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Craig Forcese

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TOUCHING TORTURE WITH A TEN FOOT POLE

Craig Forcese

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Abstract:
In 2011, then-Public Safety Minister Vic Toews issued “ministerial directions” to Canada’s key security and intelligence agencies on “information sharing with foreign entities”. These directions permit information sharing in exigent circumstances, even “when doing so may give rise to a substantial risk of mistreatment of an individual”. The directions prompted a brief chorus of condemnation. They have since sunk into relative obscurity, remaining part of the Canada’s national security policy framework. And yet, in trying to walk the fine line between principle and realism in the administration of Canada’s approach to torture, they continue to raise pressing moral and legal questions.

This Article aims to reignite discussion of these policies and their controversial content, relying in large measure on documents obtained by this author directly or through journalistic researchers under access to information law. It examines dilemmas raised when information is shared between human rights-observing and abusing states and then focuses on the legal parameters and policy context in which both “in-bound” and “out-bound” information-sharing takes place. It then analyzes the 2011 instruments and considers their legality under both international and domestic law. The Article concludes that legality of the measures is doubtful in international law – at least in so far as “out-bound” information sharing is concerned – and domestic criminal culpability and constitutional validity are very close questions.

Keywords:
torture, intelligence, intelligence-sharing, national security, Canada, international law, complicity, criminal law

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The Legality of Canada’s Approach to National Security Information Sharing with Human Rights-Abusing States

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Introduction

In 2011, then-Public Safety Minister Vic Toews issued “ministerial directions” to the Canadian Security Intelligence Service, the Royal Canadian Mounted Police and the Canada Border Services Agency on “information sharing with foreign entities”. This innocuous title betrayed little of these administrative instruments’ actual content. The directions focused on information sharing “when doing so may give rise to a substantial risk of mistreatment of an individual”. They were, in other words, new policies on the thorny issue of information-sharing and torture, a question that has galvanized Canadian court cases and driven numerous high profile public inquiries since 9/11. In contrast with the recommendations in some of these inquiries, the directions were permissive of information-sharing that might induce (or be the product of) mistreatment. While they limited and controlled how that sharing might take place, they did not preclude it absolutely.

When acquired by journalist Jim Bronskill in 2012 under access to information law, the directions prompted a brief chorus of public condemnation. Subsequently, Professor Kent Roach penned a critical academic editorial on the topic in 2012 and the Canadian Bar Association tabled a resolution condemning

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1 These three agencies constitute Canada’s chief security and intelligence bodies. A fourth agency, Communications Security Establishment Canada (CSEC), may also be implicated in intelligence sharing of the sort discussed here. It is, however, not an agency within the portfolio of the Minister of Public Safety and there is no public record on what policies, if any, govern information sharing and torture between CSEC and its partners.

the measures in 2013. But for most part, the directions have sunk into relative obscurity, remaining part of the Canada’s national security policy framework. And yet, in trying to walk the fine line between principle and realism in the administration of Canada’s approach to torture, they continue to raise pressing moral and legal questions.

This Article aims to reignite discussion of these policies and their controversial content, relying in large measure on documents obtained by this author directly or through journalistic researchers under access to information law. It does so in three parts. Part I discusses the dilemmas raised when information is shared between human rights-observing and abusing states. Part II examines the legal parameters within which both “in-bound” and “out-bound” information-sharing takes place and describes in detail past ministerial directions and CSIS operational policies on these questions. Finally, Part III analyzes the 2011 instruments and considers their legality under both international and domestic law.

I conclude that the legality of the measures is doubtful in international law – at least in so far as “out-bound” information sharing is concerned – and domestic criminal culpability and constitutional validity are very close questions. Even more perniciously, the directions operate in obscurity and there is no systemic way for those outside of the security sectors to unearth how they have been used, making a challenge to the policies extremely difficult.

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Part I: Dilemmas in International Information Sharing

Unexpectedly, information-sharing between states has been one of the most difficult legal and policy issues in the post-9/11 national security law environment.

This issue figured prominently in the Maher Arar commission of inquiry’s key findings. There, the RCMP’s ill-considered provision to American authorities of raw information, along with sensationalist commentary on the putative affiliation with al-Qaeda of Mr. Arar and his wife Monia Mazigh, was the likely cause of Arar’s rendition to Syria, a state in which he was tortured.4

Although critical of the performance of the RCMP on the specifics of the Arar case, Justice O’Connor nevertheless underscored the importance to national security of international information-sharing.5 As academic analysts have asserted, this practice permits the “acquisition of intelligence that is valuable to decision makers but otherwise unobtainable at an acceptable cost.”6 As such, it is particularly important for small countries, able to use alliance relationships to tap into the intelligence capacities of larger states.

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5 Ibid. at 22.
More than that, intelligence-sharing in the anti-terrorism area now has an international legal imprimatur. In Resolution 1373 (2001), the UN Security Council employed its UN Charter Chapter VII powers to decide that all states must, among other things, “take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information … [and] afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.”\textsuperscript{7} As a result, information-sharing is now a mandatory counterterrorism obligation.

Nevertheless, there are countervailing human rights considerations. In Justice O’Connor’s words, “the need to investigate terrorism and the need to comply with international conventions relating to terrorism do not in themselves justify the violation of human rights.”\textsuperscript{8}

In practice, states have not found it simple to strike a balance between the need to share information and the obligation to manage the pernicious human rights impacts of that exchange. Speaking generally, the difficulties posed by this sort of inter-agency cooperation can be divided into those associated with in-bound intelligence sharing and those associated with out-bound exchanges. “In-bound” refers to circumstances in which Canadian officials obtain information

\textsuperscript{7} S/RES/1373 (2001), at para. 2(b) and (f).

\textsuperscript{8} \textit{Ibid} 346.
from a foreign service. “Out-bound” is simply the inverse: the provision of information by Canadian government bodies to foreign interlocutors.

A. In-Bound Information Sharing

Information provided by foreign government may be suspect on human rights grounds – most notably, it may have been secured through unpalatable methods such as torture and cruel, inhuman or degrading (CID) treatment. For instance, in the Arar inquiry, Justice O’Connor criticized CSIS for failing to assess the reliability of information extracted by Syrian authorities from Mr. Arar, and for failing to warn other agencies when distributing that information that it could have been produced by torture. CSIS relied on this information at least twice, to Mr. Arar’s detriment.9

Similar criticisms were directed at Foreign Affairs and the RCMP,10 sparking Justice O’Connor’s recommendation that “Canadian agencies should accept information from countries with questionable human rights records only after proper consideration of human rights implications. Information received from countries with questionable human rights records should be identified as such and proper steps should be taken to assess its reliability.”11

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9 Arar inquiry, Factual Report at 198.
10 Ibid at 34.
11 Ibid at 348.
Since the Arar matter, there have been a number of other controversies associated with in-bound intelligence. For example, individuals caught up in the related Almalki matter allege, among other things, that the RCMP characterized several other Muslim Canadians as “Islamic extremist individuals” suspected of Al Qaeda affiliations and obtained search warrants on the basis of statements made by one of these individuals under torture in Syria.\(^{12}\)

Evidence procured by torture has also been at issue in several of the controversial immigration “security certificate” cases. In 2010, for instance, the Federal Court concluded that there were reasonable grounds to believe that at least some of the information used by the government in the Mahjoub security certificate matter was obtained by a foreign service through use of torture.\(^{13}\)

**B. Out-Bound Information Sharing**

The Arar inquiry pointed to another troubling aspect of transnational information-sharing: the inability to control information supplied by the Canadian government, once conveyed to a foreign agency. This matter arose also in the subsequent Iacobucci inquiry, examining the mistreatment of Adbullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin. There, commissioner Iacobucci concluded that Canadian officials indirectly contributed to the maltreatment of these individuals in foreign custody when they shared information about the

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\(^{12}\) *Almalki v. Canada (Attorney General) 2012 ONSC 3023* at para. 6.

\(^{13}\) *Mahjoub (Re) 2010 FC 787.*
detainees (especially suspected terrorist involvement) and/or communicated suspicions in the form of efforts to interrogate the individuals, or to have them questioned by the foreign officials.¹⁴

In the Arar case, the RCMP failed to abide by its own policy by not attaching caveats to the information provided to American authorities.¹⁵ Provisos that purport to exert what is known as “originator control”¹⁶ over information and limit the use to which the recipient agency can put the data, these caveats are only a starting point. They are effective only where foreign agencies choose to abide by them. These agencies may do so out of self-interest, fearing that a failure to honour these conditions will stall future information sharing. It seems unlikely, however, that a country with limited foreign intelligence capacities, such as Canada, would detect that tacit information sharing in violation of caveats. Further, information is inherently fungible, and can seep into decision-making in ways that can never be traced. Caveats are not, in other words, a guarantor that information will be used properly.

In these circumstances, Canadian authorities may have to be circumspect in how they share information with problematic foreign agencies. The government, for instance, may have to withhold reliable information concerning the terrorist affiliations of a suspect in foreign custody, if disclosure is likely to induce torture.

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¹⁵ Arar inquiry, Factual Report at 339.

¹⁶ For a discussion of this concept and the related third-party rule, see Canada (Attorney General) v. Khawaja, 2007 FC 490 at para. 139 et seq.
or other human rights abuses. In 2006, CSIS’s review body, the Security and Intelligence Review Committee (SIRC), expressed concern that “even though CSIS was fully compliant in providing certain information to a foreign agency, this could have contributed to that agency’s decision to detain a Canadian citizen (who was also a CSIS target) upon arrival in that foreign country.”

It also noted “that questions submitted by CSIS to this agency via a third party may have been used in interrogating a Canadian citizen in a manner that violated his human rights.”

While not identified by SIRC, the person in question was almost certainly Maher Arar. SIRC recommended that CSIS “amend its policy governing the disclosure of information to foreign agencies, to include consideration of the human rights record of the country and possible abuses by its security or intelligence agencies” and that it “review its procedures so that the parameters and methods of exchange – as well as the Service’s expectations – are communicated to the foreign agency prior to entering into new foreign arrangements.”

In the Arar Inquiry itself, Justice O’Connor concluded that

[i]nformation should never be provided to a foreign country where there is a credible risk that it will cause


\[\text{\footnotesize 18} \] *Ibid.*

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.\textsuperscript{20}

\section*{Part II: Key Legal Issues in Information Sharing}

These information-sharing controversies and discussions arise in a particular legal context. In some respects, the legal issues associated with “in-bound” information sharing are the simplest, although the moral dilemmas are most acute. In comparison, the legal rules governing “out-bound” transfers require especially careful parsing.

\subsection*{A. Law and In-bound Information Sharing}

\subsubsection*{1. Torture as Evidence}

International law prohibits extreme forms of interrogation such as torture and cruel, inhuman and degrading treatment. Two broadly ratified international treaties include a prohibition on both torture and cruel, inhuman and degrading treatment and punishment (“CID treatment”). The \textit{International Covenant on}

\footnote{Arar inquiry, Factual Report at 345.}
Civil and Political Rights (ICCPR)\textsuperscript{21} provides in Article 7 that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”)\textsuperscript{22} includes more detailed prohibitions. As well as requiring states to criminalize torture and barring CID treatment, the Torture Convention provides in Article 15 that “each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

This is a sweeping ban. As the then-United Kingdom House of Lords ruled in \textit{A v. Secretary of State}, the Article “cannot possibly be read ... as intended to apply only in criminal proceedings. Nor can it be understood to differentiate between confessions and accusatory statements, or to apply only where the state in whose jurisdiction the proceedings are held has inflicted or been complicit in the torture.”\textsuperscript{23} Tortured evidence is inadmissible in all legal proceedings, an approach also followed (for federal proceedings) in Canada’s reception of the rule in section 269.1 of the Criminal Code.

Canada’s immigration law goes one step further in limiting the sorts of evidence that may be deployed in immigration security certificates. That law

\begin{itemize}
\item 999 UNTS 171, entered into force in 1976 (ICCPR).
\item \textit{A and others v. Secretary of State}, [2005] UKHL 71 at para. 35, Lord Bingham of Cornhill.
\end{itemize}
affirms the Criminal Code’s prohibition on tortured evidence and extends it also to information that is believed on reasonable grounds to have been obtained through the related concept of cruel, inhuman or degrading treatment or punishment.24

Even in the absence of these frank limitations, some tortured evidence would be excluded from Canadian civil or criminal court proceedings by simple common law limitations on the admissibility of confessions extracted from the accused themselves through abusive tactics.25 Similarly, the Charter supplements statutory law constraints on the use of evidence produced by torture. Section 7 of the Charter protects against deprivation of life, liberty and security of the person in violation of “fundamental justice”. Section 11(d), meanwhile, guarantees those accused of an offence a “fair” trial. In Hape, the Supreme Court signaled clearly that torture evidence would violate these constitutional standards.26

2. Torture and Operational Intelligence

All of these rules have, however, one thing in common: they relate to the

24 Immigration and Refugee Protection Act, S.C. 2001, c.27, s-s.83(1.1). For the leading case applying this provision, see Majoub (Re) 2010 FC 787, discussed further below.

25 See discussion in R. v. Oickle, [2000] 2 S.C.R. 3 at para. 47 (“The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not always) be unreliable”). The issue of voluntary confessions has arisen in the terrorism context in Australia. See, e.g., R. v. Thomas, 2006 VSCA 165 (Supreme Court of Victoria – CA, Australia) (dismissing a terrorism case on the basis of the inadmissibility of evidence obtained by interrogators while the suspect was incarcerated in Pakistan and where Australian officials suggested that the assistance of Australia could only be procured by cooperation).

use of information in a judicial or quasi-judicial setting. They are silent on use of
information in a purely operational environment. Manfred Nowak, the former UN
special rapporteur on torture and co-author on the leading treatise on the Torture
Convention, concludes that Article 15 does not reach operational use of tainted
information: “[i]t would indeed by unreasonable to require the police to check the
possible use of torture by foreign intelligence agencies before exercising their
duty to prevent terrorist or other attacks and to protect the lives of human beings being
endangered”. Such use would not be carried out

in the framework of any proceeding envisaged by
Article 15. The phrase ‘evidence in any proceeding’
only refers to the assessment of evidence before a
judicial or administrative authority acting in
accordance with certain rules of taking evidence laid
down in the respective (criminal, civil or
administrative) procedural code.27

In the result, the law in this area may leave open an “operational” vs.
“adjudicative” distinction in the use to which tortured information may be put.

This is a view sometimes advanced by government figures. In the United
Kingdom, then-Home Secretary Charles Clarke concluded that the A and Others

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27 Manfred Nowak and Elizabeth McArthur, The United Nations Convention Against
decision described above “held it was perfectly lawful for such information to be relied on operationally, and also by the home secretary in making executive decisions.” In fact, two law lords in that case did address the issue, suggesting that the executive could (and, in one law lord’s view, must) use even tainted information to stave off danger to public safety.

Within Canada itself, a CSIS lawyer sparked controversy in March 2009 testimony before a parliamentary committee with the following statement: “...do we use information that comes from torture [supplied by foreign agencies]? And the answer is that we only do so if lives are at stake.” There were, the witness continued, “occasional, unusual, almost once-in-a-lifetime situations when that kind of information can be of value to the national security of the country.”

Subsequently, on May 5, 2010, a second CSIS witness told another parliamentary committee that it was possible that some information supplied by


29 A and others v. Secretary of State, [2005] UKHL 71 at paras 68-69, Lord Nicholls of Birkenhead (raising a ticking time bomb scenario and indicated that “the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this”); para. 161, Lord Brown (“Generally speaking it is accepted that the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. Not merely, indeed, is the executive entitled to make use of this information; to my mind it is bound to do so. It has a prime responsibility to safeguard the security of the state and would be failing in its duty if it ignores whatever it may learn or fails to follow it up. Of course it must do nothing to promote torture. It must not enlist torturers to its aid (rendition being perhaps the most extreme example of this). But nor need it sever relations even with those states whose interrogation practices are of most concern”).

Afghan security services to CSIS was the product of torture, which should result in the information then being flagged and corroborating evidence sought. In both instances, tortured information could serve as the basis for operational actions, albeit with prudential controls such as corroboration. Asked in testimony what would happen were it not possible to corroborate tainted information, the May 2010 CSIS witness observed that “I think the average Canadian would not accept that its intelligence service do nothing and let Canadian military or civilians be killed because we did nothing.”

These comments raise pointed dilemmas, now familiar to most who have followed the debates over torture, intelligence-sharing and terrorism since 9/11. As is common practice in such discussions, the dilemma is made most acute through a hypothetical, in this case one drawn from the actual 1985 Air India bombing:

On June 22, 1985, a CSIS officer receives a telex from a liaison with the Indian police that, summarized to its essence, reads: “We have a member of a Sikh militant group in our custody and we’ve given him our usual treatment and he’s told us there is a bomb in the baggage of Air India Flight 182, scheduled for departure soon from Vancouver”. The officer knows and is right that torture is practiced by the Indian police of the era and that the “usual treatment” in this missive is a euphemism for torture. Question: Should the officer tip off the RCMP

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and airport security officials so that the latter may conduct a renewed search the baggage for Air India Flight 182?

If the officer does provide this notice, there has been “use” of or “reliance” on the tortured intelligence, but of a very different sort than, for example, using it in a judicial proceeding. This reliance in the airport scenario does not itself impair (in any meaningful way) the rights or liberties of a person on the basis of tortured evidence. In these circumstances, and given the “opportunity cost” of not using the information (possible death, injury and political fall-out from these events), the absolutist view on non-use comes risks prioritizing the prohibition on torture over the right to life.

These views are controversial. Critics contend that “ticking time bomb” type scenarios of these sorts do not happen. They are probably mostly right when referring to the sort of extreme ticking time bomb scenarios portrayed on television. But intelligence insiders do occasionally insist that tainted information can point to actual peril, claims that an imbalance of information make difficult to counter.\footnote{Debate over this question is legion, especially in relation to US use of “waterboarding” during the Bush administration period. See Peter Baker, “Banned Techniques Yields ‘High Value Information,’ Memo Says,” \textit{New York Times} (April 21, 2009), available at \url{http://www.nytimes.com/2009/04/22/us/politics/22blair.html}.} Put another way, one cannot reasonably deny the possibility that information might be received in exigent circumstances.

Critics also contend that any reliance (of whatever sort) on torture amounts to tacit acceptance of the practice and is morally wrong (even when it is
not technically illegal). The International Commission of Jurists’ Eminent Panel on Terrorism, Counter-Terrorism and Human Rights put it this way:

This differentiation between the use of information obtained by torture and other cruel, inhuman or degrading treatment, for “legal” and for “operational” purposes is problematic for several reasons. It undermines the absolute prohibition on torture which entails a continuum of obligations – not to torture, not to acquiesce in torture, and not to validate the results of torture and other cruel, inhuman or degrading treatment. Secondly, it suggests a water-tight distinction between “legal” and “operational” use which is probably illusory, and certainly the Panel was supplied with examples where information was supposedly sought on operational grounds, but subsequently relied upon in legal proceedings that followed. Thirdly, States have publicly claimed that they are entitled to rely on information that has been derived from the illegal practices of others; in so doing they become “consumers” of torture and implicitly legitimise, and indeed encourage, such practices by
creating a “market” for the resultant intelligence. In
the language of criminal law, States are “aiding and

Likewise, the UN special rapporteur on human rights and counter-terrorism urged in 2009 that “States must not aid or assist in the commission of acts of torture, or recognize such practices as lawful, including by relying on intelligence information obtained through torture. States must introduce safeguards preventing intelligence agencies from making use of such intelligence.”\footnote{UN Human Rights Council, Martin Scheinin, Report to the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms, A/HRC/10/3 (4 February 2009) at para. 53.}

It is indisputable that this can happen: as some of the controversies described in Part I demonstrate, states may induce torture through tacit or even active encouragement or through out-bound information or queries that draw the attention of foreign torturers. That sort of activity arguably violates the bar of complicity with torture found in the Torture Convention, and discussed further below.

It is less clear, however, that entirely passive receipt of shared intelligence can properly be analogized to a “marketplace” and that this “marketplace” amounts to complicity. This analogy assumes that even here, a “supplier” is
enticed to torture, not by its own security preoccupation, but to please the state to which the information is supplied. Ultimately, whether this “desire to please” arises is an unanswerable empirical question, but there is no reason to believe that pleasing foreigners is a dominant or even common reason for torture.

It is worth pondering a counterfactual: in the event that Canadian authorities meticulously observed an absolute ban on operational use of inbound torture intelligence, would the Indian police in the hypothetical above stop torturing? At least in the context of the 1985 case study, the answer is almost certainly “no” – Indian domestic security and political preoccupations, and not some misguided effort to cater to perceived Canadian interests, likely animate the maltreatment. Whether or not Canadian authorities tip off airport security on the strength of the Indian intelligence changes nothing.

A further objection to the operational use of torture information – voiced by critics from civil society and occasionally the security services – is that such intelligence is inherently unreliable and thus a poor (and indeed counterproductive) source on which to base action.\textsuperscript{35} Since those subjected to torture will say anything to stop the pain, torture produces “false positives” – data that turn out to be without merit. These false positives in turn consume scarce

\textsuperscript{35} See, e.g., the discussion in Duncan Gardham, “Torture is not wrong, it just doesn’t work, says former interrogator,” \textit{The Telegraph} (28 Oct 2011), available at http://www.telegraph.co.uk/comment/8833108/Torture-is-not-wrong-it-just-doesnt-work-says-former-interrogator.html.
investigative resources by leading investigators down dead ends or skew intelligence assessments where they are deployed in support of conclusions.36

This too is a persuasive critique, but it is tempting to treat it as an absolute. Not every action in response to unreliable information is necessarily counter-productive. For instance, redoing a search of baggage on Flight 182 does not fall into this category of “resource intensive”.

All of this is to say that the debate about operational use of in-bound intelligence that may be the product of torture is no simple issue, and people of utmost good faith may reasonably differ on the issue. It also seems clear from the discussion above that law provides no clear guidance on the proper standard.37

36 See, e.g., U.S. Department of the Army, FM 2-22.2 Human Intelligence Collector Operations (6 September 2006) at 5-21 (“Use of torture is not only illegal but also it is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the HUMINT collector wants to hear.”), available at http://www.fas.org/irp/doddir/army/fm2-22-3.pdf.

37 These sorts of considerations prompted following compromise in the Ottawa Principles on Anti-terrorism and Human Rights, a set of guidelines formulated by civil society and academic participants at a 2006 conference:

4.3.2 Information, data, or intelligence that has been obtained through torture or cruel, inhuman or degrading treatment or punishment may not be used as a basis for

(a) the deprivation of liberty;
(b) the transfer, through any means, of an individual from the custody of one state to another;
(c) the designation of an individual as a person of interest, a security threat or a terrorist or by any other description purporting to link that individual to terrorist activities; or
(d) the deprivation of any other internationally protected human right.

Reproduced in Nicole LaViolette and Craig Forcese (eds), The Human Rights of Antiterrorism (Toronto: Irwin Law, 2008).

Principle 4.3.2 bars in-bound use where that use itself is then associated with the impairment of rights and interests. Put another way, there can be no fruit from the poisoned tree, if that fruit is a disadvantage visited on a person.
B. Law and Out-bound Information Sharing

Out-bound information-sharing raises very different legal issues. There is, for instance, no express limitation on such sharing in the Torture Convention. At the same time, Article 4 of that treaty may reach the provision of information that induces torture:

Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.\(^{38}\)

In the right circumstance, the sharing of information might amount to “complicity” or “participation” in torture, and violate this criminal standard. “Complicity” and “participation” are not defined terms in the treaty. Indeed, there is little from the drafting history of the Convention that lends precision to the concepts, with most attention to the issue seemingly focused on whether complicity was broad enough to cover concealment of torture after the fact.\(^{39}\)

Logically, however, “complicity” and “participation” include a range of inchoate or near inchoate crimes – that is, crimes that precede the actual infliction

\(^{38}\) Torture Convention, Art. 4.

\(^{39}\) Nowak and McArthur, above note 27 at 238.
of harm. The UN Committee Against Torture – the treaty body charged with administration of the treaty – has posed questions of state parties concerning their criminalization of “complicity” and “participation”. In 2010, Canada responded to such a question by pointing to provisions in the Criminal Code that deem an individual a party to a crime, such as counseling and aiding and abetting.\textsuperscript{40}

The latter offence also exists in international criminal law. The International Criminal Court for the Former Yugoslavia has treated aiding and abetting as part of customary international law\textsuperscript{41} and has described its elements as follows:

(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. ...

(ii) In the case of aiding and abetting, the requisite


\textsuperscript{41} See, \textit{e.g.}, \textit{Prosecutor v. Furundzija}, IT-95-17/1, Judgment (10-12-1998) (ICTY) at para. 191 \textit{et seq.}
mental element is knowledge that the acts performed
by the aider and abettor assist [in] the commission of
the specific crime of the principal. ...\(^42\)

The Appeals Chamber of the ICTY recently affirmed that the first
requirement does not require that the accused specifically direct assistance to the
criminal conduct \textit{per se}. Instead, “under customary international law, the actus
reus of aiding and abetting ‘consists of practical assistance, encouragement, or
moral support which has \textit{a substantial effect on the perpetration of the
crime}.”\(^43\)

In relation to the second requirement, “knowledge on the part of the aider
and abettor that his acts assist in the commission of the principal perpetrator’s
crime suffices for the \textit{mens rea} requirement of this mode of participation.”\(^44\) It “is
not necessary that the aider and abettor...know the precise crime that was
intended and which in the event was committed. If he is aware that one of a
number of crimes will probably be committed, and one of those crimes is in fact


committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.”

This concept has obvious application to out-bound intelligence-sharing. If an intelligence service notifies a partner agency with a history of torture that “Person of interest X is believed to be affiliated with Al Qaeda and is arriving at your airport on the following flight”, this then has a “substantial effect” on the occurrence of any torture that may then follow. The person is on the torturing agency’s radar and in its clutches because of the information-sharing. This fact, coupled with knowledge of the torturing service’s propensities and the probability of torture, may constitute the international crime of aiding and abetting.

Culpability under Canadian law for the same offence would likely require something more. Section 269.1 of the Criminal Code makes torture a crime. Meanwhile, the aiding and abetting offence in the Criminal Code reads: “Every one is a party to an offence who (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it.” “Aiding” means “to assist or help the actor” while abetting includes “encouraging, instigating, promoting or procuring the crime to be committed”.

In terms of the mental element, the reference to “purpose” in s.21(b) could suggest that the accused desire the ultimate outcome. This is not, however, the

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45 Ibid.
approach adopted by the Supreme Court of Canada. Instead, “purpose” is equated with “intent”, and “does not require that the accused actively view the commission of the offence he or she is aiding as desirable in and of itself”. The Ontario Court of Appeal has subsequently held that the normal meaning of the words “purpose” and “intend” “suggests that a person must subjectively advert to a specific objective and that he or she, therefore, must have knowledge of the facts that constitute that objective”. The Supreme Court has described this “knowledge” requirement as “knowledge of the perpetrator’s intention to commit the crime”. This threshold may be reached on a “willful blindness” theory – that is, the suspicion of an accused is “aroused to the point where he or she sees the need to make further inquiries,” but instead he or she “deliberately chooses not to make those inquiries”.

But more than knowledge, the accused must intend that his or her actions aid or encourage the perpetrator: the assistance must be provided “with the intention of helping the (or, a) principal to commit the offence.” Mere knowledge of the perpetrator’s criminal acts or propensities may prompt a legitimate inference that the accused intended to assist, but knowledge alone is

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50 Briscoe, 2010 SCC 13 at para 18 (emphasis in original).
51 Briscoe, 2010 SCC 13 at para 21 (emphasis in original).
not enough: “while knowledge can found an inference of intention, it alone cannot constitute the requisite *mens rea*”\(^{53}\).

Thus, in the scenario described above, domestic culpability only arises where intelligence is shared by the Canadian agency with its foreign interlocutor with the intent of producing the resulting torture.

C. Past Policy Responses

As discussed above, international and Canadian law limits (although does not fully eliminate) the use of information acquired through mistreatment. Security service rules have also attempted to grapple with this problem for more than a decade. Because most of these policies are confidential, and often protected under the government’s information security rules, it is not possible to provide a full portrait of their sweep and evolution. Many of these policies have, however, been released to this author or others through access to information law.

1. Ministerial Directions

By access request dated 2012, this author received (often redacted) copies of “ministerial directions” (sometimes also referred to as “ministerial directives”) issued by the minister of public safety and that official’s predecessor to both the

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\(^{53}\) *R. v. Palombi*, 2007 ONCA 486 at paras. 18 and 19.
 TOUCHING TORTURE WITH A TEN FOOT POLE

RCMP (1950 forward) and CSIS (1984 forward). With several exceptions, the following discussion focuses on these “ministerial directions”. In their contemporary guise, these directions are issued by the minister of public safety under provisions in both the CSIS and RCMP Acts that empowers the head of these agencies to control and manage their services, but “under the direction of the Minister”.\(^{54}\) The directions issued by the minister are binding administrative instruments, and their issuance is an act of discretion by the Minister.\(^{55}\)

The compilation of documents released by the government in response to my access request was incomplete, either through omissions or redactions.\(^{56}\) However, it is possible to piece together some imperfect sense of the trajectory of these policies.

\(^{54}\) RCMP Act, R.S.C. 1985, c. R-10, s.5; CSIS Act, R.S.C. 1985, c. C-23, s.6.

\(^{55}\) CSIS Act s-s.6(2) expressly empowers the minister to issue written directions to the Director. These directions are then exempted from the Statutory Instruments Act. The minister’s authority to issue directions to the RCMP is less emphatic. One of the released documents is an undated instrument entitled “The Directives System” and outlines the then-Solicitor-General’s competency and powers to issue ministerial directives under the RCMP Act (section 5 specifies that the the RCMP commissioner acts “under the direction of the Minister”). This document then observes “[i]t is left to the direction of the Commissioner [of the RCMP] to incorporate the standards of the Directives in appropriate RCMP operational or administrative policies…” and to “ensure the confirm of Force policies, procedures and methods to these Directives”. Directives System, paras. 4.1 and 4.2, on file with the author. Notably, the 2011 direction to the RCMP invokes s.5 of the RCMP Act as the basis for the instrument. Also of note: the more recent Department of Public Safety and Emergency Preparedness Act, S.C. 2005, c.10, charges the Minister of Public Safety with coordinating the activities of the RCMP, CBSA and CSIS, among others (s.5) and specifies that the Minister may implement “policies” relating to public safety and “facilitate the sharing of information, where authorized, to promote public safety objectives” (s.6).

\(^{56}\) For instance, CSIS’s review body, the Security Intelligence Review Committee, discusses ministerial directions in its annual reports that were not released to this author under the Access request. These include the 1996-97 ministerial direction on “information management”. See discussion in SIRC, Annual Report 1996-97, available at http://www.sirc-csars.gc.ca/anran/1996-1997/sc03-eng.html.
Early instruments deal with police assistance to foreign nations in the form of policy training, consultative and investigative assistance. A second instrument on “RCMP law enforcement agreements” with, among others, foreign agencies specifies that “[w]ith respect to the disclosure of personal information, the provisions of the Privacy Act shall be respected.” A 2002 instrument on the same topic replaces earlier versions and is silent on disclosure or information-sharing.

There is, therefore, no evidence of any ministerial direction on torture and information-sharing prior to 2003 – that is, prior to the period in which the question became controversial in the wake of the Maher Arar incident. A 2003 ministerial direction governing RCMP foreign intelligence and security cooperation practices specifies that these arrangements “may be established and maintained as long as they remain compatible with Canada’s foreign policy,” including consideration of the foreign entity’s “respect for democratic or human rights.” These arrangements must “respect applicable laws and practices relating to the disclosure of personal information”.

57 Ministerial Directive on Police Assistance to Foreign Nations, undated document on file with the author. This instrument pre-dates at least 1994, since the document refers to “External Affairs”, a department whose named was changed to Foreign Affairs and International Affairs in 1993.

58 Ministerial Directive on RCMP Law Enforcement Agreements (undated, but structured and styled like directives from the mid-1980s) at para. 4.5, on file with the author.


The closest equivalent document issued to CSIS and available to this author is entitled “Minister Direction for Operations”. It requires the Service to “ensure adequate and consistent handling of information about Canadians when collecting, storing, sharing and disclosing information”\(^{62}\) and requires arrangements with domestic and foreign partners to “establish their purpose and obligations, including the application of privacy…legislation.”\(^{63}\)

Since this document released under access law is undated and deeply redacted, it is unclear whether this direction is the one described in the annual reports of the Security Intelligence Review Committee.\(^{64}\) Specifically, in 2000-01, SIRC reported that the until-then “hodgepodge” of ministerial directions had been replaced with a single instrument “covering the entirety of CSIS operations.”\(^{65}\) Among other things, that document included requirements that “the human rights record of the country or agency concerned…be assessed” and that weighed “in any decision to enter into a co-operative relationship”. Likewise, “the applicable laws of Canada must be respected and the arrangement must be compatible with Canada’s foreign policy”.\(^{66}\)

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\(^{62}\) Ministerial Direction on Operations, Annex A, on file with the author.

\(^{63}\) *Ibid* at Annex D.

\(^{64}\) The May 2010 letter to Richard Fadden, described below, references a “2008 Ministerial Direction on Operations”.


\(^{66}\) *Ibid* at 5 and 7. SIRC’s annual reports since 2001 also include brief mentions of the following policies contained in this or other instruments:

In May 2009, the minister of public safety issued a more specific ministerial direction on CSIS information-sharing with foreign agencies. This document provided:

so as to avoid any complicity in the use of torture,

CSIS is directed to

• not knowingly rely upon information which is derived from the use of torture, and to have in place reasonable and appropriate measures to identify information that is likely to have been derived form the use of torture;
• take all other reasonable measures to reduce the risk that any action on the part of the Service might promote or condone, or be seen to promote or condone the use of torture, including, where appropriate, the seeking of

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• A ministerial direction dealing with cooperation with foreign security and intelligence organizations (Canada, SIRC, Annual Report, 2007-8 at 6.)
• A ministerial direction dealing with investigations into sensitive sectors (academic, political, media, religious, trade union) (Canada, SIRC, Annual Report, 2007-8 at 13.)
• A ministerial direction dealing with segregation of security screening information from the Service's other information holdings (Canada, SIRC, Annual Report, 2006-7 at 15.)
• A ministerial direction on “National Requirements for Security Intelligence” (Canada, SIRC, Annual Report, 2004-5 at 53.)
assurances when sharing information with foreign agencies.\textsuperscript{67}

2. CSIS Operational Policies

This author has also obtained redacted copies of CSIS’s operational policies designed to implement these ministerial directions. By 2002, CSIS apparently completed a review of the foreign agency’s human rights record in assessing potential new foreign arrangements pursuant to the 2001 Ministerial Direction on CSIS Operations. According to the Service’s operational policies, “if there are allegations of human rights abuses, the Service always ensures to use a cautious approach when liaising with the foreign agency and closely scrutinizes the content of the information provided to, or obtained from, the foreign agency” either “in an effort to avoid instances where the security intelligence information exchanged with the latter is used in the commission of acts which would be regarded as human rights violations” or “to ensure none of the security intelligence information exchanged with the latter is used in the commission of acts which would be regarded as human rights violations.”\textsuperscript{68}

\textsuperscript{67} Ministerial Direction to the Director Canadian Security Intelligence Service: Information Sharing with Foreign Agencies, undated but may date from or around November 2008. See discussion in the CSIS Annual Report, 2008-9, at 28.

\textsuperscript{68} CSIS, OPS-402 Section 17 Arrangements with Foreign Governments and Institutions, dated 2002-01-28, but apparently still in operation on 2005-06-06, on file with the author (emphasis added).
In a directive issued in November 2008, the CSIS Deputy Director of Operations described the then-extant CSIS policy on information-sharing with agencies possessing poor human rights records. Among other things, that directive provides that: “When sharing, seeking or accepting information from a foreign agency, employees must consider the record of that agency or the country, in regard to its use of mistreatment to collect information. In this respect, employees will be expected to be familiar with human rights (HR) agency and country profiles.” Depending on this assessment, the Service employee must follow a process of approval prior to using or sharing the information. With respect to out-bound information sharing, the risk of maltreatment might be mitigated by use of a caveat. A sample CSIS caveat was also released under the access request and reads:

Our service is aware that your organization might be in possession of threat related information on Canadian citizen (name of individual). As we believe (name of individual) will be present in your country, our Service recognizes the sovereign right of your government to undertake reasonable measures under the law to ensure your public safety. Should you deem some form of legal action against (name of individual)

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is warranted, our Service trusts that (name of individual) will be fairly treated within the accepted norms of international Conventions, that he is accorded due process under law and afforded access to Canadian diplomatic personnel if requested. Furthermore, should you be in possession of any information that originated from our service regarding (name of individual), we ask that this information not be used to support (name of individual)’s detention or prosecution without prior formal consultation with our service.

The 2008 policy also makes clear, however, that with proper approval, information could be shared, even if the substantial risk of mistreatment could not be eliminated or significantly mitigated by a caveat. Further information on what might guide such a decision is redacted from the document.

Various accountability bodies have questioned the effectiveness of these operational policies. In its 2004-5 annual report, the Security Intelligence Review Committee doubted CSIS could meet the human rights standards expressed in its

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70 See also press coverage of documents with a similar content obtained by the media on this topic. Jim Bronskill, “CSIS would use tips gained through torture,” *Globe and Mail* (13 September 2010) at A4.
2002 policy. The Federal Court raised equally pressing concerns in relation to the 2008 policy. In *Majoub*, Justice Blais observed that

> [t]he Service appears to rely on the experience of their employees to assess and … [filter] information that is from a country or agency with a questionable human rights record. There is no evidence that employees, trained in the art of intelligence collection, have specific expertise in assessing whether information comes from torture or not. … It is also clear from the record that the Service does not have the means to independently investigate whether the information is

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71 SIRC reported in its 2004–5 annual report that at least one of the CSIS foreign arrangements that it audited “did not provide an adequate analysis of potential human rights issues.” Canada, SIRC, *Annual Report 2004–2005* at 35. Further, it objected to CSIS’s claim that it “ensures” that information exchanged is not the cause or product of human rights abuses:

> the use of the term “ensure” implies that CSIS will make certain that the information shared does not lead to—or result from—acts that could be regarded as human rights violations. However, the Committee concluded that CSIS was not in a position to provide such an absolute assurance. … Second, while CSIS is cautious when sharing information with foreign agencies, it cannot determine in all cases how that information is used by the recipient agency. Similarly, the Service is rarely in a position to determine how information received from a foreign agency was obtained. As [former CSIS director] Mr. Elcock stated to the [Arar] Commission, when it comes to information that may have been the product of torture, ‘the reality is in most cases we would have no knowledge that it was derived from torture. You may suspect that it was derived from torture, but that is about as far as one will get in most circumstances.’

*Ibid* at 25.
obtained from torture. Indeed, the evidence of [senior CSIS officer] Mr. Vrbanac suggests that the Service is ill equipped to conduct an inquiry into the provenance of information to ensure that it is not from torture.\textsuperscript{72}

In the result, the Service’s approach was insufficient to “ensure that all the information obtained from countries with a poor human rights record meets the admissibility criteria” of the immigration security certificate law, mentioned above.\textsuperscript{73}

**Part III: The 2011 Directions and their Legality**

**A. Background**

The policies governing CSIS (and RCMP and now Canada Border Services Agency) information-sharing have evolved since 2010, in a manner that seems to acknowledge more overtly a willingness to share information in exigent circumstances, even at the risk of torture.

\textsuperscript{72} *Majoub (Re)* 2010 FC 787 at paras. 92 to 93.

\textsuperscript{73} *Ibid* at para. 95.
On December 7, 2010, then-minister of public safety Toews wrote a letter to then-CSIS director Richard Fadden. In that letter, he observed “the number one national security priority of the Government of Canada has been, and will remain for the foreseeable future, the fight against terrorism. In this context, it is critical that information be shared quickly and widely among those with the mandate and responsibility to disrupt serious threats before they materialize.”

The minister characterized his letter as further guidance on the May 2009 ministerial directive, reiterated his expectation that CSIS must “always ensure that its actions do not appear to condone the torture or mistreatment of any individual, and that its interactions with foreign agencies accord with this principle” and then added a new admonishment:

In exceptional circumstances where there exists a threat to human life or public safety, urgent operational imperatives may require CSIS to discharge its responsibility to share the most complete information available at the time with relevant authorities, including information based on intelligence provided by foreign agencies that may have been derived from the use of torture or mistreatment. In such rare circumstances, it is

75 Letter to CSIS Director Richard Fadden from Minister Toews, Dec 7, 2010, on file with author.
understood that it may not always be possible to
determine how a foreign agency obtained the
information that may be relevant to addressing a
threat. It is also understood that ignoring such
information solely because of its source would
represent an unacceptable risk to public safety.\footnote{Ibid}

The document was an evident partial re-think of torture and in-bound (but not
out-bound) intelligence sharing. The letter also promised a new directive on the
topic, then under development.

Subsequently, the promised ministerial directive, issued in July 2011,
provided a new “guidance document” for CSIS. The minister subsequently issued
essentially identical directions to the RCMP and the CBSA. The new directives are
an expression of what appears to be a whole-of-government “framework” for
“addressing risks of mistreatment in sharing information with foreign entities.”\footnote{This
document, on file with the author, seems to be directed to the entire Canadian
security and intelligence community, including the Department of National Defence.}

\section*{B. 2011 Ministerial Directions}
The 2011 ministerial directions seem to be the most detailed treatment on information sharing and torture issued to date.\textsuperscript{77} They begin with a section on “Canada’s legal obligations”, define several key terms, establish “information sharing principles” and then provide a road map for approving both in-bound \textit{and} out-bound information sharing “when there is a substantial risk of mistreatment in sharing information”.

Having acknowledged the international, statutory and constitutional prohibitions on torture discussed above, the instruments define “mistreatment” to include both torture and CID treatment or punishment. “Substantial risk” of such treatment means a “personal, present and foreseeable risk of mistreatment” that is “real and must be based on something more than mere theory or speculation” that typically arises when “it is more likely than not that there will be mistreatment”. The latter test is not, however, to be “applied rigidly because in some cases, particularly where the risk is of severe harm, the ‘substantial risk’ standard may be satisfied at a lower level of probability”.\textsuperscript{77}

The information-sharing principles applicable to CSIS, RCMP and CBSA include an obligation to avoid “complicity in mistreatment by foreign entities” as well as a requirement to assess the accuracy and reliability of information received from partner agencies. Approvals for information-sharing are to be indexed to the level of risk of mistreatment.

\textsuperscript{77} Then public safety minister Toews issued the CSIS Direction to CSIS on July 28, 2011, and to the RCMP and the CBSA on September 9, 2011. The directions were obtained by journalist Jim Bronskill under access law and are on file with the author.
1. Out-bound Rules

Where the risk of sending or soliciting information from a foreign entity is substantial, and it is unclear that the risk can be mitigated by caveats and assurances, the CSIS director, the RCMP commissioner or the CBSA president decide on the information-sharing. These officials consider a list of factors in arriving at their decisions, including the national security interest, the basis for believing a substantial risk exists, measures to mitigate that risk and the views of other departments, including Foreign Affairs. The matter may also be referred to the minister. The minister or the director “shall authorize the sharing of information with the foreign entity only in accordance with” the direction and “Canada’s legal obligations”.

2. In-bound Rules

The direction then reiterates the core of the 2010 letter on use of in-bound information, noting that in exceptional circumstances CSIS, RCMP and CBSA will share information from foreign entities that likely stems from mistreatment: “When there is a serious risk of loss of life, injury, or substantial damage or destruction of property, CSIS [RCMP or CBSA] will make the protection of life
and property its priority.” As a prudential measure, “[m]easures will also be taken to ensure that the information which may have been derived through mistreatment is accurately described, and that its reliability is properly characterized. Caveats will be imposed on information shared with both domestic and foreign recipients to restrict their use of information, as appropriate.”

**C. Legality of the 2011 Ministerial Directions**

When reported in the press in 2012, the new directions elicited a hostile reception from opposition politicians, and the human rights and legal community. The 2011 directions represent a shift in emphasis from their closest predecessors. The 2009 ministerial direction, for example, seems to bar use of inbound torture information – CSIS is not to “knowingly rely upon information which is derived from the use of torture” and there is no emphatic instruction allowing out-bound sharing that might contribute to torture. At the same time, it is also clear that CSIS operational policies implementing these directions have overpromised by asserting unverifiable and implausible guarantees that shared

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information was not the product, or a contributing cause, of torture, and have also held the door open to information sharing even in the face of substantial risk of mistreatment.

The 2011 directions may be an honest rendition of longstanding government practice in at least some agencies, consolidating more tacit and less regimented practices into a single code of conduct for the three key security and intelligence services within the minister of public safety’s portfolio. At core, they provide a high-level system of approval for in-bound or out-bound information sharing tied to torture, where the stakes are high enough. In this respect, they satisfy some of the expectations announced in 2010 by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. In that expert’s compilation of human rights good practices for intelligence services while countering terrorism, he calls for a solid legal grounding for intelligence exchanges, complete with approval processes and safeguards. In this respect, the ministerial directions seem to constitute an improvement. Still, as discussed below, UN experts have raised doubts about the legality of directions that open the door (at least in principle) to information-sharing even where there is substantial risk of mistreatment.

To be clear, the directives do not oblige “out-bound” harm-inducing

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79 UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, A/HRC/14/46 (17 May 2010) at paras. 45 et seq.
information-sharing to counter national security threats. Rather, they establish a protocol for approving such risky sharing. They open the door without necessarily requiring anyone to walk through it. Everything turns, therefore, on how these directions have been used.

Unfortunately, there is precisely no information on government decision-making under the directions. This author filed access to information requests in the spring 2013 asking for information on the question, but had received no substantive response by the date of this writing. Given the reach of national security-related exemptions and exceptions in the Access to Information Act, it is unlikely much will be disclosed. This is unfortunate, because how the directions are used is material to the question of their legality. Nevertheless, it is possible in this Article to consider the legality of the 2011 directions, on their face.

1. International Legality

As the discussion above suggests, distinctions must be drawn between in-bound and out-bound information-sharing. In-bound information-sharing is subject to Article 15 of the Torture Convention, precluding the use of torture-induced information as evidence in proceedings. Both in-bound and out-bound information sharing are governed by the requirement that states criminalize “complicity and participation” in torture.

As discussed above, “complicity” in international criminal law may be best captured by the concept of “aiding and abetting”. The latter is a sweeping
concept in international criminal law, possibly reaching conduct in which, e.g., a Canadian agency with knowledge of the foreign service’s torturing propensities tips off a foreign partner to the presence of a person. This tip off then facilitates that person’s detention and maltreatment.

Notably, a pressing national security motivation for this information-sharing is entirely irrelevant. The Torture Convention states unequivocally that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture”\(^8\). Complicity in torture could not, therefore, reasonably be forgiven for these sorts of motivations.

Outside of an armed conflict situation,\(^8\) there is presently no venue in which an international prosecution of a Canadian government official complicit in torture could occur. That, of course, does not change the illegality of the action, or obviate Canada’s own state responsibility under the Torture Convention were these events to arise. Indeed, in its June 2012 “concluding observations” issued in response to Canada’s periodic report on its Torture Convention compliance, the UN Committee Against Torture observed as follows:

\(^8\) Torture Convention, Art. 2.

\(^8\) Under the Rome Statute, creating the International Criminal Court, simple torture is not a crime over which the court has jurisdiction. However, torture and more indirect forms of participation in torture may be a “war crime” if they arise in an armed conflict situation. Note, however, that the Rome Statute standard for aiding and abetting in prosecutions brought to the ICC is “purpose”, different from the “knowledge” requirement that likely exists in customary international law. See Rome Statute, U.N. Doc. A/CONF.183/9, Article 25(3)(c).
17. While taking note of the State party's national security priorities, the Committee expresses its serious concern about the Ministerial Direction to the Canadian Security Intelligence Service (CSIS), which could result in violations of article 15 of the Convention in the sense that it allows intelligence information that may have been derived through mistreatment by foreign States to be used within Canada; and allows 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, in contravention to recommendation 14 from the Arar Inquiry (arts. 2, 10, 15 and 16).

The Committee recommends that the State party modify the Ministerial Direction to CSIS to bring it in line with Canada’s obligations under the Convention. The State party should strengthen its provision of training on the absolute prohibition of torture in the context of the activities of intelligence services.82

82 UN Committee Against Torture, Concluding observations of the Committee against Torture: Canada, CAT/C/CAN/CO/6 (25 June 2012) at para. 17.
The Committee adverts to the possibility of non-compliance raised by the ministerial direction, not to the inevitability that it will be used. In that respect, the Committee operated in the same factual vacuum as this article. However, in the event the directive was used to share information in the manner feared, it seems clear from its language that the Committee would consider Canada in non-compliance with its Torture Convention obligations.

It is not entirely clear what legal construal of the Convention would support that conclusion. As is typical, the Committee is opaque in its legal reasoning. In respect to out-bound use, it does not expressly cite any relevant Convention rule. As noted, however, “complicity” would be the most likely legal basis for Committee condemnation of Canada.

For in-bound, the Committee invokes Article 15 but does not distinguish between evidentiary and operational use of intelligence. It may be that the Committee does not agree that such a distinction is defensible, giving rise to an expansive reading on the language in Article 15. As the discussion above suggests, such a conclusion would be inconsistent with those of Manfred Nowak, the former UN special rapporteur on torture and co-author on the leading treatise on the Torture Convention.

2. Domestic Legality
a) Criminal Law

The Torture Convention obligations have been received into Canadian criminal law. As described above, torture is a crime, as is aiding and abetting torture. However, the reach of Canada’s aiding and abetting provision appears less sweeping than is the case with its international analogue. Mere knowledge is not enough to satisfy the mens rea requirement. There must also be intent to help the torturer commit the offence.

There is nothing on the face of the 2011 ministerial directive that connotes such intent – indeed, the directive contains language condemning torture. It is therefore difficult to see how information-sharing done with the intent of inducing torture would be compliant with the directive, and anything other than aberrant and patently criminal activity.

Still, there are other criminal offences that might (at least theoretically) come into play where information is shared in knowledge of the likely consequences. Criminal negligence causing bodily harm, for instance, carries a possible sentence of ten years.\textsuperscript{83} Criminal negligence is an act or omission that “shows wanton or reckless disregard for the lives or safety of other persons”.\textsuperscript{84} Wanton means “‘heedlessly’ … ‘ungoverned’ and ‘undisciplined’ … or an ‘unrestrained disregard for the consequences’”, while “reckless” means “heedless

\textsuperscript{83} \textit{Criminal Code}, s.221.
\textsuperscript{84} \textit{Criminal Code}, s.219.
of consequences, headlong, irresponsible."\(^8^5\) Wanton and reckless behaviour arises where there is a “marked and substantial departure” from the norm.\(^8^6\)

While the jurisprudence is less than crystal clear, the test for the mental element of this offence requires a court to “consider whether the accused either adverted to the risk involved and disregarded it, or failed to direct his or her mind to the risk and the need to take care at all. In most cases, the mental element can be inferred from the accused's conduct or omission.”\(^8^7\)

It would be no answer to a charge under this provision that the harm was visited on the victim overseas. An act conducted in Canada with consequences that befall and individual outside of Canada nevertheless lies within the criminal jurisdiction of Canadian courts.\(^8^8\)

At one level, application of the 2011 ministerial directives directly as intended constitutes a step-by-step path to culpability for criminal negligence causing bodily harm. That is, the directive anticipates the possibility of out-bound information-sharing even in the face of an **express** realization of a “personal, present and foreseeable risk of mistreatment” that is “real and … based on something more than mere theory or speculation”. A real risk is, in other words,

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\(^8^6\) R. v. J.F., 2008 SCC 60 at paras. 9 and 16.


\(^8^8\) Libman v. The Queen, [1985] 2 SCR 178 at para. 74 (describing a “real and substantial link” test for jurisdiction in a criminal case: “all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada”).
discounted. If sharing is authorized “heedless of these consequences”, a plausible case exists that this is reckless behaviour.

Obviously, this is not the typical criminal negligence case involving, for example, a car crash and marked departure from the conduct of the reasonable automobile driver. Instead, at issue is the novel question of whether criminal negligence can arise through the execution of a government policy that is causally linked to (an internationally condemned) harm inflicted by a third party on an individual.

It is not clear how a court would decide this question. As already noted, however, information-sharing done despite the very real prospect of maltreatment would clearly deviate dramatically from the standards articulated by the Arar Commission. It would also depart from what the UN Committee Against Torture sees as Canada’s international human rights obligations. As I argue below, it is also conduct I believe to be inconsistent with constitutional expectations. In these respects, application of the policy may be described as a marked departure from such standards as do exist, a conclusion that would ground a claim to criminal negligence.

The countervailing national security imperative driving the information-sharing does not change this fact, although it might be the basis for a defence. The common law defence of “necessity” is the most likely suspect, albeit a concept rarely available in practice. Necessity is an excuse (although not an ex ante justification) for noncompliance with the criminal law “in emergency situations
where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience.” Compliance with the law must also be “demonstrably impossible.” Finally, there must be proportionality “between the harm inflicted and the harm avoided.”

Notably, the defence is available “in urgent situations of clear and imminent peril,” and the Supreme Court has frowned on efforts to justify a premeditated plan on a necessity basis. The ministerial directive cannot, therefore, itself be envisaged as a “standing” defence to criminal culpability. For one thing, that directive does not purport to provide this cover – indeed, it specifies that information-sharing should be compliant with the law. For another, there is no support for the notion that criminal culpability can be waived by executive fiat, and without a statutory exemption.

It is conceivable, however, that an actual use of the policy might meet the strict requirements of necessity, on the specific facts relating to this use. Emergencies may arise. Still, the actions of the official charged with the offence would be gauged on an objective standard – was, in fact, compliance with the law impossible and was the harm at issue proportionate to the torture visited on the victim? The defendant must place before the court sufficient evidence raising

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90 Ibid at 251.
the issue, after which the Crown must demonstrate the inapplicability of the concept beyond a reasonable doubt.\textsuperscript{95}

This is a modest burden on the defendant. However, given the nature of the matters at hand, evidence supporting the defendant's position would almost certainly be highly sensitive, and of a sort the government is loath to disclose in open court. Put another way, it may be difficult for a defendant to table evidence sufficient to meet even the limited threshold imposed on him or her.

This criminal law discussion is entirely speculative, of course. Indeed, it raises the somewhat unworldly prospect of police investigating police or security services, followed by the Crown prosecuting its agents, all for applying a direction imposed by a political minister. At the very least, however, this analysis points to the conundrums use of the policy might create, and the risks imposed on those who follow the policy.

b) Constitutional Law

The constitutional question is equally complex. At core, the issue boils down, first, to the applicability of the Charter to conduct under the ministerial directions and, second, to the precise scope of the Charter right in question.

i) Charter Applicability

The Charter of Rights and Freedoms prohibits torture by barring cruel and

\textsuperscript{95} \textit{Perka}, [1984] 2 S.C.R. 232 at 257.
unusual treatment or punishment, a category in which torture falls. Moreover, as already noted, a section 7 “security of the person” interest is triggered by the administration of torture. This includes torture visited on a victim by a foreign government. As the Supreme Court observed in *Suresh*,

the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected.

... At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.

*Suresh*, and an earlier case standing for similar principles in the death penalty context, involved potential victims in the custody of Canada facing

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97 *Ibid* at para. 54.
removal to jurisdictions where they might be harmed. The 2011 ministerial directives at issue in this article raise a different situation: the flow of information that induces mistreatment of a victim in (or who then falls into) foreign custody. At first issue in deciding the relevance of the Charter is, therefore, whether it matters where the victim is at the time the government sets in train events that lead to his or her mistreatment.

In this regard, the Court in Suresh did not constrain the Charter-triggering “causal connection” between government action and harm to circumstances in which the victim (and not just information) moves across borders. There is, therefore, certainly no reason in principle to view the causal doctrine as confined to immigration or other removals of persons from Canada. In relation to the 2011 ministerial directive, the harm-initiating conduct (information-sharing or the authorization for such sharing) is itself undertaken in Canada, and the fact that the injury manifests overseas should not somehow sanitize the government’s action. That approach would be consistent with criminal law approaches to transnational jurisdiction where elements of the wrong straddle borders.99

From this perspective, there is nothing at all extraterritorial about the application of the Charter – it is applied to conduct in Canada, undertaken by the Canadian government or its agents. However, even if these events were perceived as extraterritorial in reach, the Supreme Court’s dicta in Hape and Khadr suggest that the Charter does attach to extraterritorial conduct where Canada’s

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international human rights obligations are also in play.\textsuperscript{100} As noted above, the UN Committee Against Torture is persuaded that the ministerial directive is governed by Canada’s Torture Convention obligations, regardless of where victims may be located. This may not be definitive conclusion. It does, however, stand to reason that Canada cannot disregard its international human rights obligations by arguing that the torturer with whom it is “complicit” acts outside of Canada.

There is a perplexing line of Federal Court jurisprudence that purports to limit the extraterritorial reach of the Charter to circumstances where the harm is visited on a Canadian citizen.\textsuperscript{101} There is reason to doubt this particular construal. Although the facts in \textit{Khadr} involved a Canadian citizen detained overseas, and the Supreme Court does mention this, there is no clear citizenship limiter in the Supreme Court’s jurisprudence. Indeed, it would be impossible to reconcile such a limiter with the Court’s admonishment that the Charter incorporates Canada’s international human rights obligations. The nationality of victims of human rights abuses does not determine the reach of international human rights law. Further, the Federal Court cases involve (at least in part) conduct by Canadian officials physically located overseas. This fact should distinguish those cases from

\textsuperscript{100} \textit{Hape}, 2007 SCC 26 at para. 90 (concerning whether Canadian police need to observe Charter obligations while operating abroad and concluding that the Charter will not reach this conduct unless officers were “participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights”); \textit{Canada (Justice) v. Khadr}, 2008 SCC 28 at para.2 (“The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada’s international human rights obligations”).

\textsuperscript{101} \textit{Amnesty International Canada v. Canada (Canadian Forces)}, 2008 FCA 401; \textit{Slahi v. Canada (Minister of Justice)}, 2009 FCA 259.
circumstances where officials execute a policy in Canada whose consequences then are aimed across borders.

Still, the Federal Court in *Slahi* suggested that section 7 of the Charter would not apply in circumstances where a foreign national was detained by a foreign government in an internationally wrongful manner because of information provided by and from Canada, unless it could also be shown that Canada participated in the actual detention “contrary to its international law obligation”.

The Supreme Court has so far declined to pronounce on these issues and will at some juncture need to decide whether it really meant what it said in identifying international human rights law as the index of Canada’s extraterritorial obligations. Affirming that position hardly opens the floodgates – Canada’s international human rights obligations do not themselves have endless extraterritorial reach.

For the purposes of this Article, however, the situation raised in *Slahi* should be distinguished from that prompted by the ministerial directives and their application. Detention is not per se a wrongful act – the nature and circumstances of the detention are what matters in deciding lawfulness. In comparison, torture is an inherent wrong in every circumstance, and more than that, international law requires the criminalization and prosecution of complicity.

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102 *Slahi v. Canada (Minister of Justice)*, 2009 FC 160 at para. 52, aff’d (without mention of this issue), 2009 FCA 259.

103 For discussion, see Craig Forcese, *National Security Law* (Toronto: Irwin Law, 2008) at 28 et seq.
in torture. If Canada’s sharing of information amounts to complicity – a serious prospect as measured against the sweeping aiding and abetting concept in customary international law – then by definition Canada is actively participating in the international wrong. The Federal Court’s condition that Canadians participate in the actual wrong in violation of Canada’s international obligations is thereby satisfied.

In sum, it would be implausible to conclude that the government has a Charter carte-blanche to share information in knowledge of likely torture so long as only foreigners (and not Canadians) are then harmed in foreign facilities. It is hard to see how such a jurisdictional exclusion could possibly be treated as anything other than an arbitrary construal of the Charter, unmooring it from international law.


\[ii) \textit{Charter Requirements}\]

The constitutionality question is not, however, answered by simply asserting “the Charter applies”. A second issue is whether a court would exonerate particular decisions to share on the basis of an attenuated read of the actual substantive section 7 requirements, or under exigent circumstances pursuant to section 1.

In \textit{Suresh} itself, the Supreme Court declined to exclude the possibility that in exceptional circumstances, deportation to face torture might be
justified, either as a consequence of the balancing process mandated by s. 7 of the Charter or under s. 1. (A violation of s. 7 will be saved by s. 1 “only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like”…). We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.  

This “Suresh exception” is irreconcilable with the relevant international obligations, which (as the Court acknowledged) “rejects deportation to torture, even where national security interests are at stake”. Still, this “exceptional conditions” language may be the inspiration for the potentially permissive position on information-sharing taken in the 2011 ministerial direction.

However, the persistence of the Suresh exception as good law may be doubted. For one thing, the Supreme Court has since been clear in (reasserting) that international law provides the standard against which Charter rights are to be measured. If it means what it says, it has therefore already tacitly closed the door on the Suresh “exception” in the context of removals to torture. As already noted, the bar in international law on removals to torture is absolute.

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104 Suresh, 2002 SCC 1 at para. 78.
105 Ibid at para. 75.
106 This approach was first raised in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at 1056. It has been resuscitated by Hape, 2007 SCC 26 at para 56 (“[i]n interpreting the scope of application of the Charter, the courts should seek to ensure compliance with Canada’s binding obligations under international law where the express words are capable of supporting such a construction”) and in cases such as Divito v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 47 at para. 25 (describing international human rights treaties as the minimum level of protection in interpreting Charter rights, in that case s.6).
Likewise, it is entirely undecided whether (by analogy) a *Suresh*-style exception extends to section 7 when the provision is triggered, not by a removal, but by other circumstances. Certainly, in *Khadr*, the Supreme Court did not imagine a *Suresh*-style “exceptional” justification limiting the reach of section 7 and tied to national security. Instead, it held that section 7 applied to “Canadian officials when they participated in the Guantanamo Bay process by handing over the fruits of its interviews with Mr. Khadr”.107

These *Khadr* facts are much closer to the issues raised by the 2011 ministerial directions than are those in *Suresh*. There is little reason, therefore, to assume that what the Supreme Court said in 2002 in *Suresh* in relation to immigration removals is pertinent, in the least, to the question of section 7 and its application to information-sharing that induces foreign maltreatment.

It is also notable that since *Suresh*, the Court has held that section 7 rights are to be sternly defended and not tempered by an “internal” balancing. Courts are to consider any deviation from section 7 under section 1. This holding, issued in *Charkaoui*,108 concerned the procedural aspect of section 7, but there is no reason to assume that the Court would apply a different standard in the application of section 7 fundamental justice’s substantive entitlements.

As a practical matter, a decision to share information would be examined now under the Court’s fused s.1/administrative standard of review approach. In

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the wake of *Dore*, the section 1 analysis in relation to discretionary executive action amounts to consideration of “reasonableness”. In deciding that matter, everything would then turn on the facts – was the national security objective motivating the sharing information with a torturing agency so pressing as to be proportionate with the right violated? It would presumably be for the government to demonstrate this justification, something that might prove awkward given that evidence supporting the government’s contentions may be of a highly sensitive nature. Indeed, the government might prefer to lose the constitutional case than disclose information protected by national security confidentiality. More than that, we have not yet had a recent case in which the Court was obliged to contemplate whether s.1/reasonableness can be applied in any real way to forgive a Charter violation that in term reflects a non-derogable and absolute international human rights norm (in this case, the prohibition on torture).

All of this is to say that the sharing of information where there is a risk of overseas torture is constitutionally doubtful, and for practical purposes difficult to defend.

**Conclusion**

The 2011 ministerial directions clearly represent a change in official

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110 *Ibid* at para. 57 (“On judicial review, the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play”).
positions from those articulated in the aftermath of the Arar matter. Indeed, as the UN Committee Against Torture has observed, they are impossible to reconcile with the recommendations of the Arar commission itself.

On the other hand, the directions may be a more honest and forthright expression of the operational policies in fact employed by, at the very least, CSIS. CSIS policies have overclaimed in terms of guarding against information sharing tied to torture, while at the same time holding the door open in practice to such exchanges.

While the new approach is more transparent than its predecessors, this does not exonerate its content. To summarize the chief conclusions of the Article: There is a plausible legal basis to distinguish between evidentiary and operational use of in-bound information tied to torture. Moral arguments on this issue are pressing and difficult to resolve. It is, however, likely an overreach to ascribe a prohibition on operational use to Article 15 of the Torture Convention or to characterize passive consumption of such information by a receiving agency as “complicity” under that treaty.

On the other hand, the complicity concept in the Convention plausibly overlaps with the concept of “aiding and abetting” that international criminal tribunals have regarded as part of customary international law. If so, then use of the directives to justify out-bound information sharing, in knowledge of the likelihood of torture, may give rise to international criminal culpability and trigger Canada’s own state responsibility for internationally wrongful conduct.
At the same time, Canada’s own “aiding and abetting” concept appears to have a different reach, and require a more emphatic intent to assist a torturer. In these circumstances, it is difficult to see how a domestic criminal prosecution for aiding and abetting torture could be mounted against (proper) uses of the directives. Criminal negligence for bodily injury may, however, be another story, and a concerted application of the 2011 directives by an official within Canada would seem to fit the elements of that crime. If so, an accused would likely need to resort to a defence of necessity, pointing to national security exigencies. Marshaling even the modest evidence needed to invoke that defence might, however, run up against the state’s interest in protecting its secrets.

There is also an obvious Charter of Rights and Freedoms issue raised by the directives. Whether the application of section 7 to use of the directive would be stymied by preoccupations with extraterritoriality might depend, in one theory, on how a court construed past precedent like *Suresh* and recognized the territorial nexus between use of the policy and Canada. On another theory, the court would need to grapple with the confounding jurisprudence on the extraterritorial reach of the Charter, and the possible argument that the Charter does not reach harm done to foreigners in foreign lands, even when compounded by Canadian conduct.

If the territoriality issues were, however, overcome, it is difficult to see how the government could convert *Suresh* and its language of “exceptional conditions” into a limitation on the substantive reach of section 7. Put simply, the court has progressed in its treatment of the Charter, and now is more earnest in treating
compliance with international law as the baseline construal of the Charter. Put another way, behaviour that violates the Torture Convention now seems unlikely to pass muster under the Charter. Even if the courts were prepared to exonerate under section 1 for exigent circumstances, proving that exigency would oblige the government to table evidence that it would almost certainly wish to retain as confidential.

These conclusions represent the limit of what can be said based on the information now available. Exactly how the directives will be used in practice remains entirely unclear, and definitive conclusions on their legality will depend on those facts. Sadly, those data will be hard to come by. It is not likely that the government will announce its use of the policy, or willingly release information on such use under access law. In the result, a challenge to the policy would require a frank challenge to the directions themselves without evidence of their use, something that would make the applicant’s case more difficult. As the 2013 Canadian Bar Association resolution protesting the directions noted “decisions to share information pursuant to the Direction tend to elude judicial review and public oversight due to the circumstances in which they are made.”

At some level, that is perhaps the most pernicious aspect of a policy articulated, not in legislation with reporting obligations, but in the form of executive fiat. Put simply, the public will not know what the state is doing unless and until a scandal arises, similar to the one that engulfed Maher Arar. Until then,

we depend on executive good faith and the operations of accountability bodies with limited resources and capacities (and in some eyes, credibility), like the Security Intelligence Review Committee.

Absolute bans on information sharing may be unrealistic, but they are easy to implement. If the government wishes to nuance its approach, it should also layer on equivalent procedural distinctions, including periodic public reporting on the number of times the directions have been deployed and mandatory provision of details to SIRC each time they are. 112 Otherwise, in the hothouse of inside-government thinking, dissenting views may be lost, and the 2011 directions’ willingness to touch torture with a 10-foot pole may produce even shorter poles in time.