who has been designated the Director (designated CSIS employee) can access the dataset during the 90-day evaluation period.

44. Under usual circumstances, the designated CSIS employee can consult the newly acquired Canadian dataset, which must fall within one of the "approved classes" for the purpose of making an application for a judicial authorization to retain it. This will be discussed further in the fourth step below.

45. Of note, during the 90-day evaluation period, the designated CSIS employee cannot query nor proceed with the exploitation of the Canadian dataset. However, in exigent circumstances where life, individual safety, or information of significant importance to national security is at risk of being diminished or lost by the delay (paragraph 11.22(1)(b) *CSIS Act*), CSIS may query the dataset when specific requirements are met. This will be discussed further in Section C – Exigent Circumstances of this decision.

46. For this review, I will not list all the statutory responsibilities conferred to a designated CSIS employee, nor list all the activities that they are authorized to carry out. However, I note that for the purpose of identifying and organizing a Canadian dataset, a designated CSIS employee must, pursuant to paragraph 11.07(5)(d) of the *CSIS Act*, carry out "the application of privacy protection techniques".

iv) Retention of a Canadian Dataset – Designated Judge of the Federal Court of Canada

47. To lawfully retain a Canadian dataset that was collected, CSIS must obtain a judicial authorization from the Federal Court of Canada (section 11.13 of the *CSIS Act*). As an additional layer of accountability, the Director of CSIS or a designated CSIS employee must first obtain the Minister's approval, prior to making the application to the Court (section 11.12 of the *CSIS Act*.)

48. Subsection 11.13(2) of the *CSIS Act* lists the contents of an application for a judicial authorization to retain a Canadian dataset. I will not repeat the complete list, but would like to note the following two elements, which must be set out in the application:

    i) Any privacy concern which, in the opinion of the Director of CSIS or the designated CSIS employee who makes the application, is exceptional or novel (paragraph 11.13(2)(d) of the *CSIS Act*); and
    ii) If the Intelligence Commissioner has approved the Director's authorization on the basis of exigent circumstances, the content of that authorization, the results of the authorized query and any actions taken after obtaining those results (paragraph 11.13(2)(f) of the *CSIS Act*).

49. As stipulated in subsection 11.13(1) of the *CSIS Act*, a designated judge of the Federal Court of Canada may authorize the retention of a Canadian dataset if satisfied that its retention is likely to assist CSIS in the performance of its duties or functions under sections 12, 12.1 and 16 of the *CSIS Act*; and that CSIS has complied with its continuing obligations under section 11.1 which are to: (a) delete any information in respect of which there is a reasonable expectation of privacy that relates to the physical or mental health of an individual; and (b) delete any information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries.

50. A judicial authorization can only be valid for a period of not more than two years (subsection 11.14(2) of the *CSIS Act*).

51. Following the judicial authorization, a designated CSIS employee may pursuant to section 11.2 of the *CSIS Act* query and exploit a Canadian dataset in the following circumstances:

    i) To the extent that it is strictly necessary to assist CSIS in the performance of its duties and functions under section 12 of the *CSIS Act* (collection, analysis and retention of threats to the security of Canada) and section 12.1 of the *CSIS Act* (measures to reduce threats to the security of Canada); and

ii) If the query or exploitation is required to assist the Minister of National Defence or the Minister of Foreign Affairs in accordance with section 16 of the *CSIS Act* (collection of information concerning foreign states and persons in Canada.

52. As defined in section 2 of the *CSIS Act*, a query means a specific search, with respect to a person or entity, of one or more datasets, for the purpose of obtaining intelligence. An exploitation means a computational analysis of one or more datasets for the purpose of obtaining intelligence that would not otherwise be apparent.

C. Exigent Circumstances – The Exception to the Rule

53. In accordance with subsection 11.22(1) of the *CSIS Act*, the Director of CSIS may authorize a designated CSIS employee to query a Canadian dataset that belongs to an "approved class", prior to obtaining a judicial authorization for retention by the Federal Court of Canada.

54. In order to do so, the Director of CSIS must first conclude in an authorization, that (a) the collected dataset is relevant to CSIS' duties and functions pursuant to sections 12, 12.1 and 16; and (b) that there are exigent circumstances that require a query of the dataset.

55. Exigent circumstances may occur in two instances (paragraph 11.22(1)(b) of the *CSIS Act*):
    i) to preserve the life or safety of any individual, or
    ii) to acquire intelligence of significant importance to national security, the value of which would be diminished or lost if CSIS is required to comply with the judicial authorization process.

56. Secondly, pursuant to section 18 of the *IC Act*, prior to the query taking place, the Intelligence Commissioner must be satisfied that the conclusions of the Minister are reasonable and approve the ministerial authorization.

57. [redacted] the Director of CSIS issued an authorization for a designated CSIS employee to query a Canadian dataset in exigent circumstances, which was subsequently approved by my predecessor.

58. As CSIS wanted to retain two datasets part of the queried Canadian dataset in question, in November 2021, CSIS submitted its first application – since the dataset regime was assented to in July 2019 – for a judicial authorization to retain them.

59. In March 2022, Justice Richard Mosley (Justice Mosley) of the Federal Court of Canada in *Canadian Security Intelligence Service Act (CA) (Re)*, 2022 FC 645, authorized CSIS to retain both datasets for a period of two years.

60. As stated by Justice Mosley in paragraph 6 of his decision, the Canadian dataset regime is "detailed and complex". I add, that it also requires from CSIS multiple considerations. In addition, the Minister must constantly be aware of national security objectives consistent with the application of Canadian privacy rights from the initial stage of the determination process.

61. With this in mind, let us proceed to the standard of review to be applied when reviewing the Minister's conclusions in the *Determination* of classes of Canadian datasets for which CSIS is authorized to collect, if deemed reasonable by the Intelligence Commissioner.

IV. STANDARD OF REVIEW

62. Sections 12 and 16 of the *IC Act* stipulate that the Intelligence Commissioner must review whether the Minister's conclusions are reasonable.

63. The term "reasonable" is neither defined in the *IC Act* nor in the *CSIS Act*. However, it is a term that has been associated in administrative law jurisprudence with the process of judicial review of administrative decisions.

64. In accordance with subsection 4(1) of the *IC Act*, the Intelligence Commissioner must be a retired judge of a superior court. However, the Intelligence Commissioner is not a court of law. As such, he or she does not perform a "judicial review" but rather a "quasi-judicial review" of the Minister's conclusions, who is acting as an administrative decision maker.

65. As established by the Intelligence Commissioner's jurisprudence, when Parliament used the term "reasonable" in the context of a quasi-judicial review of administrative decisions, it intended to give to that term the meaning it has been given in administrative law jurisprudence. As such, I will apply the standard of reasonableness to my review.

66. The leading case regarding the standard of review to be applied in an administrative law setting is the Supreme Court of Canada's decision in *Vavilov*. In it, the majority of the Supreme Court of Canada clearly indicated that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits.

67. When making a determination as to whether the conclusions issued by the Minister are reasonable, I am guided by the following passage found at paragraph 99 in *Vavilov*:

> 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: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

68. In its *Vavilov* decision, the majority of the Supreme Court of Canada also stated that a "reasonable decision is one that is both based on internally coherent reasoning and justified in light of the legal and factual constraints that bear on the decision" (*Vavilov* para 99).

69. In order to better understand the role of the Intelligence Commissioner when conducting a quasi-judicial review of a ministerial order determining classes of Canadian datasets, it is important to refer to the objectives of Bill C-59, the *National Security Act, 2017*, SC 2019,

c 13 and its Preamble, which led to the creation of the *IC Act* and made important amendments to the *CSIS Act*.

70. I have reproduced below some of the relevant portions which I consider relate directly to my role as Intelligence Commissioner:

> Preamble
>
> Whereas a fundamental responsibility of the Government of Canada is to protect Canada's national security and the safety of Canadians;
>
> Whereas that responsibility must be carried out in accordance with the rule of law and in a manner that safeguards the rights and freedoms of Canadians and that respects the *Canadian Charter of Rights and Freedoms*;
>
> Whereas the Government of Canada is committed to enhancing Canada's national security framework in order to keep Canadians safe while safeguarding their rights and freedoms;
>
> …
>
> Whereas enhanced accountability and transparency are vital to ensuring public trust and confidence in Government of Canada institutions that carry out national security or intelligence activities;
>
> Whereas those institutions must always be vigilant in order to uphold public safety;
>
> Whereas those institutions must have powers that will enable them to keep pace with evolving threats and must use those powers in a manner that respects the rights and freedoms of Canadians.

71. It is interesting to note in the excerpts of the Preamble quoted above, the important balancing between national security interests and respect for the "rule of law" and the "rights and freedoms of Canadians". In seeking to preserve this balance, Parliament created the role of the Intelligence Commissioner as a gatekeeper and as an overseer of Ministerial Determinations as they relate to classes of Canadian datasets in this matter.

72. In light of the above, I believe that at the stage of determining if the Minister's conclusions are reasonable in the context of national security, I am to carefully consider and weigh the important privacy and other interests of Canadians and persons in Canada. I consider this to be the *raison d'être* of my role as the Intelligence Commissioner in relation to classes of Canadian datasets.

73. In support, I would like to quote from the *Minister of Justice Charter Statement*, where the Minister of Justice describes the role of the Intelligence Commissioner as follows:

> In addition, Part 2 of Bill C-59, the *Intelligence Commissioner Act*, would establish an independent, quasi-judicial Intelligence Commissioner, who would assess and review certain Ministerial decisions regarding intelligence gathering and cyber security activities. <u>This would ensure an independent consideration of the important privacy and other interests implicated by these activities in a manner that is appropriately adapted to the sensitive national security context.</u>
>
> …
>
> A key change proposed in Bill C-59 is that the activities would also have to be approved in advance by the independent Intelligence Commissioner, who is a retired superior court judge with the capacity to act judicially. (emphasis added)

74. I am of the view that my independent quasi-judicial review must take into consideration the reasonableness of the Minister's conclusions as they relate to the privacy interests of Canadians and persons in Canada with other relevant and important interests in the context of national security.

75. This means that the review of this matter must not only be done in accordance with the appropriate principles mentioned above but it must also take into consideration the requirements of the *IC Act* and the *CSIS Act*. As such, a quasi-judicial review is an innovative concept in Canadian law, and not a judicial review per se. Consequently, in the analysis of my reasons, I must consider the different roles and attributes of the Minister, the Director of CSIS and myself as well as the overall objectives of both acts.

76. I will now proceed with my analysis of the Minister's conclusions.

V. ANALYSIS

77. In accordance with section 16 of the *IC Act*, I must review whether the Minister's conclusions – made under subsection 11.03(2) of the *CSIS Act* and on the basis of which the *Determination* was made – are reasonable.

78. In the matter before me, the Minister determined by order that CSIS is authorized to collect the following four classes of Canadian datasets, which have not been made public:

[redacted]

79. As indicated earlier, for the purposes of this review, I consider my *raison d'être* as Intelligence Commissioner is to ensure the preservation of the required balance between national security interests on the one hand, and respect for the rule of law, the *Charter*, as well as the quasi-constitutional privacy rights of Canadians and persons in Canada, on the other.

80. In light of the record before me, I find the Minister's conclusions in determining the classes of datasets not reasonable for the following grounds:

    i) The breadth of scope of the four classes of Canadian datasets are overbroad. The classes lack some specificity and do not provide parameters that would allow me to better define which datasets are included and excluded.

ii) Neither the Minister, nor the Director of CSIS, with the exception of general statements and references to the *CSIS Act* found in the record, have provided specific measures such as privacy protection techniques, CSIS policies, procedures or internal framework explaining how the privacy rights of Canadians are being protected.

81. I will now provide a further explanation of each ground.

i) The Breadth of Scope of the Classes of Canadian Datasets are overbroad

82. In his *Memorandum to the Minister*, the Director of CSIS explains that based on an evaluation of current operational plans, and consistent with its previous submission which was approved by my predecessor in January 2022, the same classes of Canadian datasets continue to meet the operational requirements of CSIS again this year.

83. Justice Mosley made the following comments at paragraph 11 of his decision (*Canadian Security Intelligence Service Act (CA) (Re),* 2022 FC 645) regarding the broad scope of the classes of Canadian datasets approved by my predecessor in February 2021, which are the same as those approved in January 2022:

> The approved classes of datasets have not been made public but the decisions by the Minister and the Intelligence Commissioner were included as exhibits to the Applicant's affidavit. <u>They are exceptionally broad in scope</u> and I had no difficulty accepting that the datasets in question in this application fell within them. <u>Indeed it is difficult to see how any collection of personal information might be excluded given the breadth of their scope.</u> (emphasis added)

84. I agree with Justice Mosley that the breadth of scope of the classes of Canadian datasets are overbroad. That said, it is my understanding that Justice Mosley was not provided with the full record supporting my predecessor's two decisions in relation to the classes of Canadian datasets. It is my opinion that, even if he did have access to the full record, his comments would be the same. Furthermore, I would be remiss not mention that when rendering his decisions, my predecessor did not have the benefit of Justice Mosley's significant comments.

85. In reviewing the record in this matter, I noticed that Justice Mosley's comments are not addressed. I trust that if the Minister had not been made aware of the comments, he is now alive to them.

86. I appreciate that the implementation of the dataset regime is still at an early stage and that the classes of Canadian datasets determined by CSIS cannot be explicitly circumscribed. As indicated at pages 2 and 3 of the *Memorandum to the Minister*, it is CSIS's position that:

> The classes must be both specific and sufficiently broad to guide Service dataset collection efforts, given that the precise nature of potentially useful datasets may not be known in detail prior to collection. Narrowly defined classes could unintentionally preclude or delay the collection of operationally relevant datasets.

87. I agree with this statement. Nonetheless, I am of the view that the classes are much too broad and non "specific" that it is difficult, if not impossible, to determine which datasets are included or excluded from the classes of Canadian datasets. As stated by Justice Mosley in paragraph 11 of his decision: "Indeed it is difficult to see how any collection of personal information might be excluded given the breadth of their scope." The record before me does not support a different point of view.

88. I have noted that CSIS has included in the record a diagram titled *Interaction of Proposed Classes & Application of Relevancy – In order to collect a Canadian dataset, CSIS must ensure it belongs to a class and is relevant to its duties and functions*, illustrating the application of both the collection relevance tests and limits of the classes of Canadian datasets. This document relates to the [redacted] It provides examples of the datasets that CSIS could collect, those that are excluded because they belong to a class but are not relevant or those that are relevant but do not belong to one of the classes. This type of information is helpful for the Minister and myself to understand the type of personal information contained in the datasets. Obtaining similar diagrams for all the classes and more explanations on the use of the diagrams would have also been beneficial.

89. As stated in paragraph 98 of *Vavilov*:

> Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

90. While the record provides generalities that supports the objective of broadness of the said classes, it does not support the one of specificity ("specific"). In fact, it does not clearly specify the parameters for each class nor provide tangible examples which would allow the Minister and myself to ascertain which datasets would potentially fall within the class, and those that should be excluded from the class. Identifying parameters of inclusion and exclusion of the classes would allow for a proper balancing between the need for the class to be "sufficiently broad" as well as being "specific".

91. Currently, there is no balancing in the record between the objectives of broadness and specificity. Such balancing between these two objectives should be an "essential element" of the Minister's conclusions, which is not addressed in the record nor can it be inferred from it.

92. As indicated in *Vavilov*, I am reminded that in conducting a reasonableness review, I must begin with the principle of judicial restraint and demonstrate a respect for the distinct role of the Minister, who is the administrative decision maker (*Vavilov* at para 13). In applying the standard of review of reasonableness I must refrain from deciding itself the issues that were before the administrative decision maker. In other words, it does not ask what decision I would have made in place of the Minister, nor conduct a *de novo* analysis or seek to determine the "correct" solution to the problem (*Vavilov* at para 83).

93. While I have taken into account the concept of deference, I find that the conclusions of the Minister do not deal with an essential element of what the conclusions should consider. As a result of that, I find that the conclusions do not reflect the requisite degree of justification, transparency and full fledge intelligibility that is required on a topic of such importance. They contain flaws that are sufficiently central or significant to render the decision unreasonable (*Vavilov* at para 100).

94. In relation to this ground, I am not satisfied that the Minister's conclusions are reasonable.

95. Now, let us proceed with the other ground of unreasonableness.

ii) Neither the Minister, nor the Director of CSIS have provided specific measures explaining how privacy rights of Canadians would be protected

96. To be meaningful, the classes of Canadian datasets must be more precisely defined and provide additional key information at the initial stage of the determination of classes of Canadian datasets. Specifically, significant considerations regarding the protection of Canadians' personal information must be included in the record and most importantly in the Minister's conclusions.

97. As mentioned earlier, the *Minister of Justice Charter Statement* provides that the role of the Intelligence Commissioner is to carefully consider and weigh the important privacy and other interests of Canadians and persons in Canada within the context of national security. Similarly to the Minister, this role also begins at the determination process of classes of Canadian datasets.

98. I am of the opinion that CSIS generally knows or should know how it intends to protect the privacy interests of Canadians and this information should be included in the *Application* to the Minister. Specifically, CSIS should identify specific measures such as privacy protection techniques, procedures and internal framework explaining how privacy rights of Canadians would be protected.

99. My review of the record shows that the Minister's conclusions and the record are mainly silent on this important issue. In fact, the Minister and the Director of CSIS rely on general statements from the legislative framework to identify these measures. They do not provide specific details on the measures implemented by CSIS to meet these legislative requirements.

100. For example, at pages 3 and 4 of the *Memorandum to the Minister*, the Director of CSIS states the following:

> The determination of the classes is an initial step intended to provide a first layer of accountability with regard to the types of Canadian datasets CSIS will be authorized to collect under the framework. The framework contains a number of additional safeguards, with Canadian datasets afforded the highest degree of protective measures. For example, to collect a dataset, the Service must be satisfied that the dataset "is relevant to the performance of its duties and functions." After collection, the framework governs how the dataset can be accessed during the evaluation period and, if thresholds are not met to retain the dataset, it must be destroyed. To retain a Canadian dataset, the Service must first obtain Ministerial approval pursuant to section 11.12 of the *CSIS Act* before submitting its application for judicial authorization to the Federal Court under section 11.13. The Federal Court applies another relevance threshold ("likely to assist") in considering a Service application to retain a Canadian dataset. Finally, the framework sets out record-keeping and reporting requirements, as well as a robust review function by the National Security and Intelligence Review Agency.

101. In his conclusions, at pages 2 and 3, the Minister makes some reference to the importance of the privacy of Canadians when he states the following:

> In particular, it [the legislative framework] contains detailed provisions intended to protect the privacy of Canadians.
> …
> I fulfill an important role in this scheme by ensuring that the Canadian datasets collected and retained by CSIS are justified and that potential impacts on Canadians are taken into account.
> …
> CSIS's collection and use of datasets pursuant to these classes will be subject to the following accountability mechanisms and safeguards that will ensure that these activities are performed in accordance with my expectations:
>
> - The 2019 Ministerial Direction on Accountability (**TAB E**) requires CSIS to notify me and consult with my Deputy Minister regarding the use of novel authorities, techniques or technologies;
> - The National Security and Intelligence Review Agency has a mandate to review any activity carried out by CSIS and provide a report to me on the results; and
> - In his submission for my determination of the classes of Canadian datasets, the Director will continue to inform me how the classes have been used, including examples of how querying or exploiting datasets generated results that were relevant to CSIS's duties and functions.

102. While I agree with these general statements, I find that the classes of Canadian datasets must be more precisely defined for me to understand the rationale underlying the Minister's conclusions. It should include specific information as to how eventual approved Canadian datasets will treat Canadians private information. The record is silent as to specific measures. It limits itself to the legislative framework of the dataset regime.

103. As stated in paragraph 102 of *Vavilov*:

> Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment.

104. I find that the Minister's conclusions and the record as a whole do not provide any specific information such as policies, procedures and mechanisms that may be used by CSIS to address its obligation to protect the privacy interests of Canadians and persons in Canada.

105. At this stage of the determination process, I am of the view that CSIS must know or should know how it intends to protect the privacy interests of Canadians and provide the Minister and myself with the information. Relying on the legislative framework is not sufficient for me to understand the rationale underlying the conclusions of the Minister.

106. When reviewing this ground, I have once again taken into account the concept of deference towards the Minister's conclusions. I reiterate that the protection of the privacy of Canadians is of the utmost importance in the context of national security. This essential element has not been addressed in the Minister's conclusions nor in the record. Consequently, this flaw is sufficiently central or significant to render the Minister's conclusions unreasonable.

107. In relation to this second ground, I am not satisfied that the Minister's conclusions are reasonable.

VI. REMARKS

108. Despite having found that the Minister's conclusions are not reasonable, I would like to make the three additional remarks to assist in drafting of future determinations regarding classes of Canadian datasets.

109. First, it would have been informative for the purposes of this review for the record to explain why the two Canadian datasets, approved for retention for a period of two years by Justice Mosley, [redacted]

110. Second, I have noted that the *Ministerial Direction for Accountability* included in the record, does not mention the quasi-judicial oversight role of the Intelligence Commissioner. Having read a large part of the Hansard on Bill C-59, the role as described by a good number of witnesses including the Minister of the time and his officials was described as being part of this accountability framework.

111. Third, I have noted earlier the complexity of the legislative framework pertaining to the determination of classes of Canadian datasets. Pursuant to section 25 of the *IC Act*, I look forward to receiving any information that may assist in the exercise of the powers and the performance of my duties and functions.

112. I am of the view that the reasons I provided in this decision are not such that they create an unsurmountable task. I trust that they will provide CSIS with some guidance on how to further improve the implementation of the dataset regime and set out its intended use for Canadian datasets. This layer of accountability allows the Canadian public to know that their privacy rights are considered at the initial stage of the determination process and throughout the legislative framework.

VII. CONCLUSIONS

113. Based on my review of the record submitted, I find that the conclusions of the Minister are not reasonable with regard to the *Determination* of Classes of Canadian Datasets, pursuant to subsection 11.03(1) of the *CSIS Act*.

114. Therefore, pursuant to paragraph 20(1)(b) of the *IC Act*, I do not approve the Minister's *Determination* dated January 12, 2023.

115. 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.

February 15, 2023

(Original signed)

The Honourable Simon Noël, K.C.
Intelligence Commissioner