



A Canadian Perspective on Lawfare

Date: July 19th, 2018

Disclaimer: This briefing note contains the encapsulation of views presented throughout the evening and does not exclusively represent the views of the speaker or the Canadian Association for Security and Intelligence Studies.

Key Events

On July 19th 2018, the Canadian Association for Security & Intelligence Studies (CASIS) Vancouver held its sixth roundtable meeting themed by a presentation on “A Canadian Perspective on Lawfare” by Desmond MacMillan. The following presentation and question period focused on Canada’s use of lawfare in domestic and international security, as well as the legal framework to which lawfare can be used in offensive and defensive tactics. The subsequent roundtable discussion centered around Canada’s participation in lawfare with respect to intelligence collection and the legal framework with which Canadian citizens’ constitutional rights are protected.

Nature of Discussion

The presentation illustrated what Lawfare is, and how it can be used both to promote Canada’s national security objectives as well as defending Canada from potential threats. The presentation also defined issues attributing to lawfare such as the Access to Information Act in Canada.

Roundtable

The roundtable portion of the event centred around debating whether or not Canada should be participating in Lawfare and the parameters lawfare should be subject to, in order to protect Canadian citizens constitutional rights. It was also discussed how evidence discovered during intelligence collection and searches that are out of the scope of

the particular operational objective should be used to advance national security objectives.

Background

Lawfare, as defined by Charles Dunlap (2001) is the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective. In Canada, lawfare can arguably be used to distort rule of law (for instance, no person, government or company is above or below the law) to gain an objective, or to uphold the rule of law for legitimate purposes relevant to the group’s interests. For example, lawfare can be used by ethnic or religious actors to use the courts for the advancement of the group’s agendas. Further, lawfare may be used in psychological operations (use of multiple techniques to defeat or manipulate an outcome), and in intelligence functions lawfare is used to hold governments accountable for domestic and international actions. The effects of using lawfare on another nation can be both monetary consequences through sanctions or the exposure of human rights violations leading to a decreased in trade. Further, the impact of using lawfare can be used to bring down the morale of state and non-state actors, intimidate the enemy, and information collection by actors during the discovery process of a court proceeding.

The Charter of Rights and Freedoms (1982) and Access to Information Act (1985) ensure that a legal framework is established to protect Canadian citizen’s fundamental right and to maintain rule of law for all government and intelligence agencies.

Roundtable

The collection of information for intelligence purposes by government and law enforcement agencies is required in order to achieve an operational objective. However, to safeguard Canadian citizens from unreasonable intrusion by the state, the Charter of Rights and Freedoms (1982) provides a legal framework to which agencies can operate. Specifically, Chapter 8 of the Charter of Rights and Freedoms provides

protection from unreasonable search or seizure by the Canadian government and law enforcement agencies ensuring Canadians are protected from possible infringement on their rights.

Technological advancements, and big data collection, increase law enforcement agencies' ability to collect terabytes of data, in a short time frame, including data that may not be relevant to their operational objective within the scope of lawfare. Further cybersecurity (defined by the Canadian Chamber of Commerce as within four categories: national security, critical infrastructure, intellectual property, and personal data) questions how Canadian's personal information can be protected during operations where an overload of data is collected. The Australian Electronic Evidence Branch's random sampling and statistical elimination algorithms regarding data analysis stage of the intelligence cycle combat the misuse of data collection. Therefore, by adopting the random sampling and elimination algorithms law enforcement agencies reduce information backlogs and ensure the rights of citizens are protected by limiting staff exposure to potentially disturbing or sensitive content.

Key Points of Discussion & West Coast Perspectives

- It is suggested that the use of lawfare by Canada internationally should focus on ensuring Canadian values, such as democracy. This can be done by using lawfare to expose those nations violating international law thus weakening the target state.
- The use of a multi-method Mosaic approach to investigate the classification of information, and therefore may declassify the whole of intelligence information, exposing certain operations where subjects' privacy may be violated.
- It was argued that sovereign movements such as Freeman on the Land, intentionally use lawfare to undermine the Canadian justice system. It is suggested that the use of lawfare by groups be turned to

other forms of court such that the justice system can tend to other victims of crime.

- It is suggested that lawfare may be used to promote Canada's foreign interests. For instance, Canadian relief operations in Haiti give way for Canada to aid Haiti with their land tenure system by co-creating a land registry.

Roundtable

- A focus on the integration of anthropology in the Canadian asymmetric perspective can aide in changing ungoverned territories policies by understanding local and tribal peoples' law, thus using key tribal leaders to inject Canadian ethical and legal viewpoints.
- Canada should respectively remain restrained in its use of lawfare and should only use lawfare as a means of last resort. Therefore, securing that intelligence collection is not conducted in means that are ethically wrong, and ensuring that one's rights are not violated to achieve a greater security objective.
- In a 5th generation warfare context (group vs. group), instances where groups use lawfare to act against the state should be investigated. For example, the Hells Angels use of counter-intelligence has given the group the means to use lawfare in B.C.'s Supreme court against the Canadian government.
- Evidence discovered about a crime that is outside the scope of the operational objective/target should be used and given to the appropriate agency as a form of warning about a potential threat.



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