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File: 2200-B-2023-04

INTELLIGENCE COMMISSIONER

DECISION AND REASONS

IN RELATION TO A FOREIGN INTELLIGENCE AUTHORIZATION FOR [redacted] ACTIVITIES PURSUANT TO SUBSECTION 26(1) OF THE *COMMUNICATIONS SECURITY ESTABLISHMENT ACT* AND SECTION 13 OF THE *INTELLIGENCE COMMISSIONER ACT*

JULY 18, 2023

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I. OVERVIEW

1. This is a decision reviewing the reasonableness of the conclusions of the Minister of National Defence (Minister) authorizing the Communications Security Establishment (CSE) to carry out certain activities in furtherance of its foreign intelligence mandate.

2. As the Government of Canada's (GC) signals intelligence and cryptologic agency, CSE is tasked with acquiring foreign intelligence from or through the global information infrastructure (GII) – essentially the Internet and telecommunications networks, links and devices. The acquired information with foreign intelligence value is disseminated to the GC in accordance with its intelligence priorities.

3. Certain activities that CSE may wish to carry out in order to effectively fulfill the foreign intelligence aspect of its mandate may breach Canadian laws or lead to the incidental collection of information that would infringe on the privacy interests of Canadians or persons in Canada. The *Communications Security Establishment Act*, SC 2019, c 13, s 76 (*CSE Act*), allows CSE to acquire foreign intelligence to further Canada's national interests and security while potentially breaching laws and privacy interests by obtaining a foreign intelligence authorization from the Minister, which must be approved by the Intelligence Commissioner.

4. On June 21, 2023, pursuant to subsection 26(1) of the *CSE Act*, the Minister issued a Foreign Intelligence Authorization for [redacted] Activities (Authorization).

5. On June 22, 2023, 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*).

6. Based on my review and for the reasons that follow, I am satisfied that the Minister's conclusions made under subsections 34(1) and (2) of the *CSE Act* in relation to activities and classes of activities enumerated at paragraphs 42(a), (b), (c), (d) and (e) of the Authorization are reasonable. As explained in my decision, I am not satisfied of the reasonableness of the

Minister's same conclusions in relation to class of activities described at paragraph 42(f) of the Authorization.

7. Consequently, pursuant to paragraph 20(1)(a) of the *IC Act*, I approve the Authorization, except for the class of activities that it lists at paragraph 42(f).

II. LEGISLATIVE CONTEXT

A. *Communications Security Establishment Act*

8. In June 2019, *An Act respecting national security matters* (referred to as the *National Security Act, 2017*, SC 2019, c 13) came into force and established the Intelligence Commissioner. CSE's authorities and duties were also expanded through the creation of the *CSE Act*, which came into force in August 2019.

9. CSE's mandate has five aspects, one of which being foreign intelligence. Foreign intelligence means information or intelligence about the capabilities, intentions or activities of foreign individual, state, organization or terrorist group, as they relate to international affairs, defence or security (s 2, *CSE Act*).

10. As described in section 16 of the *CSE Act*, CSE may acquire, covertly or otherwise, information from or through the GII, including by engaging or interacting with foreign entities located outside Canada or by using any other method of acquiring information. It may also use, analyse and disseminate the information for the purpose of providing foreign intelligence, in accordance with the GC's intelligence priorities.

11. When undertaking these foreign intelligence activities, CSE is subject to limitations and conditions as set out in the *CSE Act*. Most importantly, the activities in question must not be directed at a Canadian or at any persons in Canada and they must not infringe the *Canadian Charter of Rights and Freedoms* (*Charter*) (s 22(1), *CSE Act*).

12. Although CSE's activities are directed at foreign entities outside of Canada, CSE may acquire, use and retain information relating to a Canadian or a person in Canada that was

obtained in an incidental manner. Incidental collection means "that the information acquired was not itself deliberately sought and that the information-acquisition activity was not directed at the Canadian or person in Canada" (s 23(5), *CSE Act*). Pursuant to section 24 of the *CSE Act*, CSE is required to have measures in place to protect the privacy of Canadians and persons in Canada. I note that incidental collection of Canadian information in past foreign intelligence authorizations authorizing the same activities has been minimal.

13. CSE must also not contravene any other Act of Parliament (pursuant to section 50 of the *CSE Act*, Part VI of the *Criminal Code* does not apply in relation to an interception of a communication under a foreign intelligence authorization) or acquire information from or through the GII that interferes with the reasonable expectation of privacy of a Canadian or a person in Canada (s 22(3), *CSE Act*) – unless such activities are approved by the Minister in a foreign intelligence authorization issued under section 26 of the *CSE Act*.

14. More specifically, subsection 26(1) provides that the Minister may issue a foreign intelligence authorization to CSE that authorizes it, despite any other Act of Parliament or of any foreign state, to carry out, on or through the GII, any activity specified in the authorization in the furtherance of the foreign intelligence aspect of its mandate. As for subsection 26(2), it enumerates the activities that may be included in an authorization.

15. Section 33 of the *CSE Act* describes the requirements for the Chief of CSE to apply for a ministerial authorization. The application must be in writing, it must set out the facts that would allow the Minister to conclude that there are reasonable grounds to believe that the authorization is necessary and that the conditions set out in subsections 34(1) and (2) of the *CSE Act* for issuing it are met.

16. The ministerial authorization provides the grounds for which the authorization is necessary as well as the activities or classes of activities that would be authorized for CSE to carry out. The Minister may issue the foreign intelligence authorization if, among other conditions, she concludes the proposed activities are reasonable and proportionate.

17. The ministerial authorization is only valid once approved by the Intelligence Commissioner (s 28(1), *CSE Act*). It is only then that CSE may carry out the authorized activities specified in the authorization.

B. *Intelligence Commissioner Act*

18. Pursuant to section 12 of the *IC Act*, the role of the Intelligence Commissioner is to conduct a quasi-judicial review of the Minister's conclusions on the basis of which certain authorizations, in this case a foreign intelligence authorization, are issued to determine whether they are reasonable.

19. Section 13 of the *IC Act* relating to the issuance of a foreign intelligence authorization states that the Intelligence Commissioner must review whether the conclusions of the Minister made under subsections 34(1) and (2) of the *CSE Act*, on the basis of which the authorization was issued, are reasonable.

20. The Minister is required by law to provide to the Intelligence Commissioner all information that was before her as the decision maker (s 23(1), *IC Act*). As established by the Intelligence Commissioner's jurisprudence, this also includes any verbal information reduced to writing, including ministerial briefings. The Intelligence Commissioner is not entitled to Cabinet confidences (s 26, *IC Act*).

21. In accordance with section 23 of the *IC Act*, the Minister confirmed in her cover letter that all materials that were before her when issuing the Authorization have been provided to me. Thus, the record before me is composed of:

    a. The Authorization dated June 21, 2023;
    b. The Chief's Application dated May15, 2023, which includes seven annexes;
    c. Briefing Note from the Chief of CSE to the Minister dated May 15, 2023; and
    d. Summary – Activities Overview 2023–24.

III. STANDARD OF REVIEW

22. The *IC Act* requires the Intelligence Commissioner to review whether the Minister's conclusions are reasonable. The Intelligence Commissioner's jurisprudence establishes that the reasonableness standard that applies to judicial review of administrative action is the same standard that applies to reviews conducted by the Intelligence Commissioner.

23. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraph 99, succinctly describes what constitutes a reasonable decision:

> A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.

24. Relevant factual and legal constraints 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 context in which it is being reviewed. It is therefore necessary to understand the role of the Intelligence Commissioner, which is an integral part of the statutory scheme set out in the *IC* and *CSE Acts*.

25. A review of the *IC Act* and the *CSE Act*, as well as legislative debates, shows that Parliament created the role of the Intelligence Commissioner as an independent mechanism to ensure that governmental action taken for the purpose of national security was properly balanced with the respect of 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 and as an overseer of ministerial authorizations.

26. When the Intelligence Commissioner is satisfied the Minister's conclusions at issue are reasonable, he "must approve" the authorization (s 20(1)(a), *IC Act*). Conversely, where

unreasonable, the Intelligence Commissioner "must not approve" the authorization (s 20(1)(b), *IC Act*).

27. In the context of a foreign intelligence authorization issued pursuant to section 26 of the *CSE Act* – which is the matter before me – the Intelligence Commissioner's jurisprudence has established that the Intelligence Commissioner can "partially" approve an authorization (File 2200-B-2022-01, pp 10-11).

28. 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.

IV. ANALYSIS

29. On May 15, 2023, the Chief submitted a written Application for a Foreign Intelligence Authorization for [redacted] Activities (Application). The Application describes the activities that can be used by CSE to acquire foreign intelligence information and maintain covertness while carrying out the activities.

30. A description of the activities included in the Application can be found in the classified annex to this decision (Annex A). Including this information in a classified annex renders the eventual public version of this decision easier to read and ensures that the decision contains the nature of the facts that were before me, which otherwise would only be available in the record.

31. I would also like to note that although the record stands on its own, my understanding of the activities has been bolstered by presentations provided by CSE to myself and my staff in a forum where questions, not directly related to a specific file, can be asked (s 25, *IC Act*).

32. Based on the facts presented in the Application, and generally in the record, the Minister concluded, in accordance with subsection 33(2) of the *CSE Act*, that there are reasonable grounds to believe that the Authorization is necessary and that the conditions of subsections 34(1) and (2) of the *CSE Act* were met.

33. I must review whether the Minister's conclusions made under subsections 34(1) and (2) of the *CSE Act* and on the basis of which the Authorization was issued under subsection 26(1) of the *CSE Act* are reasonable.

A. Subsection 34(1) of the *CSE Act* – Determining whether the activities are reasonable and proportionate

i. The meaning of reasonable and proportionate

34. Pursuant to subsection 34(1) of the *CSE Act*, for the Minister to issue a foreign intelligence authorization, she must conclude that "there are reasonable grounds to believe that any activity that would be authorized by it is reasonable and proportionate, having regard to the nature of the objective to be achieved and the nature of the activities."

35. Determining whether an activity is "reasonable" under subsection 34(1) is part of the Minister's obligation and is distinct from the "reasonableness" review conducted by the Intelligence Commissioner. The Minister concludes that any activity that would be authorized by the Authorization is reasonable by applying her understanding of what the term means. The Intelligence Commissioner determines whether the Minister's conclusions are reasonable by conducting a quasi-judicial review and applying the reasonableness standard of review, explained previously.

36. Determining whether an activity is reasonable and proportionate under subsection 34(1) is a contextual exercise. The Minister may be of the view that the context calls for a number of factors to be considered. Nevertheless, for the Minister's conclusions to be reasonable, I am of the view that her understanding of the meaning of the terms "reasonable" and "proportionate" must at least reflect the following underlying considerations.

37. The Intelligence Commissioner's jurisprudence has stated that the notion of "reasonable" pursuant to subsection 34(1) includes an activity that is fair, sound, logical, well-founded and well-grounded having regard to the objectives to be achieved. The notion also entails that the activity must be legal in the sense that it must be permissible under the statute. The Intelligence Commissioner's role is limited to reviewing the reasonableness of the ministerial

conclusions. If a foreign intelligence authorization included activities that the statute does not allow the Minister to include, I am of the view that such a conclusion would be reviewable under the "reasonable" criterion.

38. In essence, a reasonable activity is one that is authorized by the *CSE Act* and that has a rational connection with its objectives. The objectives of the activity must align with the legislative objectives. In the context of this Authorization, this means that the objectives of the activities that would be authorized must contribute to the furtherance of CSE's foreign intelligence mandate.

39. As for the notion of "proportionate", it entails a balancing of the interests at play. A useful comparison is the balancing conducted in a reasonableness review where *Charter* rights are at issue. In that context, a decision maker must balance *Charter* rights with the statutory objectives by asking how those rights will be best protected in light of those objectives (see for example *Doré v Barreau du Québec*, 2012 SCC 12 at paras 55-58). It is not sufficient to simply balance the protections with the statutory objectives. A reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 80-82).

40. Adopted to our context, it requires that the Minister perform the balancing exercise and finds that the activities that would be permissible under the Authorization be minimally impairing on the privacy interests of Canadians and persons in Canada. It is also important that the acquisition and use of foreign intelligence does not outweigh the impact of any potential breaches to Acts of Parliament. If necessary to achieve these purposes, measures should be in place to restrict the acquisition, retention and use of that information.

ii. Reviewing the Minister's conclusions that the activities are reasonable

41. The Minister concluded that she had reasonable grounds to believe that the activities authorized in the Authorization are reasonable.

42. These activities can broadly be categorized as follows:

> Category 1 – acquiring information of foreign intelligence interest, [redacted]. This category corresponds to activities that would be included in paragraphs 26(2)(a), (b) and (c) of the *CSE Act*.
>
> Category 2 – ensuring the covert nature of the authorized activities, [redacted] This category corresponds to activities that would be included in paragraph 26(2)(d) of the *CSE Act*.
>
> Category 3 – supporting the acquisition of information, [redacted] This category corresponds to activities that would be included in paragraph 26(2)(e) of the *CSE Act*.

43. Given that subsection 34(1) requires that any activity that would be authorized must be reasonable and proportionate "having regard to the nature of the objective to be achieved and the nature of the activities," the activities must therefore be examined in relation to those factors. For the purpose of the Authorization, it means that there may be different considerations when evaluating the categories of activities given the varying objectives and nature of the activities.

44. In support of the Authorization, the Minister writes that the authorized activities would be carried out for the sole objective of obtaining foreign intelligence in accordance to GC intelligence priorities, as set by Cabinet. These priorities are further refined by the *Ministerial Directive to CSE on the Government of Canada Intelligence Priorities for 2021-2023* that provides direction to CSE on the implementation of the priorities. Based on the *Directive*, CSE develops the *National SIGINT Priority List* which prioritizes the intelligence priorities in relation to CSE's foreign intelligence mandated activities by identifying and highlighting specific entities, regions or other areas of interest as identified by GC departments. In sum, GC intelligence priorities would guide CSE's foreign intelligence collection activities.

45. The Minister states that the activities will enable CSE to produce intelligence on a number of foreign intelligence priorities, which she enumerates. The enumerated priorities are the same priorities on which intelligence was collected under last year's authorization.

Category 1 – Acquiring Foreign Intelligence

46. Category 1 captures the activities listed at paragraph 42(a) of the Authorization, as well as the acquisition activities listed at paragraphs 42(b) and (c) of the Authorization.

47. With respect to these activities related to acquiring foreign intelligence, the Minister's conclusions set out a rational link between (i) the intelligence priorities as set by Cabinet and operationalized by CSE; (ii) the intelligence acquisition activities; and (iii) the nature of the foreign intelligence CSE anticipates it will acquire.

48. I recognize that the nature of the intelligence acquisition activities in the Authorization are such that [redacted] Further, the activities would allow CSE to [redacted] Therefore, I am of the view that the Minister has reasonable grounds to believe that these activities will lead to the collection of valuable foreign intelligence. I am therefore satisfied that the Minister's conclusion is reasonable that the first category of activities is reasonable.

Category 2 and 3 – Activities in support of maintaining covertness and in support of acquisition of information that may contravene Acts of Parliament

49. The second and third categories of activities, namely those in relation to maintaining the covert nature of other activities and those in support of the acquisition of information that may contravene Acts of Parliament, fall within paragraphs 26(2)(d) and (e) of the *CSE Act*, which state the following:

> (d) doing anything that is reasonably necessary to maintain the covert nature of the activity; and

> (e) carrying out any other activity that is reasonable in the circumstances and reasonably necessary in aid of any other activity or class of activity, authorized by the authorization. (emphasis added)

50. The "reasonably necessary" threshold is used in other areas of the law – for example in human rights cases where a prima facie discriminatory policy or practice can be found to be "reasonably necessary" to an appropriate purpose (see for example *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3), or as part of the analysis when applying the ancillary powers doctrine to determine whether police action that interferes with a person's liberty is "reasonably necessary" for the carrying out of the police's duty (see for example *Fleming v Ontario*, 2019 SCC 45).

51. Extracting the principles of its application in other areas of law, I am of the view that the "reasonably necessary" threshold in the matter before me requires a rational link between the activity and its objective, specifically to maintain covertness (s 26(2)(d)) and to aid any other activity (s 26(2)(e)). The threshold also requires that there be no reasonable alternatives to carrying out the activity to attain the stated objective. Determining what is "reasonably necessary" requires a contextual analysis.

52. Paragraph 26(2)(e) also includes the threshold that the activity "is reasonable in the circumstances". In my view, this threshold requires a thorough examination and understanding of the context to determine whether carrying out the activity is justified.

53. For the issuance of an authorization, the legislation therefore requires that the Minister must conclude, pursuant to subsection 34(1), that there are reasonable grounds to believe the authorized activities are reasonable. For the Minister to have reasonable grounds to believe that the activities that fall within paragraphs 26(2)(d) and (e) are reasonable, she must be satisfied that CSE will meet the respective provisions' threshold when carrying out the activities. If the Minister's conclusions reflect those elements, and I find the conclusions reasonable, the activities will be approved.

54. Applying that framework, I am of the view that the Minister's conclusions are reasonable that activities and classes of activities described at paragraphs 42(b), (c) and (e) of the Authorization are reasonable. Most of the activities described at paragraphs 42(b) and (c) fall

within paragraph 26(2)(e) of the *CSE Act* while the class of activities described at paragraph 42(e) is captured by paragraph 26(2)(d) of the *CSE Act*. They are enumerated with specificity, delineating for CSE employees the nature of the activities that they may lawfully carry out. The Minister explains how these activities support the primary objective of acquiring foreign intelligence information.

55. I am also of the view that the Authorization describes how CSE will meet the "reasonably necessary" and the "reasonable in the circumstances" thresholds when carrying out these activities.

56. With respect to the "reasonably necessary" threshold, it is clear from the record that these activities are directly related to the objective they are intended to facilitate, namely maintaining covertness and aiding other activities. Indeed, the nature of the information acquisition activities entails that certain unlawful activities in support of them are necessary to facilitate any chance of CSE succeeding in its foreign intelligence collection. Without the activities set out at paragraphs 42(b), (c) and (e) of the Authorization, CSE's ability to acquire foreign intelligence using the techniques set out in the Authorization would be completely hamstrung.

57. With respect to the "reasonable in the circumstances" threshold, paragraphs 42(b) and (c) of the Authorization set out the circumstances in which the specific activities will be carried out, [redacted]

58. My analysis with respect to the class of activities enumerated at paragraph 42(d) of the Authorization is slightly different. This class of activities consists of "conducting any activities reasonably necessary in order to maintain the covert nature of these activities." This class falls within paragraph 26(2)(d) of the *CSE Act*. It is not as specific as the activities listed at paragraphs 42(b), (c) and (e) of the Authorization. However, I am of the view that the record reflects what types of activities could fall in this class – [redacted] The Minister's conclusions and the record show that she

understands the nature of the activities. I am of the view that the Minister's conclusions with respect to this class of activities are reasonable because the class is sufficiently specific for CSE employees to apply it as it is understood by the Minister and it is clear how the activities in the class are connected to the goal of acquiring foreign intelligence.

59. However, the specificity exhibited by the authorized activities at paragraphs 42(a), (b), (c), (d) and (e) is not reflected at paragraph 42(f) of the Authorization. In this paragraph, the Minister authorizes CSE to carry out exactly what is set out at paragraph 26(2)(e) of the *CSE Act*, namely "carrying any other activity that is reasonable in the circumstances and reasonably necessary in aid of any other activity, or class of activity, authorized by this Authorization." She then adds: "In doing so, should CSE conduct activities that are outside the scope of what is described in paragraphs 42(a)-(e) above [namely all of the authorized activities], CSE will notify me."

60. As a result, with respect to activities that fall within the scope of paragraph 26(2)(e) of the *CSE Act*, the Minister:

i. authorizes certain specific activities and classes of activities at paragraphs 42(b) and (c). I have found reasonable the Minister's conclusions that these specific activities are reasonable;
ii. issues an additional and separate blanket authorization at paragraph 42(f) for activities that are "reasonable in the circumstances" and "reasonably necessary in aid of any other activity" if the activities would fall "outside the scope" of the other activities she has authorized; and
iii. requires that she be notified if an out-of-scope activity is carried out.

61. The *CSE Act* allows CSE employees to carry out otherwise unlawful activities or activities that would infringe on Canadian privacy interests. Indeed, section 3 of the *CSE Act* specifically states that:

> It is in the public interest to ensure that [CSE] may effectively carry out its mandate in accordance with the rule of law and, to that end, to expressly recognize in law a

> justification for persons who are authorized to carry out activities under this Act to, in the course of carrying out those activities, commit acts or omissions that would otherwise constitute offences.

62. The otherwise unlawful activities are effectively rendered legal with a ministerial authorization and subsequent approval by the Intelligence Commissioner. Given the Minister's role as the decision maker, and the Intelligence Commissioner's role as a gatekeeper, it is therefore essential for the Minister to have a solid understanding of the activities, or classes of activities, that are included in the authorization, and for her conclusions to reflect that understanding. This understanding is especially important for the activities that fall within the scope of paragraph 26(2)(e) because this provision can authorize "any other activity", which means that it is extremely broad.

63. For this reason, in File 2200-B-2023-01 [*IC Foreign Intelligence Decision 2023-01*], I wrote at paragraph 80:

> I add that paragraph 26(2)(e) of the *CSE Act* is broadly worded. I would expect that a Minister being asked to include activities that would be covered by paragraph 26(2)(e) would be provided with some details and have a solid understanding of the types of activities in question.

64. I am of the view that the basket clause at paragraph 42(f) of the Authorization, as worded, does not allow the Minister to have sufficient understanding of unlawful activities that could be carried out under it. Without a solid understanding of the nature of the activities, the Minister is effectively delegating to CSE her statutory responsibility to determine whether an activity is reasonable. If the Minister does not know what the activities may be, she cannot logically authorize them. Further, a basket clause stating that any other activity that someone else will determine is reasonable in the circumstances and reasonably necessary does not help the Minister understand what kind of activities these may be.

65. Replicating the exact wording of paragraph 26(2)(e) of the *CSE Act* as a "catch-all" clause in the Authorization does not provide the Minister with sufficient specificity to understand the activities that would be "outside the scope" of the other activities in the Authorization. The Minister's conclusions do not provide insight into what these activities could be.

66. Although there may be after-the-fact transparency by requiring CSE to inform the Minister should CSE conducts otherwise unlawful activities that are "outside of the scope" of the activities set out in the Authorization, it is unclear from the record what occurs subsequent to this notification, or its purpose. Notifying the Minister after the fact would effectively mean that the Minister was not aware of the nature of the activities prior to CSE carrying them out. Further, if the activities are "outside the scope", approval from the Intelligence Commissioner has therefore not been obtained, which is not what the *CSE Act* and the *IC Act* provide for.

67. The specific activities that CSE knows are reasonable in the circumstances and reasonably necessary in support of the foreign intelligence acquisition activities are set out in the Authorization. Since 2019, foreign intelligence authorizations have authorized CSE to carry out the foreign intelligence acquisition activities in the Authorization. By this point in time, the record shows that CSE has a solid understanding of circumstances where other types of activities that may be reasonably necessary in support of the techniques outlined in the Authorization.

68. As a result, I am of the view that the Minister's conclusion at paragraph 42(f) of the Authorization that CSE can carry out "any other activity that is reasonable in the circumstances and reasonably necessary in aid of any other activity, or class of activity, authorized by this Authorization" is unreasonable.

69. My conclusion should not be understood to mean that I believe that CSE intended to engage in activities other than the specific activities listed in the Authorization. Indeed, there is nothing in the record that suggests that my conclusions will impact the activities CSE will carry out pursuant to the Authorization.

70. My conclusion should also not be understood to mean that every single potential activity that could be reasonable in the circumstances and reasonably necessary in aid of other activities authorized by an authorization needs to be described in detail in a foreign intelligence authorization. I understand that not all specific activities that may support the foreign intelligence acquisition activities may be known when applying for a foreign intelligence

authorization. However, the Minister must be able to at least understand the nature of the activities or the class of activities that she is authorizing so she can adequately evaluate the impact on the rule of law and on Canadian privacy interests, as well as evaluate whether the statutory thresholds will be met when CSE carries out the activities.

iii. Reviewing the Minister's conclusions that the activities are proportionate

71. The Minister concluded that she had reasonable grounds to believe the activities authorized are proportionate and provided four reasons for doing so.

72. First, the potential value of information that could be acquired pursuant to the Authorization is high, whereas the risk of acquiring Canadian-related information is low. The Minister states that to carry out the activities, CSE must have reasonable grounds to believe that foreign entities being targeted are located outside Canada.

73. Second, carrying out an operation that falls within the authorized activities would be subject to extensive planning as well as a risk assessment. As part of the risk assessment framework, the SIGINT Operations Risk Acceptance Form (SORAF) sets out the elements that must be considered. The higher the risk, the higher the approval authority must be for the activity. Further, only CSE employees with the required training are allowed to engage in the activities.

74. Third, when the activities would constitute certain offences, they can only be carried out if they would not [redacted]

75. Fourth, there are certain limitations CSE cannot cross when carrying out activities – such as causing, intentionally or by criminal negligence, death or bodily harm to an individual or willfully attempting to obstruct, pervert or defeat the course of justice or democracy.

76. These reasons seek to address the impact of the activities on Canadian privacy interests and the rule of law. To limit the impact on Canadian privacy interests, the requirement to have reasonable grounds to believe that the target is not an entity that is Canadian or located in

Canada minimizes the risk of incidentally acquiring Canadian related information. Considering the nature of the foreign intelligence acquisition activities, I find reasonable the Minister's conclusions on this issue.

77. To limit the impact on the rule of law, the Minister imposes restrictions on the scope of the activities that would contravene Acts of Parliament that go beyond the legislative limits. Indeed, even though the legislative framework allows for Acts of Parliament to be contravened, it may not be sufficient on its own to ensure that there are adequate checks and balances in place when CSE engages in activities that would be unlawful without the authorization.

78. In contrast, the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (*CSIS Act*), sets out a justification framework where the Minister of Public Safety determines classes of acts or omissions that would otherwise constitute offences and that designated CSIS employees may be justified in committing or directing another person to commit. Similar to a foreign intelligence authorization, the Intelligence Commissioner must approve the classes of acts or omissions that would otherwise constitute offences. Subsection 20.1(18) of the *CSIS Act* sets out the limitations of the acts and omissions. They cannot, for example, justify causing death or bodily harm or wilfully attempting to obstruct the course of justice. The *CSE Act* only requires that the Minister reasonably believes the activities are reasonable and proportional.

79. The Minister's conclusions implicitly recognize that the legislative limits are insufficient to ensure that certain activities are reasonable and proportionate by [redacted]. These activities can only be undertaken if [redacted]

80. Indeed, for certain breaches of Acts of Parliament, the impact on the rule of law is simply whether the offence has occurred or not – for example, a private message is either intercepted or not. For these activities that constitute offences, the Minister can rely on the legislative framework to conduct her balancing exercise to determine if they are proportionate.

81. However, for other offences, the impact on the rule of law may depend on a number of factors, such as their scope or gravity. Given the classified nature of the activities, I cannot provide a concrete example in a public decision. However, I will use theft as a hypothetical example: theft of goods below a certain value – say $100 – may be proportionate, but anything above that amount may not. As a result, the legislative framework setting out the threshold that the activity – in this example theft – is reasonable and proportionate would be insufficient. The authorization would require an additional internal threshold setting out that only theft of goods below $100 would be proportionate.

82. Even if CSE does not want or seek to engage in activities that would materially contribute to a threat to Canada and its allies, the legal framework should unmistakeably not allow it. Returning to the hypothetical example, even if CSE has no intention to steal goods with a higher value than $100, the limit should be clearly set out in the authorization.

83. Specificity is important for two reasons. First, even though the content of a foreign intelligence authorization may not be made public, public trust is enhanced by a regime that relies on clear boundaries rather than on an expectation or promise that CSE will act responsibly. Specificity allows all parties involved – CSE, the Minister and myself as Intelligence Commissioner – to tell the Canadian public that the balance between the need for CSE to acquire foreign intelligence and breaching laws and privacy interests has been set with a clear line that does not grant sole discretion to CSE.

84. Second, clearly delineating what activities are allowed facilitates operational decisions. Well-defined and understood limits on the scope of contraventions to Acts of Parliament that CSE employees can engage in is particularly important for their own protection. Section 49 of the *CSE Act* provides civil and criminal immunity to a person, which would include an employee, “who acts in accordance with an authorization.” Acting in accordance with an

authorization entails respecting the authorization's internal limits. The clearer the internal limits are delineated and understood, the greater the certainty that CSE employees are acting lawfully and consequently avoiding liability.

85. By imposing this internal threshold, the Minister is of the view that the legislative threshold – any activity that could be authorized is reasonable and proportionate – will be met. I agree with the Minister that an internal limit is necessary for these offences to be proportionate. Without an internal limit, it would be unreasonable for the Minister to authorize CSE to carry out these activities that would otherwise constitute offences as their permitted scope would be too broad. The issue that remains is whether the Minister's conclusions are reasonable that the internal CSE threshold of [redacted] is sufficient to render the activities to which it applies reasonable and proportionate, in accordance with subsection 34(1) of the *CSE Act*.

86. The threshold is not defined in any CSE policy documents included in the record. The threshold also does not figure in the SORAF template provided in the record. The footnote in the Minister's conclusions simply adds that the "perceived threat" is "real and based on something that is more than speculation."

87. Nevertheless, I have to find reasonable the Minister's conclusion that the internal threshold of [redacted] renders the activities to which it applies proportionate. I come to this conclusion because I am of the view that the purpose of this internal threshold is clear: CSE's activities that contravene an Act of Parliament cannot [redacted].

88. The concept of "foreseeability" applies to other areas of the law, such as in the law of negligence (tort law). It is an objective concept. Thus, although the threshold as a whole could be defined more precisely and integrated in policy documents, the reasonableness standard requires that I show restraint and recognize the role of the Minister as decision maker. With that in mind, I am of the view that the record contains sufficient information for CSE employees to understand how to apply the threshold.

89. The Minister has also imposed other internal limits to render the activities proportionate.

[redacted]

90. Finally, as mentioned, the Minister has set out general internal limits on CSE activities undertaken pursuant to the Authorization, including that CSE will not cause, intentionally or by criminal negligence, death or bodily harm to an individual or willfully attempt in any manner to obstruct, pervert or defeat the course of justice or democracy. I am of the view that explicitly including these limits is necessary, as the *CSE Act* does not provide for them and they do not appear in policy documents in the record.

91. As a whole, I find that the Minister has adequately considered the impact of the authorized activities on the rule of law and on Canadian privacy interests. She has demonstrated that the activities that may contravene Acts of Parliament are necessary and reasonable in the circumstances, and has imposed limitations on the scope of these activities. She has also established limitations that CSE cannot cross. As a result, I find reasonable that the Minister's conclusions that the authorized activities are proportional.

B. Subsection 34(2) of the *CSE Act* – Conditions for authorization

92. Subsection 34(2) of the *CSE Act* provides that the Minister may issue an authorization for foreign intelligence activities only if she concludes that there are reasonable grounds to believe that the three listed conditions are met, namely:

a) any information acquired under the authorization could not reasonably be acquired by other means and will be retained for no longer than is reasonably necessary;
b) any unselected information acquired under the authorization could not reasonably be acquired by other means, in the case of an authorization that authorizes the acquisition of unselected information; and
c) the measures referred to in section 24 will ensure that information acquired under the authorization that is identified as relating to a Canadian or a person in Canada

will be used, analysed or retained only if the information is essential to international affairs, defence or security.

i. Any information acquired under the authorization could not reasonably be acquired by other means (s 34(2)(a))

93. As explained in the Authorization, the purpose of [redacted], one of the foreign intelligence acquisition activities, is to [redacted] Acquiring the information in another manner would defeat its purpose.

94. [redacted] Given the nature of the information sought, the activity is necessary. As a result, the information that would be acquired under the Authorization could not reasonably be acquired by other means.

95. As a result, I am satisfied that the Minister's conclusions are reasonable that the information that would be acquired pursuant to the Authorization could not reasonably be acquired by any other means.

ii. Any information acquired under the authorization will be retained for no longer than is reasonably necessary (s 34(2)(a))

96. The Minister explains that information is retained in accordance with requirements set in in CSE policies and governed by a retention scheduled. She also explains that the requirements set out in CSE policies comply with the *Library and Archives of Canada Act,* SC 2004, c 11 (*LAC Act*).

97. The Minister provides a rationale for the retention periods that apply to different types of information. In particular, the Minister explains the basis for which certain types of information can be retained for longer than [redacted] She also indicates that CSE's systems are designated to automatically delete or overwrite the information at the end of any expiration period. For operational reasons, information may be deleted earlier than the maximum retention period.

98. Information that has a recognized Canadian privacy interest and is assessed as essential to international affairs, defence, or security, including cybersecurity, can be retained for "as long as is reasonably necessary." This same retention criterion was used in *IC Foreign Intelligence Decision 2023-01* where I remarked that the record could benefit from greater detail regarding how often this type of information is reviewed to determine if its retention remains reasonably necessary. In the record before me, CSE indicates that "[o]n a quarterly basis, operational managers must review all recognized information related to a Canadian or person in Canada retained in a CSE central repository to revalidate whether it is still essential to international affairs, defence, or security, including cybersecurity. Information that is no longer essential must be deleted."

99. In my view, the Minister's conclusions that any information acquired under the Authorization will be retained for no longer than is reasonably necessary are reasonable. The Minister's rationale establishes a rational connection between the types of information and their retention period and explains why the different retention periods are necessary for operational reasons.

iii. Any unselected information acquired under the authorization could not reasonably be acquired by other means (s 34(2)(b))

100. [redacted]. As defined in section 2 of the *CSE Act*, unselected information is information acquired without the use of terms or criteria to identify foreign intelligence interest. Therefore, when acquiring unselected information, all of the information, including any information that could contain Canadian privacy interests, is captured. For that reason, the *CSE Act* requires that particular attention be given to unselected information that is acquired.

101. The Minister explains that she has reasonable grounds to conclude that unselected information must be acquired for both technical and operations reasons, [redacted]

[redacted] that is, as outlined in the Authorization. Where CSE has the required access to acquire unselected information pursuant to the Authorization, there is no other apparent manner to acquire that information.

102. I am therefore of the view that the Minister had reasonable grounds to believe that unselected information could not reasonably be acquired by other means.

iv. Measures to protect privacy will ensure that information acquired under the authorization identified as relating to a Canadian or a person in Canada will be used, analysed or retained only if the information is essential to international affairs, defence or security (s 34(2)(c))

103. The Minister's conclusions describe the measures in place to protect the privacy interests of Canadians and persons in Canada, which consist of CSE policies related to the retention, use and disclosure of information. As a result, the adequacy of the measures, and therefore the reasonableness of the Minister's conclusions, rests on the strength of the policies and the robustness of their application.

104. The record describes that information relating to a Canadian or a person in Canada can only be retained if it is assessed to be essential to international affairs, defence or security, including cybersecurity. The Authorization explains that information is essential:

> if without that information CSE would be unable to provide foreign intelligence to the GC, including by understanding a foreign entity's identity, location, behavioural patterns, capabilities, intentions, or activities, or is necessary for comprehension of that information in its proper context. This may also include information that is retained in order to prevent inadvertent selection of information related to Canadians or persons in Canada (i.e. the information is retained in order to ensure that Canadians, their devices and activities are appropriately protected).

105. In response to a remark made in my *IC Foreign Intelligence Decision 2023-01* that a greater understanding of the operational definitions of what constitutes international affairs, defence and security, including cybersecurity would be beneficial, CSE specifies that its definition of essential provided above is:

> an appropriate approach to operationalizing the threshold of essential to international affairs, defence and security, including cybersecurity, because the activities it conducts under the foreign intelligence aspect of its mandate are

> statutorily bound by section 16 of the CSE Act to the GC's intelligence priorities. The GC intelligence priorities help provide an understanding of Cabinet's views on what is of relevance to international affairs, defence and security, including cybersecurity, by articulating their intelligence priorities within those spaces. Thus, if information is essential to understand the meaning or import of foreign intelligence, and that foreign intelligence supports GC intelligence priorities, then the information by extension becomes essential to international affairs and defence and security. This approach avoids the difficult task of CSE having to independently define the subjective, regularly-evolving, and context-specific bounds of the terms international affairs, defence and security, and ensures its approach does not result in inconsistencies with how Cabinet views those terms.

106. I am of the view that CSE's definition of "essential" and the explanation provided is reasonable. I am satisfied that it falls within a range of interpretations that could be reasonable given the purpose of paragraph 34(2)(c) of the *CSE Act*.

107. In addition to describing when information with a Canadian privacy interest is retained, the record provides significant information concerning when it is used and disclosed outside of CSE to other government departments or partners. Releasable Canadian identifying information will be suppressed, meaning that it is anonymized with a generic term such as "named Canadian", unless the information is necessary to understand the foreign intelligence. Further, unsuppressed information may only be disclosed if the recipient or class of recipients have been designated by Ministerial Order, and the disclosure is essential to international affairs, defence, security or cybersecurity, pursuant to section 43 of the *CSE Act*.

108. CSE also limits access to its information repositories to those who are properly accredited to conduct foreign intelligence activities and have received training on information handling procedures.

109. I am of the view that the record reveals that CSE policies and practices take seriously the retention, analysis and use of information relating to a Canadian or a person in Canada. I am also satisfied that the Minister's conclusions are reasonable that such information will only be retained, analysed and used if it is essential to international affairs, defence or security, including cybersecurity.

V. REMARK

110. I would like to make an additional remark to assist in the consideration and drafting of future of ministerial authorizations, which does not alter my findings regarding the reasonableness of the Minister's conclusions.

A. The threshold for determining whether a target is not Canadian or a person in Canada

111. Even though I found reasonable the Minister's conclusions that CSE only requires "reasonable grounds to believe" that a target is not Canadian or a person in Canada to carry out the authorized activities, I note that a higher threshold may be more appropriate. This remark is informed by the legal prohibition on CSE to target the communications of Canadians or anyone in Canada. A legal threshold that requires less than 50 percent certainty – such as reasonable grounds to believe – effectively dilutes the force of the absolute ban of targeting Canadians or persons in Canada. This may be a subject of discussion for the upcoming five-year legislative review. In the meantime, CSE should take this comment in consideration.

VI. CONCLUSIONS

112. Based on my review of the record, I am satisfied that the Minister's conclusions made under subsections 34(1) and (2) of the *CSE Act* in relation to activities and classes of activities enumerated at paragraphs 42(a), (b), (c), (d) and (e) Authorization are reasonable.

113. I am not satisfied that the conclusions made under subsections 34(1) and (2) of the *CSE Act* in relation the class of activities enumerated at paragraph 42(f) of the Authorization are reasonable.

114. I therefore approve the Authorization pursuant to paragraph 20(1)(a) of the *IC Act*, except for the class of activities described at paragraph 42(f) of the Authorization.

115. As indicated by the Minister, and pursuant to subsection 36(1) of the *CSE Act*, this Authorization expires one year from the day of my approval.

116. 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.

July 18, 2023

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