

FOREIGN INTERFERENCE COMMISSION – SUBMISSIONS BY THE CHURCHILL SOCIETY FOR THE ADVANCEMENT OF PARLIAMENTARY DEMOCRACY

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

2. The Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions ("Commission") granted the Society Intervenor status with respect to Part 1 of its hearing. The mandate for Part 1 is as set out in its terms of reference as:
 - a) examine and assess interference by China, Russia and other foreign states or non-state actors, including any potential impacts, in order to confirm the integrity of, and any impacts on, the 43rd and 44th general elections at the national and electoral district levels,

 - b) in relation to the issues set out in clause (A), examine and assess the flow of information to senior decision-makers, including elected officials, and between the Security and Intelligence Threats to Elections Task Force and the Critical Election Incident Public Protocol panel during the election periods that led up to the 43rd and 44th general elections, and in the weeks following those periods, and actions taken in response.

Part A: Electoral interference by foreign actors

3. Under subsection 2(b) of the CSIS Act, foreign influence is defined as,

foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person.

4. The Commission has made available a number of documents and although many were redacted due to national security reasons there remains a significant quantity of CSIS reports that indicate that CSIS was of the view that there were a number of foreign states that were engaged in some form of foreign interference. Not only was CSIS aware of such interference but they published reports and had regular briefings with all relevant officials of the government. Similarly, there were regular reports made available by the RRM and SITE at relevant periods as well.

5. 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). 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. (see Interview Summary: Marta Morgan, Natalie Drouin, Gina Wilson). At paragraph 17 of their interview summary,

Ms. Drouin acknowledged that it is difficult to assess the impact of FI on an election. It is extremely challenging to assess whether a particular tactic impacted a voters' intention and how many voters may have been impacted,

given that there are many variables to assess the reasons for someone's vote.

6. However the government did not present evidence as to the on the ground impact of the interference. The only evidence available to the participants with respect to the local impact is that given by Chong, Kwan, Chui and O'Toole. The evidence by these individuals indicate that they formed the view that there was interference but did not know how to raise their concerns (i.e. who was the right authority to investigate this matter). As an example, Chiu who has testified before this Commission that he was a victim of foreign interference, and provided evidence to that effect, stated that he reported his allegations of election interference to CSIS during the election campaign but neither CSIS, nor the Panel of 5 reached out to him. Subsequently, someone else filed a complaint involving foreign interference with the Commissioner of Elections Canada. He understands that the CCE is investigating. (see stage 1 interview summary: Kenny Chui) Michael Chong in his Stage 1 interview summary paragraph 13-17 states that the RRM was tracking in real time the disinformation campaign against Chiu but no information was released to the public or to Chui. Mr. Chong himself was only notified of the threat against him after media reporting (paragraph 18). Mr. Chong does not assert that there was interference in his riding.
7. The evidence of the witnesses called by the Commission allege interference in the electoral process and mental distress. However, these allegations have not been investigated. Simultaneously there are CSIS and RRM reports that seem to corroborate these allegations. But at best, the portions of these reports that have been released to the participants are vague and lack empirical data or baseline information which make it very difficult to actually assess the local impact. To fully answer Part A, the Society submits that a more robust system of investigation by the authority with expertise in foreign interference, needs to be undertaken with

baseline empirical data. Until that time the question posed in Part A cannot be answered fully.

8. It is the Society's submission that the evidence submitted by the aforementioned individuals warrant at least an investigation by the authority with the required expertise and legal authority.

Part B: Flow of Information

9. It is important to understand Canada's system of government before answering this part of the submission in order to determine whether the information flow was adequate and appropriate and whether the right accountabilities were in place. Canada is governed by a Westminster system of government with three branches, the executive, the judicial and the legislative (*Ontario Attorney General v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4, para 3). (Joseph Heath; *ibid*, p, 26) In this system of government the official head of State is the Monarch or his representative and all legislation has to receive royal assent before becoming law. The executive is the Government and is de facto headed by the Cabinet. The civil service is part of the executive branch of government. 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. It should be mentioned that an all-party Parliamentary Committee, the National Security and Intelligence Committee, (NASICOP) was struck. This committee made various recommendations on government process with respect to foreign interference. However, their oversight is limited during the crucial writ period and Parliament is dissolved at that time and their committee is *functus*. Further as they are part of 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.

Flow of information during pre-writ period.

10. The flow of information during this period is governed by ministerial authority as statutorily mandated. As per standard practice, Ministers with intelligence and security responsibility get briefed and decisions are made in legally mandated ways. The PMO and PCO get briefed as well on matters that 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. (see interview summaries of PCO and PMO, Institutional Role of the PCO). These processes are in accordance with the Westminster system of government which is based on ministerial accountability. (Heard, *ibid*, p. 33).

Flow of Information during writ period.

11. 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, (para 20)

...“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 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.

12. The critical and significant difference during the writ period was the creation of the Critical Election Incident Public Protocol (CEIPP). A summary of the CEIPP is set out in the Institutional report for PCO. The CEIPP was established pursuant to a Cabinet directive, to be operational during the writ period which would be governed by the caretaker convention. It is not stated but the assumption is that the authority for the Cabinet Directive is the Crown Prerogative. The CEIPP was first established in 2019 and established a Panel of 5 composed of 5 senior deputy ministers, chaired by the Clerk of the Privy Council who 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 TF was tasked with briefing the Panel of 5 regularly on all relevant security and intelligence issues regarding foreign interference. The SITE TF was in turn briefed by other government subcommittees with the relevant expertise. As can be noted there was significant information flow of technical expert information. However, there does not seem to have been any information flow from riding levels. When questioned on this during cross examination the answers were that this is an issue to be handled by the political parties. This is a questionable response. It is accepted that the political parties had no expertise in foreign interference as was evidenced by the panel of party officials who appeared before this Commission. They were simply consumers of briefings provided by SITE. This was an important part of the information chain that was missing.

13. Pursuant to section 6 of the Cabinet Directive determining whether the threshold has been met will require considerable judgment and the following considerations apply.

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.

Institutional independence of the Panel of 5.

14. The Panel has been tasked with one of the most critical functions during an election and the question arises as to whether the panel has sufficient institutional independence to carry out this responsibility. Minister Gould who was the Minister of Democratic Institutions at the time of the creation of the CEIPP testified that a number of jurisdictions had been canvassed and something similar to the French model 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 which is based on ministerial accountability. However, the government here appointed 5 senior ranking civil servants to fulfill this critical function on the basis that they are neutral. Their institutional independence as opposed to their actual independence (which is not in question) does not seem to have been looked at.

15. 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” really means in the civil service context is that a civil servant will not support particular political parties or engage in partisan political activities. (Joseph Heath; *The Machinery of Government*; p. 33). 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 can be questioned despite the fact that they may be individually credible people. They do not have the institutional independence such as sitting judges who enjoy security of tenure, financial security and administrative independence (*Valente v. The Queen*, [1985] 2 S.C.R. 673) . Appointing retired judges would be similar to appointing civil servants as they would not have the institutional independence that should be required for the task set out in the Cabinet directive.

Information Flow Up

16. There was little information as to what happens with the information that the Panel of 5 receives, except for the fact that they deliberate as to whether the threshold has been met (this is along with their other duties and obligations). It seems pursuant to the Cabinet Directive that they inform the Prime Minister and other relevant officials and party leaders if they have decided to make an announcement (paragraph 5). This raises the question of whether the Prime Minister ultimately bears the accountability for the announcement (or lack of an announcement if there should have been one). Under the Westminster system of government civil servants cannot take on ministerial accountability. It 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 take that on. 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 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. (Heard; *ibid*, p 55)

17. 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 (or not making such announcement when it is required).

18. In conclusion, it is the Society's submission that there was a lack of information flow from riding levels up and given the model set up little evidence of information flow to the political level which is ultimately accountable under the Westminster system of government.

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