



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

September 19, 2008

Erin McKey and Michael Zigayer
Criminal Law Policy Section
Department of Justice
East Memorial Building
284 Wellington St.
Ottawa, ON, K1A 0H8

Dear Ms. McKey and Mr. Zigayer,

Re: Towards a framework for integrated cross-border law enforcement initiatives

We are writing on behalf of the Canadian Bar Association, a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and the administration of justice. The CBA appreciates the invitation to comment on "Towards a framework for integrated cross-border law enforcement initiatives" (Consultation Document). The Consultation Document explores the desirability and feasibility of Canada entering into new arrangements with the United States to allow law enforcement officials from that country to be granted status as peace officers in Canada, and *vice versa*, with the goal of improving the effectiveness of law enforcement on issues of transnational concern.

The CBA believes that such initiatives must always be regarded as exceptional, and only to be undertaken in the narrowest circumstances. Clear and compelling evidence should be required to demonstrate the necessity of recourse to the framework in each instance in which it is to be used to guide these activities.

That said, we recognize that a principled framework to govern transnational enforcement initiatives could have advantages over the current *ad hoc* approach. Ideally, it would also address the problems that have become apparent through use of that *ad hoc* approach. It could provide a vehicle to ensure that fundamental principles are respected, adherence to Canadian laws and values are enshrined and consequences are required for any breach. It could also stress the exceptional nature of such transnational enforcement efforts.

General Comments

Any framework established to guide cross-border law enforcement must be founded on certain core principles. Those principles include adherence to the Canadian *Charter of Rights and Freedoms* and all applicable customary and conventional international law, accountability, transparency, oversight,

respect for solicitor/client privilege, and respect for Canadian autonomy, meaning the ability and authority to determine what takes place within our own borders. Accountability should include not just the accountability of those officers actually carrying out the enforcement work, but also the international implications of the enforcement work being done.

In all but the most exceptional cases and only where clearly necessary and demonstrably justified, Canadian authorities should enforce the law in Canada. If peace officer status is granted to a US agent in Canada, a competent Canadian authority should direct and have accountability for that agent. Named individuals at the highest levels must be responsible for any such actions taken in the name of Canada.

Any framework must also ensure adequate safeguards for solicitor/client privilege. Recent reports of US customs officials routinely searching the laptop computers and other electronic devices of Canadian lawyers when they cross the border, in spite of claims of privilege, illustrate the potential dangers.¹

The CBA recently called for a comprehensive review of public sector privacy legislation to ensure that the private information of Canadians is protected, both within and beyond Canada's borders. A framework for cooperation and information sharing should ensure that privacy protection afforded in Canada continues to apply when Canada shares information to a foreign government. For example, one of the recommendations of the Financial Action Task Force (FATF), an inter-governmental body to combat money laundering and terrorist financing both nationally and internationally, says,

Countries should establish controls and safeguards to ensure that information exchanged by competent authorities is used only in an authorised manner, consistent with their obligations concerning privacy and data protection.²

Finally, there must be transparency when breaches of the framework agreement that are contrary to the values of Canadians occur, and those responsible must be held to account. Transparency is critical to maintain public confidence of that which is done in the public name.

Specific questions raised

The Consultation Document suggests a framework that would include broad arrangements encompassing ordinary criminal investigations, preventative policing and measures to protect national security. The criteria and conditions proposed are also generic in nature. Given the very general nature of the proposals in the Consultation Document and the broad range of activities that it would span, we offer preliminary responses but require further detail to fully respond and answer the specific questions posed.³

The first two questions refer to “benefits and concerns” with regard to cross-border law enforcement. We stress that all perceived benefits of a framework must be clearly and simply articulated. Overly broad or general language is unlikely to achieve the expressed goals and may be open to abuse. Only when clearly identified can the benefits be assessed as to whether they are proportional to potential harms.

¹ See, <http://www.cba.org/CBA/PracticeLink/TAYP/laptopborder.aspx> for more information.

² See, http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html#r40

³ See Consultation Document at 8.

The CBA believes that generally, Canadian police should enforce Canadian laws on Canadian soil. If a law enforcement agency believes this to be insufficient in a particular case, reasons why should be clearly stated and convincing evidence provided. We recognize that there is already a significant level of cooperation between the two countries in regard to law enforcement, and that cooperation has met with some success. On the other hand, the shortcomings of the current cooperation are less clear. The significant harm inflicted on Canadians in cases where cooperative efforts have proceeded based on erroneous information and in breach of national and international law is well documented.⁴ We note that the Consultation Document does not refer to those cases, which is unfortunate. To gain useful input on whether and what new arrangements would be advisable, a more comprehensive review of what has worked and what has not would be helpful.⁵

Experiences across the full spectrum of criminal investigations, preventative policing and national security may raise very different considerations and raise different legal concerns. Establishing one common regime is not, in our view, advisable.

The third question in the Consultation Document asks if there are “national interests, values or principles” that should be taken into consideration. It is impossible to respond without a clearer articulation of the goals of the framework. Any arrangement between Canada and the US must ensure that US officers working in Canada are subject to the *Charter*, and that Canadians working in the US under a cross-border enforcement arrangement act in conformity with *Charter* obligations. We note that the law respecting the applicability of the *Charter* abroad is in an active stage of development⁶, and suggest that caution supports a generous approach to the issue of territorial applicability in cross-border law enforcement. Any framework should not provide a means to circumvent *Charter* obligations.

The next several questions raise direct or indirect issues of oversight. The CBA has consistently stressed the need for effective oversight mechanisms to maintain the quality, coherence and integrity of law enforcement work.⁷ Oversight is a pillar of many aspects of law enforcement work and cross-border law enforcement should be no exception. Accordingly, there should be clear justification for any devolution of policing to US officers.

Some important issues are not addressed in the list of questions. One example is the status of the fruits of investigations conducted in cross-border cases. Are US officers entitled to come to Canada, gain information and then return to the US with that information without any Canadian input or knowledge? This is unacceptable particularly if that information is mistaken or misconstrued, as Canadians could be put in jeopardy when travelling to the US because of that information.

Any framework must not permit any abuse that could amount to jurisdictional arbitrage, allowing law enforcement officers to take advantage of the differences between laws on either side of the border to

⁴ While there are unfortunately now several examples, the findings of the Commission of Inquiry into the case of Maher Arar (Commissioner Dennis O’Connor) provides the most extensive record of such a case.

⁵ The “Operation Pipeline” incident with the RCMP and Texas State Troopers serves as one example.

⁶ Although the majority decision of the SCC in *R.v.Hape*, [2007] 2 SCR 292 would suggest that the *Charter* cannot apply extraterritorially, the Court was not unanimous on this issue.

⁷ For example, Bill C-36, *Anti-terrorism Act* (Ottawa: CBA, 2001), *Policy Review of the Commission of Inquiry into the case of Maher Arar* (Ottawa: CBA, 2005) and *Submission on the Three Year Review of the Anti-terrorism Act* (Ottawa: CBA, 2005).

the detriment of Canadians or Canadian residents. For example, if officers have grounds to arrest an individual and that person is physically present, it should not be permissible to wait until that individual moves to another jurisdiction that offers the accused less protection. It should not be permissible to move evidence to the other jurisdiction only for such an advantage. Further, those arrested should not be transported across borders. These troubling possibilities only scratch the surface of the various considerations that must be a key component of any new framework.

Conclusion

It appears from both the Consultation Document and from media reports that cross-border or transnational law enforcement initiatives are already underway. The CBA is concerned that these initiatives are proceeding on an *ad hoc* basis. Given the serious implications of these initiatives on issues such as sovereignty, coupled with the experience of negative consequences from unregulated information sharing, we again stress that these initiatives be regarded as exceptional in nature and be undertaken only where clearly justified. A framework may provide a useful mechanism both to articulate the threshold and factors to be considered in determining when and whether the initiatives should be undertaken, and to ensure the transparency and accountability that are fundamental elements of effective law enforcement in a free society. A framework agreement between Canada and the US could also provide a precedent for any similar arrangements with other countries in future.

If Canada proceeds to negotiate a framework to implement a cross-border law enforcement initiative with the US, then the CBA recommends that the following considerations guide the content and form of the agreement:

- Transparency must be assured by the terms of the agreement. Due to the unprecedented nature of the framework contemplated by the Consultation Document, a proposed agreement should be exposed to full public scrutiny. Arrangements should be described by treaty, the terms of which should be implemented by an Act of Parliament. We also urge Canada to develop negotiation proposals on the basis of positions elaborated through broad-based and detailed consultations.
- The terms of the framework should be clear and specific. Among other things, permitted and prohibited conduct should be clearly described, as should the process of and basis for conferring peace officer status on a foreign law enforcement agent.
- The framework should not usurp or displace ordinary policing practices in boundary communities.
- The framework should strictly prohibit the transportation of arrested individuals across borders, or taking advantage of movement of evidence and individuals across borders to access more stringent laws.
- The framework should describe the nature, scope and limits of information-sharing across borders, and set clear lines of accountability for the handling and security of any information shared between agencies, such as clear and enforceable limits on sharing information with third parties to the framework, including other law enforcement agencies.
- The framework should provide an effective oversight mechanism, lines of accountability and remedies in the event of breach. The agreement should provide specific remedies for individuals whose rights are violated as a result of actions or omissions under the framework.

- The framework should provide that the parties agree to respect all domestic and applicable international customary and conventional law in arrangements made and activities carried out under the agreement.
- Any proposal related to cross-border policing must be very carefully scrutinized to ensure that it accords with the letter and the spirit of Canada's *Privacy Act* and the *Access to Information Act*. Records of the program itself, regardless of where they are located, should be subject to both Acts, along with the *Privacy Act* of 1974, 5 U.S.C. § 552a et seq. and the *Freedom of Information Act*, 5 U.S.C. § 552.
- All information systems, filing systems, registries and the like (both electronic and paper-based) should be subject to a comprehensive privacy impact assessment.

We trust that our general comments will be helpful. We look forward to responding to any more specific proposals that may be developed in future.

Yours truly,

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