



January 8, 2014

The Honourable Steven Blaney, P.C., M.P.  
Minister of Public Safety and Emergency Preparedness  
269 Laurier Avenue West  
Ottawa, ON K1A 0P8

Dear Minister Blaney:

**Re: Ministerial Direction to CSIS on Information Sharing with Foreign Entities**

I am writing on behalf of the Canadian Bar Association (CBA) to voice concerns with the Ministerial Direction. It permits CSIS, in limited circumstances at the Director's discretion, to share information that may be derived from torture or other forms of cruel, inhuman or degrading treatment ("mistreatment"), or that may put a person at a substantial risk of torture or mistreatment. We would welcome an opportunity to work with you and your officials to amend the Ministerial Direction in a way that protects the public from terror threats without violating the law.

The CBA is a national association of over 37,500 lawyers, law students, Québec notaries and law teachers. Our primary objectives include improvement in the law and the administration of justice, promoting the rule of law and public respect for the law and legal process.

Torture and mistreatment are prohibited by sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*. Canada has criminalized torture and corollary offences (including aiding and abetting torture, counselling the commission of torture, conspiracy to commit torture and being an accessory after the fact to torture) in the *Criminal Code* and the *Crimes Against Humanity and War Crimes Act*.

The Ministerial Direction correctly states that Canada is bound by international conventions prohibiting torture and mistreatment, and complicity in this behaviour. Canada's obligations arise from the *International Covenant on Civil and Political Rights*, the *Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture)*, the *Geneva Conventions of 1949*, the *Rome Statute of the International Criminal Court* and the *Convention relating to the Status of Refugees*. In international customary law, the prohibition against torture is a peremptory norm that binds all states and is non-derogable, even in times of national emergency.

Sharing information that may be derived from torture or mistreatment, or that may subject a person to a substantial risk of torture or mistreatment, is not consistent with Canada's international legal obligations. These prohibitions must be interpreted in light of their intended purpose, not in a partial or technical manner. The Ministerial Direction fails to observe the absolute prohibition against torture and the very strong prohibition against mistreatment. In our view, public safety can be ensured and information effectively shared in ways consistent with Canada's legal obligations.

Canada has in recent years been connected to the torture or mistreatment of several individuals abroad. The 2006 *Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar (O'Connor Inquiry)* concluded that information shared by the RCMP was implicated in the decision of US officials to detain and remove Mr. Arar to Syria,<sup>1</sup> and there were multiple failures with sharing and receipt of information during Mr. Arar's detention and torture there.<sup>2</sup>

Similarly, the report of the *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (Iacobucci Inquiry)* concluded that information shared by CSIS and the RCMP led indirectly to Mr. Elmaati's detention in Syria,<sup>3</sup> and information shared by Canadian officials indirectly resulted in his torture there<sup>4</sup> and in Egypt.<sup>5</sup> Information shared by DFAIT and the RCMP indirectly contributed to the torture of Mr. Almalki in Syria.<sup>6</sup> Information shared by CSIS led to the detention of Mr. Nureddin in Syria,<sup>7</sup> and to his torture while in detention there.<sup>8</sup>

In concluding observations to Canada's sixth periodic report under the *Convention Against Torture*,<sup>9</sup> the Committee Against Torture expressed "serious concern" about the Ministerial Direction. While noting Canada's national security priorities, the Committee cited the risk that the Ministerial Direction may contribute to a violation of Article 15 of the *Convention Against Torture*. It also cited concerns in relation to Articles 2, 10 and 16 of the treaty. The Committee recommended that Canada modify the Ministerial Direction "to bring it in line with Canada's obligations under the Convention".

The Committee also noted that "allowing CSIS to share information with foreign agencies even when doing so poses a serious risk of torture, in exceptional cases involving threats to public safety," contravenes Recommendation 14 of the *O'Connor Inquiry*, which states,

Information should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture. Policies should include specific directions aimed at eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.<sup>10</sup>

O'Connor also recommended that Canada accept information from countries with questionable human rights records only after proper consideration of the human rights implications.<sup>11</sup>

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has also commented on issues related to information sharing,

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<sup>1</sup> See pp. 13 – 14 and 30.

<sup>2</sup> See, e.g., pp. 34 – 35, 38 – 39.

<sup>3</sup> See p. 348.

<sup>4</sup> See pp. 361, 364.

<sup>5</sup> See pp. 368 – 370; 372, and 376 – 377.

<sup>6</sup> See pp. 409, 411 – 415.

<sup>7</sup> See p. 440.

<sup>8</sup> See pp. 449.

<sup>9</sup> CAT/C/CAN/CO/6 (25 June 2012).

<sup>10</sup> See pp. 367 – 368; Recommendation 14.

<sup>11</sup> See p. 368; Recommendation 15.

torture and mistreatment. In 2010, then-Special Rapporteur Martin Scheinin elaborated ten areas of best practice in countering terrorism. In relation to the arrest and interrogation of terrorism suspects, the Special Rapporteur found that it was a core element of best practice that information obtained through torture or mistreatment “shall never be solicited or condoned”.<sup>12</sup>

Canada is not the only democracy to wrestle with sharing information that may lead to, or be derived from, torture or mistreatment. In 2009, the UK Parliament’s Joint Committee on Human Rights released its report into *Allegations of UK Complicity in Torture*.<sup>13</sup> The Joint Committee considered allegations that the UK had been complicit in torture by, among other things, UK agents providing information to foreign intelligence services that enabled those services to apprehend terrorism suspects or facilitate their extraordinary rendition, and UK agents systematically receiving information known or thought likely to have been obtained from detainees subject to torture.<sup>14</sup>

The UK Joint Committee considered the meaning of “complicity” in these contexts and had “no doubt” that the provision of information enabling the arrest of individuals at credible risk of torture was a form of assistance and facilitation capable of amounting to complicity in torture on the part of the state.<sup>15</sup> The Joint Committee concluded that the systematic, passive receipt of information known or thought likely to have been obtained from detainees subject to torture would amount to complicity, although “one-off” use of information would probably not amount to complicity, if it did not lend tacit support or agreement to the use of torture or mistreatment as a means of obtaining information.<sup>16</sup>

The “Information Sharing Principles” in the Ministerial Direction contemplate discretion to share information in *exceptional* circumstances, but does not prohibit regular or repeated transmissions of information in the context of an exceptional circumstance. The CBA remains concerned that the discretion conferred in the Ministerial Direction leaves open the door to Canadian complicity in torture and mistreatment elsewhere.

I am attaching for your information a resolution adopted by the CBA’s governing Council, urging the government to amend the Ministerial Direction. We believe it is possible to meet the pressing objectives of protecting the public from terror threats without violating international law. We would be pleased to assist in developing a plan to achieve this.

Yours truly,

*(original signed by Fred Headon)*

Fred Headon

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<sup>12</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Ten areas of best practices in countering terrorism, A/HRC/16/51 (22 December 2010) at p. 19.

<sup>13</sup> <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/15202.htm>

<sup>14</sup> See para. 17.

<sup>15</sup> See para. 37. The Joint Committee also found that, in principle, these and other acts are “capable of making a sufficient contribution by way of assistance to amount to the crime of complicity in torture by individual agents where the other ingredients of the offence are made out.”

<sup>16</sup> See paras. 39 – 43.