PUBLIC INQUIRY INTO FOREIGN INTERFERENCE IN FEDERAL ELECTORAL PROCESSES AND DEMOCRATIC INSTITUTIONS

WRITTEN SUBMISSIONS OF THE GOVERNMENT OF CANADA (PART D HEARINGS)

February 9, 2024

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OVERVIEW

1. The Government of Canada recognizes both the cardinal importance of preserving the integrity of Canada's electoral processes and democratic institutions and the need for transparency in order to enhance Canadians' trust in their democracy. At the same time, the protection of national security information is critical to the effective functioning of our intelligence agencies. There need not be a dichotomy between the two imperatives of transparency and the protection of information.

2. Countering foreign interference requires both that the Canadian public be informed and engaged, and that national security, intelligence, and law enforcement agencies be able to operate effectively. Indeed, protecting the rights and freedoms enshrined by the *Canadian Charter of Rights and Freedoms*[1] can only be achieved through a whole of society approach.

3. There are profoundly important interests underlying both of these imperatives: preserving a well-functioning democracy, privacy rights, ensuring strong protections against foreign interference, building the confidence and awareness of Canadians and enabling reliable and accountable security agencies to effectively perform their work by countering those who seek to harm us.

4. Ultimately, the victim of foreign interference is Canada itself. Foreign interference undermines trust in Canada's democratic institutions, stigmatizes diaspora communities, and threatens our economic prosperity. The response to this challenge cannot be a partisan matter; the responsibility lies with all of us to ensure that decisions about Canada are made by Canadians.

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

PART I – THE NEED FOR A PUBLIC INQUIRY ON FOREIGN INTERFERENCE

5. On September 7, 2023, the Government of Canada established the Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions (the Commission).

6. The Terms of Reference, agreed to by all recognized parties in the House of Commons, direct the Commission to take "all necessary steps to prevent the disclosure of information whose disclosure could be injurious to the critical interests of Canada or its allies, national defence or national security" while maximizing transparency.[2]

7. As elaborated below, this can be achieved by: providing the Commission with all relevant information, classified and unclassified; ensuring accountability through Commission counsel challenging the Government's claims of national security confidentiality; assisting the Commission to publicly release the intelligence that needs to be shared in a way that protects sensitive information; redacting certain key documents that would be of benefit to the public; working with the Commission to provide public summaries of *in camera* hearings; soliciting input from Participants on questions for Commission counsel to put to Government witnesses in *in camera* hearings; and, supporting the Commission in explaining, to the extent possible, the reasons why certain information cannot be made public.

[2] Order in Council PC 2023-0882, clause (a)(i)(F)(I) [Terms of Reference].

PART II – PROTECTING THE CRITICIAL INTERESTS OF CANADA, ITS ALLIES, NATIONAL DEFENCE AND NATIONAL SECURITY

Injury to National Security in Disclosing Sensitive Information

8. The Government of Canada uses intelligence to understand threats, to inform its position, to guide its decisions and ultimately to protect the safety, security and prosperity of Canada and Canadians. Secrecy is essential for intelligence. For intelligence agencies to operate effectively, much of the information they collect, as well as the knowledge, sources and methods used to obtain it, must remain confidential. Although agencies may acquire information from a variety of sources, in many circumstances this collection is conducted covertly and, as a result, the methods and sources of that collection cannot be disclosed.

9. Disclosure of sensitive information[3] can reveal, directly or indirectly:

a. Interest in individuals, groups or issues. This includes the existence or non-existence of past or present files or investigations, the intensity of investigations, or the degree or lack of success of investigations.[4]

b. Methods of operation and investigative techniques. Exposing technical sources and methods can potentially endanger the lives of individuals involved.[5] It could also risk

[3] Section 38 of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*] defines "sensitive information" as "information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard."

[4] Letter from Greg Tzemenakis and Barney Brucker to Shantona Chaudhury (15 December 2023) at 3, online: <https://foreigninterferencecommission.ca/fileadmin/commission_ingerence_etrangere/Documents/Presentations/Preuves/CAN.DOC.000001.pdf> [December 15 letter].

[5] Foreign Interference Commission, "Day 3 of Public Hearings" (31 January 2024), testimony of Alan Jones, online (video): <Day 3 - January 31 (foreigninterferencecommission.ca)>.

losing access to technical sources of information, which are complex, difficult and very expensive for Canada to obtain and maintain.[6]

c. Relationships with other security and intelligence agencies. As a net importer of intelligence, Canada relies heavily on longstanding partnerships with various agencies around the world, particularly those within the Five Eyes.[7] These partnerships assist Canada in investigating the multitude of threats to Canada's security, including foreign interference. It would be detrimental to the mutual trust and cooperation built over many decades if Canada could not protect its allies' information. Closely related, the "third-party rule" is an understanding among partners that information providers maintain control over any subsequent disclosure and use. A breach of the third-party rule would have a negative impact on relations with our allies, potentially leading to a reduction or a complete cessation of information sharing.[8]

d. Employees, internal procedures, administrative methodologies, and telecommunications systems. It is equally important to protect the people who work in security and intelligence agencies, and to ensure their safety. Subsection 18(1) of the *Canadian Security Intelligence Service Act* (*CSIS Act*), for instance, prohibits the disclosure of information that would identify a Canadian Security Intelligence Service

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[6] December 15 letter, *supra* note 4 at 3; Canada, Department of Justice, *Institutional Report on the Protection of Information in the National or Public Interest*, Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions (Ottawa: DOJ, 22 January 2024) at 12–13, online: <CAN.DOC.000003.pdf (foreigninterferencecommission.ca)> [Institutional Report].

[7] Foreign Interference Commission, "Day 2 of Public Hearings" (30 January 2024), testimony of Professor Michael Nesbitt, online (video): <Day 2 - January 30 (foreigninterferencecommission.ca)>.

[8] December 15 letter, *supra* note 4 at 3. See also Foreign Interference Commission, "Day 2 of Public Hearings" (30 January 2024), testimony of Professor Leah West, online (video): <Day 2 - January 30 (foreigninterferencecommission.ca)>.

(CSIS) employee who has been or may become engaged in covert operational activity, or allow their identity to be inferred.[9]

e. Persons who cooperate with or provide information in confidence to Canadian intelligence agencies. CSIS Director David Vigneault underscored the need to apply rigorous protection to information that reveals human sources. The purpose for doing so is to protect the safety of those sources, to ensure continued access to the sources and to preserve CSIS' ability to recruit other sources.[10] Section 18.1 of the *CSIS Act* prohibits the disclosure of any information that would reveal the identity of a human source or allow their identity to be inferred.[11] Similarly, subsection 55(1) of the *Communications Security Establishment Act* (*CSE Act*) prohibits the disclosure of the identity of a person or entity that has assisted or is assisting the Communications Security Establishment (CSE) on a confidential basis, or any information from which the identity of such a person or entity could be inferred.[12]

10. Disclosing these categories of information could undermine Canada's security and intelligence agencies' investigations by permitting a subject of interest to deliberately introduce false or misleading information into an investigation. This, in turn, could affect the scope and reliability of information. It could enable the use of countermeasures by subjects of investigation

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[9] *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s 18(1) [*CSIS Act*].
[10] Foreign Interference Commission, "Interview Summary: David Vigneault (Canadian Security Intelligence Service), Alia Tayyeb (Communications Security Establishment), Daniel Rogers (Privy Council Office)" (1 February 2024) at 9, online: <WIT0000003.pdf (foreigninterferencecommission.ca)>. See also Foreign Interference Commission, "Day 4 of Public Hearings" (1 February 2024), testimony of David Vigneault, online (video): <Day 4 - February 1st (foreigninterferencecommission.ca)>.
[11] *CSIS Act*, *supra* note 9, s 18.1. Note that the exception to non-disclosure, if authorized by a Federal Court judge, would be to establish the innocence of an accused. See paragraph 18.1(4)(b) and subsection 18.1(8). See also *Canada (Attorney General) v Almrei*, 2022 FCA 206, where it is confirmed that 18.1 is an absolute class privilege. The FCA held that does not allow the issuance of summaries, including non-identifying ones, in the context of civil proceedings.
[12] *Communications Security Establishment Act*, SC 2019, c 13, s 76, s 55(1).

or operational targets against future investigative activities, which could lead to a gap in intelligence related to the threat.[13]

Mosaic Effect

11. The damage that would be caused by a particular disclosure cannot and should not be assessed in isolation. Otherwise known as the "mosaic effect", small pieces of seemingly innocuous information, if released one by one, can be pieced together with other existing information to present a picture that would be harmful to Canada's security interests.[14] This is especially true when dealing with sophisticated nation-states in the era of big data and extraordinarily powerful computer systems. Such systems can be used to assess the pieces of assembled information that are too numerous and complex for human analysts.[15]

PART III – FOSTERING TRANSPARENCY

12. The threat of foreign interference in federal electoral processes and democratic institutions is real, evolving and growing in both scope and substance. Canadians need to be aware of the threat in order to strengthen democratic institutions. Fostering transparency on the threat of foreign interference is integral to the public interest.

13. Over the last 20 years, Canada has seen an evolution in the disclosure of historically classified information. This is due, in part, to: (a) increased national security prosecutions and other legal proceedings requiring disclosure; (b) the work of Canada's oversight and review bodies

[13] Institutional Report, *supra* note 6 at 13.
[14] *Huang v Canada (Attorney General)*, 2017 FC 662 at para 65.
[15] *Ibid*. See also Foreign Interference Commission, "Day 2 of Public Hearings" (30 January 2024), testimonies of Professors Leah West and Pierre Trudel, online (video): <Day 2 - January 30 (foreigninterferencecommission.ca)>.

in reviewing classified information and producing public reports; and (c) the Federal Courts' commitment to issuing public decisions on matters related to national security. This evolution has been accompanied by a Government shift towards openness, evidenced by the increased media engagements, public appearances and public reports by Canada's security and intelligence agencies.[16]

14. This shift, coupled with the Government's stated commitment to educate the Canadian public about the threats of foreign interference in democratic institutions, results in a Government approach to this Commission – and, specifically, to dealing with issues like the protection of sensitive information – that is not "business as usual".

15. Business as usual would be to simply redact documents. It would divert subject matter experts from their intelligence collection and analysis roles.[17] What is more, a redaction exercise may not meaningfully contribute to the public's appreciation of the issues. This is because many highly sensitive intelligence products are written in a way that reveals the methods and sources of its collection or investigative priorities and gaps. They are intended for Government consumers who have a security clearance and a need to know the specific intelligence contained in that product for the purposes of discharging the duties of their role. Redactions are applied to protect this sensitive information, even if the substance of the intelligence could possibly be released otherwise. Also, proceeding this way would be resource-intensive and time-consuming.

[16] Foreign Interference Commission, "Day 4 of Public Hearings" (1 February 2024), testimonies of Daniel Rogers and David Vigneault, online (video): <Day 4 - February 1st (foreigninterferencecommission.ca)>.
[17] December 15 letter, *supra* note 4 at 5.

Proposals by Participants

16. The Participants have made various proposals as to how the Commission ought to approach the Commission's dual mandate of fostering transparency while protecting information. Those proposals can be summarized as follows:

a. The use of *amicus curiae* to review redactions. Some Participants[18] have proposed the Commission use an *amicus curiae*, as was done in the Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar.

While the Government defers to the Commission as to whether the appointment of an *amicus curiae* should be given consideration, the Government submits that Commission counsel are well placed to fulfill this role. Commission counsel have experience in national security law, particularly having been *amici curiae* and/or special advocates in matters involving the Government of Canada. They are all security-cleared to the highest levels and indoctrinated to any applicable compartment.[19] Their experience, together with their independence and impartiality, enables them to challenge the Government's redactions; accept or reject measures advanced by the Government to make information available and make informed representations to the Commissioner.

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[18] Written submissions of the Centre for Free Expression (17 January 2024) at para 35; Foreign Interference Commission, "Day 5 of Public Hearings" (2 February 2024), closing submissions of Jon Doody representing the Ukrainian Canadian Congress, Transcript of Proceedings at 98, online: <Microsoft Word - PIFI - Public Hearings - Volume 5 - February 2, 2024-Floor transcript.docx (foreigninterferencecommission.ca)>; Foreign Interference Commission, "Day 5 of Public Hearings" (2 February 2024), closing submissions of Malliha Wilson representing the Churchill Society for the Advancement of Parliamentary Democracy, Transcript of Proceedings at 121, online: <Microsoft Word - PIFI - Public Hearings - Volume 5 - February 2, 2024-Floor transcript.docx (foreigninterferencecommission.ca)>; Written submissions of the Honourable Michael Chong (19 January 2024) at 3.

[19] Foreign Interference Commission, "Day 1 of Public Hearings" (29 January 2024), presentation by Gordon Cameron, Transcript of Proceedings at 56, online: <Microsoft Word - PIFI - Public Hearings - Volume 1 - January 29 2024-English Interpretation.docx (foreigninterferencecommission.ca)>.

b. Participant involvement in *in camera* hearings. When the Commissioner must, for reasons of national security, hold *in camera* hearings, some Participants have urged the Commission to grant them access to, or allow them to participate in, these hearings.[20] Such a proposal is at odds with the Terms of Reference, which stipulate that, when the disclosure of information could be injurious to the critical interests of Canada or its allies, the Commission is to receive information *in camera* and "in the absence of any party and their counsel…".[21] Again, Commission counsel are well placed to question witnesses during *in camera* hearings. As outlined below, the Government supports canvassing Participants and the public for input prior to *in camera hearings*. The Government will also assist in preparing public summaries of those hearings if requested by the Commission.

c. Participation in the determination of national security confidentiality claims. There are Participants who propose that they should be notified and be permitted to make submissions in response to Government's claims for protection.[22] In effect, this would create a separate process for every claim. This suggestion would not be workable.

According these Participants, the confidential undertakings that have been signed are sufficient to grant them access to all sensitive information. Confidential undertakings are not a substitute for security clearances. When dealing with intelligence of the utmost sensitivity, there is a need to keep the pool of individuals who have access to such information limited. The greater the number, the higher the risk that such information

[20] Written submissions of the Centre for Free Expression (17 January 2024) at para 34; Foreign Interference Commission, "Day 5 of Public Hearings" (2 February 2024), closing submissions of Jon Doody representing the Ukrainian Canadian Congress, Transcript of Proceedings at 98, online: <Microsoft Word - PIFI - Public Hearings - Volume 5 - February 2, 2024-Floor transcript.docx (foreigninterferencecommission.ca)>; Written submissions of the Russian Canadian Democratic Alliance at para 30.
[21] Terms of Reference, *supra* note 2, clause (a)(iii)(C)(I).
[22] Written submissions of the Media Coalition (17 January 2024) at paras 16–17.

could be disclosed, inadvertently or otherwise. Commission counsel are well placed to make full and fair submissions relating to the protection and disclosure of sensitive information.

Furthermore, introducing a process whereby Participants can make submissions each time the Government makes a claim to protect potentially injurious information would delay the proceedings and hinder the Commission's efficiency. An important part of the Commission's mandate is timely reporting on this matter of substantial public concern.

d. Pre-emptive engagement of the Federal Court. Some Participants have encouraged the Commission to pre-emptively engage the Federal Court to expedite an application process under section 38 of the *Canada Evidence Act* (*CEA*) and employ the use of an *amicus*.[23] The Government is committed to working collaboratively with Commission counsel in accordance with the Terms of Reference and Rules of Practice and Procedure to try to resolve all issues of national security confidentiality. It is hopeful that no s. 38 litigation will be necessary. In that context, there is no indication that prejudging the issue and pre-emptively engaging the Federal Court will save any time or effort.

[23] Written submissions of the Centre for Free Expression (17 January 2024) at para 35; Foreign Interference Commission, "Day 5 of Public Hearings" (2 February 2024), closing submissions of Jon Doody representing the Ukrainian Canadian Congress, Transcript of Proceedings at 98, online: <Microsoft Word - PIFI - Public Hearings - Volume 5 - February 2, 2024-Floor transcript.docx (foreigninterferencecommission.ca)>; Foreign Interference Commission, "Day 5 of Public Hearings" (2 February 2024), closing submissions of Malliha Wilson representing the Churchill Society for the Advancement of Parliamentary Democracy, Transcript of Proceedings at 121, online: <Microsoft Word - PIFI - Public Hearings - Volume 5 - February 2, 2024-Floor transcript.docx (foreigninterferencecommission.ca)>; Written submissions of the Honourable Michael Chong (19 January 2024) at 3.

Government of Canada's Proposals

17. The Government is committed to a collaborative process to make use of the limited time available and ensure as much information can be made public in a way that still protects Canada's vital interests. The Government thus proposes:

a. Providing the Commission with all relevant information, classified and unclassified. The Commission will continue to receive the relevant information necessary for it to fulfill its mandate efficiently and effectively. This will allow the Commission to follow and test the evidence.

b. Ensuring accountability. The Government agrees that when the public's access to information is limited, it needs to have confidence that there will be an independent and impartial process, led by the Commissioner and Commission counsel, to challenge the Government's claims of national security confidentiality.[24] The Commission is well-equipped to fulfill this function.

c. Supporting writing to release. The Government will work with the Commission to ensure that the intelligence and information it wants to release to the public can be shared without disclosing sensitive information. This applies to the Commission's final reports and to any other information the Commission deems necessary to disclose publicly, including summaries of documents or relevant topics.[25] Writing to release is a more efficient and more informative option, compared to redacting original documents.

[24] Foreign Interference Commission, "Day 2 of Public Hearings" (30 January 2024), testimony of Professor Pierre Trudel, online (video): <Day 2 - January 30 (foreigninterferencecommission.ca)>.
[25] In *R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110, the Supreme Court of Canada has recognized summaries as a useful way of balancing the protection of information with the public interest in disclosure.

d. Choosing a proportionate and select group of documents to redact. There may be certain key documents containing highly sensitive information that the public would benefit from receiving in redacted form.

e. Holding *in camera* hearings leading to public summaries. When *in camera* hearings are required, the Government commits to working with the Commission to provide public summaries of those hearings, as it did for interviews in advance of the Part D hearings.

f. Canvassing questions from Parties, Participants and the public for *in camera* hearings. The Government supports Commission counsel soliciting input from Participants on questions for Commission counsel to put to Government witnesses in *in camera* hearings.

g. Providing reasons. The Government agrees that it would be important for the public to appreciate the rationale for limiting public access to information. To that end, the Government supports the Commission in explaining, to the extent possible, the reasons why certain information cannot be made public.[26]

18. These proposals are consistent with the Terms of Reference which call for the Commission to "consider the use of alternative measures, such as summaries, in accordance with the procedures set out in clause (iii)(C), to describe withheld information and, to the extent possible, explain

[26] Foreign Interference Commission, "Day 2 of Public Hearings" (30 January 2024), testimonies of Professors Pierre Trudel, Michael Nesbitt and Leah West, online (video): <Day 2 - January 30 (foreigninterferencecommission.ca)>.

decisions to withhold information in order to foster understanding of the limitations on and impacts of the disclosure of classified information and intelligence".[27]

PART IV – CONCLUSION

19. The Government is fundamentally committed to preserving the integrity of Canada's electoral processes and democratic institutions. This necessarily entails transparency in order to enhance Canadians' trust and confidence in their democracy. It also means confidentiality, when necessary, to ensure that Canada's national security, intelligence, and law enforcement agencies can do their work effectively, and to prevent Canada's adversaries from causing harm. The challenge faced by the Commission is how to best achieve both objectives. The Government has put forward concrete proposals to help achieve these objectives and looks forward to working collaboratively with the Commission in meeting that challenge.

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[27] Terms of Reference, *supra* note 2, clause (a)(i)(F)(II).