RE: Threshold and Letter to Min LeBlanc

From: @pco-bcp.gc.ca>
To: @pco-bcp.gc.ca>, @pco-bcp.gc.ca>
Date: Mon, 12 Jun 2023 20:24:08 +0000
Attachments: NSIA letter to IGA Min draft.docx - DI comments.docx (27.3 kB)

Here's the letter – let me know if you wish to discuss 5th by-election comment

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From: @pco-bcp.gc.ca>
Sent: Monday, June 12, 2023 3:47 PM
To: @pco-bcp.gc.ca>; @pco-bcp.gc.ca>
Subject: RE: Threshold and Letter to Min LeBlanc

Hello,

Please find the threshold document attached with some comments and tracked changes.

Let me know if you have any questions.

De : @pco-bcp.gc.ca>
Envoyé : 12 juin 2023 11:49
À : @pco-bcp.gc.ca>; @pco-bcp.gc.ca>
Objet : FW: Threshold and Letter to Min LeBlanc

From: @pco-bcp.gc.ca>
Sent: Sunday, June 11, 2023 12:29 PM
To: @pco-bcp.gc.ca>; Stinson, Sarah @pco-bcp.gc.ca>
Cc: Chayer, Marie-Helene @pco-bcp.gc.ca>; @pco-bcp.gc.ca>; @pco-bcp.gc.ca>; @pco-bcp.gc.ca>; @pco-bcp.gc.ca>; @pco-bcp.gc.ca>; @pco-bcp.gc.ca>; @pco-bcp.gc.ca>; @pco-bcp.gc.ca>; @pco-bcp.gc.ca>
Subject: Threshold and Letter to Min LeBlanc

Hi Sarah and

Sorry for not sending this out on Friday (Sarah, not sure if you had a chance to talk to Al about any of this?)

As discussed on Thursday afternoon, our task following the last DMCIR on SITE is to: 1) provide additional information/guidance on the threshold for public communications during the by-elections; 2) clarify the decision-making flow; and 3) move forward with the letter from NSIA to Minister LeBlanc.

1. **Threshold:** Attached is my attempt to articulate a threshold for public communications. As I note in the document, while there was an explicit threshold in the 2021 Protocol, there was no threshold articulated in the 16 May 2023 public announcement s. 39 - Cabinet I followed Paul MacKinnon's suggested during DMCIR that the threshold would follow the threshold from the 2021 Protocol (which was "*A public announcement during the caretaker period would only occur if the Panel determines that an incident or an accumulation of incidents has occurred that threatens Canada's ability to have a free and fair election…*" The full 2021 threshold is at the bottom of this email).

   In the attached proposal, I nuanced this threshold in the following ways:

   i. Given that ministerial accountability applies and there is no caretaker convention, I guessed that the statement that a public announcement "would only occur" should be changed to a statement that a public announcement "could be" recommended (since Deputy Heads can apply judgement in accordance with their accountabilities). That said, this seems like a question that's outside of my lane (a DI/MOG question perhaps?)

   ii. I changed "have a free and fair election" to "have a free and fair by-election". My sense (but welcome Sarah's view) is that the term "by-election" refers to an election being held in an individual riding (i.e. there are 4 concurrent by-elections going on right now, not one by-election covering 4 ridings). If that's right, then I think "have a free and fair by-election" implies that if a by-election in *any* riding cannot be free and fair, then the threshold would be triggered. But welcome Sarah's views.

   I also went back and looked at what the Judd and Rosenberg reports had to say about the thresholds.

   > The Judd Report seemed to imply that the threshold should not be over-quantified: "The threshold within the Protocol for any action by the Panel did not easily lend itself to the application of quantifiable metrics upon which to arrive at any decision. In the final analysis, determinations about the context of the interference were necessary [both the action and the potential impact upon the election campaign of any interference.]"
   >
   > On the other hand, the Rosenberg Report argued that the standard required for the threshold to be met should be clarified. In particular, it argued that one sentence in the final paragraph – "ultimately, it is the impact of the incident on Canada's ability to have a free and fair election that is at issue in the determination of whether the threshold has

been met, and if a public announcement is required"- should be removed. I'm not sure that I am well placed to provide the type of clarity that Mr. Rosenberg calls for – particularly not in the time available – but I omitted the entire last paragraph of the 2021 Protocol threshold in the attached document. I suspect that if this process is used for future by-elections, further clarity on this point will be required.

Finally, one last question for Sarah: I noted that the Rosenberg Report states that "whereas section 1.0 of the 2019 Protocol had identified the problem as vulnerability to foreign interference, the 2021 revision removed the word 'foreign'." However, the 16 May 2023 statement explicitly flags "foreign interference". Was the inclusion of "foreign" for these by-elections a deliberate change from the 2021 GE? Wondering if our letter, etc, should say "foreign interference" or just "interference".

2. **Decision making:** Some DMCIR members also expressed confusion about the decision-making flow. I am not exactly sure that the best articulation of this flow would be, given that Ministerial accountability remains in place and there is no caretaker convention.

   On the one hand, I could see an argument that, as suggested by the announcement, DMCIR itself is providing advice to Ministers on any measures to be taken (e.g. public announcement, or operational measure). For public announcements, this would be consistent with the Cabinet protocols for GE, which said, for example, that "the Panel would determine", etc. If this is the case, then our documents should say something like "SITE will provide reporting to DMCIR, and DMCIR will advise Ministers".

   On the other hand, I could see an argument that DMCIR itself is not a legal entity with legal authorities or accountabilities: it is Ministers and Deputy Heads who have such authorities and accountabilities. If this is right place to focus, then DMCIR is a venue for consultation and discussion, but Deputy Heads would have accountability for briefing their Ministers on intelligence and advising them on any course of action, including public communications. This is consistent with what we have in the attached document "While DMCIR will provide a venue for Deputy Heads to discuss response options, the decision to take a measure to respond to foreign interference will rest with the Deputy Head and/or Minister with the relevant mandate." Is this the right approach? I do note that the note to the PM said "For Ministers with mandates to combat foreign interference and protect democracy this may entail communicating to Canadians regarding foreign interference in the by-elections."

   This seems like a MOG question, so grateful for any advice from Sarah and/or MOG.

3. **Letter:** Finally, also attached is a draft letter. Any views/advice welcome.

Thanks very much!

Full threshold from 2021 Protocol

A public announcement during the caretaker period would only occur if the Panel determines that an incident or an accumulation of incidents has occurred that threatens Canada's ability to have a free and fair election.

Determining whether the threshold has been met will require considerable judgement. There are different considerations that could be included in making this judgement:

- the degree to which the incident(s) undermine(s) Canadians' ability to have a free and fair election;
- the potential of the incident(s) to undermine the credibility of the election; and
- the degree of confidence officials have in the intelligence or information.

The Panel brings together unique national security, foreign affairs, democratic governance and legal perspectives, including a clear view of the democratic rights enshrined in the Canadian Charter of Rights and Freedoms.

A disruptive event or incidents of interference may emanate from domestic and/or foreign actors. Attribution of interference attempts may be challenging or not possible within the timelines permitted by events, given that attempts to unduly influence the election may involve misdirection and disinformation. Further, it is possible that foreign actors could be working in collaboration with, or through, domestic actors. Ultimately, it is the impact of the incident on Canada's ability to have a free and fair election that is at issue in the determination of whether the threshold has been met, and if a public announcement is required. For clarity, Canadians – and democracy – are best served by election campaigns that offer a full range of debate and dissent. The Protocol is not intended to, and will not, be used to respond to that democratic discourse.