

SECURITY INTELLIGENCE REVIEW COMMITTEE

TOP SECRET/CANADIAN EYES ONLY

SIRC STUDY 2015-04

REVIEW OF CSIS'S COLLECTION OF ECONOMIC SECURITY INTELLIGENCE

SUMMARY

- This review undertook an examination of CSIS's collection of economic security intelligence, its targeting of _____ and its role and participation in the *Investment Canada Act's* National Security Review (NSR) process.
- SIRC found that CSIS collected intelligence on _____ in accordance with its mandate and authorities, and in line with the GoC's priorities and intelligence requirements.
- SIRC recommends that CSIS use consistent language in all of its *ICA* reviews: that there is a national security concern; that there is not enough information to determine if there is a national security concern; or that there is no national security concern.
- Overall, SIRC found that CSIS operated within its mandate; however, SIRC believes that more clarity around the language used in the advice provided to Government under the *ICA* would aid in ensuring a consistent approach.

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1 INTRODUCTION

CSIS collects information and intelligence regarding threats to the security of Canada as defined under section 2 of the *CSIS Act*. Increasingly, some of those threats are related to economic matters, particularly when they fall under espionage or foreign-influenced activities.

SIRC has reviewed CSIS's collection and advice on economic matters in the past, specifically in the 1990s, when CSIS to deal with the issue-based threat of economic espionage. the Government's 1991 identification of economic security as one of five "national interests" approved by Cabinet. Subsequent Ministerial Direction to CSIS specified that it should "continue to monitor state-sponsored intelligence activity in this area [i.e. economics] in so far as it poses a threat to the security of Canada." More recent Ministerial Direction was far more vague, stating that "intelligence is required on the activities of foreign countries actively targeting Canada's public and private sector to gain economic advantage or to threaten its security."

One aspect of this intelligence collection is on A few years ago, SIRC noted that the targeting of, and the broader advice to government that CSIS is providing on, push the boundaries of "threat", as defined under s. 2 of the *CSIS Act*,

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2 METHODOLOGY

In this review, SIRC examined CSIS's investigations in order to better understand CSIS's approach, investigation and advice on economic and/or financial threats. SIRC also examined CSIS's role in the National Security Review process of the *Investment Canada Act (ICA)* and the advice it provided to the Government through that process.

The core review period for this study was January 1, 2010 to March 31, 2015, but SIRC examined some documentation that fell outside this period in order to provide a complete assessment of relevant issues.

2.1 Review Activity and Criteria

SIRC's framework for this review encompassed targeting and advice to Government. SIRC reviewed all relevant operational and corporate documentation to assess these activities through the lenses of authority, necessity, reasonableness, legality, proportionality and internal governance. SIRC also had briefings to discuss the investigations.

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3 BACKGROUND

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4 CSIS INVESTIGATIONS

In order to review CSIS investigations

SIRC examined operational reporting during the review period:

Based on its review of targeting, **SIRC found that CSIS collected intelligence in accordance with its mandate and authorities, and in line with the GoC's priorities and intelligence requirements.**

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4.4 Challenges of Investigating

indicated that the threshold for seeking warrant powers requires reasonable grounds to believe that a specific individual, espionage.¹⁸ Going forward, CSIS stated it will continue to investigate threat-related activities.

CSIS
is engaging in

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¹⁸ Briefing Note. From:

To: I/DIR (via DDO/

2013 08 01.

5 THE INVESTMENT CANADA ACT

In addition to collecting on economic threats, CSIS is also involved in Industry Canada's *ICA* process. As stated by Industry Canada, "the *ICA* is the primary mechanism for reviewing foreign investments in Canada. Its purpose is twofold: to review significant foreign investments to determine if they are likely to be of economic benefit to Canada and to review investments that could be injurious to national security."¹⁹ It is under the latter purpose that CSIS participates in the process.

Similar legislation governing foreign investment exists among Canada's allies. In the United States, for example, the *Foreign Investment and National Security Act* of 2007 explicitly states that the Director of National Intelligence "shall ensure that the intelligence community remains engaged in the collection, analysis, and dissemination to the Committee of any additional relevant information that may become available during the course of any investigation conducted ...with respect to a transaction." The legislation also lists "factors for consideration" which give additional information on the triggers for a national security review.

The *ICA* provides limited information on the NSR process, but does state that an investment is reviewable under the *ICA* if the Minister, after consultation with the Minister of Public Safety, considers that the investment could be injurious to national security and the Governor-in-Council (GiC), on the recommendation of the Minister, makes an order within the prescribed period for the review of the investment. Once advice has been provided, in consultation with the Minister of Public Safety, the Minister of Industry shall refer the investment under review to the GiC, together with a report of his/her findings and recommendations on the review, if the Minister is satisfied that the investment would be injurious to national security, or on the basis of the information available, the Minister is not able to determine whether the investment would be injurious to national security. The triggers for such a review, while provided to the departments and agencies implicated in the NSR process, are not shared with either the potential investor nor with the public.

In 2013, a discussion paper was drafted to assess options for the GoC to provide guidance to stakeholders in the *ICA* process with regard to the national security provisions.

While such options may be in consideration, for the moment, the NSR process is guided by what is set out in the current legislation and in the guidance documents drawn up by the participating departments and agencies including CSIS, Public Safety, RCMP, DND, Finance, and CSEC.

5.1 CSIS's Role in the NSR Process

Under the authority of the *ICA*, CSIS "is required to evaluate foreign investments in Canada for potential national security concerns."²¹

¹⁹ *ICA* Annual Report 2014-2015. Industry Canada.

²¹ Investment Canada Act National Security Review Snapshot – January 2014.

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5.2

In 2013, CSIS was asked by Public Safety to

However, there are no provisions within the *ICA* for

Accordingly, it is unclear under which portion of the
ICA would fall.

SIRC reviewed the related documentation and internal CSIS discussion about the request.

In 2014, CSIS received another request to

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As with the case of . it is unclear under which authority CSIS would provide that advice. CSIS did provide advice despite this case coming more than a year after the case, in which CSIS management determined that CSIS should not be involved as there was no clear authority. **SIRC found that there was a lack of clarity on the issue given that CSIS did not seek a legal opinion, nor were the lessons or concerns recorded or added to CSIS's guidelines on the NSR.**

5.3

filed an investment under the *ICA*

The investment triggered an NSR. Until just before the end of its assessment of the investment, CSIS noted that the transaction "could" be injurious to national security, but that it did not have enough information from its own collection to state that it "would" be injurious to national security.²⁷

In a preliminary assessment

In short, CSIS believed that the investment should be referred for an NSR, which it was.

Assistant Director of Intelligence presented CSIS's findings

CSIS "was not opposed to a determination that the transaction "could" be injurious to national security, thereby necessitating further inquiry."

²⁷ Email from

9 October 2014. (as example)

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CSIS's

internal documentation,

maintained its position that it did not have enough information to determine whether it "would be injurious to national security." However, this position changed when the CSIS Director "decided to revise the previous assessment" and the conclusion changed from "could" to "would" be injurious to national security.

SIRC sought to understand the change in assessment and requested documentation and briefings to follow-up on what criteria were used to determine when an investment meets the "could" threshold and the "would" threshold. CSIS's response to SIRC did not provide adequate clarity. Ultimately, the outcome of CSIS's advice under this process is to determine whether or not a transaction is referred for further consideration owing to national security concerns.

In CSIS's internal guidebook on its role in the *ICA* review process, CSIS discusses points for consideration in "determining a national security concern."

SIRC found that CSIS's guidebook provided adequate advice on its role and process within the NSR and that the language contained therein is more appropriate for CSIS's advice to Government under the *ICA*.

Therefore, SIRC believes that the language used by CSIS should be a recommendation aligned with its own internal criteria, which are defined in the guidebook. **SIRC recommends that CSIS use consistent language in all of its *ICA* reviews: that there is a national security concern; that there is not enough information to determine if there is a national security concern; or that there is no national security concern.**

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6 CONCLUSION

In general, SIRC was satisfied with the targeting and collection by the operational branches. However, SIRC identified some issues regarding clarity and consistency around CSIS's participation in the *ICA* process and made recommendations to remedy those concerns.

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