FOREIGN INTERFERENCE COMMISSION

CLOSING SUBMISSIONS OF THE CENTRE FOR FREE EXPRESSION ON THE NATIONAL SECURITY HEARINGS

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DMG Advocates LLP
155 University Avenue, Suite 1230
Toronto, ON M5H 3B7

John Mather LSO# 63766O
jmather@dmgadvocates.com
Tel: 416-238-2265
Fax: 647-689-3062

Michael Robson LSO # 84984P
mrobson@dmgadvocates.com
Tel: 437-781-5967

Counsel for the
Centre for Free Expression

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PART I - INTRODUCTION

1. The Centre for Free Expression thanks the Commission for the opportunity to participate in the national security confidentiality hearings. Few things are more fundamental to a democracy than free and fair elections and the public's right to know about the integrity of those elections.

2. The CFE is pleased that the Government of Canada has walked back from the posture and language of its December 15, 2023 letter. That letter suggested the Government did not have the resources or inclination to assist the Commission in fulfilling its mandate of maximizing transparency (a mandate given to it by the same Government).

3. The senior intelligence officials and Minister LeBlanc took a different tone in their testimony. They committed to cooperating with the Commission and providing the necessary resources to allow this public inquiry to be public. Having said the right things, the Government of Canada must now take meaningful action.

4. At the same time, to fulfil its mandate of maximizing transparency, the Commission cannot defer to the Government of Canada's conclusions on what can and cannot be disclosed. The Commission must be persistent in scrutinizing the Government's positions and evidence. The Commission heard repeatedly about a culture of overclaiming. The Commission also heard about the experiences of the Arar Inquiry and Commissioner O'Connor's frustration with the Governments failure to be transparent. The Commission must push back on the Government of Canada's claims. Doing so is necessary to instill confidence in the Commission's conclusions.

PART II - PUBLIC INTEREST IN DISCLOSURE

5. The expert panels and witnesses agreed there was an immense public interest in transparency regarding foreign interference.

6. In evidence and argument, the Government of Canada focused on the public interest in disclosure for the purpose of building resilience to foreign interference and protecting Canadian citizens. The public interest is broader than that.

7. As set out in the CFE's opening submissions, the public's right to information regarding the functioning of its government is inextricably linked to freedom of expression under the Charter. There are few things more important to Canadian democracy and public confidence in government than the integrity of elections. The public should not be denied the information to have informed discussion and debate on those issues.

8. The Commission must consider this broader public interest when weighing the Government's claims that the disclosure of certain information may cause harm to Canada's national security.

9. The importance of this broader public interest can be illustrated by the media reports on foreign interference that have been sourced to leaks from CSIS. In those reports, media have advanced various allegations about the integrity of the last two federal elections, as well as current and former Members of Federal and Provincial Parliament. These include allegations that foreign actors encouraged a campaign donation kickback scheme, anti-PRC candidates were subjected to coordinated attacks, a Member of Parliament advised a

Chinese foreign operative to delay the release of two Canadians and that the Chinese government had harassed and targeted another Member of Parliament and his family.

10. In conducting his review of these allegations, Independent Special Rapporteur and former Governor General David Johnston concluded that the reports of foreign interference "are less concerning than some media reporting has suggested, and in some cases the true story is quite different". Mr. Johnston, however, said that to arrive at this conclusion it was "necessary" to review both the leaked information and classified information "carefully and in context".[1]

11. The Canadian public has a fundamental right to review, weigh and assess that necessary context – and not just the Commission's conclusions on that context. The public should not be denied information that can, according to the former Governor General, answer the serious and troubling questions about the integrity of federal elections and public officials.

12. In balancing the public interest in transparency against national security concerns in the context of these allegations, the public interest in building resiliency may be given less weight as the information may not assist in building that resiliency. That cannot end the inquiry, however. The public interest in the right to information about the integrity of the Canadian elections and public officials must also be weighed, and that weight is immense.

PART III - PRINCIPLES FOR PUBLIC CONFIDENCE

13. In its opening submissions, the CFE suggested four principles the Commission should follow to demonstrate its commitment to transparency and instill confidence in its process.

[1] CFE0000019, page 29

The expert discussion, testimony and submissions during the national security hearings re-enforced those principles. Specifically:

(a) **Scrutiny:** The Commission heard from former Department of Justice Counsel (Professor Leah West) and former senior intelligence officials (Richard Fadden, Alan Jones and John Forster) that intelligence agencies are prone to overclaiming national security confidentiality. For this reason, they encouraged the Commission to push back on the Government's claims in this inquiry.[2] In contrast, CSIS Director David Vigneault resisted the notion that his agency might be prone to overclaiming.[3] The director's reluctance to acknowledge this culture within his own organization reflects that an intelligence agency like CSIS cannot be treated as impartial when it comes to the weighing the public interest in transparency against national security confidentiality claims. The testimony re-enforced that it is critical that national security confidentiality claims are independently scrutinized.

(b) **Transparency in Process**: Several parties emphasized the importance of the Commission being transparent in how it assessed and determined claims of national security confidentiality. Not only must the Commission push back, it must demonstrate that it has pushed back. The Commission can achieve this by explaining when it has agreed or disagreed with the Government of Canada. Where the Commissioner agrees that certain information must be withheld, the process leading to and the reasons for that determination must be explained in plain and satisfactory language, so that the public can debate, at the very least, whether there is a justification for being denied information of such importance.

[2] See, for example, Richard Fadden, Day 3, Page 22.
[3] Day 4, Page 74-75.

(c) **Timeliness:** The Government of Canada acknowledged that, in dealing with disclosure requests, it cannot follow the ordinary course. The Government of Canada insisted that it had created a bespoke process to facilitate the Commission's mandate and timeliness. The Commission should test that process early, as suggested below and, if it fails, be prepared to seek recourse in Federal Court on an expedited basis.

(d) **Effectiveness**: Professor West made clear that the Commission cannot compel disclosure of any information that is the subject of a national security confidentiality claim. If there is a disagreement, the Government of Canada can force the matter into Federal Court, which may have the practical effect of ending any challenge from the Commission.[4] The Commission, however, can still be effective in holding the Government of Canada accountable to its stated commitments. The Commission should be loud and clear in public when, in its view, the Government of Canada has failed to maximize transparency and, as a result, failed to assist the Commission achieve its mandate.

PART IV - SUGGESTIONS

14. The CFE makes the following suggestions to the Commission.

A. Appoint Openness Advocates

15. The CFE strongly encourages the Commission to appoint openness advocates, both from a legal and expert perspective.

[4] Day 2, pages 45-60.

16. From a legal perspective, the openness advocate's sole responsibility would be to challenge the Government's claims of national security confidentiality. The role would be similar to that of an *amicus curiae*.

17. In making this suggestion, the CFE acknowledges that Commission Counsel have deep experience dealing with national security confidentiality claims. The CFE does not question this experience and Commission Counsel's ability to impartially challenge the Government's claims. Nevertheless, keeping in mind the overwhelming importance of transparency, a legal openness advocate would enhance the Commission's process for the following reasons:

(a) The openness advocate could focus solely on the issue of public disclosure. Commission counsel have multiple responsibilities, including – and perhaps most importantly – conducting the factual investigation and leading evidence before the Commissioner (whether that evidence is in camera or in public). A counsel dedicated to challenging national security claims will ensure the Government's positions are rigorously tested while Commission Counsel focus on their other work.

(b) The openness advocate can be actively adverse to the Government of Canada. As set out in the Commission's introductory presentation, Commission Counsel's role is not inherently adversarial. Commission Counsel must work cooperatively with the Government Canada and, as a result, may have incentives not to always challenge the Government of Canada's positions.

(c) The openness advocate can add credibility and reliability to the Commissioner's decisions by providing a second voice and view on the issue of disclosure. Where the

Commissioner agrees that certain information should not be disclosed, the support of the openness advocate can assist that decision. Similarly, where the Commissioner disagrees with the Government of Canada on disclosure, the openness advocate can be an important voice of support, and an additional point of pressure.

18. From the expert perspective, Professor West and Mr. Fadden explained that, in assessing the potential injury of disclosure, deference is given to the intelligence agencies and their expertise. For this reason, Mr. Fadden suggested that a retired senior intelligence official be appointed to review and independently assess the claims of injury. That retired official can provide valuable insight and expertise to the Commission. Given the importance of the questions before the Commission deference should not be the default.[5]

B. Permit Counsel with Appropriate Clearance to Attend

19. Counsel for parties with the appropriate security clearance should be permitted to attend in camera hearings where the Government seeks to justify withholding information on the basis of national security confidentiality. Counsel will have to agree to be bound by their legal obligations to keep secret information that is not ultimately disclosed. The presence of additional counsel will both bring additional scrutiny to the Government's claims, as well as provide further comfort that the disclosure of information being heard in camera outweighs the public interest in the disclosure of information.

[5] Day 2, page 49-50; Day 3, page 21-24.

C. Test the Government of Canada's Process Early

20. The Government of Canada asserts that it has created a bespoke process to respond to disclosure requests. The Commission should test the process early by identifying key documents or information it believes ought to be disclosed. Testing the process early will help both the Commission and Government understand if it is working effectively and quickly. If there are concerns, they can be addressed.

D. Challenge Arguments that Enable Overclaiming

21. Throughout the hearings and in their December 15, 2023 letter, the Government of Canada raised several arguments that, if accepted without challenge, effectively enable the Government to claim national security confidentiality over any piece of information. The Commission must be particularly diligent in scrutinizing these arguments, which include:

(a) **The mosaic effect**. Governments can abuse the notion that any particular piece of innocuous information can become injurious when stitched together with other pieces of information. As Professor West noted, the Federal Court does not accept this argument without sufficient reasons to support the mosaic effect's application to the particular piece of information at issue.[6] The Commission must follow this law.

(b) **Open source information can be classified, somehow**. If the Government is seeking to withhold information that has been posted in public, the Commission must insist

[6] Day 2, page 43.

on its disclosure unless it can provide a compelling explanation of how the disclosure of that public information could be injurious to national security.

(c) **The risks associated with artificial intelligence**. The growth and development of artificial intelligence may increase foreign governments' ability to collect and analyze information. The advent of a new technology, however, cannot serve as a blanket excuse for the refusal to disclose information. The Commission should not accept this argument without evidence demonstrating how the risk applies to the information in question.

(d) **Intelligence information from the Five Eyes and the third party rule**. The Government has placed significant emphasis on safeguarding its relationship with the Five Eyes. However, as the Pillar Society noted in its closing remarks, the Five Eyes are "not like the Eye of Sauron, looking down at these proceedings with grave concern". Rather, the Pillar Society's expectation is that the intelligence and analysis relating to foreign interference is unlikely to come from the Five Eyes or other third parties. The Commission must scrutinize and assess general claims of the third party rule.

E. Provide Ongoing Updates Regarding In Camera Evidence and Summaries

22. The Commission should regularly update the public after any *in camera* evidence has been heard. The Commission should also provide updates on the timing of the Government of Canada preparing and reviewing summaries, such that the public can see and assess how the Government of Canada is fulfilling its commitments.

F. Be Public About Disagreements with the Government of Canada

23. Where there is disagreement between the Commission and the Government of Canada on how to maximize transparency, the Commission should identify that disagreement publicly and before the final report (doing so in a manner that is fair to the Government of Canada). The public should know while the inquiry is ongoing whether the Commissioner believes that the Government of Canada is withholding information that is not sensitive or injurious.

G. Work Cooperatively With Parties

24. To the extent not all counsel can attend *in camera* hearings, Commission Counsel should foster transparency by seeking to collaborate with parties' counsel in preparing for those hearings. For example, in the Arar Inquiry, Commission Counsel would seek input from intervenors on suggestions for areas of cross-examination for *in camera* hearings.[7] Considering the importance of testing the Government's national security confidentiality claims to ensure that the public interest is properly represented at any *in camera* hearing, the Commission ought to solicit input from the parties regarding submissions and areas for cross-examination.

25. Commission Counsel should also report on what questions were and the reasons for declining to ask other questions.

[7] Arar Report, Analysis and Recommendations, at p. 291.

PART V - CONCLUSION

26. The CFE is grateful for the opportunity to participate in this phase of the Commission's process. The CFE remains available and willing to assist the Commission in its work. In this respect, the CFE encourages the Commission to further explore the tension between transparency and national security as part of its policy phase. If this occurs, the CFE would welcome the opportunity to continue its participation.