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Commissioner

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File: 2200-B-2021-04

**IN THE MATTER OF AN APPLICATION BY THE
COMMUNICATIONS SECURITY ESTABLISHMENT TO THE MINISTER OF
NATIONAL DEFENCE FOR A FOREIGN INTELLIGENCE AUTHORIZATION FOR
[REDACTED] PURSUANT TO SUBSECTION 26(1) OF THE
*COMMUNICATIONS SECURITY ESTABLISHMENT ACT***

**INTELLIGENCE COMMISSIONER
DECISION AND REASONS**

September 8, 2021

TABLE OF CONTENTS

- I. Overview** 3
 - A. Role of the Minister 3
 - B. Role of the Intelligence Commissioner..... 4
 - i. The Applicable Concept of Reasonableness 4
- III. Analysis** 5
 - A. The Reasonableness of the Minister’s Conclusions..... 5
- IV. Remarks** 6
 - A. Achieved Outcomes 6
 - B. Other Acts of Parliament 8
- V. Conclusion** 9

I. Overview

On August 13, 2021, pursuant to subsection 26(1) of the *Communications Security Establishment Act*¹ (CSE Act), the Minister of National Defence (the Minister) issued a Foreign Intelligence Authorization for [REDACTED]. On August 16, 2021, the Office of the Intelligence Commissioner received the Minister's authorization for my review and approval under the *Intelligence Commissioner Act*² (IC Act). In addition, the record received contained a cover letter from the Minister, a written application from the Chief of the Communications Security Establishment (CSE), which included six annexes, a presentation deck entitled Foreign Intelligence Authorization Overview – [REDACTED], a record of discussion between the Minister and CSE officials concerning CSE's application for this authorization, and the Ministerial Directive to CSE on the Government of Canada Intelligence Priorities for 2021-2023 (MD 2021-2023). The Minister confirmed that all of the materials before him when issuing this authorization were provided to me for my review. The Minister also indicated that the MD 2021-2023 was approved by the Minister after the Chief of CSE had provided him with her application.

Based on the written application provided by the Chief of CSE pursuant to subsection 33(1) of the CSE Act, the Minister concluded, pursuant to subsection 33(2) of the CSE Act, that he had reasonable grounds to believe the Foreign Intelligence Authorization for [REDACTED] [REDACTED] was necessary, and that the conditions set out in section 34 of the CSE Act for issuing it were met. The Minister issued conclusions demonstrating he had reasonable grounds to believe that the proposed foreign intelligence activities are reasonable and proportionate, having regard to the nature of the objective and the nature of the activities, pursuant to subsection 34(1) of the CSE Act. The Minister also considered and concluded that he had reasonable grounds to believe the conditions set out in subsection 34(2) of the CSE Act were met.

Based on my review of the information provided, I am satisfied that the conclusions at issue are reasonable. Consequently, I must approve the Foreign Intelligence Authorization for [REDACTED] [REDACTED] pursuant to paragraph 20(1)(a) of the IC Act.

II. Legislation

A. Role of the Minister

The CSE Act describes the five aspects of CSE's mandate, one of them being the foreign intelligence aspect, set out in section 16 of the CSE Act.

The Minister may, pursuant to subsection 26(1) of the CSE Act, issue a Foreign Intelligence Authorization for [REDACTED] to CSE authorizing it to carry out, on or through the global information infrastructure, the activities specified in the authorization in furtherance of its foreign intelligence mandate. In order to do so, the Minister must first receive a written application from the Chief of CSE.

¹ S.C. 2019, c. 13, s. 76.

² S.C. 2019, c. 13, s. 50.

In order to issue a Foreign Intelligence Authorization for [REDACTED], the Minister must therefore have reasonable grounds to believe, based on the facts presented in the written application of the Chief of CSE, that the authorization is necessary and that the conditions for issuing it are met (subsection 33(2) of the CSE Act).

The Minister must also conclude, in accordance with subsection 34(1) of the CSE Act, that there are reasonable grounds to believe that any proposed activity to be authorized is reasonable and proportionate, having regard to the nature of the objective to be achieved and the nature of the activities, and that the conditions of subsection 34(2) of the CSE Act have been met. In doing so, the Minister must explain his reasons for arriving at the decision that any proposed activity is reasonable and proportionate in this regard.

B. Role of the Intelligence Commissioner

Pursuant to section 12 of the IC Act, the Intelligence Commissioner is responsible, as set out in sections 13 to 15, for reviewing the conclusions on the basis of which certain authorizations are issued under the CSE Act and, if those conclusions are reasonable, approving those authorizations. In this instance, pursuant to section 13 of the IC Act, the Intelligence Commissioner must review whether the conclusions — made under subsections 34(1) and 34(2) of the CSE Act and on the basis of which a Foreign Intelligence Authorization was issued by the Minister under subsection 26(1) of that Act — are reasonable.

This quasi-judicial review of the Intelligence Commissioner must be performed on the basis of all the information, or record, which was before the Minister. Subsection 23(1) of the IC Act requires that the person whose conclusions are being reviewed, the Minister of National Defence in this instance, must provide to the Intelligence Commissioner all the information that was before him when issuing the authorization.

It is noteworthy that it is the conclusions or reasons of the Minister that must be reviewed by the Intelligence Commissioner. The quasi-judicial review regime of the IC Act aims to ensure that the Intelligence Commissioner is satisfied that the conclusions of the Minister, on the basis of which the authorization was issued, are reasonable.

i. The Applicable Concept of Reasonableness

Pursuant to sections 12 and 13 of the IC Act, the Intelligence Commissioner must review whether the Minister's conclusions are reasonable. I will refer to this as the concept of reasonableness.

The term "reasonable" is not defined in either the IC Act or the CSE Act. It is a term, however, that has been associated in jurisprudence with the process of judicial review of administrative decisions. The review by the Intelligence Commissioner is not, as such, a judicial review — the Intelligence Commissioner not being a court of law — even though he or she has to be a "retired judge of a superior court" (subsection 4(1) of the IC Act). Rather, the Intelligence Commissioner is responsible for performing a quasi-judicial review of the Minister's conclusions.

However, I accept that when Parliament used the term “reasonable” in the context of a quasi-judicial review of administrative decisions by a retired judge of a superior court, it intended to give to that term the meaning it has been given in administrative law jurisprudence. In that regard, the Intelligence Commissioner must be satisfied that the Minister’s conclusions bear the essential elements of reasonableness: justification, transparency, intelligibility, and whether they are justified in relation to the relevant factual and legal contexts.³

Moreover, the concept of deference towards the decision maker must be taken into account. In that regard, the legitimacy and authority of administrative decision makers must be recognized and an appropriate posture of respect is to be adopted.⁴

III. Analysis

A. The Reasonableness of the Minister’s Conclusions

The Chief of CSE submitted a written application for a foreign intelligence authorization for [REDACTED]. According to the application, [REDACTED]

The application describes [REDACTED], notably by explaining how CSE acquires information, how it aims to maintain the covert nature of the activities and by describing their limits. The application also states how these activities fulfill the objective of collecting foreign intelligence in accordance with the Government of Canada intelligence priorities, as described in the *Ministerial Directive to CSE on the Government of Canada Intelligence Priorities for 2019-2021*⁶ and the *National SIGINT Priorities List (NSPL)*,⁷ It also establishes how the Chief of CSE proposes to use, analyze, retain and disclose the acquired information.

I note that the Minister concluded he had reasonable grounds to believe, based on the credible and compelling information found in the application and generally in the record, that the Foreign Intelligence Authorization for [REDACTED] was necessary, and that the conditions

³ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 99 [Vavilov] (citing *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at paragraphs 47 and 74; *Catalyst Paper Corp. v North Cowichan (District)*, [2012] 1 SCR 5 at paragraph 13).

⁴ *Ibid* at paragraph 14.

⁵ *Application to the Minister of National Defence for Foreign Intelligence Authorization* – [REDACTED] dated August 11, 2021 page 1, paragraph 3.

⁶ Annex I to the *Application to the Minister of National Defence for Foreign Intelligence Authorization* – [REDACTED] dated August 11, 2021.

⁷ Annex II to the *Application to the Minister of National Defence for Foreign Intelligence Authorization* – [REDACTED] dated August 11, 2021.

for issuing it were met. I am satisfied that the Minister's conclusions are reasonable in determining that the described activities are reasonable and proportionate, having regard to the nature of CSE's objective of collecting foreign intelligence in accordance with the Government of Canada intelligence priorities, which inform the NSPL, and the nature of those [REDACTED]. The conclusions of the Minister serve as a basis for the authorization that he issued, and they are justified, transparent and intelligible.

When assessing whether the activities are reasonable and proportionate, I am of the view that the notion of reasonableness includes an activity that is fair, sound, logical, well-founded and well-grounded having regard to the objective. The notion of proportionality requires that the activity be rationally connected to the objective and minimally impairing on the rights and freedoms of third parties, as well as on their equipment and infrastructures. Also, if necessary to achieve this purpose, measures should be in place to restrict the acquisition and/or the retention of information. In other words, it is a proper balance of the activities having regard to the "proportionate" aspects described in this paragraph.

The Minister's conclusions demonstrate that he understood these notions. In paragraphs 3 to 23 of his conclusions,⁸ the Minister demonstrates how [REDACTED] are reasonable and proportionate. The Minister essentially explains that these activities are reasonable and proportionate, mainly because they are subject to controls and limits that are applied on an ongoing basis and aimed at targets or platforms where those targets are active.

Based on my review of the record submitted, I am satisfied that the Minister's conclusions are reasonable with respect to the proposed [REDACTED].

IV. Remarks

In last year's decision,⁹ I made remarks with respect to the following: [REDACTED] achieved outcomes; and, certain referenced documents not included in the record. I am pleased to note that three of the four items have been addressed, whereas the achieved outcomes item, discussed below, has been partially addressed.

Although I am satisfied that the Minister's conclusions are reasonable, I would like to express my opinion on some aspects of CSE's application, as well as the Minister's conclusions and authorization, to inform them in the future.

A. Achieved Outcomes

In last year's decision, I expressed my opinion on the lack of examples demonstrating achieved outcomes. Specifically, I noted that the application lacked information on achieved outcomes to help establish "the necessity, as well as occasionally the reasonableness and proportionality of the activities to be authorized, foster transparency, and support the Minister in his decision

⁸ *Foreign Intelligence Authorization for [REDACTED]* dated August 13, 2021, pages 2-6.

⁹ *Intelligence Commissioner – Decision and Reasons*, September 24, 2020, pages 6-9, 2200-B-2020-04.

making. Indeed, with the insertion of achieved outcomes in the application, the Minister will be able to confirm, if not bolster, his reasonable grounds to believe that the authorization is necessary.”¹⁰

I also remarked the following:

In this instance, the application states that [REDACTED] provided intelligence on some Government of Canada intelligence priorities and proceeds to list those priorities for which there was reporting. The application also mentions that [REDACTED] [REDACTED] are vital to CSE's ability to fulfill the foreign intelligence aspect of its mandate. Although this arguably speaks to the necessity, reasonableness and proportionality of the activities, the information provided is minimal. There are no examples of achieved outcomes given in the application, nor any explanation of the value of CSE's foreign intelligence reporting based on real facts.¹¹

I am pleased to note that the 2021 application contains specific achieved outcomes. As indicated earlier, the 2020 authorization and application record did not provide specific achieved outcomes for [REDACTED]. This may be, at least for [REDACTED], because the Chief's application noted that “[REDACTED] [REDACTED]”¹² (emphasis added)

[REDACTED]

[REDACTED]

The [REDACTED] are in line with all the other activities that CSE is engaged in under its foreign intelligence mandate. These activities essentially consist of having CSE accessing the Global Information Infrastructure (GII) to acquire information from it. The operations are of a technical nature, i.e. signals intelligence (SIGINT). It is the type of activity that CSE has been performing historically. In fact, subsection 15(1) of the CSE Act describes CSE as the national signals intelligence agency.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰ *Ibid*, page 8.

¹¹ *Ibid*.

¹² *Application to the Minister of National Defence for Foreign Intelligence Authorization* – [REDACTED] [REDACTED] dated August 25, 2020, page 7, paragraph 26, 2200-B-2020-04.

The Minister appears to understand the particularity of [REDACTED].
 [REDACTED] Indeed, in one of his conclusions, the Minister states in part that all [REDACTED] begin with extensive planning, including consultations with subject-matter experts.¹³ In another conclusion, he discusses the fact that complex [REDACTED].¹⁴ When discussing risk assessments, in his conclusions, he refers to the principle of the approval level being commensurate with the risk, i.e., the higher the risk, the higher the approval authority.¹⁵

The Minister appears to be well aware of the sensitivity of these operations given that he requires to be consulted in two specific situations. Indeed, those two situations of the authorization provide that where CSE is planning [REDACTED] CSE must first consult him.¹⁶

The [REDACTED] used for CSE's Foreign Intelligence mandate are of a different nature, as described above. The [REDACTED] are, for their part, in line with CSE's traditional foreign intelligence collection activities. In that regard, I am of the view that the Minister would benefit from a comprehensive overview of the achieved outcomes in order to determine in his conclusions whether these activities are necessary, reasonable and proportionate.

As for [REDACTED] I am of the view that the Minister should benefit, at least initially, from a complete overview of these operations.

B. Other Acts of Parliament

I have remarked in some of my previous decisions, including my most recent one of September 1, 2021, on the absence of a ministerial condition requiring that the Minister be notified in the event that another Act of Parliament, one not listed in the application, including a provision of the *Criminal Code*, be contravened.¹⁷ I noted, however, that subsequent to my initial remark on this issue that the Minister did in fact include such a condition in one of his authorizations.¹⁸

In the current application, the Chief undertakes to notify the Minister if another Act of Parliament, including a provision of the *Criminal Code*, not listed in the application, is contravened in the course of exercising the authorities sought under this authorization.¹⁹

¹³ *Supra* note 8, page 5, paragraph 16.

¹⁴ *Ibid*, paragraph 17.

¹⁵ *Ibid*, paragraph 18.

¹⁶ *Ibid*, page 11, subparagraph 47 c) and page 12, subparagraph 51 d).

¹⁷ *Intelligence Commissioner – Decision and Reasons*, July 30, 2020, page 10, 2200-B-2020-01; *Intelligence Commissioner – Decision and Reasons*, July 20, 2021, page 12, 2200-B-2021-02; *Intelligence Commissioner – Decision and Reasons*, September 1, 2021, page 8, 2200-B-2021-03.


¹⁸ *Intelligence Commissioner – Decision and Reasons*, July 13, 2021, page 8, 2200-B-2021-01.

¹⁹ *Supra* note 5, page 23, paragraph 104.

Despite this undertaking by the Chief, the Minister does not impose such a condition in his authorization. This may simply be an oversight. I remain of the view, however, that in such a case the Minister should include a specific condition that he be notified if there is a contravention by CSE to other Acts of Parliament, including a provision of the *Criminal Code*, not listed in the application.

V. Conclusion

Based on my review of the record submitted, I am satisfied that the ministerial conclusions are reasonable. I therefore must approve the Minister's Foreign Intelligence Authorization for [REDACTED] [REDACTED], dated August 13, 2021, pursuant to paragraph 20(1)(a) of the *Intelligence Commissioner Act*.


The Honourable Jean-Pierre Plouffe, C.D.
Intelligence Commissioner

September 8, 2021.
Date