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CANADA'S PROPOSED FOREIGN INFLUENCE TRANSPARENCY REGISTRY

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A. INTRODUCTION

As foreign interference with the democratic process of nations becomes an increasing concern around the globe, governments are taking steps to curb subversive and clandestine activities by external actors. In Canada, Ottawa has drafted legislation, Bill C-70, *An Act respecting countering foreign interference* (introduced on May 6, 2024 and completed second reading on May 29, 2024),[1] which, if passed, will enact several measures to counter foreign interference aimed at all levels of government, the private sector, academia, diaspora communities, and the general public.

Part 4 of Bill C-70 would enact the *Foreign Influence Transparency and Accountability Act* (the "Act"). The proposed Act pertains to the provision and registration of certain information in relation to "arrangements" (as defined below) with "foreign principals" (as defined below) by "persons" (as defined below) on behalf of foreign principals to carry out activities in relation to "a political or governmental process" (defined below) within Canada. Relevant information from registration would be held in what is being referred to as the "Foreign Influence Transparency Registry", which would be available to the general public (the "Registry"). This proposed Act would be analogous to the American *Foreign Agents*

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[1] Bill C-70, *An Act respecting countering foreign interference*, 1st Sess, 44th Parl, 2024, cl 113 (first reading 6 May 2024) [*Foreign Influence Transparency and Accountability Act*], online <https://www.parl.ca/legisinfo/en/bill/44-1/c-70>.

Registration Act, commonly known as FARA, which was introduced in 1938 to limit the influence of authoritarian governments within the American political process.[2]

It is critical to note that, despite the use of the term "interference" in Bill C-70, the proposed Act applies to entities engaged in legitimate **influencing** (such as lobbying, political advocacy, *etc.*) of Canadian political policy, as well as malicious actors attempting to subvert the Canadian democratic process (*i.e.* interference). Organizations or individuals who need to comply with the proposed Act should not automatically be concerned that they would be operating in a manner which the government considers suspicious or unethical. However, there would be serious consequences for not complying with the Act as explained below.

The proposed Act is broad in scope and, if passed, would have implications for many individuals and entities in Canada, including charities and not-for-profits ("NFPs").[3] An overview of the proposed Act as introduced on May 6, 2024 in the House of Commons is provided below:

B. FOREIGN INFLUENCE TRANSPARENCY AND ACCOUNTABILITY ACT (THE "ACT")

1. Preamble

The Act purports to strengthen national security, as it is challenged by "foreign states or powers" and their proxies, which jeopardizes Canada's international relations and foreign policy. According to the Preamble, "non-transparent" actions by foreign powers "endanger democracy, sovereignty and core Canadian values". These actions may affect different levels of government, and are not limited to the level of government targeted by an action. The Preamble goes on to state that these actions may "have a particularly negative effect on certain communities in Canada". It states that there is a "growing consensus" in Canada and abroad that foreign influence registries are needed to counter this type of

[2] For more information about FARA, please see: Terrance S. Carter and LaVerne Woods, *September 2022 Charity and NFP Law Update*, "What Canadian Charities & NFPs Need to Know About The U.S. Foreign Agents Registration Act", (25 September 2022) online: *Carters Professional Corporation* <https://www.carters.ca/index.php?page_id=542>

[3] The Act is applicable to "persons" which, as defined in section 2, includes a number of enumerated entities. While the proposed Act does not explicitly state as much, it can arguably be presumed, based on the language in the Act, and further based on a release by Public Safety Canada, that reference to "person" includes "individual" person. For the release, see Public Safety Canada, "Canada's Foreign Influence Transparency Registry" (6 May 2024), online: *Government of Canada* <https://www.canada.ca/en/public-safety-canada/news/2024/05/canadas-foreign-influence-transparency-registry.html>.

influence, and that it is desirable that such a registry be accessible to the public, not impede "vital" freedoms, and that it be administered by an "independent public office holder".

2. Duty to Provide Information

The proposed Act largely centers around the duty of persons caught within its purview to provide information to the Foreign Influence Transparency Commissioner (the "Commissioner"), found in subsection 5(1). That provision reads as follows:

> **Duty to provide information**
>
> 5 (1) A **person** who enters into **an arrangement** with a **foreign principal** must, within 14 days after the day on which they enter into the arrangement, provide the Commissioner with the information specified in the regulations. (emphasis added)

The bulk of this *Bulletin* will explore the proposed Act, how this duty to provide information may be applied, and the significance of the reporting regime it would establish.

3. Definitions

Legislation like the proposed Act, which would have a significantly broad ranging impact on Canadian organizations and individuals, requires coherent definitions of important terms to ensure accuracy. Some of the more significant terms that the proposed Act defines are as follows:[4]

> ***arrangement*** means an arrangement under which a person undertakes to carry out, under the direction of or in association with a foreign principal, any of the following activities in relation to a political or governmental process in Canada:
>
> (a) communicating with a public office holder;
>
> (b) communicating or disseminating or causing to be communicated or disseminated by any means, including social media, information that is related to the political or governmental process; (emphasis added)
>
> (c) distributing money or items of value or providing a service or the use of a facility. (*arrangement*)
>
> […]

[4] *Foreign Influence Transparency and Accountability Act*, *supra* note 1, s 2.

> ***foreign principal*** means a *foreign economic entity*, a *foreign entity*, a *foreign power* or a *foreign state*, as those expressions are defined in subsection 2(1) of the *Security of Information Act*. [the terms from which are defined below]
>
> […]
>
> ***person*** includes a corporation, a trust, a joint venture, a partnership, a fund, an unincorporated association or organization and any other legal entity.
>
> ***political or governmental process*** includes
>
> (a) any proceeding of a legislative body;
>
> (b) the development of a legislative proposal;
>
> (c) the development or amendment of any policy or program;
>
> (d) the making of a decision by a public office holder or government body, including the awarding of a contract;
>
> (e) the holding of an election or referendum; and
>
> (f) the nomination of a candidate or the development of an electoral platform by a political party.
>
> ***public office holder*** means an individual included in a class of individuals specified in the regulations and, unless they are excluded by the regulations, any of the following individuals:
>
> (a) a *public office holder* as defined in subsection 2(1) of the *Lobbying Act*;[5]
>
> (b) an individual referred to in any of paragraphs 4(1)(a) to (c) of that Act;
>
> (c) an individual referred to in paragraph 4(1)(d) or (d.1) of that Act;
>
> (d) an officer or employee of an entity referred to in subparagraph 4(c)(ii) of this Act.

This definition of "public office holder" reflects certain exclusions, unless otherwise specified by the Governor in Council in the regulations (discussed below).

4. Purpose

As described in the Preamble, the purpose of the Act is to increase transparency: where any person, who under an arrangement, is carrying on activities related to a political or governmental process; to deter

[5] RSC, 1985, c 44 (4th Supp.), online: *Government of Canada* https://laws-lois.justice.gc.ca/eng/acts/l-12.4/.

foreign principals from attempting to influence these processes in a non-transparent way; to increase awareness of these efforts by foreign principals; and strengthen national security.

5. Application

The proposed Act would apply to arrangements relating to any of the political or governmental processes, which more simply stated, include actions at any and all levels of government in Canada. This includes federal, provincial and territorial governments, as well as Indigenous governments and potentially municipal governments.[6]

6. Potential Application to Charities and NFPs

Based on the above-referenced provisions and definitions, it is apparent that the proposed Act could have application to a number of situations involving charities and NFPs in Canada. The definition of foreign principal is extremely broad. It imports the definitions of "foreign economic entity", "foreign entity", "foreign power" and "foreign state" from the *Security of Information Act* (the "SIA"), all of which are set out below.

> ***foreign economic entity*** means
>
> (a) a foreign state or a group of foreign states, or
>
> (b) an entity that is controlled, in law or in fact, or is substantially owned, by a foreign state or a group of foreign states;
>
> ***foreign entity*** means
>
> (a) a foreign power,
>
> (b) a group or association of foreign powers, or of one or more foreign powers and one or more terrorist groups, or
>
> (c) **a person acting at the direction of, for the benefit of or in association with a foreign power or a group or association referred to in paragraph (b);** (emphasis added)
>
> ***foreign power*** means

[6] While the Act does not explicitly reference municipal governments, a release from Public Safety Canada indicates that the "proposed legislation is intended to eventually apply to activities undertaken in relation to political or government processes at all levels of government in Canada, including municipal, provincial and territorial governments, and Indigenous governments." See Public Safety Canada, "Canada's Foreign Influence Transparency Registry" (6 May 2024), online: *Government of Canada* <https://www.canada.ca/en/public-safety-canada/news/2024/05/canadas-foreign-influence-transparency-registry.html>.

(a) the government of a foreign state,

(b) an entity exercising or purporting to exercise the functions of a government in relation to a territory outside Canada regardless of whether Canada recognizes the territory as a state or the authority of that entity over the territory, or

(c) a political faction or party operating within a foreign state whose stated purpose is to assume the role of government of a foreign state;

foreign state means

(a) a state other than Canada,

(b) a province, state or other political subdivision of a state other than Canada, or

(c) a colony, dependency, possession, protectorate, condominium, trust territory or any territory falling under the jurisdiction of a state other than Canada[7]

With regards to the definition of "foreign entity" in (c) above, i.e. "a person acting at the direction of, for the benefit of or in association with a foreign power or a group or association" could, under certain circumstances, apply to charities and NFPs under the proposed Act. To act "at the direction of," or "for the benefit of", or "in association with a foreign power" or "group" removes the need for the person to have an official affiliation with the foreign power. As such, promoting a policy which could be construed as beneficial to a foreign power might be seen as acting on behalf of or in association with a foreign power under the proposed Act.

The definition of an "arrangement" is also very broad, and includes "communicating or disseminating […] including social media, information that is related to the political or governmental process". This would mean that any organisation in Canada which posts messages on social media that are made under the "direction of", or "in association with" a foreign principal could potentially fall under the purview of the proposed Act.

However, it isn't clear how the Act's definition of "arrangement" would in fact be applied. For example, if a Canadian environmental charity were to communicate the climate change initiatives of a foreign

[7] *Security of Information Act*, RSC, 1985, c O-5, s 2(1), online: *Government of Canada* <https://laws-lois.justice.gc.ca/eng/acts/o-5/page-1.html>.

government over social media, such as publishing excerpts from a legislative proposal or policy of that foreign government, would that constitute an "association" that falls under the Act's requirements for the charity to provide information to the Commissioner? What level of involvement with the foreign government, and with what intentions, would be necessary to be considered an undertaking to carry out activities "in relation to the political or governmental process" as defined under the Act? At what point in fact would such an arrangement be established? Further Guidance from Public Safety Canada could help charities and NFPs, as well as other "persons" under the Act, understand precisely whether, and when, their activities may trigger the legal provision of information obligations under the Act.

7. Provision of Information

Under the proposed Act, any person who enters into an arrangement with a foreign principal must, within 14 days after the day on which they entered into said arrangement, inform the Commissioner. The information that must be specified is to be determined in forthcoming regulations. This also includes a positive duty to inform the Commissioner of any updates to the specified information.[8]

The duty to provide information to the Commissioner would not apply to any foreign national whose passport contains valid diplomatic consular, official or special representative qualifications; those working openly in the employ of a foreign principal; or a person exempted in the regulations. Furthermore, any arrangement which is of a class specified in the regulations or to which His Majesty in right of Canada is a party is exempt.[9]

There is an explicit prohibition on providing false information to the Commissioner or their agents.[10]

8. Registry

Under the proposed Act, the Commissioner must establish the Registry containing information provided under the Provision of Information requirements. The Act stipulates that the Registry "must be accessible to the public."[11]

[8] *Foreign Influence Transparency and Accountability Act*, *supra* note 1, s 5.
[9] *Ibid*,s 6.
[10] *Ibid*,s 7.
[11] *Ibid*, s 8(2).

9. Foreign Influence Transparency Commissioner

The Governor in Council would appoint the Commissioner in consultation with various governmental leaders, as specified in the Act. The Commissioner would "be responsible for the administration and enforcement" of the Act.[12]

The Commissioner would hold office for a term of up to 7 years, provided they exemplify "good behaviour", but can be removed by the Governor in Council at any time.[13] Reappointment would be available for one additional term of up to 7 years. An interim appointment can be made for a period of up to 6 months. There would also be the position of a Deputy Commissioner.

The Commissioner would have the power to issue advisory (non-binding) opinions and interpretation bulletins in regard to the enforcement, interpretation or application of the Act.[14] There is statutory immunity for the Commissioner, or anyone acting on their behalf or under their direction, from civil or criminal provisions for any act or omission done in good faith under the purview of the Act.[15]

10. Confidentiality

Though the prescribed information included on the Registry itself would be made public for the purposes of transparency, any other information collected by the Commissioner under the proposed Act not published on the Registry would not be disclosed, with the following exceptions:

(a) disclosure of the information is necessary for an investigation in the Commissioner's opinion under the Act;

(b) the information is disclosed as part of a proceeding for a violation of the Act;

(c) the information is disclosed in the course of a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect to statements made to the Commissioner;

[12] *Ibid*, s 9(1).
[13] *Ibid*, s 9(3).
[14] *Ibid*, s 13.
[15] *Ibid*, s. 14.

(d) the Commissioner believes on reasonable grounds that disclosure to law enforcement would assist in the investigation of an offence under any act of Parliament or legislature of a province or territory (not simply limited to the Act itself);

(e) the disclosure is permitted under the regulations; or

(f) the disclosure is "permitted, authorized or required by law."[16]

11. Investigations

The Commissioner may conduct investigations to ensure compliance with the Provision of Information provisions, discussed in section B 7., above. In an investigation, the Commissioner may, "in the same manner and to the same extent as a superior court of record,"

- summon and enforce attendance of persons before the Commissioner and compel them to give evidence on oath or solemn affirmation, and

- compel them to produce documents or other things the Commissioner considers relevant to the investigation.

As well, the Commissioner may administer oaths and solemn affirmations. Finally, the Commissioner may receive and accept information, "whether or not it would be admissible as evidence in a court of law."[17]

Any evidence given by a person in an investigation under the Act, and even "evidence of the existence of an investigation", would be inadmissible against a person in a court or other proceeding, unless that proceeding were for a violation under the Act or under section 131 (perjury) of the *Criminal Code*, as it relates to a statement made to the Commissioner.[18]

[16] *Ibid*, s 15.
[17] *Ibid*, s 16(2).
[18] *Ibid*, s 17.

12. Administrative Monetary Penalties

Contravening the duties to provide or update information, or knowingly providing misleading information to the Commissioner can be treated as a violation or offence. The proposed Act does not clearly delineate between violations and offences – for example, section 18 indicates that a contravention of subsection 5(1) (failure to provide information to the Commissioner), subsection 5(2) (failure to update the said information) or section 7 (providing false or misleading information) may be a violation subject to an administrative monetary penalty, and sections 23 and 25 provide that a contravention of those same provisions may be an offence subject to a higher fine (of up to $5 million or imprisonment). On this basis, it appears that the intention is for lesser breaches to be treated as violations, which are subject to administrative monetary penalties, and for more serious contraventions of the Act to be treated as offences.

If an act or omission is treated as a violation, it is not treated as an offence, and *vice versa*. The proposed Act states "the purpose of an administrative monetary penalty is to promote compliance with this Act and not to punish."[19]

13. Violations

The Commissioner may issue a notice of violation if it has reasonable grounds to believe that a person has committed a violation. The notice must set out:

> (a) the person's name;
>
> (b) the violation at issue;
>
> (c) the amount of the administrative monetary penalty to which the person is liable;
>
> (d) the person's right, within 30 days after the day on which the notice is served or within any longer period that the Commissioner may specify, to pay the penalty or to make representations to the Commissioner with respect to the violation and the penalty, and the manner for doing so; and
>
> (e) the fact that, if the person does not pay the penalty or make representations in accordance with the notice, the person will be deemed to have committed the violation and the Commissioner may impose a penalty in respect of it.[20]

[19] *Ibid*, s 18(2).
[20] *Ibid*, s 19(2).

Paying the penalty deems the person as having committed the violation, and the proceeding ends upon payment. If the person makes representations, then the Commissioner will determine, on a balance of probabilities, whether the person committed the violation, and can impose the penalty set out in the notice, a lesser penalty than that in the notice, or no penalty at all. Notice of the decision must be served on the person.[21]

The Commissioner must make public the nature of any deemed violation, the nature of the violation, the name of the person who committed it and the penalty imposed, if any. The Commissioner may include the reason for the decision, including the relevant facts, analysis and consideration that went into the decision.[22]

The Governor General in Council may make regulations pertaining to the administrative monetary penalties scheme. These regulations may pertain to the amount or range of penalties, the factors which are to be taken into account when imposing a penalty, compliance agreements, and the individuals or classes of individuals who may "exercise or perform any of the Commissioner's powers, duties or functions" relating to the administrative monetary penalties scheme.[23]

14. Offences

As mentioned, contravening the duties to provide or update information, as well as providing misleading information to the Commissioner can be treated as a violation or offence, but will only be handled as one or the other.

Due diligence would be available as a defence in regard to the failure of the duty to provide information.[24] It is an offence to "knowingly obstruct the Commissioner," or any person acting on their behalf or under their direction, with carrying out the powers, duties, or functions required under the proposed Act[25].

[21] *Ibid*, s 20.
[22] *Ibid*, s 21.
[23] *Ibid*, s 22.
[24] *Ibid*, s 23(2).
[25] *Ibid*, s 24.

Anyone who commits an offence by contravening the duty to provide information, or providing misleading information to the Commissioner, or obstructing the Commissioner, are liable to either an indictment or summary conviction. On indictment, a person is liable to a fine of not more than $5 million, or imprisonment for a term of not more than 5 years, or both. On summary conviction, a person will be liable to a fine of not more than $200,000, or to imprisonment for a term of not more than two years less a day, or both.[26]

15. Judicial Review

The proposed Act provides a number of rules with regard to judicial review of decisions made by the Commissioner. Review would be conducted by "the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice."[27] Firstly, the judge must provide the applicant and the Commissioner with the opportunity to be heard. Secondly, if the judge determines that evidence or other information provided by the Commissioner is not relevant or if evidence or other information is withdrawn, the judge must not base their decision on that evidence or information, and must return it to the Commissioner. Finally, the judge must ensure the confidentiality of all evidence or information that is withdrawn by the Commissioner. These rules must be followed on appeal, with any necessary modifications.[28]

16. Regulations

The Governor in Council is empowered to make regulations under the proposed Act. These regulations would specify the classes of individuals included and excluded for the purpose of the definition of "public office holder", information to be provided and updates to the Commissioner, those individuals and entities who would be excluded from the requirement to provide information to the Commissioner, the type of information which would be included in the Registry, the retention and disposal of information contained in the Registry, and exceptions to the disclosure of confidential information. The Governor in Council may also authorize "government institutions" as defined under the *Privacy Act*,[29] "or entities specified in

[26] *Ibid*, s 25.
[27] *Ibid*, s 26(3).
[28] *Ibid*, s 26 (1)–(2).
[29] RSC, 1985, c P-21, online: *Government of Canada* https://laws-lois.justice.gc.ca/eng/acts/p-21/FullText.html.

the regulations to disclose information to the Commissioner" or to the Deputy Commissioner and other staff appointed to enable the powers, duties and functions of the Commissioner under the Act.[30]

17. Reports

Under the proposed Act, the Commissioner would be required to submit an annual report on its activities to the Minister of Public Safety and Emergency Preparedness within 6 months after the end of each fiscal year. The Minister must cause the report to be tabled in each House of Parliament on any of the first 15 days on which the House is sitting after the day on which the Minister receives it. The Commissioner may submit special reports at any time to the Minister on any matter within the scope of the Commissioner's powers, duties and functions.[31]

In preparing an annual or special report, the Commissioner must consult with the deputy heads (as defined in s. 2 of the *National Security and Intelligence Review Agency Act*[32]) to ensure that the report does not disclose information which "would be injurious to international relations, national defence or national security."[33]

18. Review

If the proposed Act receives Royal Assent, a committee of Parliament would conduct a comprehensive review after 5 years, and submit a report within one year of the review, or within any further period that Parliament authorizes. The report would contain recommendations by the committee for any changes to the legislation.[34]

C. CONCLUSION

As the proposed Act currently reads, it would impose an obligation on individuals and entities, including Canadian charities and NFPs that enter into an arrangement with a foreign principal, to register their arrangements and disclose any foreign influence activities undertaken where they are in relation to government or political processes in Canada, with certain stated exemptions. To promote transparency for foreign influence activities in Canada, relevant information would be published in the Foreign Influence

[30] *Foreign Influence Transparency and Accountability Act*, *supra* note 1, s 27.
[31] *Ibid*, ss 28–29.
[32] SC 2019, c 13, s 2, online: *Government of Canada*, https://laws-lois.justice.gc.ca/eng/acts/N-16.62/index.html.
[33] *Foreign Influence Transparency and Accountability Act*, *supra* note 1, s 30.
[34] *Ibid*, s 31.

Transparency Registry, available to the general public. Non-compliance with the Act would incur primarily administrative sanctions, such as administrative monetary penalties, for minor violations, but there are also more significant sanctions for offences that are of a more serious nature under the Act.

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