Summary Report

Author: Croft Michaelson, K.C., former Senior Counsel, Public Prosecution Service of Canada

Panel Theme: Enforcing, Deterring and Prosecuting Foreign Interference Activities

Key Issues:

Is the criminal law an appropriate way of responding to foreign interference? Are there reasons why other approaches could be preferable?

Do Canada's laws prohibit the right things? Are there gaps in our legislation? Should the definition of existing offences be revised to better account for the reality of foreign interference or to enhance the prospect of successful prosecutions? How has this changed since the passage of Bill C-70?

Prosecuting foreign interference crimes in a courtroom presents its own challenges, including – but not limited to – the "intelligence to evidence" problem. Are there ways that criminal procedures could be reformed to make foreign interference prosecutions more viable?

How does the Canadian Charter of Rights and Freedoms come into play in foreign interference prosecutions? Would reforms to our foreign interference laws be consistent with Charter rights and values?

Assessment:

While the criminal law has an important role to play in signalling to foreign states and their agents the types of conduct that we consider unacceptable, I caution against relying on the criminal law to do the heavy lifting in combatting foreign interference. In my opinion, the criminal law should be complementary to other measures aimed at deterring foreign interference and should not be relied on as the primary means to address the issue. Other measures outside of the criminal law, such as administrative proceedings under the *Foreign Influence Transparency and Accountability Act*, sanctions, enhanced governance and oversight of vulnerable electoral processes, may well be more effective than criminal proceedings in deterring foreign interference.

There are three challenges with using criminal law to combat foreign interference: (1) the challenge in defining foreign interference offences with sufficient precision to survive scrutiny under the *Charter of Rights and Freedoms*; (2) the high bar to obtain a

conviction at a criminal trial and, (3) what is commonly referred to as the "Intelligence to Evidence" problem – the difficulties that arise when one seeks to use intelligence information in the context of a criminal investigation and prosecution.

Turning to the first challenge, both the Commissioner and the National Security and Intelligence Committee of Parliamentarians have noted the difficulty in drawing the line between foreign influence that is considered legitimate and foreign interference that is unacceptable. Both have further observed that there is a considerable grey zone.[1]

The criminal law is not a particularly good tool to address ambiguity or conduct that may fall into a "grey zone". Criminal offence provisions are subject to scrutiny under the *Charter of Rights and Freedoms* for overbreadth. The Supreme Court of Canada has stated that if a criminal offence provision is so broad in scope that it includes conduct bearing no relation to the law's purpose, the provision is overbroad and violates section 7 of the *Charter*.[2] This principle places a restraint on the use of the criminal law. Laws that are broadly drawn to make enforcement more practical will run afoul of s. 7 of the *Charter* if they deprive even one person of their liberty in a way that does not serve the law's purpose.[3] The new foreign interference offences in sections 20.1 to 20.4 of the *Foreign Interference and Security of Information Act*[4] appear to have been crafted with this principle in mind and consistent with section 7 of the *Charter*. These new offences also seem to capture much of the conduct that amounts to foreign interference. Could one, however, go further and craft a broader offence or offences that would capture all potential permutations of foreign interference? I am not sure that one could do so without running into concerns of overbreadth.

Turning to the second challenge, the legal standard to prove a criminal case is high. The Crown is required to prove all the elements of the offence beyond a reasonable doubt, a standard that is considerably higher than the civil standard of proof on the balance of probabilities. The new foreign interference offences all require that the Crown prove a link between the offender and a foreign entity.[5] I think that this essential element of the offences will be the most challenging for the police to investigate. Given that foreign interference involves conduct by foreign entities and their agents that is concealed and obscured, we can anticipate that in future it will be difficult for the police to gather sufficient evidence to prove the necessary link with the foreign entity beyond a reasonable doubt. A well-grounded suspicion that the offender is acting at the direction of, or in association with, a foreign entity is not sufficient to obtain a conviction; even a well-grounded belief will not suffice if there remains room for reasonable doubt. The

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[1] Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions, *Initial Report* (His Majesty the King in Right of Canada, 2024), pp. 84-85; The National Security and Intelligence Committee of Parliamentarians, *Special Report on Foreign Interference in Canada's Democratic Processes and Institutions (Revised version pursuant to subsection 21(5) of the NSICOP Act)* (His Majesty the King in Right of Canada, 2024), pp. 7-9

[2] *R. v. Ndhlovu*, 2022 SCC 38, at para. 77

[3] *R. v. Ndhlovu*, above, at para. 78

[4] RSC 1985, c O-5, as amended

[5] That is, the Crown must prove beyond a reasonable doubt that the offender engaged in certain conduct at the direction of, in association with, or for the benefit of a foreign offender.

high bar to prove a criminal conviction lessens the utility of the criminal law as a tool in deterring foreign interference.

The third challenge, the "Intelligence to Evidence" problem, relates to the difficulties encountered when one seeks to bring intelligence information obtained through covert means into a criminal trial process that is open and transparent.

Based on my experience, I think it likely that future investigations of the new foreign interference offences will have their genesis in intelligence information that is shared by CSIS with the police. This is because one of the essential elements of the offence – the necessary link between the offender and the foreign entity – will probably first surface in the context of an intelligence investigation.[6]

In my experience, the intelligence information gathered by CSIS of value to a police investigation will probably consist of information obtained from confidential human sources or intercepted communications. There are difficulties associated with both types of intelligence.

If the intelligence information is from a confidential human source, that will pose a difficulty because both the human source and the Service would need to agree to waive the confidentiality that ordinarily protects the identity of the human source under the *CSIS Act*.[7] That is not to say a waiver of confidentiality is out of the question – in the *R. v. Ahmad* terrorism case, colloquially known as the *Toronto 18* terrorism case, two confidential CSIS sources agreed to become police agents and testify at trial. However, human sources in the context of foreign interference may be reluctant to disclose their identities if they have concerns about possible retaliation by the foreign entity against themselves or their loved ones.

If the intelligence information provided to the police is a communication intercepted by CSIS under a warrant issued pursuant to s. 21 of the *CSIS Act*, and the police then rely on that communication as part of their reasonable grounds to obtain their own warrant or authorization to intercept communications, the CSIS warrant and underlying affidavit may well become the subject of scrutiny at trial. This is because, under current Supreme Court of Canada jurisprudence, the state is not entitled to rely on evidence that was obtained illegally by state actors, and such information must be excised on review from the reasonable grounds.[8] Thus, the trial court may well need to review the CSIS warrant and affidavit in order to determine whether the seizure of the communication by the Service was lawful. Any time the Service is assessing whether to share with the police information that was obtained under a CSIS warrant, they will need to consider whether the CSIS warrant and underlying affidavit could be disclosed to the defence in a manner sufficient to allow for effective review and challenge at trial without compromising national security.

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[6] I note that, according to a media report, much of the evidence in *CDPP v Duong*, [2024] VCC 182, a recent prosecution of an individual in Australia under that country's foreign interference laws, was before a closed court and included testimony from intelligence officials: https://www.abc.net.au/news/2024-02-29/di-sanh-duong-jailed-foreign-interference-alan-tudge/103526200

[7] *Canadian Security Intelligence Service Act*, RSC 1985, c. C-23, s. 18.1

[8] *R. v. Zacharias*, 2023 SCC 30, at paras. 30-32; *R. v. Grant,* [1993] 3 SCR 223; *R. v. Wiley*, [1993] 3 SCR 263

In some cases, it will be possible to balance the two competing interests. A good example of this is the terrorism case of *R. v. Jaser*, where the defence was provided with redacted copies of the CSIS warrant and underlying affidavit, as well as summaries of redacted information, in a manner that was sufficient to allow for effective review and challenge at trial.[9] In that case, the trial judge was able to conclude that the CSIS warrant was lawful. But there may well be other cases where it will not be possible to disclose the warrant and affidavit in a redacted form that is sufficient. And if that is the case, the intelligence information gathered under the warrant cannot be used by the police under our current legal framework.

I should highlight that, in *R. v. Jaser*, the Service prepared redacted copies of the warrant and affidavit, as well as some summaries of redacted information, in consultation with the prosecutor and the trial judge. These were produced to the defence without resorting to the s. 38 disclosure regime in the *Canada Evidence Act* and avoided the necessity of a bifurcated proceeding in the Federal Court.[10] In *Jaser*, the defence was content with what CSIS produced. But in other cases, the defence might well resort to the s. 38 disclosure regime and pursue an application in the Federal Court for disclosure. The s. 38 regime can be cumbersome, time consuming, and result in inefficiencies and delays.[11] If the defence had resorted to that process in *R. v Jaser*, it would have resulted in bifurcation of the proceedings and considerable delay of the trial.

In my view, the bespoke process that was crafted in *R. v. Jaser* may provide a template for reform of the s. 38 disclosure regime that would help address the "Intelligent to Evidence" problem. If superior court trial judges had jurisdiction to determine s. 38 disclosure applications, they could determine what information needs to be redacted from a CSIS warrant and affidavit and provide the defence with judicial summaries, as may be needed in the circumstances of the case. In many cases, this may be sufficient to balance the competing interests and promote trial efficiencies. Where, however, judicial summaries cannot be provided to the defence without compromising national security, it would be helpful if the superior court trial judge had jurisdiction, on application by the Crown, to review the warrant and affidavit in a closed proceeding. This would involve appointment of a special counsel with the necessary clearance, who would be able to access the CSIS warrant and affidavit and represent the interests of the accused in the closed proceeding.

The foregoing challenges associated with the criminal law limit its utility in combatting foreign interference. Other measures that don't have these same challenges may well be more effective.

Recommendations:

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[9] *R. v. Jaser*, 2024 ONCA 448

[10] *R. v. Jaser*, above, at paras. 44-77

[11] *R. v. Jaser,* above, at paras. 51-52; *R. v. Ahmad*, 2011 SCC 6, at paras. 71-76; and see my criticism of the s. 38 disclosure regime in "*Navigating National Security: The Prosecution of the Toronto 18*", (2021) 44:1 ManLJ 115, at pp.138-142

1) Measures outside of the criminal law, such as administrative measures, sanctions, and enhanced governance/oversight of vulnerable electoral processes, should be developed and used to combat foreign interference.

2) The current s. 38 disclosure regime should be reformed to permit superior court trial judges to decide disclosure applications relating to sensitive information in the context of criminal trial proceedings.

3) Where a warrant is the subject of scrutiny under the *Charter* and judicial summaries are insufficient to permit the defence to challenge the issuance of the warrant by submissions or evidence, superior court trial judges should have the jurisdiction to order, on the application of the Crown, a closed proceeding and the appointment of special counsel for the purpose of reviewing the warrant for compliance with the *Charter*.