

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

Office of the Commissioner of Canada Elections (OCCE)

Party

**Closing Submissions of the Office of the Commissioner of Canada Elections (OCCE)
with respect to the Public Hearings in Phase 1 of the Public Inquiry into Foreign Interference
in Federal Electoral Processes and Democratic Institutions**

Introduction

1. The Commissioner of Canada Elections (CCE) is the independent officer whose duty it is to ensure that the *Canada Elections Act* (CEA) and the *Referendum Act* are complied with and enforced.

COM.0000009, s. 509.2
CEF.IR.0000001.EN, para. 1.01
WIT0000006, para. 5

2. The CCE will, upon receipt of a complaint and if the subject matter falls under her mandate, conduct a review to determine if a contravention of the CEA has been committed. The evidence collected during this review instructs the CCE on which enforcement regime to adopt in response to the complaint. The CCE may also launch an investigation on her own initiative.

COM.0000009, s. 510
CEF.IR.0000001.EN, para. 1.06
WIT0000025.EN, para. 46 to 49
WIT0000006, para. 7
TRN0000007, pp. 9, 118, 119

3. In carrying out its review of any complaint received, the Office of the Commissioner of Canada Elections (OCCE) may rely on publicly available information, extensive open-source analysis and information provided by its partners, witnesses or by individuals or entities.

WIT0000006, para. 26 to 28

4. The CCE has two regimes under which she can ensure compliance with, and enforcement of, the CEA: a criminal regime and an administrative regime.
5. A review of a complaint will inform the preferred route under which the CCE chooses to proceed. Depending on the type of the alleged contravention of the CEA, the CCE may have the discretion to proceed under either regime. The exercise of this discretion is dependent on a variety of factors, including: the severity of the contravention, the nature and the quality of the evidence gathered, the avenues or ability to collect the necessary evidence to meet the respective thresholds under the respective regimes, the specific circumstances of each case as well as the public interest. The decision to proceed under one or the other of these two regimes can be made at any time during the course of the review or investigation.

CEF.IR.0000001.EN, para. 1.40 to 1.42

Criminal Regime

6. Once an investigation is launched, the CEA provides a variety of investigative tools under the criminal regime. As provided for in subsection 510(3), Part XV of the *Criminal Code* is available to the CCE and her team.

COM.0000009, s. 510(3)

7. The OCCE is required to obtain prior judicial authorization in order to access relevant information for which a person is entitled to a reasonable expectation of privacy. If an investigator can satisfy the judge, through affidavit evidence, that there are reasonable grounds to believe, among other things, that there is evidence of an offence in a particular place, a search warrant may be issued.

CEF.IR.0000001.EN, para. 1.75, 1.76

8. Production orders may serve to compel a third party (in the general sense and not as understood under the CEA), i.e., a person other than the subject of the investigation, to provide the CCE or one of her investigators with information or documents in the possession of the third party as described in the order. The court may issue a production order if the issuing justice or judge is satisfied that there are reasonable grounds to believe, among other things, that a document or data in the possession of the third party will provide evidence respecting the commission of the offence under investigation.

CEF.IR.0000001.EN, para. 1.77

9. The powers given to the CCE under this regime are not, however, without important limitations. The ability to use tools to compel evidence under the CEA or *Criminal Code* is contingent upon

the CCE having reasonable grounds to believe that the CEA has been contravened or is about to be contravened.

COM.0000009, s. 510(3), s. 510.01

Administrative Regime

10. A contravention of the CEA may be subject to an administrative investigation, one that does not carry the risk of criminal prosecution in court. It aims at ensuring compliance with the CEA.
11. The CEA does not contain specific and adapted tools for gathering evidence under the administrative regime. Thus, the only formal means that could be used to gather evidence in the context of an administrative investigation is to seek an order, under section 510.01 of the CEA, requiring an individual to testify or to make and produce a written return. Where the contravention is potentially both an offence and a violation, the criminal tools (search warrant, production and preservation orders) are not available once a decision has been made to pursue the matter under the administrative regime. On the other hand, the standard to be met for obtaining a court order under the CEA to compel a witness, i.e. the existence of reasonable grounds to believe that an offence or a contravention has been committed, is very similar to the standard for issuing a notice of violation (existence of reasonable grounds to believe that a violation has been committed).

CEF.IR.0000001.EN, para. 1.78

12. In relation to administrative investigations, the CCE has the power to impose administrative monetary penalties with respect to certain provisions of the CEA. This regime offers greater agility and can obtain swifter compliance than the criminal regime. This regime is, however, limited in terms of the maximum amounts it may impose.

COM.0000009, s. 508.4 to 508.6

CEF.IR.0000001.EN, Annex B

Foreign Interference Complaints During the 43rd and 44th General Elections

13. The term “foreign interference” is not defined in the CEA. There are, however, several possible contraventions in the CEA that may relate to foreign individuals, entities or funds, including the following:
 - a foreigner unduly influencing an elector to vote or refrain from voting for a particular candidate or political party (s. 282.4);

- a foreigner compelling or influencing someone, by intimidation or duress, or by pretense or contrivance, to vote or refrain from voting, or to vote or refrain from voting in a certain way (s. 282.8);
- broadcasting election advertising outside of Canada or using broadcasting stations outside of Canada (s. 330);
- foreign funding or incurring regulated expenses by a foreign third party (ss. 349.02, 349.4 and 351.1); and
- a person who is not a Canadian citizen or permanent resident contributing to a party, association, nomination candidate, candidate or leadership contestant (s. 363(1)).

CEF.IR.0000001.EN, Annex B
 WIT00000025.EN, para. 25
 WIT00000006, para. 13, 30, 31

14. Subsection 282.4(1) of the CEA, for example, prohibits a foreign individual or entity from unduly influencing an elector to vote or refrain from voting for a particular candidate or registered party during an election period. Undue influence, under subsection 282.4(2), requires that, during an election period, a foreign individual or entity knowingly incur an expense to directly promote or oppose a candidate, party or party leader or that they unduly influence an elector by committing an offence under an Act of Parliament or a provincial legislature.

COM0000009, s. 282.4
 WIT00000025.EN, para. 29
 WIT00000006, para. 36
 TRN0000007, p. 122

15. Subsection 282.4(3) also provides important exemptions to the prohibition of undue influence that reflect basic Canadian principles of freedom of expression. Subsection 282.4(3) reads as follows:

282.4 (3) For greater certainty, subsection (1) does not apply if the only thing done by the person or entity to influence the elector to vote or refrain from voting, or to vote or refrain from voting for the particular candidate or registered party, consists of

(a) an expression of their opinion about the outcome or desired outcome of the election;

(b) a statement by them that encourages the elector to vote or refrain from voting for any candidate or registered party in the election; or

(c) the transmission to the public through broadcasting, or through electronic or print media, of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news, regardless of the expense incurred in doing so, if no contravention of subsection 330(1) or (2) is involved in the transmission.

WIT0000025.EN, para. 30
TRN0000007, pp. 126 to 128

16. Section 282.8 of the CEA prohibits a person, by intimidation or duress, from compelling or attempting to compel a person to vote or refrain from voting, or to vote or refrain from voting for a particular candidate or registered party at an election. It equally prohibits a person, by any pretence or contrivance, from influencing or attempting to influence a person to vote or refrain from voting or to vote or refrain from voting for a particular candidate or registered party at an election. Intimidation of a candidate or a prospective candidate is not an offence under the CEA.

COM000009, s. 282.8
WIT0000025.EN, para. 36, 37
WIT0000006, para. 34, 35
TRN0000007, pp. 123, 124

17. Although disinformation may be an element of a contravention under several provisions of the CEA (for example misleading publication or unauthorized use of computer), disinformation, when considered by itself, will only contravene the CEA if the subject matter is,

- a. a false statement that a candidate, prospective candidate, party leader or a public figure associated with a political party has committed an offence under an Act of Parliament or provincial legislature or has been charged with or is under investigation for such an offence;
- b. a false statement about these persons with respect to their citizenship, place of birth, education, professional qualifications, or membership in a group; or
- c. a false statement that a candidate has withdrawn.

COM.0000009, ss. 91, 92, 481 and 482

43rd General Election

18. In relation to the 43rd general election, 201 complaints alleging foreign interference were made to the OCCE. 160 of those complaints were in relation to three particular matters. Of significance, the overwhelming majority of those 201 complaints were related to American individuals or entities. The vast majority of the complaints were concerning comments or statements purportedly made by foreigners, or published in foreign publications or on foreign websites, with respect to the Canadian election or a candidate running in the election, which are expressly exempted under the CEA. After review of these complaints, three of these allegations resulted in the initiation of an investigation.

CEF.IR.0000001.EN, para. 2.20, 2.21
CEF0000016, CEF0000017_R2, CEF0000164
TRN0000007, pp. 129, 168 to 172

19. One of the investigations, regarding a song and music video made in support of a candidate, was ultimately not assessed as foreign interference. The video, produced in a language other than English or French, was made and broadcasted in Canada and paid for by a Canadian. The complaint did raise the issue of a lack of registration of a third party under the CEA's political financing regime and the OCCE accepted an undertaking in this regard, aimed at ensuring future compliance with the Act.

CEF00000012

20. The second investigation related to the allegation of the broadcasting of Canadian election advertising on a United States radio station. There were insufficient grounds to determine who made the request to broadcast the Canadian-made advertisement. Further to the investigation, it was arguable that there was inadvertent non-compliance as the Canadian advertisement was broadcast on a U.S. sister station in Washington state. After the candidate and her officials were informed of the broadcast and about the provisions of the CEA, the broadcast was discontinued on the American affiliate and a partial reimbursement processed. In addition, initial payment and reimbursement of the cancelled advertisement was to and from a Canadian broadcaster.

CEF00000013

TRN00000007, p. 250

21. The third investigation, with respect to an article posted in the U.S.-based Buffalo Chronicle entitled "RCMP plans to charge Trudeau with obstruction in SNC Lavalin affair, following federal elections" was investigated within the parameters of the CEA in relation to whether the article was a breach of section 91 (false statement) or paragraph 282.8(b) (pretense or contrivance). Insufficient evidence was gathered to substantiate the elements of an offence. The onset of the COVID-19 pandemic and the closing of borders between Canada and the United States hindered investigation. In light of these factors, the likely effectiveness of other enforcement or compliance measures and the passage of time since the article was posted, the CCE determined that it was no longer in the public interest to pursue the matter.

CEF000000160

44th General Election

22. In relation to the 44th general election, 22 complaints alleging foreign interference were made to the OCCE. A review of all the complaints was conducted and in three cases an investigation was initiated. Similar to the events of the 43rd general election, the vast majority of the complaints were concerning comments or statements purportedly made by foreigners, or published in foreign publications or on foreign websites, with respect to the Canadian election, or a candidate running in the election, which are expressly exempted under the CEA. In all cases in which an

investigation was initiated, the investigation determined that there was a contravention of the CEA unrelated any allegation of foreign interference and the OCCE issued a compliance measure.

CEF.IR.0000001.EN, para. 2.22, 2.23

CEF0000031, CEF0000033, CEF0000157, CEF0000158

WIT00000025.EN, para. 92

TRN0000007, p. 129

23. The first investigation arose out of a non-Canadian who obtained a ballot for the federal election. The investigation did not conclude foreign interference. An administrative compliance measure is currently under consideration.

24. The second investigation involved allegations related to an American opinion piece reposted to an online social media platform during an election campaign, which was investigated as a contravention to the elections advertising regulations. After consideration of the specific circumstances of the case, the CCE concluded that the matter would be best addressed informally and a caution letter was issued.

CEF00000029

25. The third investigation, concerning a lunch event for the electoral campaign of Josh Vander Vies in Vancouver East, did not result in sufficient evidence on which to conclude that there was any contravention of the CEA that may have been characterized as alleged foreign interference. The evidence available to the OCCE indicated that the lunch event was initiated by the candidate. The cost of the lunch was paid for by a Canadian but was not reported in the candidate's return. Given the nature of the contravention, an administrative investigation was initiated.

CEF00000156

WIT00000025.EN, para. 95 to 98

WIT00000006, para. 50 to 53

TRN0000007, pp. 178 to 181

26. The candidate for whom the lunch was organized was not elected in the riding. While the OCCE was cognizant of allegations of foreign interference, the investigation did not identify any evidence of foreign funding or undue foreign influence in relation to this event.

27. Ultimately, on July 10, 2023, the OCCE imposed a Notice of Violation for an administrative monetary penalty issued to the official agent for the candidate. The monetary penalty was finalized on March 5, 2024, following a review requested by the recipient.

28. In the case of complaints alleging an advertisement concerning a leader of a political party with a Russian URL that appeared on a YouTube video during the election campaign, the OCCE, in its review, undertook several steps including interviews and analytics research to try and replicate the advertisement to trace its origins. Unable to reproduce or capture the advertisement and with no evidence of the originator of the advertisement, the file was closed. The OCCE reached out to GAC for assistance and to offer disclosure that may have assisted that partner in its mandate. Of note, as only two complaints were received in this regard, there was no indication of extensive publication of this advertisement.

CEF0000023_R2
WIT00000006, para. 24

29. Subsequent to numerous summer and fall 2022 media reports concerning alleged foreign interference in the 43rd and 44th general elections, the OCCE initiated three reviews on related matters, two on the initiative of the CCE, and one as a result of a series of complaints received following the media reporting.

CEF00000150_R2, CEF00000152_R2, CEF00000161
WIT00000006, para. 47
TRN00000007, pp. 185 to 187

Flow of Information

30. The OCCE works closely with Elections Canada (EC), while ever cognizant of and maintaining the independence of the CCE from the Chief Electoral Officer and EC itself. In accordance with the CEA, this independence does not preclude the CCE from consulting with the CEO in respect of any matter, if the CCE considers it appropriate, including consultation between the two organizations on their respective mandates.

CEF.IR. 0000001.EN, para. 1.30 to 1.33

31. When EC becomes aware of potential contraventions of the CEA, it may refer the information to the OCCE for consideration of investigative, compliance or enforcement action. Roughly 80% of the complaints that are received by the OCCE are either referred by EC further to their mandate – chiefly on electoral integrity or political financing matters - or are complaints which fall within the mandate of the CCE and are therefore redirected to the OCCE. EC referrals with respect to the 2021 general election are ongoing.

CEF.IR.0000001.EN, para. 1.34, Annex A
WIT00000025.EN, para. 39 and 40

32. The OCCE contributes to the electoral ecosystem in a role distinct from that of EC. Nonetheless, there are instances where information and correspondence falling to the OCCE mandate is

mistakenly addressed to EC. Despite extensive engagement with partners, and repeated and ongoing efforts to increase its profile regarding its compliance and enforcement mandate, testimonies in Part I of the Public Inquiry indicated confusion as to which body departments provided pertinent documents or information - OCCE or EC.

TRN0000007, pp. 9, 105, 116

33. This Public Inquiry has provided an opportunity for deepening the understanding of the OCCE's mandate and its distinct role within the government of Canada and in the Canadian public.

34. The OCCE has established relationships with key partners including the Royal Canadian Mounted Police (RCMP), Canadian Security Intelligence Service (CSIS), and Global Affairs Canada (GAC).

WIT00000025.EN, para. 55, 56

WIT00000006, para. 25

TRN0000007, pp. 145 to 151

35. In advance of, and during, the 43rd and 44th general elections the OCCE prioritized outreach to all major partners. Among others, engagements were made with the RCMP, CSIS, GAC, the Canadian Security Establishment (CSE), political parties and the Canadian Association of Chiefs of Police to communicate OCCE's mandate. The essence of the engagements was to speak to partners on the parameters of the CEA as it relates to alleged foreign interference.

WIT00000025.EN, para. 12, 55 to 71

TRN0000007, p. 134 and 135

36. Before the 2019 election, officials at OCCE engaged with RCMP, CSIS, CSE and GAC to provide them with an overview of the OCCE mandate and to coordinate contact that may be required during and following the election period. Additional meetings were held as were necessary. While OCCE is not a member of the Security and Intelligence Threats to Elections (SITE) Task Force, these four partner agencies are. Accordingly, a briefing was held in advance of the 2019 election with the members of the SITE Task Force for liaison and education on the role of the OCCE as the investigative body responsible for investigating offences under the CEA.

CEF00000046_R2, CEF0000047, CEF0000048, CEF0000049_R2, CEF0000053, CEF0000055
CAN019300, CAN019301, CAN019302

WIT00000025.EN, para. 64

TRN0000007, pp. 162 and 163

37. In the fall of 2019, a memorandum of understanding was renewed with RCMP and one entered into with CSIS, to further solidify these two key partnerships and to set out terms for the sharing of information.

38. The OCCE is not a direct recipient of information from the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). One of the advantages of the memorandum of understanding with the RCMP is that it can facilitate the transfer of such information on an as-requested basis. While the on-request disclosure can be helpful in certain specific investigations, it does not provide OCCE with proactive leads or additional contextual information as is available to the designated recipients of FINTRAC.

WIT00000025.EN, para. 27
WIT00000006, para. 32(f)

39. Preparation for the 2021 general election by OCCE built on the pre-existing relationships with partners on issues about any allegations of foreign interference, specifically, and CEA issues more generally. Further engagement was undertaken to ensure the various departments and all agencies understood the OCCE's mandate and its ability to assist with issues within its purview. Although not a member of the SITE Task Force, OCCE is a member of the Electoral Security Coordinating Committees, which include EC and the SITE members, among others.

CEF00000056_R2, CEF00000058, CEF00000059_R2, CEF00000061, CEF00000065
WIT00000025.EN, para. 66, 67
TRN00000007, p. 164

40. The 2021 case of the complaints alleging an advertisement concerning a leader of a political party with a Russian URL was an instance where, despite being unable to reproduce or capture the advertisement and with no evidence of the originator of the advertisement, the CCE reached out to GAC for assistance and to offer disclosure that may have assisted that partner in its mandate.

CEF00000023_R2
WIT00000025.EN, para. 78
WIT00000006, para. 23, 24

41. Between 2018 and 2024, CSIS provided multiple briefings to OCCE including proactive invitations from CSIS for OCCE to participate in classified briefings as well as tailored reading sessions of relevant intelligence reporting and assessments. The use of intelligence in investigations is limited. Even where intelligence may be sufficiently detailed and convincing to meet the legal threshold to initiate a review or investigation, the original collection avenue may not meet evidentiary requirements and any request to the originating body for declassification will be considered taking into account the potential impact on intelligence sources and methodologies. To date, intelligence briefings have resulted in the provision of two classified use

letters, provided by CSIS to OCCE for intelligence only. No actionable intelligence was obtained at these briefings.

CEF.IR.0000001.EN, para. 3.06

WIT00000025.EN, para. 69, 70

WIT00000006, para. 48

TRN00000007, p. 151

42. The OCCE, at present, has a limited ability to manage classified information, and as a result briefings are conducted in person, with limited or no notes taken, and classified records of exchanges are produced and maintained by the originating agency. Work is ongoing to implement solutions that would permit the receipt, processing and retention of classified material and to ensure that OCCE's partners can be confident in its ability to protect the information disclosed.

CEF.IR. 0000001.EN, para. 3.21

43. The OCCE is an investigative body and not a member of the security and intelligence community. As such, it is generally the recipient of information from these partners, including intelligence and information related to potential contravention to the CEA, as well as contextual information. Confidentiality provisions set out in the CEA prevent a fulsome disclosure of information related to investigations, and any potential disclosures are carefully considered in the context of public interest and other criteria set out in the CEA.

COM000009, s. 510.1

WIT00000025.EN, para. 104, 105

WIT00000006, para. 22

TRN00000007, p. 183

Conclusion

44. Within the scope of the OCCE's mandate that may relate to allegations that foreign individuals or entities may have contravened the CEA or that a contravention through the use of foreign funds may have been committed, to date the OCCE is not in possession of any evidence that would indicate a breach of the CEA in the 43rd and 44th general elections of a scale to impact on the integrity of either of those elections.

45. The OCCE's partner agencies and the Canadian security and intelligence community, looking at the elections through the lens of their respective mandates, have concurred with this conclusion.

CAN.DOC00000019, p. 9

CAN015487

TRN00000010, p. 186, TRN00000013, p. 50, TRN00000014, p. 181

46. The OCCE has devoted significant resources to carefully and thoroughly reviewing all information to which it has access, including any new facts that came to its attention regarding any allegation of foreign interference that could fall under its mandate. Significant efforts have been made, and continue to be made, on developing and solidifying relationships with partner agencies, and working to strengthen and maintain internal knowledge with respect to foreign interference and related potential CEA contraventions. All of these efforts will continue so as to ensure OCCE is fully prepared to not just review those past events with which it is currently seized, but also to successfully fulfill its mandate in the next election.

CEF.IR.0000001.EN, para. 3.16 to 3.25

47. In testimony before the public hearing, the Chief Electoral Officer spoke about the importance to Canadian democracy of the concept of free and fair elections. He indicated that while there will never be a perfect election, what the concept requires, among other things, are mechanisms to detect and address irregularities and threats to the electoral process. Foreign interference is one such threat to the electoral process. The OCCE is a key mechanism within the electoral ecosystem, on which this concept is based. It is the entity that receives complaints, investigates contraventions and ensures compliance with the CEA. It is a critical piece of the electoral infrastructure in collaboration with and in complement to a range of institutions and agencies which combine efforts to ensure the vitality of Canada's concept of free and fair elections.

TRN00000007, pp. 14 to 16

48. The OCCE is one of many organizations that play a role in the electoral ecosystem. It is circumscribed by its mandate, the need to balance enforcement with a broad freedom of expression guarantees, particularly during election campaigns, and the high threshold of evidence to a criminal standard, including proving direct links to foreign entities.

CEF.IR.0000001.EN, para 3.01

49. The CCE treats all parties involved in a matter under review or investigation equally and fairly. Once a complaint has been reviewed, the complainant may be asked to provide further evidence or information pertaining to the allegations. By its very nature, the electoral process involves competition between opposing political parties and other participants. Maintaining public confidence in the integrity of this process requires that no participant be able to exert influence over the organization responsible for ensuring compliance with and enforcement of the rules, including but not limited to an attempt to gain an advantage or harm an opponent. Consequently, the CCE carries out her duties independently of any political, ministerial or government interference or influence.

CEF.IR.0000001.EN, para 1.35 to 1.37

50. The unique role that the OCCE plays in ensuring that all key stakeholders in the electoral process comply with the CEA provisions has become even more critical in building and keeping the trust of Canadian in their democratic electoral institutions. OCCE's independence and its ability to have access to tools and resources to deliver properly on its mandate are central to the fight against foreign interference and any threat to Canada's democracy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

At Gatineau, Quebec this 15th day of April, 2024.

Luc Boucher

Nancy Miles

For the Office of the Commissioner of Canada Elections