CLOSING SUBMISSIONS OF THE CHURCHILL SOCIETY FOR THE ADVANCEMENT OF PARLIAMENTARY DEMOCRACY

INTRODUCTION

1. Set out below are the closing submissions of the Churchill Society for the Advancement of Parliamentary Democracy ("Society"). The Society is a non-partisan, charitable organization that honors the life of Sir Winston Churchill by facilitating education, discussion and debate about Canada's parliamentary democracy.

2. Foreign interference undermines the integrity of democratic processes and institutions, and erodes public trust in these processes and institutions.

3. Democratic decision making involves disagreement, deliberation and persuasion[1]. This process takes time.

4. As Professor Vasanthakumar states[2],

> *Interference* refers to attempts to *circumvent* these processes of deliberation and persuasion; they are clandestine efforts to determine policy outcomes through threat or inducement. Interference can come from domestic and foreign actors: both sources of interference pose a threat to Canadian democracy and the values it helps to secure.
>
> Foreign interference raises special concerns. First, foreign sources of interference often will be more difficult to detect, regulate, and deter. Second, foreign sources of interference may pursue policy outcomes without due regard for Canadian interests and perspectives.2 (*See, e.g.*, J.D. Ohlin and D.B. Hollis (eds), *Defending Democracies: Combatting Foreign Election Interference in a Digital Age* (Oxford University Press, 2021). But it is *interference*, domestic and foreign, that threatens Canadian democracy.

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[1] A. Vasanthakumar, Foreign Interference and Diasporas in Liberal Democracies, Paper submitted to the Commission, p.1

[2] Ibid., at p. 1

5. Finally foreign interference takes place throughout the electoral cycle, not just during the writ period.

FACTS

6. In May of 2024, at the conclusion of the First Phase of the Factual Hearings, Commissioner Hogue delivered her Initial Report to share her preliminary findings. In her report she states at pages 4-6,

> The facts revealed by the evidence I have heard so far showed that intelligence agencies collected information about troubling events that occurred in a handful of ridings during the 2019 and 2021 elections. However, given the multitude of factors that may affect how someone cast their vote, and the secrecy of their vote, it is impossible for me to determine whether those events had an impact on the election results in these ridings.
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> The integrity of the electoral system, however, goes beyond the result of the election itself. Our electoral system is based on the principle of fairness among voters: every vote counts equally, and is treated as having the same value, weight, and potential effect. Fairness presupposes that voters have access to reliable information, can take part in robust discussions and are free to think for themselves and form their own opinions. In my view the events named in this report likely **diminish** the ability of some voters to cast an informed vote, thereby tainting the process. There may not be many so affected, but even a small number should be a **concern**. (emphasis added).

7. The Commissioner goes on to state that,

> We need to take a closer look at attempted foreign interference in our democratic processes if we are to prevent hostile state actors from achieving their goals. To achieve this, we need better communication and collaboration between various players. Several worthwhile initiatives were taken in the run up to the 2019 and 2021 elections, but there is still room for evolution and improvement.

8. She succinctly summarizes the challenges by stating,

> The evidence seems to demonstrate that the roles of some actors in existing processes are not always well understood, that there are sometimes significant differences of opinion between the intelligence community and elected officials, and that the fear of disclosing

> information that could undermine national security is a major impediment to information sharing. The nature of the information gathered and shared by intelligence agencies seems to raise the suspicions of many, who may prefer to refrain from acting when such information is brought to their attention.

9. In the second phase of the Factual Hearings the Commission heard from many of the same witnesses with the addition of diaspora representatives who spoke about the impact of foreign interference on them and their communities. The second phase of factual hearings also further illustrated the challenges that the Commissioner discussed in her Initial Report.

SUBMISSIONS OF THE SOCIETY

10. With the abovementioned background, the Society will make the following submissions:

1) The number and confusion among and between the myriad of entities involved in the flow of security and intelligence information regarding foreign interference results in a lack of accountability;
2) That there be a Code of Conduct to address foreign interference.
3) The lack of sufficiently robust and consistent rules for nomination and leadership contests within political parties creates opportunities for foreign interference; and
4) That there is a lack of legal remedies for combatting foreign interference.

ORGANIZATIONAL STRUCTURES

11. On the surface, the following federal entities have responsibility for addressing foreign interference. They are,

1) Canadian Security Intelligence Service ("CSIS");
2) Communications Security Establishment ("CSE");
3) Royal Canadian Mounted Police ("RCMP");
4) Global Affairs Canada ("GAC");
5) Privy Council office ("PCO");
6) Public Safety;
7) Ministry of Heritage Canada.
8) Elections Canada ("EC");
9) Office of the Commissioner of Canadia Elections (OCCE);
10) Panel of 5

11) Deputy Minister Committee for Intelligence Response;
12) National Security and Intelligence Advisor (to the Prime Minister); and
13) Rapid Response Mechanism.
14) National Security and Intelligence Committee of Parliamentarians ("NSICOP")
15) Security and Intelligence Threats to Elections ("SITE") Task Force

12. This list does not include all the sub-committees that support these entities. Nor does it include the various Parliamentary Committees that also play a role. Apart from the Security ministries, the rest of the entities are staffed by generalists with no specific training in detection and prevention of foreign interference. Further, there is no indication that there is a particular minister accountable for foreign interference. Accountability is dispersed among many resulting in no accountability and a generalist approach to a complex and increasingly dangerous issue. Attached as an Appendix is a chart, created by Corrine Murray, to capture some of the entities listed above and provide an historical perspective on the evolution.

13. Canada is governed by a Westminster system of government with three branches, the executive, judicial and the legislative[3] In this system of government, the official head of State is the Monarch or his representative. The executive is the Government and is *de facto* headed by the Cabinet. The civil service is part of the executive branch of government.[4] This inquiry concerns the actions of the Executive branch of government and includes a review of the actions of the civil service and the relevant political actors. It also, due to the process set up by the Minister for Democratic Institutions at the material time, involves a closer look at the caretaker convention and delegated authority to high-ranking civil servants through a Cabinet Directive. Further, in 2019 an all-party Parliamentary Committee, the National Security and Intelligence Committee, (NSICOP) was also created, a somewhat unique creation which attempted to merge for the legislative and executive branches of the Crown, for these Parliamentarians.[5] At all material times, this committee made various recommendations on government process with respect to foreign interference. However, its oversight is limited or ambiguous during

[3] *Ontario Attorney General v. Ontario (Information and Privacy Commissioner), 2024 SCC 4, para 3.*
[4] Joseph Heath, The Machinery of Government. Oxford University Press, 2020, p 25-26, para 4.
[5] This matter went to the Court of Appeal to have the issue of Parliamentary privileges sorted out.

the crucial writ period since Parliament is dissolved at that time and their committee should be *functus*. Further as they are from the legislative branch of government, they have political persuasive powers with respect to the actions of the executive but no actual decision-making authority which rests with the executive arm.

14. All of the security and intelligence reports made available to the participants in this hearing were general in nature (i.e. reporting generally that there was foreign interference activity) by certain foreign actors and that the nature and identity of the said foreign actors changed over the time period between the 43rd and 44th elections). The Society does not take issue with redactions for National Security reasons. It takes issue with the government's lack of empirical data. These reports did not provide any empirical data which would assist in decision making with respect to the on the ground impact of such interference. This is important because all subsequent decision making by the executive arm of government seems to have been based on the impact of interference as opposed to the fact that the interference took place at all.[6] At paragraph 17 of their interview summary, Ms. Drouin acknowledged that it is difficult to assess the impact of Foreign Interference on an election.[7]

> It is extremely challenging to assess whether a particular tactic impacted a voter's intention and how many voters may have been impacted, given that there are many variables to assess the reasons for someone's vote

FLOW OF INFORMATION AND ACCOUNTABILITY DURING PRE-WRIT PERIOD AND BY-ELECTIONS

15. The flow of information during this period is and continues to be governed by ministerial authority as statutorily mandated. As per standard practice, Ministers with the requisite accountability are briefed and decisions are made in a legally and constitutionally mandated manner. The PMO and PCO are briefed as well on matters that

[6] See Interview Summary: Marta Morgan, Natalie Drouin, Gina Wilson
[7] Ibid., at paragraph 17

are deemed to require their attention. At this level of briefing, the Clerk and the Chief of Staff of the PMO play a significant role in deciding what information needs to get to the PM along with the critical advice of the NSIA. Briefings are done by paper and orally.[8] These processes are in accordance with the Westminster system of government which is based on ministerial accountability.[9]

16. In between the first and second factual hearing the government set up a deputy minister committee (Deputy Minister Committee for intelligence Response) to call out foreign interference during a by-election. According to the evidence at the Hearing, this committee was to report to a minister who would then inform the public of foreign election interference if there was any. The rationale for this was because there was a minister in charge during the non-writ period. Under the Westminster system of government, there is always a minister in charge, even during the caretaker period. This raises an issue about the constitutionality of the Panel of 5 Model. However, this deputy minister amendment to process does not resolve the issue of a lack of an accountability focal point and in fact simply layers on another process.

FLOW OF INFORMATION AND ACCOUNTABILITY DURING WRIT PERIOD.

17. This period is referred to as the caretaker period as discussed above and is governed by the caretaker convention. As stated in the Interview summary of Marta Morgan, Natalie Drouin, Gina Wilson,[10]

> ..."caretaker convention", the government is expected to exercise restraint in its activities during the election period, except where a routine decision or "urgent" action that is in the "national interest" needs to be taken. Ms. Drouin explained that the flow of information to ministers is usually significantly reduced during the writ period as the ministers are expected to limit themselves to routine decisions and addressing emergencies. This

[8] See interview summaries of PCO and PMO, Institutional Role of the PCO
[9] Supra, footnote 4 at p. 33
[10] Supra, footnote 7 at paragraph 20

results from convention and the risk is in the political realm, not in the legal realm. Ministers can always decide to do something even when the advice is that they should not.

18. The critical and significant difference with regard to foreign interference during the writ period was set up by the Cabinet Directive on the Critical Election Incident Public Protocol (CEIPP). A summary of the CEIPP is set out in the Institutional report for the PCO. The CEIPP was first set up by Cabinet Directive in 2019. Pursuant to the terms of the CEIPP a Panel of 5 ("Panel of 5") composed of 5 senior deputy ministers, chaired by the Clerk of the Privy Council was established. The Panel of 5 had the responsibility of determining whether the threshold for informing the public (of foreign interference) has been met either through a single incident or an accumulation of separate incidents. The SITE Task Force was tasked with briefing the Panel of 5 on all relevant security and intelligence issues regarding foreign interference. The SITE Task Force was in turn briefed by other government subcommittees.

19. Pursuant to section 6 of the Cabinet Directive setting up the Panel of 5 to determine whether the threshold has been met required considerable judgment pursuant to the following considerations: 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.

20. The Panel of 5 had been tasked with one of the most critical functions during an election period. It should be noted that the model of the Panel of 5 sought to move away from the ministerial accountability model. This is contrary to the Westminster system of government. Further, to have created such a model, notwithstanding that it was contrary to the Westminster model, more robust underpinnings of neutrality and institutional independence would have been required. Minister Gould who was the Minister of Democratic Institutions at the time of the creation of the CEIPP testified that several jurisdictions had been canvassed and something similar to the French system of

government was used. However, it should be noted that the French system of government (a mixture of Presidential and Prime Ministerial with a Constitutional Council who are appointed by the President) is quite different from the Westminster model and unlike the Westminster model, is not based on ministerial accountability.

21. While it is correct that there is a convention of neutrality with regard to the civil service in the Westminster system of government, in recent times it has not always been so at the highest levels and varies from (Canadian) jurisdiction to jurisdiction. At times, an incoming new government will appoint a new Clerk of the Privy Council or Secretary of Cabinet who will in turn make changes at the deputy minister level. Further, what the term "neutrality" means in the civil service context is that a civil servant will not support particular political parties or engage in partisan political activities.[11] There are other issues as well such as the fact that the deputy minister level civil servants do not enjoy security of tenure and are appointed "at pleasure". Therefore, the credibility of the panel is open to question and criticism, despite the fact that they may be individually credible people. As aforementioned, they do not have institutional independence such as sitting judges who enjoy security of tenure, financial security and administrative independence.[12] Under the Westminster system of government civil servants cannot take on ministerial accountability.

22. The Panel of 5 model also raises the question of whether there should be better and more information flow upwards even though the government is in caretaker mode. Caretaker mode does not mean that all the usual obligations of the Westminster model stop. Ministerial accountability continues. Civil servants cannot constitutionally take on such responsibility. This is articulated in the Armstrong memorandum which was circulated in the United Kingdom in 1985:

> Civil servants are servants of the Crown. For all practical purposes the Crown in this context means and is represented by the government of the day. There are special cases in which certain functions are conferred by law

[11] Supra, footnote 10 at p. 33
[12] Valente v. The Queen, [1985 2 S.C.R. 673]

> upon particular members or groups of members of the public service; but in general the executive powers of the Crown are exercised by and on the advice of Her Majesty's Ministers, who are in turn answerable to Parliament. The Civil Service as such has no constitutional personality or responsibility separate from the duly constituted Government of the day. It is there to provide the Government of the day with advice on the formulation of the policies of the Government, to assist in the carrying out the decisions of the Government, and to manage and deliver the service for which the Government is responsible.[13]

23. The foundational principle in a Westminster government is that it is answerable to Parliament; it violates a fundamental Westminster tenet when civil servants are made accountable for a critical decision such as announcing whether there has been election interference.

24. A possible option could be a panel composed of judges, civil servants and/or experts. Along with the required independence, these individuals should have the required competencies to carry out the task at hand. Any such panel would have to be supported by a secretariat of experts with the required expertise and knowledge. Further, if the Westminster, model is to be maintained this panel should report to a minister who would have accountability. This should be in accordance with the point discussed above of a focal point for investigations and strategic responses to foreign interference.

CODE OF CONDUCT

25. Cyber attacks have become a potent tool of foreign interference especially during elections, where they pose significant risks to the integrity of democratic institutions. Through covert and sophisticated means, foreign states disrupt electoral systems, manipulate public opinion, and erode voter confidence by compromising critical information infrastructure or spreading disinformation. Several liberal democracies (G7, EU) have already called for remedies such as clear and readable labeling of deep fakes;

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[13] Supra, footnote 10 at p. 55

regulation of services offering social media manipulation tools; and detection and suspension of inauthentic accounts linked to coordinated influence operations.[14] However, it is difficult to differentiate between legitimate influence and illegitimate interference. At this time Canadians are generally not well informed on foreign interference and it may be unlikely that there would be consensus among parliamentarians on what constitutes foreign interference. The conversation has just commenced with this commission. Until consensus is reached on the distinction between legitimate influence and illegitimate interference, options other than or in addition to targeted and specific legislation may have to be considered. Other democratic jurisdictions have considered options such as pledges of integrity, codes of ethics or conduct, attestations and the like. These instruments can ready the ground for future legislation. As stated by Jones,[15] political candidates and parliamentarians could voluntarily commit to not engage in inappropriate influence. They could pledge to not fabricate, use or spread falsified, fabricated, or doxed data on materials for disinformation or propaganda purposes; take active steps to maintain good cyber hygiene, such as regular cybersecurity checks and password protection, and train campaign staff in media literacy and risk awareness in order to recognize and prevent attacks; have transparency in foreign and domestic sources of campaign financing, including online political advertising purchases in an effort to maximize public trust in the electoral process.

26. The Speaker could strike an all parliamentarian committee to work on a code of conduct/ethics or awareness practices to assist with election integrity and to encourage parliamentarians to not engage in dis, mis or mal information. Compendium of influence techniques could be commissioned which set out examples of such manipulative practices. Further as Charles Burton[16] discusses in his paper submitted to the Commission, a careful review of Politicians' and Civil servants' Post-Employment restrictions on foreign sources of income should be conducted.

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[14] Kate Jones, European Parliament Coordinator, Legal loopholes and the risk of foreign interference, p.34
[15] Ibid., at page 34
[16] See paper submitted to the Commission

POLITICAL PARTIES, NOMINATION AND LEADERSHIP CONTESTS

27. All of the major political parties have differing rules for membership and for nomination and leadership contests. However, there is commonality in the move away from delegated conventions due to the advent of technology which allows for ranked ballots and the ability to vote from places other than convention halls. This however, makes it more difficult to verify the identity and credentials of the voter. Based on the evidence heard at the convention, the mischief does not seem to occur at the ability to have a membership but at the various contests. It may therefore be possible to allow for a preferred membership process. The ability to join a political party could be relatively open, thereby avoiding the problem of discouraging people from engaging in the democratic process. When dealing with the ability to vote in a contest, it could be considered a privilege and to be earned and be more restricted; only people over 18 and Canadian citizens can participate. This process may go some way in alleviating the Don Valley North issue.

LEGAL REMEDIES

28. As discussed above one of the many challenges with implementing legal remedies for foreign interference is the ambiguity surrounding legitimate influence vs illegitimate interference. In the case of cyber-attacks, this is made more complicated by the anonymity of the attacker. In the case of diplomats, whose actions are governed by the Vienna Convention on Diplomatic Relations (1961), this ambiguity is further exacerbated by the question of what a legitimate form of engagement between states is, allowing diplomats to promote their nation's interests within the bounds of international law and established diplomatic protocols. In addition as was discussed during the Policy phase of this Commission there is a reluctance among Canadians to draft laws, especially criminal laws with extra territorial reach which is an important factor when dealing with foreign interference issues.

29. As a result of these ambiguities, there is an enforcement gap both in domestic law and international law. It is only recently that States have begun to develop countermeasures under international law.[17] Countermeasures are actions that would typically violate international obligations of an injured state but permissible when taken in response to an internationally wrongful act by a responsible state. Countermeasures are required to aim to induce compliance with legal obligations rather than seek retribution and should only target the responsible state.[18]

30. Another possible legal remedy could be sanctions, both under the Special Economic Measures Act (SEMA) and the Justice for Victims of Corrupt Foreign Officials Act (Magnitsky Act). Both Acts have an extra territorial reach but are controlled fully by the executive branch of the government. Given that there is no focal point or accountability in relation to foreign interference, this tool has not been used to date to combat and deter foreign interference.

CONCLUSION

31. As can be noted from these submissions foreign interference is a complex and serious matter and measures for prevention, detection, mitigation and accountability have to be more robustly undertaken. The transnational nature of the activity has to be fully comprehended and artificial divides between Global Affairs of Canada and the Security ministries should be eliminated. It makes no sense for a mature democracy like Canada, with all its privileges to take the position that while its citizenry may be intimidated, harassed, extra-judicially assassinated and subjected to mis, dis and mal information that diplomatic concerns trump and therefore the Executive cannot engage in briefing affected people and setting up full protections. Surely, there is a way to be found to do both. Although there has been some progress in briefing affected parliamentarians there is some ways to go in making the people of Canada aware that they can be protected from

[17] Janakan Muthukumar, Cyber-Attacks as Election Interference Challenges Responses and International Law, paper submitted to the Commission
[18] Ibid

foreign interference. It is understood that this is a new, evolving and complex area for Canada and progress may be difficult.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED the 4th day of November, 2024

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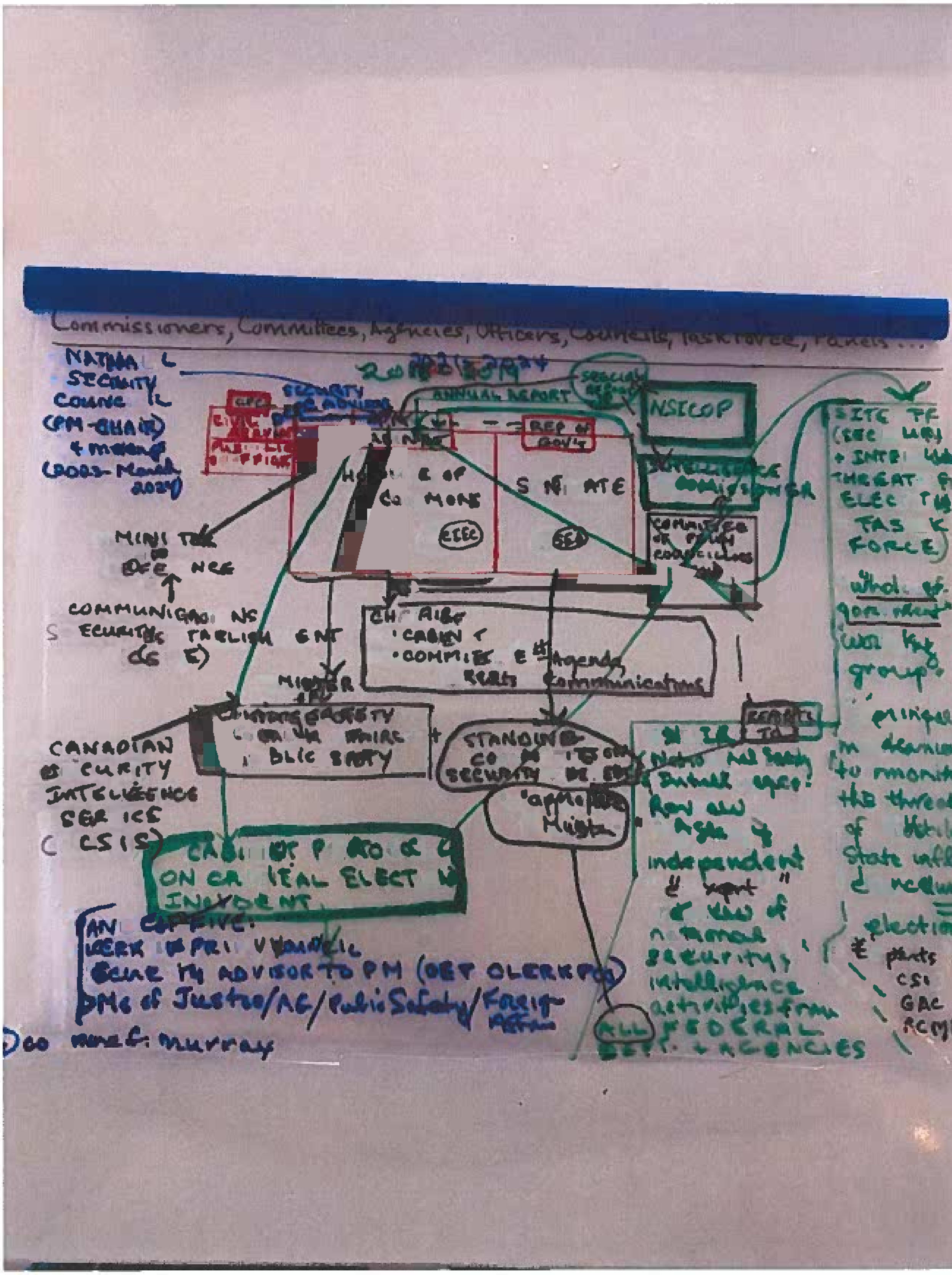
APPENDIX



Commissioners, Committees, Agencies, Officers, Councils, Task Force, Panels ...
NSICOP
SITE TF
ANNUAL REPORT
SPECIAL REPORT
SENATE
INTELLIGENCE COMMISSIONER
MINISTER OF DEFENCE
COMMUNICATIONS SECURITY ESTABLISHMENT (CSE)
CANADIAN SECURITY INTELLIGENCE SERVICE (CSIS)
STANDING COMMITTEE ON SECURITY
Agenda
Communications
independent
national security
intelligence activities from ALL FEDERAL DEPT + AGENCIES
to monitor the threat
election
GAC
RCMP
Justice/AG/Public Safety
murray

APPENDIX

Colour	Explanation
Red	Status quo 2015
Green	2018-2019 Major sequence of adding layers of review of existing National Securities Agencies
Blue	2021-2024 Addition of National Security Council with PM as Chair; four meeting from date of creation in 2023 until March 2024