



Summary Report

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Panel Theme: Enforcing, Deterring and Prosecuting Foreign Interference Activities

The Utility of Criminal Justice in Deterring Foreign Interference

A properly resourced, professionally aggressive, Charter compliant criminal investigation in support of a prosecution is an essential component to Canada's 'whole of country approach' to deterring and combatting foreign interference. Canadians rightfully expect to see criminal actions interdicted and those who commit these crimes held to account in public proceedings.

Hostile state actors are unlikely to stop their illicit activity because their proxies and confederates have been arrested, charged and convicted of criminal offences. We must nevertheless display competence and timeliness in bringing the full force of the criminal justice system to bear against those who would give life to or engage in criminal interference in our democratic processes. Arresting, charging and prosecuting those conducting foreign interference will serve to expose the threat to Canadians while holding these criminals accountable for serious offences, thereby reinforcing trust and confidence in our institutions.

The decision to initiate a criminal investigation is well understood to be the prerogative of the police. A threshold belief that a specific criminal offence has been committed creates a duty for the police to act by investigating, arresting and charging, or recommending charges. The police may also exercise discretion. There are instances of course where using this discretion is not appropriate. However, it is this application of discretion which permits the police to collaborate with other enforcement authorities to ensure that, having regard for the circumstances of a given case, the best enforcement action that can be taken, is taken in the public interest.

The Criminal Code already prescribes several offences which could apply to a given instance of foreign interference:

1. Corruption
2. Breach of Trust
3. Extortion
4. Threatening / Intimidation

Bill C-70 has added several very specific foreign interference offences, along with a host of other tools and authorities to existing enforcement and investigative agencies. It has created a foreign agent registry and a Commissioner of Foreign Interference and Transparency with coercive investigative powers.

A complex array of agencies: CSE, CSIS, RCMP, Global Affairs Canada, Elections Canada, the Commissioner of Elections and the Commissioner of Foreign Interference and Transparency each has an important role to play in combatting foreign interference. They are armed with a host of authorities. What is needed is a reliable means of coordinating their operations and decision-making such that timely interdiction against acts of foreign interference is achieved. In the result Canadians can be reassured of the potency and effectiveness of the security, enforcement and intelligence agencies.

In the early 2000s, CSIS and the RCMP faced challenges coordinating their respective counter-terrorism investigations. Resulting prosecutions encountered significant, sometimes fatal challenges arising



from the so-called intelligence to evidence conundrum. The creation of “One Vision” (the details of which are in evidence before the Commission) sought to overcome many of these challenges through a series of guiding principles for counter-terrorism operations. This protocol has evolved and while imperfect, has succeeded in overcoming some of the challenges of “intelligence to evidence” by, among other things:

1. Instituting a prescribed cadence of operational deconfliction meetings among the upper most operational decision makers in each agency.
2. Being guided by the recognition that a criminal justice outcome is the preferred course of action where public safety is put at risk.
3. Recognizing the need to engage the police as soon as possible when intelligence uncovers a public safety risk.

It is my submission to the Commission that, building upon the seed of the SITE task force, a formal committee of senior operational decision makers from each relevant agency, supported and advised by an experienced prosecutor, be created. This should exist outside of the existing labyrinth of public service assistant deputy minister and deputy minister meetings. It should assess enforcement and interdiction options, look to integrate each agencies’ capabilities in support of the best course of action in the public interest having regard for the specific facts and circumstances surrounding instances of foreign interference. Important consideration would include:

1. Decision making be free of political considerations.
2. Deliberations focus on acting to interdict.
3. Records be maintained reflecting the deliberations and rationale for decisions.

Such a body would be well positioned to canvass the risks of each case and determine which of the agencies’ authorities were most appropriate to invoke. Examining opportunities to exploit each agencies’ authorities in support of a given course of action would ensure a thorough canvassing of enforcement possibilities and an assessment of the risk of acting in a given manner. For example, could the coordinated use of the coercive powers of the Elections Commissioner or the Commissioner of Foreign Interference and Transparency advance the parallel collection of evidence by the police? Having assessed the risk of transnational repression, should alternative enforcement action or diplomatic intervention be applied? Would the application of CSIS’s threat diminishment powers suffice in deterring the threat? In short, operational brainstorming towards action.

Of course, no discussion of enhanced powers and responsibilities in an enforcement context can be complete without a discussion of resources. Ten years ago, in preparing to speak at a forum on “the economics of policing”, I reviewed trends in public spending on a per capita basis in health, education and policing. Spending on health and education produced graphs in which $X=Y$ - or sharply rising lines - while the graph on policing (including federal policing) produced a line that crept horizontally across the page. This is more noteworthy when one considers the rapidly increasing legal and logistical complexity associated with producing charter compliant investigations. Even more so when pursuing significant criminality against enforcement resistant criminals – crooks who don’t want to get caught - and who have the means to resist enforcement efforts.

What used to require two or three paragraphs of justification in an ‘information to obtain’ search and seizure authority from the courts, now routinely comprises two to three hundred pages. The administrative and logistical obligations relating to disclosure can easily double the costs of project-based investigations. Heightened privacy expectations require prior judicial authority before collecting this information. Legal and Charter considerations relating to the admissibility of evidence are complex and despite having been litigated aggressively over 40 years still form a considerable portion of a trial.

Conducting major investigations built around charter compliance is a significant labour-intensive undertaking. In consideration of the complexity and risks associated with significant investigations the RCMP has developed and implemented the doctrine of Major Case Management. Consistent with and illustrative of



the inherent challenges attached to undertaking these investigations it seeks to train investigators in the nine principles of MCM:

1. Crime solving and investigative strategies.
2. The command triangle.
3. Accountability systems.
4. Legal / Charter considerations.
5. Management considerations.
6. Communications.
7. Ethical decision making.
8. Partnerships.
9. Leadership and team building.

The RCMP's federal policing mandate – the core business of the Force – has been and continues to be under pressure. Not, as is often publicly misunderstood, because of the Force's contract obligations – contract policing operates on a cost recovery basis – the provinces and territories pay their freight. The work of federal policing largely focusses on hardened targets using project-based investigations which in turn require costly, specialized investigative strategies. Federal policing carries a significant remit:

1. Drugs and Organized Crime.
2. Terrorism and National Security.
3. Border Integrity.
4. Economic Crime.
5. Protective Policing.
6. International Policing.
7. Criminal intelligence.
8. Specialized and Technical operations.

Providing a credible and competent enforcement capacity against foreign interference would require regional deployment of centrally overseen investigative teams as well as significant specialized and administrative support. There is no sugar coating the substantial investments that would be required to build a credible foreign interference enforcement capacity within federal policing. I invite the reader to consider why it is that Canada is being aggressively targeted by hostile state actors. I would suggest part of the reason is because Canada's defences against this activity are assessed by these states as weak and ineffectual. Defending Canada's world leading individual freedoms comes with a cost – namely, investing in our detection and enforcement capacity such that those who would exploit our freedoms can be known and stopped.

In closing, and in respect of the challenges relating to public outreach and education around foreign interference I would like to suggest the Commission consider the often-overlooked existing infrastructure and relationships within Canadian front-line policing agencies to credibly access, engage, communicate with and inform the many affected communities across this country. There is not one square mile of Canada that is not served by a police force of jurisdiction, all of whom have as their mandate the prevention crime. All of whom practice the principles of community policing. There exists too, many points of access to engage the broader policing community in important initiatives such as this: the Canadian Association of Chiefs of Police and their provincial associations, the Major City Police Chiefs, the Criminal Intelligence Service of Canada and their provincial and territorial bureaus. I can assure you that all of them would respond favourably and eagerly to engaging on such a matter of national interest.