Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions

AMENDED Written Closing Submissions of MP Jenny Kwan

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A. Introduction

The central question currently before the Commissioner is how to address paragraph (a)(i)(F) in the Commission's *Terms of Reference*, which directs her to:

> (I) maximize the degree of public transparency while taking 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, in accordance with the procedures set out in clause (iii)(C),
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> (II) 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 decisions to withhold information in order to foster understanding of the limitations on and impacts of the disclosure of classified information and intelligence, and
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> (III) address any relevant classified content in a separate report, if required.

To assist the Commissioner in addressing how to balance national security confidentiality (**"NSC"**) with public transparency, MP Kwan respectfully makes the following submissions. These supplement her oral closing submissions at the conclusion of the NSC hearings on February 2, 2024.

Maximizing transparency and participation are crucial to the legitimacy and success of the Commission. The Commission has been asked to investigate extraordinarily serious allegations that strike at core pillars the Canadian constitutional order – political freedom without fear of repression, parliamentary democracy, and multi-party competitive politics. It must do so against the backdrop of a process led by the Special Rapporteur on Foreign Interference which failed because it was insufficiently transparent and recommended against a public inquiry that would have been transparent; deep concern among Canadian diasporas regarding the integrity of the 43rd and 44th general elections; and the tendency of Canadian governments to overclaim NSC relative to their Five Eyes peers.

Public inquiries are not courts of law. Their reports are not judgments that bind the parties to the controversy that gave rise to public inquiry in the first place. At the end of the day, once the Commission has completed its work, it is the Canadian public which will decide to accept or reject the Commission's findings as accurate and fair, and its policy proposals as responsive or inadequate to address the enormous challenges posed by foreign interference to Canadian democracy. Their assessment of the Commission's work will depend not only on *what* the Commission concludes and recommends, but also on *how* the Commission goes about its work. Maximizing transparency and participation are therefore integral to building public trust in the work of the Commission while it is underway, and to ensuring its ultimate success. This is particularly true for Canada's diasporas, who are the principal targets of foreign interference.

The Commissioner should also bear in mind that the goal of foreign interference is to undermine our democratic system, by creating distrust in the integrity of our electoral processes and democratic institutions in the hearts and minds of Canadians. The role of this Commission is

to get at the truth, so that Canadians may learn from it. The Canadian public is looking to the Commission to tell them what went wrong and going forward, what the GOC needs to do to prevent and fight against foreign interference. This work, as the Commissioner is no doubt aware, is central to restoring faith and trust in Canadian democracy. If the Canadian public is not told the truth, actors engaging in foreign interference will have won the day by sowing discord and distrust in our democratic institutions.

B. The Commission must maximize transparency *and* participation

In interpreting paragraph (a)(i)(F), this Commission must follow *Sherman Estate*.[1] As the Commissioner recently confirmed, the Commission is governed by the open court principle.[2] The constitutional basis for the open court principle is section 2(b) of the *Charter*, which binds both the Commission and the Government of Canada (**"GOC"**) in this proceeding.[3]

Any departures from the principle of public transparency must a meet a strict test of proportionality based on the *Oakes* test, adapted to the context of court proceedings.[4] There must be evidence that disclosure could be injurious to national security or a specified public interest, not a mere assertion by the GOC that disclosure is harmful. Moreover, even if there is a threat to national security or a specific public interest, the Commissioner must adopt the most minimally impairing measures to address that concern. Finally, the Commissioner must not neglect the final stage of the test, proportionality *strictu sensu*, to determine if the public interest

[1] *Sherman Estate v. Donovan*, 2021 SCC 25.
[2] *Decision on an Application to Disclose some Standing Applications (Bob Mackin)* (February 8, 2024), para. 13.
[3] *Sherman Estate v. Donovan*, 2021 SCC 25, para. 39.
[4] *Decision on an Application to Disclose some Standing Applications (Bob Mackin)* (February 8, 2024), para. 11.

in transparency outweighs national security concerns or the SPI.

In relation to claims made by the GOC based on NSC and/or specified public interest immunity (**"SPII"**), there are both *substantive* and *procedural* dimensions to minimal impairment. Substantively:

- The GOC bears the burden of proof in asserting NSC and SPII.
- For NSC claims, the Commission must *disaggregate* the different kinds of national security interests asserted by the government and assess the potential injury of disclosure to those interests separately in relation to each document. During the NSC hearings, it became clear that the government's NSC interests are highest in relation to: (a) human sources; (b) intelligence received from Five Eyes partners; and (c) signals intelligence (these categories overlap). But it must necessarily follow that the government's NSC interests are lower for documents which do *not* raise these issues – for example reports that aggregate and summarize intelligence. The categories of classified intelligence (Top Secret, Secret, Confidential) permit a similar approach, and correlate with these distinctions. This is a case-by-case determination, not only across documents, but potentially within the same document itself.
- Section 2(b) of the *Charter* and paragraph (a)(i)F(III) require the Commission to publicly release as much information as possible to achieve maximum public transparency. In concrete terms, this means: (a) documents should be redacted instead of being sealed in their entirety; and (b) if redactions are not feasible, public summaries should be released. The GOC bears the burden of explaining why

redactions and/or summaries are not minimally impairing. Moreover, the GOC must also justify the scope of any proposed redactions. Finally, the Commission must issue a decision explaining why it accepts, or rejects, the GOC's arguments.

- The same principles apply, with any necessary adaptations, to any assertions of Special Public Interest Immunity (**"SPII"**). Depending on the nature of the asserted SPII, the GOC's interest in confidentiality may be weaker than in relation to NSC claims.

Procedurally, the Commissioner must make her decisions to maximize transparency and participation. As the Commissioner is no doubt aware, a public inquiry can be much more creative procedurally than a court. For example, the Arar Inquiry's use of an *amicus curiae* was a pioneering Canadian procedural innovation without precedent. This was the first time an *amicus curiae* had been used in the national security context, in an *in camera*, *ex parte* hearing. The appointment of an *amicus curiae* by the Federal Court, with an expressly adversarial mandate to test the GOC's assertions of privilege under sections 37 and 38 of the *Canada Evidence Act* ("***CEA***"), has since become a central part of Canadian public law practice. The *amicus curiae* was also crucial to the legitimacy of the Arar Inquiry, because it created an adversarial procedure that put the GOC to the test and allowed Commissioner O'Connor and his counsel team to stand apart from, and critically assess, the arguments presented by counsel.

This Commission should also be procedurally bold and break new ground. Concretely, this includes the following:

- The Commission should conduct *in camera* hearings on assertions of NSC and SPII. There should be public notice of the date of such hearings, and to the greatest

extent possible, of details regarding the documents, or categories of documents, at issue.

- In relation to hearings on NSC claims, the Commission should appoint an *amicus curiae* with the requisite security clearance, from the roster of Special Advocates for security certificates under the *IRPA* or the roster maintained by the Federal Court for section 38 *CEA* matters, with an expressly adversarial mandate to challenge assertions of NSC. Security clearance is not necessary for an *amicus curiae* in relation to SPII claims, but may be convenient if those claims are intertwined with NSC claims.
- For NSC claims, the Commission should grant Parties the right to have counsel with the requisite security clearance to have full rights to participate in the hearing. This includes counsel-only access to all materials over which NSC is claimed, and to make oral and written submissions.[5] For SPII claims, counsel-only access for all Parties, pursuant to a confidentiality undertaking, is sufficient.
- The Commission should release its reasons from NSC and PSII hearings as quickly as possible, in both confidential and public forms.

[5] The British Columbia Supreme Court granted to counsel for the accused in the Air India bombing, Ripudaman Singh Malik and Ajaib Singh Bagri, leave to attend an otherwise *ex parte in camera* hearing for the testimony of a key Crown witness, Satnam Kaur Reyat, under the former section 83.28 of the *Criminal Code*. Section 83.28 pertained to terrorism offences. The hearing was intended to be *ex parte in camera*. However, given the seriousness of the case and the substantial and direct interest of the accused in the information that Ms. Reyat could disclose in the hearing, the Court agreed that the accused's counsel should be present. *In the Matter of an Application Under s. 83.28 of the Criminal Code and Satnam Kaur Reyat*, 2003 BCSC 1152, paras. 218-219. The Supreme Court of Canada did not address the legality of this order on appeal, but impliedly approved it in a later decision, *R. v. Ahmad*, 2011 SCC 6, para. 49.

- In the event the GOC disputes the decision of the Commissioner and asserts privilege under sections 37 and/or 38 *CEA*, the Commission should contact the Federal Court to request that a judge be available on standby to adjudicate any dispute on an urgent basis.

In addition, the Commission should be procedurally innovative in how it approaches *in camera* hearings. It has been clear, from the very outset, that *in camera* hearings will occur because of the nature of the evidence provided by the GOC to the Commission. But the assumption appears to be that there are only two options: full public hearings, with all Parties and Interveners present, or *ex parte in camera* hearings for the Commissioner, Commission counsel, and government.

In reality, there is a spectrum of intermediate options between fully public and closed proceedings. For *in camera* hearings held pursuant to Rules 79 and 80 of the *Rules of Practice and Procedure* ("***Rules***"), the Commission:

- should grant full participatory rights to counsel for the Parties with the requisite security clearance for NSC claims, including the right to cross-examine witnesses; and
- should grant full participatory rights to counsel for the Parties for SPII claims, subject to a confidentiality undertaking.

In camera, *ex parte* proceedings may also take place for witnesses who fear for their personal security. Rule 83g grants the Commissioner the power:

> to receive the evidence of a witness in the absence of the public and any or all Participants, including the Government, and to disclose only so much of the evidence of or pertaining to the witness as the Commissioner determines to be appropriate …

This is an important power in relation to witnesses from diasporic communities who come forward with allegations of foreign interference. The Commissioner should exercise her power to exclude "any or all Participants" surgically, to maximize the participation of Parties. The Commissioner may direct that counsel for the Parties participate in the hearing pursuant to a confidentiality undertaking.

Finally, there is the issue of cabinet confidences. Clause (c) of the *Term of Reference:*

> directs that the Commissioner be given access, so that they may carry out their mandate, to those confidential cabinet documents that came into existence on or after November 4, 2015 and that were provided to the Independent Special Rapporteur on Foreign Interference in relation to the preparation of his First Report, dated May 23, 2023.

The Commission has received these documents unredacted. But the GOC has redacted other documents on the basis that they contain cabinet confidences, pursuant to Rule 69 (which operates in the shadow of section 39 *CEA*). The Commission should be given full access to cabinet confidences, completely unredacted – in a manner identical to how the Special Rapporteur received access to unredacted cabinet documents – to ensure it can answer the crucial questions of who knew what, when, and what they did with the information they received. These questions must be asked of the cabinet itself.

C. The Commission should not repeat the mistakes of the Independent Special Rapporteur on Foreign Interference

The Commission was created in the wake of the controversy over the investigation and *First Report of the Independent Special Rapporteur on Foreign Interference* ("*First Report*"). With the deepest and greatest respect to the Special Rapporteur, that process failed to satisfy Canadians, especially members of diasporas, because by its very design, it was not transparent. In addition, the Special Rapporteur recommended against holding a public inquiry. This Commission should learn from and refuse to repeat the mistakes of that process. Specifically, the Commission:

- should strive for maximum transparency of the underlying information it reviews wherever possible to give Canadians the ability to judge the Commission's conclusions for themselves; and
- should demand access to *all* of the relevant documents, in light of the experience of MP May, and the National Security and Intelligence Review Agency (**"NSIRA"**), which has struggled to get the full picture (as explained further below).

For the Commission and the Special Rapporteur's investigation, a key focus has been and remains the need for transparency to ensure that Canadians have trust and confidence in our democracy. The Prime Minister's announcement of the Appointment of the Special Rapporteur begins as follows (emphasis added):[6]

[6] Prime Minister announces Independent Special Rapporteur to help protect the integrity of Canada's democracy (March 15, 2023)

> The Government of Canada takes any attempts at undermining our democracy very seriously and will continue to take action to protect our institutions and uphold Canadians' confidence in our democracy.

The Prime Minister went on to say, "Canadians need to have confidence in our electoral system, and in our democracy."[7]

Likewise, the first recital of the *Terms of Reference* for the Commission states (emphasis added):

> Whereas, given concerns expressed surrounding foreign interference with respect to the 43rd and 44th general elections, the Government of Canada and the leaders of all recognized parties in the House of Commons recognize 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 and confidence in their democracy;

Despite the importance of reassuring Canadians they can trust and have confidence in our democratic processes, the *First Report* of the Special Rapporteur was insufficiently transparent to achieve this goal. Though the Special Rapporteur's *First Report* acknowledged the desire for transparency, he said it was simply not possible:[8]

> Though in an ideal world, I would have been able to transparently take Canadians along with me through my journey, to show them in this report how comprehensive the process has been, and to allow them to draw their own conclusions about the

[7] Prime Minister announces Independent Special Rapporteur to help protect the integrity of Canada's democracy (March 15, 2023).
[8] *First Report of the Special Rapporteur*, Section V, 1. The Limits of this section

> allegations from the fully body of information. This was never going to be possible due to the national security concerns. But the allegations have caused significant misunderstandings and contributed to a discourse of distrust.

Regrettably, the *First Report* did not do enough to give Canadians visibility into the underlying information on which the Special Rapporteur based his conclusion to enable them to put to one side issues of distrust. Specifically, the *First Report* glosses over the underlying information and focuses instead on the method and conclusions. For example, when addressing the allegation that there was a network of 11 federal election candidates and operatives in the Greater Toronto Area, the Special Rapporteur states: [9]

> I have reviewed the intelligence relating to this allegation, interviewed CSIS officials, NSIA Thomas, past NSIAs, security personnel in the PCO and the Panel of Five Deputy Ministers from the 2019 election as well as the Prime Minister and relevant Ministers. I can report the following. The PRC has leveraged proxy agents and has tried to influence numerous Liberal and Conservative candidates in subtle ways. There is no basis to conclude that the 11 candidates were or are working in concert or understood the proxies' intentions.

The statement describes a method and a conclusion but leaves Canadians with no way to judge the conclusion for themselves. While national security is a concern, there needs to be more careful thought given to the level of underlying information that can be shared with Canadians to address issues of distrust effectively. This is particularly important for Canada's diasporas. The Commission should not repeat the same mistake.

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[9] *First Report of the Special Rapporteur*, Section V, 2. My Review of the principal allegations

It is the lack of meaningful disclosure wherever possible of the underlying information that made the *First Report* so unsatisfying and controversial – again, no more so than for Canada's diasporas. There is a consensus that Canada's diasporas are disproportionately at risk from transnational repression. They have consistently called for this Commission because they fear that repression. MP Kwan is particularly aware of the fears that exist in the Chinese diaspora.

The fear of transnational repression has undermined diasporas' trust in the integrity of Canada's constitutional democracy. They are looking to this Commission to provide a roadmap to Parliament and the government for how to restore their trust, so they can participate fully in Canadian political life without fear.

Democracy ultimately rests on public trust. Free and fair elections create a virtuous circle that reinforces that trust. A lack of confidence in the integrity of elections can create a vicious cycle that undermines trust in democracy. Trust in democracy is fragile. As we can see across the world, once lost, public trust in democracy is very hard to restore. It should never be taken for granted and is a very precious thing. Canada is not immune from this risk.

The lack of transparency in the *First Report* is compounded by the failure of the mechanisms for accountability recommended in that report, namely: (a) that opposition leaders be allowed to view the confidential information reviewed by Special Rapporteur's to arrive at his conclusions; and (b) that NSIRA be allowed to view cabinet confidences shared with the Special Rapporteur.

Green Party leader Elizabeth May MP accepted the government's invitation to obtain a Top Secret security clearance – which she obtained – but was critical of the foreign interference briefing she received, because it lacked key documents. MP May stated that the information she

received was, "well below [her] expectation of what [she] would review."[10] She went on to say, "I didn't see any documents. I saw a summary annex penned by David Johnston" with footnotes that "directed me to documents I cannot read…That doesn't allow me to verify in any way, shape or form that David Johnston's conclusions were reasonable or not."[11]

The Special Rapporteur also recommended:[12]

> My report, including the confidential annex, and all the documents that were provided to me should be provided to NSICOP and NSIRA for them to review comprehensively and identify any different conclusions than mine. I note that I was given access to documents protected by Cabinet Confidence, which NSICOP and NSIRA are not typically entitled to see. However, I recommend the government disclose to NSICOP and NSIRA those cabinet confidential documents provided to me. They were instructive, and in my opinion reflect careful consideration of difficult issues by the federal cabinet. NSIRA and NSICOP would benefit from reviewing them to ensure these review bodies have access to the same information I gathered and reviewed.

On June 7, 2023, the Honorable Marie Deschamps, Chair of NSIRA, wrote the Prime Minister on to request these cabinet documents, because they had not yet been provided to NSIRA.[13] As she explained, access to these documents was necessary "to ensure the integrity of our review and not limit or influence our evidence base".

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[10] Green Party's Elizabeth May says top-secret foreign interference briefing lacked key documents, *The Globe and Mail* (August 18, 2023).
[11] *Ibid*.
[12] *First Report of the Special Rapporteur*, Section VIII, 4(c) An important role for NSICOP and NSIRA.
[13] Letter of the Honorable Marie Deschamps, Chair of NSIRA to Prime Minister Trudeau (June 7, 2023).

The Commissioner must be able to say, at the end of this process, that she had access to every piece of relevant information to answer the questions posed to her by the *Terms of Reference*. But she must also do more – she must be able to disclose to the Canadian public what information she received, so that her report goes beyond a recitation of methods and conclusions in the manner of the *First Report*, and dispels the concern that she was provided with incomplete information, like MP May and NSIRA.