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Submission to Public Inquiry on Foreign Interference: Policy Phase

Dear Commissioner:

I am responding to your call for submissions related to the policy phase of the Inquiry. Let me begin by again thanking you and your team for the work that you have put into the hearings over the last year and for the professionalism with which your team has conducted itself.

I have previously made submissions on the factual phase of the Inquiry (https://senatoryuenpauwoo.ca/en/domestic-outreach/public-inquiry-on-foreign-interference-2024/) and will be building on many of the points I raised in those submissions. I also provided input on the *Preparatory Document for Phase 2 Policy Roundtables*, and offered comments and suggestions on policy responses covering most of the themes in that document.

The starting principle for any policy recommendations should be that they do no harm. This may be an obvious point, but in the context of the intense and highly politicized public focus on the issue of foreign interference (FI) over the last two years, it is a very difficult principle to uphold. The clamor for broad and deep changes in our laws and practices will be difficult to resist, but it is better to do nothing than to do something that results in unintended harm.

The scope and scale of the proposed policy response to foreign interference (FI) should be proportionate to the threat. Many of the FI claims made by witnesses and circulating in the public domain are spurious, exaggerated, or unsubstantiated. Some can even be considered defamatory. The Commission can help restore confidence in our democracy by rejecting the types of claims that are based on suppositions, hearsay, bias, groupthink, and political or ideological self-interest. Not doing so will only encourage such claims to be repeated, resulting in the stigmatization of certain groups of Canadians and the violation of their fundamental rights.

The rejection of irresponsible FI claims is especially important given that individuals who are the targets of FI accusations are now subject to severe penalties under new laws to counter FI that were passed by Parliament in June 2024 (*C-70: The Countering Foreign Interference Act*). This submission, therefore, will focus on C-70 and some of the ways in which it can be improved. It is beyond the scope of my submission to offer a full critique of the Act, but I would like to draw your attention to three of its major provisions:

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1.0 The Foreign Influence Transparency and Accountability Registry (C-70, Part 4)

The Act creates a *Foreign Influence Transparency and Accountability Registry* (FITAR), which requires persons to register and provide information "in relation to arrangements entered into with foreign states or powers and their proxies under which persons undertake to carry out certain activities in relation to political or governmental processes in Canada".

It defines arrangement as "an arrangement under which a person undertakes to carry out, under the direction of or in association with a foreign principal. . . ". The term "under the direction of "is reasonably clear, but "in association with" is highly problematic.

The phrase is borrowed from the criminal code pertaining to the Commission of offence for criminal organizations, for example in

> ***467.12 (1)*** *Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.*

In *R v. Ruzic,* 2001 the Supreme Court explains that there is an implicit requirement that the accused committed the predicate offence with the intent to do so for the benefit of, at the direction of, or *in association with* a group he/she knew had the composition of a criminal organization.

And in *R v.Venneri,* 2012, the Supreme Court highlighted the underlying principles behind the terms "in association with" and "benefit" and "at direction of". The court says the terms have a shared purpose - that their common objective "...is to suppress organized crime" and that "to this end, they especially target offences that are connected to the activities of criminal organizations and advance their interests."

The SCC rulings refer to the suppression of organized crime and the activities of criminal organizations. The FITAR, however, is not a registry of organized crime and criminal organizations. It is a transparency registry intended to encourage persons and organizations lobbying on behalf of a foreign principal to be transparent about their activities. Those activities are not illegal, and they are certainly not criminal. Officials testifying at parliamentary hearings on C-70 have stressed that FITAR is not meant to be a blacklist; rather it should be seen as a "whitelist".

The words "in association with" may have some utility in the prosecution of individuals involved in criminal gangs, but it is not helpful for the purposes of the FITAR. The predicate activity with respect to criminal gangs that "in association with" seeks to address is criminality; on the other hand, the predicate activities with respect to FITAR and the corresponding C-70 statutes are lobbying and democratic participation, which are not crimes. The replication of "in association

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with" from the criminal code to FITAR is therefore inappropriate, and in doing so the new law creates a risk of violating the fundamental rights of Canadians.

The open-ended nature of the phrase "in association with" will incline the Commissioner of the Registry and investigators to look at the backgrounds and views expressed by suspected agents, as a proxy for being "in association with". This amounts to a violation of Canadians' rights to freedom of expression and freedom of association. Even if the Commissioner and investigators do not specifically go in that direction, there will be public pressure – including snitching and rumour mills – about who should be required to register, based on the vague notion of being "in association with". This has already been a problem throughout the Inquiry, where witnesses have casually named individuals and organizations as possible foreign agents or proxies, based on little or no evidence, and media organizations have recklessly amplified these allegations.

2.0 Political Influence for a Foreign Entity (C-70 Part 2, Division 1, Section 53)

It is bad enough that the FITAR requires Canadians to register based on a vague definition of arrangements with a foreign entity, leading to confusion about who should register. The graver risk is for Canadians who, in good faith, fail to register (because they do not consider themselves to be "in association with") and are subsequently prosecuted under Part 2 of C-70 for "Influencing political or governmental process".

The new law states that

> *Every person commits an indictable offence who, at the direction of, or in association with, a foreign entity, engages in surreptitious or deceptive conduct with the intent to influence a political or governmental process, educational governance, the performance of a duty in relation to such a process or such governance or the exercise of a democratic right in Canada.*

The maximum penalty for such an offence is life imprisonment. It should be noted that political interference on behalf of a foreign entity as such is not illegal under this statute; rather it is only when such activity is carried out in a surreptitious or deceptive manner.

The test of whether there is surreptitious or deceptive behavior would presumably be based on whether the actor is "in association with" a foreign entity and has registered with the FITR. But what does it mean to be "in association with" a foreign entity? Agreeing with the position of a foreign government? Meeting periodically with foreign officials? Being a member of a bilateral business association? Participating in organizations that have overseas funding? Joining an alumni group of a foreign university?

Why would anyone who could be tagged as being "in association with" a foreign entity run the risk of life imprisonment for participating in Canadian democracy? Under such circumstances,

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the best course of action for Canadians, especially immigrants who maintain ties with their country of origin, is to stay away from political and civic engagement. How ironic that a law to counter foreign interference in our democracy could end up discouraging Canadians from taking part in that very democracy. This is an outcome that goes beyond any reasonable response to the FI threat that has been identified by the Commission and it surely runs counter to the very objective of the Inquiry.

The problem is made worse by clause 22 (1):

> *Every person commits an offence who, for the purpose of committing an offence under this Act, other than under subsection 13(1) or 18(1), does anything that is directed towards or done in preparation of the commission of the offence.*

This provision is also drawn from the criminal code and applied in the context of preventing criminal gang activity, for which there is a certain justification. To apply it to political and civic engagement activities, however, is dubious, if not downright Orwellian. How will the authorities determine if someone is *preparing* an act of political influence for a foreign entity in a surreptitious or deceptive manner? We have already seen how the Australian authorities have implemented a similar law, and it is chilling:

https://www.nytimes.com/2024/03/16/world/australia/foreign-interference-laws-sunny-duong.html

3.0 Foreign-influenced or Terrorist influenced Intimidation, Threats or Violence (C-70, Part 2, Division 1, Sections 52-53)

C-70 has also created a new set of criminal offences around what is popularly known as "transnational repression". Clause 20 (1) states:

> *Every person commits an offence who, at the direction of, for the benefit of or in association with, a foreign entity or a terrorist group, induces or attempts to induce, by intimidation, threat or violence, any person to do anything or to cause anything to be done.*

The new law provides for extraterritorial application and covers victims who are in Canada as well as victims outside Canada, if the victims are Canadians, permanent residents, or ordinarily resident in Canada. The offences also cover the victim's child, relative or intimate partner, whether they are in or outside Canada.

Transnational repression is the most egregious form of foreign interference, and we should use every tool at our disposal to prevent it and to bring offenders to justice. I believe the criminal code is the best way to address transnational repression, as opposed to, for example, using a foreign influence registry as an indirect way to identify possible agents of repression. The new laws will go some way in deterring acts of transnational repression, especially when the agents

of repression are in Canada. It will be more difficult to address transnational repression that is directed at victims who are not in the country, for example the targeting of relatives of Canadians who live abroad.

Given that these new laws have just been enacted, it would be prudent to allow for a period of some years to see if they are effective before proposing additional measures.

At the same time, it is important that there are measures in place to protect innocent Canadians from reckless, malicious, or politically motivated allegations of transnational repression. Good faith disagreement with the views of diaspora activist groups in Canada is not a form of transnational repression (or indeed any kind of repression). Groups that use the claim of transnational repression to target and stigmatize fellow Canadians not only do a disservice to their cause; they commit the same kind of violence to fellow citizens that they have been subjected to. We must not allow an overzealous response to FI result in the victimization of innocent Canadians, as has already happened over the last two or more years of public frenzy over this issue.

Thank you for taking the time to read my submission.

Yours sincerely,

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