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2020 12 04

TO: Chief, TR CICP
FROM: TR CICP

BRIEFING NOTE

SUBJECT: IDENTIFIED GAPS IN CANADIAN LAWS DEALING WITH FOREIGN INFLUENCE ACTIVITIES

INTRODUCTION

In the course of conducting section 12 investigations into threats to the security of Canada relating to section 2(b) of the *CSIS Act* – foreign influence (FI) activities, TR CICP has encountered numerous perceived gaps in Canadian legislation dealing with such activities. It is the assessment of the TR CICP that addressing these gaps could have a substantial and lasting impact on the ability of the PRC government, and likely other hostile state actors, to engage in clandestine and covert forms of FI against Canada's elections and democratic institutions.

DETAILS

While the pursuit of a comprehensive legislative scheme dealing with FI is a preferred long-term solution, TR believes that smaller additions and amendments to existing acts would be sufficient to mitigate a significant proportion of the high-harm FI activity currently being observed. The following will highlight instances of covert PRC foreign interference and smaller legislative changes that could address these forms of interference. In the realm of foreign interference, Australia is often held up as an example of how to address the problem, largely because of their relatively recent introduction of criminalizing this activity by way of a slew of foreign interference laws. A comparison of Canadian case studies to Australia's foreign interference laws and US legislation will highlight how small scale amendments and additions to existing Canadian legislation could, in the short term, give Canada measures to curb foreign interference comparable to the Australian model.

Case # 1: Aiding a foreign power in interfering in the electoral process

the PRC Consulate instructed Chinese international students to vote for Han DONG during the LIBERAL PARTY OF CANADA (LPC) nomination vote in the Don Valley North Riding in 2019. organizing the buses that

delivered the students to the nomination vote

Case # 2: individuals and community association channel money from the PRC officials in Canada to a political party (though provincial, it's analogous to typical influence activity at the federal level):

reporting indicates that Ontario Member of Provincial Parliament (MPP) received large amounts of money in indirect payments from the PRC officials in Canada A staff member of a 2019 Federal Election candidate. arranged for the indirect transfer of approximately $250,000.00 CAD from the PRC officials to MPP

Canadian Legislation

Canadian legislation dealing explicitly with FI activities is currently limited to the *CSIS Act*. Other pieces of legislation, such as the *Canada Elections Act (CEA)*, the *Elections Modernization Act (EMA)*, the *Security of Information Act (SOIA)*, and the *Criminal Code of Canada (CCC)*, prohibit or regulate activities that may occur in tandem with, or as an included aspect of, FI activity – particularly as these relate to the conduct of Canadian federal elections – but do not deal directly with several of the most common and high-harm examples of such activity. The following examples of provisions in Canadian legislation are the most relevant in this regard.

Under the *CEA* section 331, individuals residing outside of Canada are prohibited during election periods from inducing electors to vote, avoid voting, or vote a particular way. The recently-enacted *EMA* further added section 282.4, which prohibits foreign entities from unduly influencing electors (i.e., knowingly incurring an expense to directly promote or oppose a candidate, party or party leader, or if one of the things done to influence an elector is an offence elsewhere in Canadian legislation), and includes collusion to do so. Finally, section 349 of the

CEA also prohibits the use of funds from a foreign entity for partisan activity, advertising, or surveys.

Outside of these prohibitions, the bulk of Canadian legislation touching on FI activities targets breach of trust by Canadian officials, or offences related to the unauthorised transmission of information to foreign entities.

When applied to the foregoing examples of FI activity, it is unclear whether the prohibitions of the *CEA* would prevent a Canadian citizen (i.e., a suspected PRC proxy) from acting as the agent of a foreign government in supporting a particular candidate in a party nomination contest, as long as the activity occurs outside an election period, or the foreign entity does not incur an expense to do so. The wording of the offence poses additional practical challenges, as the GoC must prove that the foreign entity *knowingly* incurred the expense. As such expenses may be borne by the Canadian agent of the foreign entity, who may receive compensation outside of Canada, if at all; the successful prosecution of an offence under this section is unlikely. Moreover, this prohibition does not specifically apply to party nomination contests, or to provincial and municipal elections.

The Canadian prohibitions under the *CEA* are unlike the broader offences set out pursuant to the recently-enacted Australian criminal legislation, detailed below, which were drafted purposefully in order to capture the types of FI activity commonly observed by security intelligence agencies.

Australian Legislation: Division 92.3 subsection 2 of Australia's Criminal Code contains the following:

A person commits an offence if:

(a) the person engages in conduct; and
(b) any of the following circumstances exists:
  (i) the conduct is engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal;
  (ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal; and
  (c) the person is reckless as to whether the conduct will influence another person (the target):

  (i) in relation to a political or governmental process of the Commonwealth
  (ii) or a State or Territory; or
  (iii) in the target's exercise (whether or not in Australia) of any Australian
  (iv) democratic or political right or duty; and

(d) the person conceals from, or fails to disclose to, the target the circumstance mentioned in paragraph (b).

Penalty: Imprisonment for 15 years.

Pertaining to Case #1 and #2 the Australian legislation would likely cover the threat activity and actors in both instances if a similar amendment was made to the *CCC* or to the *SOIA*. Failing that, an amendment could be made to the *CEA* to cover such scenarios; however, this would only cover federal elections.

Case # 3: The threat of an individual FI threat actor (person or group)

In terms of a case study of an individual, represents one of the most clearly defined examples of a foreign interference threat actor. first came to the attention of the Service

As previously stipulated the CSIS Act allows for the investigation of foreign interference but there are few legislative options available to curb or halt the activities of individuals as active as should Threat Reduction Measures (TRM) fail to deter an FI threat actor's activity.

US Legislation: In contrast to Canada, the United States possesses the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 et seq or FARA. FARA requires the registration of, and disclosures by, an "agent of a foreign principal" who, either directly or through another person, within the United States (1) engages in "political activities" on behalf of a foreign principal; (2) acts as a foreign principal's public relations counsel, publicity agent, information-service employee, or political consultant; (3) solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of a foreign principal; or (4) represents the interests of the foreign principal before any agency or official of the U.S. government. In addition, FARA requires agents to conspicuously label "informational

materials" transmitted in the United States for or in the interest of a foreign principal. There are some exemptions to FARA's registration and labeling requirements for specified categories of agents and activities.

FARA is an important tool to identify foreign influence in the United States and address threats to national security. The central purpose of FARA is to promote transparency with respect to foreign influence within the United States by ensuring that the United States government and the public know the source of certain information from foreign agents intended to influence American public opinion, policy, and laws, thereby facilitating informed evaluation of that information.

The FARA Unit is part of the National Security Division of the Department of Justice, and is responsible for administering and enforcing FARA. The FARA Unit provides support, guidance, and assistance to registrants and potential registrants and processes registration filings and informational materials to make those materials available to the public.

The penalty for a willful violation of FARA is imprisonment for not more than five years, a fine of up to $250,000, or both. Certain violations are considered misdemeanors, with penalties of imprisonment of not more than six months, a fine of not more than $5,000, or both.

A Canadian version of FARA could be introduced as part of an amendment to the CSIS Act or as part of an amendment to the Lobbying Act. Ministerial authority could be required to designate a person as a foreign agent. The benefits of such an Act for Canada is that it could target individual FI threat actors but also community organizations being used for FI purposes or media outlets. Individuals knowingly working and assisting a foreign state in FI could also be reached with a Canadian FARA. Co-ordination with FVEY partners could also occur similar to Canada's Passenger Protect Program in terms of sharing of information to ensure an undeclared individual working on behalf of a foreign state is compelled to register with a Canadian FARA upon entering Canada. In addition to the threat of penalties for not registering with FARA, FI activity could be deterred by a person appearing on the list which could have a strong mitigating factor on FI activity. If an FI component was added to the Criminal Code in addition to the creation of a Canadian FARA, the Government of Canada would have many tools and options at its disposal for curbing various levels and degrees of foreign influence activities.

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