

Review of commissions of inquiry with respect to findings of Major, O'Connor, Iacobucci concerning information sharing that affects critical infrastructure protection

Critical Infrastructure Protection – Information Sharing Protocol Project, CSSP-2013-CP-1026

Prepared By:
Jacques J.M. Shore
Chris Schafer
Gowling Lafleur Henderson LLP
160 Elgin Street #2600, Ottawa, ON K1P 1C3

Project Number: CSSP-2013-CP-1026
CSA: Lynne Genik, DRDC Centre for Security Science, 613-943-0751

The scientific or technical validity of this Contract Report is entirely the responsibility of the Contractor and the contents do not necessarily have the approval or endorsement of the Department of National Defence of Canada.

Contract Report
DRDC-RDDC-2015-C080
January 2015

IMPORTANT INFORMATIVE STATEMENTS

Critical Infrastructure Protection – Information Sharing Protocol CSSP-2013-CP-1026 was supported by the Canadian Safety and Security Program which is led by Defence Research and Development Canada's Centre for Security Science, in partnership with Public Safety Canada. The project was led by New Brunswick Department of Public Safety in partnership with Royal Canadian Mounted Police, Dalhousie University and Gowling, Lafleur Henderson.

Canadian Safety and Security Program is a federally-funded program to strengthen Canada's ability to anticipate, prevent/mitigate, prepare for, respond to, and recover from natural disasters, serious accidents, crime and terrorism through the convergence of science and technology with policy, operations and intelligence.

© Her Majesty the Queen in Right of Canada, as represented by the Minister of National Defence, 2015

© Sa Majesté la Reine (en droit du Canada), telle que représentée par le ministre de la Défense nationale, 2015

Abstract

This report is the first report of several assessing the legal bases for information sharing, considering Canadian commissions of inquiry, the Canadian federal environment, provincial environment and finally international, specifically, the United Kingdom, Australia and the United States. Collectively, these legal analyses will underpin the development of a best practice policy and operational approach to sharing information with critical infrastructure owners/operators in a Canadian context.

In this report, three recent federal Commissions of Inquiry were examined: O'Connor Inquiry (The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar), Major Inquiry (Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182), and Iacobucci Inquiry (Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin).

More specifically, these Commissions of Inquiry were reviewed with respect to any written findings and/or recommendations concerning information sharing that affects critical infrastructure (CI) protection and Canadian Security and Intelligence and Law Enforcement (SILE) and CI communities. These Commissions of Inquiry are useful with respect to understanding the constraints and limitations of information sharing within government, be it structural, cultural, functional, or behavioural gaps including legal, policy and procedural components, and how to more effectively address them.

What these Commissions of Inquiry revealed with respect to information sharing within and between governments as it concerns national security, include the following general observations/conclusions:

- broad information sharing is essential to effective prevention of terrorism and the enhancement of national security;
- different organizational cultures between different government agencies can impact information sharing;
- clear(er) procedures are needed in regard to information sharing within and between governments and government departments and agencies;
- cooperation with foreign agencies is essential in a post 9/1 world and ground rules for cooperation for information sharing are necessary and must be made clear in advance of sharing information and preferably put in writing;
- the federal government needs to set clear direction with respect to the balance between security and privacy to ensure information sharing is not weakened inordinately by restrictions inherent in security and privacy practices;
- the federal government needs an enhanced National Security Advisor (NSA) to supervise and, where necessary, coordinate national security activities, including all aspects of the

distribution of intelligence between government agencies and to resolve, with finality, disputes among government agencies for national security; and,

- federal government agencies, acting on the “need to share” principle, should cooperate more closely with key stakeholders.

What these conclusions demonstrate is the importance these Commissions of Inquiry place on the necessity to share information between governments domestically and various agencies and stakeholders and with foreign governments and their respective agencies to bolster the national security of Canada and its CI. In order to accomplish effective information sharing and overcome bureaucratic organizational cultures that can stifle information sharing, clear(er) rules and procedures reduced to writing are necessary to foster cooperation, with overriding direction from the federal government about the appropriate balance that should be struck between sharing information to enhance national security and protecting the privacy of Canadians. Where an inappropriate balance is struck, an enhanced NSA to supervise and coordinate national security activities, including all aspects of the distribution of intelligence between government agencies and to resolve, with finality, disputes among government agencies to effectively advance Canada’s national security and the protection of the CI Canadians rely on day to day.

Significance for Defence and Security

The Commissions of Inquiry and their findings/recommendations reviewed stress the importance and necessity of information sharing between governments and the SILE community and with foreign governments and their respective agencies to bolster the national security of Canada and related CI. The Commissions of Inquiry make various recommendations to enhance information sharing within the SILE community and where implemented, may go some distance in enhancing the national security of Canada.

Résumé

Voici le premier d'une série de rapports visant à évaluer les fondements juridiques applicables à l'information. On y examine les commissions d'enquête canadiennes, l'environnement fédéral au Canada, l'environnement provincial et l'environnement international, plus précisément au Royaume-Uni, en Australie et aux États-Unis. La série d'analyses juridiques servira de base à l'élaboration d'une politique sur les pratiques exemplaires et d'une approche opérationnelle pour l'échange d'information avec les propriétaires et les exploitants d'infrastructures essentielles (IE) dans le contexte canadien.

Dans le présent rapport, on se penche sur trois récentes commissions d'enquête fédérales : la commission d'enquête O'Connor (Commission d'enquête sur les actions des responsables canadiens relativement à Maher Arar), la commission d'enquête Major (Commission d'enquête relative aux mesures d'investigation prises à la suite de l'attentat à la bombe commis contre le vol 182 d'Air India) et la commission d'enquête Iacobucci (Enquête interne sur les actions des responsables canadiens relativement à Abdullah Almalki, Ahmad Abou-Elmaati et Muayyed Nureddin).

Plus précisément, on s'attarde sur les constatations et les recommandations concernant l'échange d'information qui ont une incidence sur la protection des IE et sur les collectivités canadiennes de la sécurité, du renseignement et de l'application de la loi. Ces commissions d'enquête nous aident à comprendre les contraintes et les limites de l'échange d'information au sein du gouvernement, qu'il s'agisse de lacunes structurelles, culturelles, fonctionnelles ou comportementales, y compris les éléments de droit, de politique et de procédure, et à y répondre plus efficacement.

Voici certaines des observations et conclusions générales tirées au sujet de l'échange d'information au sein des gouvernements et entre ceux-ci en ce qui concerne la sécurité nationale :

- l'échange d'information à grande échelle est indispensable pour efficacement prévenir le terrorisme et pour renforcer la sécurité nationale;
- les différences de culture organisationnelle entre les organismes gouvernementaux peuvent avoir une incidence sur l'échange d'information;
- des procédures claires (ou plus claires) sont nécessaires en ce qui a trait à l'échange d'information entre les gouvernements et entre les ministères et organismes gouvernementaux;
- depuis les attentats du 11 septembre, il est essentiel de collaborer avec les organismes étrangers et d'établir à l'avance, de préférence par écrit, des règles de base pour l'échange d'information;
- le gouvernement fédéral doit établir une orientation claire concernant l'équilibre entre la sécurité et la protection des renseignements personnels, afin d'éviter que l'échange d'information ne soit excessivement affaibli par des restrictions inhérentes aux pratiques de sécurité et de confidentialité;
- au gouvernement fédéral, le rôle de conseiller en matière de sécurité nationale doit être élargi, de sorte que le titulaire supervise et coordonne, au besoin, les activités de

sécurité nationale, y compris tous les aspects de la diffusion de renseignements entre les organismes gouvernementaux, et règle de façon définitive les conflits entre les organismes gouvernementaux responsables de la sécurité nationale;

- les organismes du gouvernement fédéral devraient collaborer plus étroitement avec les intervenants clés, conformément au principe du besoin d'échanger.

Les conclusions reflètent l'importance accordée dans le cadre de ces commissions d'enquête à l'échange d'information entre les gouvernements, les organismes et les intervenants à l'intérieur d'un même pays ainsi qu'avec les gouvernements étrangers et leurs organismes respectifs, afin de renforcer la sécurité nationale du Canada et de ses IE. Afin d'assurer l'échange efficace de l'information et de contourner les défis posés par la bureaucratie et les cultures organisationnelles qui nuisent parfois à l'échange d'information, il est nécessaire d'établir par écrit des règles et des procédures claires (ou plus claires) favorisant la coopération. En outre, le gouvernement fédéral doit établir une orientation prépondérante concernant l'équilibre à atteindre entre l'échange d'information visant à renforcer la sécurité nationale et la protection des renseignements personnels des Canadiens. En cas de déséquilibre, un conseiller en matière de sécurité nationale au rôle élargi superviserait et coordonnerait les activités de sécurité nationale, y compris tous les aspects de la diffusion de renseignements entre organismes gouvernementaux, en plus de régler de façon définitive les conflits entre organismes gouvernementaux, afin de renforcer efficacement la sécurité nationale du Canada ainsi que la protection des IE dont la population dépend au quotidien.

Importance pour la défense et la sécurité

Les commissions d'enquête et les constatations et recommandations examinées font ressortir l'importance et la nécessité de l'échange d'information entre les gouvernements et les collectivités de la sécurité, du renseignement et de l'application de la loi ainsi qu'avec les gouvernements étrangers et leurs organismes respectifs, pour ce qui est de renforcer la sécurité du Canada et des IE connexes. Les commissions d'enquête formulent diverses recommandations visant à améliorer l'échange d'information au sein des collectivités de la sécurité, du renseignement et de l'application de la loi. Si elles sont mises en œuvre, ces recommandations pourraient renforcer la sécurité nationale du Canada.

Table of contents

Abstract.....	1
Significance for Defence and Security.....	2
Résumé... Translation will.....	3
Importance pour la défense et la sécurité.....	4
Table of contents.....	5
1. Introduction.....	6
2. O'Connor Inquiry.....	7
3. Major Inquiry ^(see[5])	13
4. Iacobucci Inquiry.....	18
5. Conclusion.....	20
References/Bibliography.....	22

1. Introduction

This report is the first report of several assessing the legal bases for information sharing, considering Canadian commissions of inquiry, the Canadian federal environment, provincial environment and finally international, specifically, the United Kingdom, Australia and the United States. Collectively, these legal analyses will underpin the development of a best practice policy and operational approach to sharing information with critical infrastructure owners/operators in a Canadian context.

Prior to the terrorist events of 9/11, Commissions of Inquiry (or Royal Commissions as they were formally known) relating to national security and intelligence were rare. The Taschereau-Kellock Commission of 1946 concerned the Gouzenko revelations of Soviet espionage in Canada and two other Royal Commissions (the Mackenzie Royal Commission reporting in 1969, and the MacDonald Royal Commission in 1981) dealt with certain activities of the Royal Canadian Mounted Police (RCMP). The Mackenzie Royal Commission concerned security procedures against subversion and the rights of those accused, while the MacDonald Royal Commission concerned illegal activities directed towards Quebec's separatist movement.

After the events of 9/11, several Commissions of Inquiry were set up to address specific national security concerns in which the intelligence community in Canada was directly involved:

1. The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (**O'Connor Inquiry**)[2]
2. Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (**Major Inquiry**)[10]
3. Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin (**Iacobucci Inquiry**).[11]

These Commissions of Inquiry were reviewed with respect to written findings and recommendations concerning information sharing that affect critical infrastructure (CI) protection and Canadian Security and Intelligence and Law Enforcement (SILE) and CI communities. These Commissions of Inquiry are useful with respect to understanding the constraints and limitations of information sharing within government, be it structural, cultural, functional, or behavioural gaps including legal, policy and procedural components, and how to more effectively address them. The review was undertaken to advance understanding on information sharing between the SILE community within government in order to better advance the protection of national security vis-a-vis information sharing with the CI sector and the related protection of CI in Canada.

Each of the above Commissions of Inquiry and their specific recommendations/findings with respect to information sharing are examined below in more detail in the sections that follow. The review that follows is limited to a review of the published final reports of the three Commissions of Inquiry and related secondary research on the findings/recommendations by the Commissions of Inquiry by academic scholars in published articles and other Parliamentary reports.

2. O'Connor Inquiry

This inquiry was established in January 2004 and mandated to investigate and report on the actions of Canadian officials in relation to Maher Arar (the Factual Inquiry) and to make recommendations with respect to an arm's length review mechanism for the activities of the RCMP concerning national security (the Policy Review). The Commission released its findings in two parts: Part I (Factual Inquiry) and Part II (Policy Review). Part I of the Inquiry is more relevant for the purposes of our work.

Maher Arar, a dual Syrian and Canadian citizen, was living in Ottawa, Ontario, in 2002, when he was arrested during a vacation stopover at New York's John F. Kennedy International Airport on suspicion of being a member of the terrorist organization Al Qaeda. Despite his Canadian passport on which he was traveling, United States authorities deported him to Syria where he was later tortured.

In Part I, O'Connor found that the sharing of intelligence (which was shown to be inaccurate) by the RCMP, some of which was received from the Canadian Security Intelligence Service (CSIS) for investigative purposes, was not done in accordance with its policies such that the information intended to be shared be assessed with respect to its relevance, reliability, and that it be subject to proper caveats. The report notes that it was very likely that U.S. authorities relied on RCMP intelligence in making the decision to deport Mr. Arar to Syria, where he was later tortured. As such:

“The recommendations in the factual report sought to correct the inadequate information-sharing practices of the departments and agencies that make up the security and intelligence community in Canada and abroad, the insufficient internal controls over such investigations and the weaknesses in the training of investigators, for example, in terms of respect for human rights as well as racial, ethnic and religious profiling. (See[1] [1] page 3)”

In Part II, O'Connor concluded that the RCMP's national security activities were not subject to sufficient accountability and review. O'Connor recommended a new review mechanism for the RCMP (the Independent Complaints and National Security Review Agency), similar to an enhanced model of the Security Intelligence Review Committee (SIRC). This new Agency would also have significant investigative powers (similar to those under the *Inquiries Act*), in addition to jurisdiction over all the activities of the RCMP.

Regarding the national security activities of agencies and departments not subject to any form of independent review or mechanism, such as Transport Canada, Canada Border Services Agency, Foreign Affairs and International Trade Canada, Citizenship and Immigration Canada, etc., O'Connor recommended that they be reviewed by SIRC, except for the Canada Border Services Agency (CBSA), whose activities he felt should fall under the review of the new review mechanism for the RCMP. He also recommended that all review agencies be linked, which he felt would make the review of integrated operational activities much easier.

It should be noted that with respect to Part II, O'Connor notes that a part of the federal government's response to 9/11 has been increased legislative protection of information that, if
CSSP-2013-CP-1026

publicly disclosed, could harm the national security of Canada. According to O'Connor, "This enhanced protection is relevant to my mandate because it may increase the secrecy of the RCMP's national security activities and affect the work of the body that reviews such activities". In this Part, O'Connor examines amendments to the *Canada Evidence Act* and to federal privacy and access to information legislation. This section also describes in detail the domestic and international responses to 9/11 that establish the legal basis for increased co-operation and information sharing which will be useful for future papers we prepare.

With respect to Part I, the only portion to have been verified as implemented by the RCMP, pertinent recommendations arising from the Factual Inquiry include the following:

Recommendation 2:

The RCMP should continue to engage in integrated and cooperative operations in national security investigations, but agreements or arrangements in this respect should be reduced to writing.

(b) While respecting their different mandates, the RCMP and CSIS should continue to co-operate with one another and expand upon the ways in which they do so.

O'Connor notes that,

Although valuable steps have been and continue to be taken, especially at the leadership level, to ensure greater co-operation and understanding between the two agencies, integration is made difficult by the different organizational cultures. Those differences are largely a legitimate, understandable reflection of the different mandates of the two institutions. However, it is imperative that a special effort is made by all personnel in each institution to develop a better understanding and appreciation of the mandate and role of the other". (See [2]page 319)

(c)The RCMP should continue to adhere to and refine its policy of cooperating with other federal agencies or departments involved in national security investigations.

According to O'Connor, "The increased level of integrated activity makes it essential that there be a clearly articulated framework within which the activity is carried out...However, it is clear that RCMP officers and officials in other agencies should have specific direction about each aspect of their interaction. There should be clear procedures in regard to the sharing of information and the creation of a paper trail to document interaction". (See [2]page 320)

(d)The RCMP should continue to work co-operatively with foreign agencies in pursuing its law enforcement mandate in national security investigations.

O'Connor states that, "Co-operation with foreign agencies is essential in the post-9/11 environment...At the same time, it is even more important than in the purely domestic context that the ground rules for co-operation with foreign agencies in national security investigations be made as clear as possible beforehand and, where practical, reduced to writing". (See [2]pages 320-321)

(e)The RCMP's agreements or arrangements with other entities in regard to integrated national security operations should be reduced to writing.

Recommendation 6:

The RCMP should maintain its policy of sharing information obtained in the course of national security investigations with other agencies and police departments, both domestic and foreign, in accordance with the principles discussed in these recommendations.

According to O'Connor's report:

Information sharing is vital, but it must take place in a reliable and responsible fashion. The need for information sharing does not mean that information should be shared without controls, particularly without the use of caveats. Nor does it mean exchanging information without regard to its relevance, reliability or accuracy, or without regard to laws protecting personal information or human rights...but I note here that controls are meant to facilitate and promote the orderly flow of information, not impede or stop it. (See [2] page 331)

Recommendation 7:

The RCMP's Criminal Intelligence Directorate (CID) or another centralized unit with expertise in national security investigations should have responsibility for oversight of information sharing related to national security with other domestic and foreign departments and agencies.

O'Connor notes in his report that, "In this age of instantaneous electronic communication, centralization need not restrict or slow information sharing or compromise operational independence. It does, however, require that the appropriate unit at Headquarters be informed of the information to be shared". (See [2]page 332)

Recommendation 8:

The RCMP should ensure that, whenever it provides information to other departments and agencies, whether foreign and domestic, it does so in accordance with clearly established policies respecting screening for relevance, reliability and accuracy and with relevant laws respecting personal information and human rights.

(a)The RCMP should maintain its policy of screening information for relevance before sharing it.

It should be pointed out that O'Connor emphasized that:

Since the Inquiry has focused on one case only, I have not heard sufficient evidence about whether the "need-to-share" concept should replace the "need-to-know" concept to come to a definitive conclusion in this regard I note, however, that sound solutions to difficult issues that arise with respect to information sharing are not likely to be found by mechanically invoking either...What is required is one clear policy about appropriate information sharing and application of that policy on a case-by-case basis. The emphasis should be on the reasons for sharing or not sharing information, rather than on conclusions. (See [2] page 334-335)

(b)The RCMP should ensure that information provided to other countries is reliable and accurate and should amend its operational manual accordingly.

(c)Information should also be screened by the RCMP for compliance with the applicable law concerning personal information before it is shared.¹

Recommendation 10

The RCMP's information-sharing practices and arrangements should be subject to review by an independent, arms-length review body.

Recommendation 11

Canadian agencies other than the RCMP that share information relating to national security should review recommendations 6 to 10 above to ensure that their information-sharing policies conform, to the appropriate extent, with the approaches I am recommending for the RCMP.

According to O'Connor, "I did not hear sufficient evidence in the Factual Inquiry to make specific recommendations about the information-sharing policies and practices of other Canadian agencies involved in national security activities. However, in most cases, the reasoning behind recommendations 6 to 10 pertaining to the RCMP is applicable to other agencies". (See recommendations [2]page 343)

Moreover, according to Melchers:

Justice O'Connor appears to have been mindful that an excessive degree of "chill" in information sharing would not be in the best interests of law enforcement and national security. The recommendations on information-sharing and investigative cooperation are modest, yet to the point: that the RCMP stick to its mandate, establish stronger internal controls, ensure compliance with current policies and professional standards, ensure adequate written policies, develop its capacities and those of its personnel to manage information and information flows and ensure that "border lookouts" are used appropriately. (See [3] page 42)

With respect to the importance of information-sharing, with respect to "Analysis and Recommendations", O'Connor states that, "Information sharing among agencies allows a more comprehensive picture to emerge...Sometimes, seemingly inconsequential bits of information may take on an importance not otherwise apparent when viewed alongside other information. Broad information sharing is therefore essential to effective prevention". (See [2] page 102)

In its review of various Commissions of Inquiry, including the O'Connor Inquiry, with respect to "connecting the dots" in counter-terrorism efforts, Eric Lerhe, a Fellow at the Canadian Defence & Foreign Affairs Institute, notes that, "The Arar case and its aftermath are not the cause or even particularly relevant factors in current Canadian data sharing failures" (See [4] page 10). Lerhe goes on to point out the following, perhaps more relevant to our future work on this project:

¹ Under the federal *Privacy Act*, there are protections to facilitate the sharing of information/intelligence vis-a-vis limited exceptions, which include consistent use, law enforcement and the public interest.

The broad image that is left on this issue is one of a government that claims that “we cannot allow organizational silos to inhibit our ability to identify and respond to threats” while simultaneously advertising it is vigorously protecting the privacy rights of Canadians. The result of the pursuit of these conflicting goals has usually been weakening data sharing, as there has been no government direction setting the balance between security and privacy. (See [4]page 11)

In a June 2009 review of the findings regarding the implementation of Justice O’Connor’s recommendations by the House of Commons Standing Committee on Public Safety and National Security, it was found that CSIS had implemented all of the recommendations directed to them in the O’Connor report on the factual inquiry. Likewise, in a report prepared by the RCMP that was submitted to this House of Commons Standing Committee, the RCMP indicates that they implemented all of the recommendations directed to it, specifically 15 of the 23 recommendations stemming from the from factual inquiry.

However, the House of Commons Standing Committee provides the following proviso in its review:

In short, the information gathered during this review is insufficient for the Committee to determine with certainty whether the changes made by the security and intelligence agencies that appeared before it have achieved the stated objectives of the recommendations of the factual inquiry and whether they are therefore sufficient. The Committee only knows for sure that the government has not implemented any of the recommendations arising from the policy review. (See [1] page 8)

As noted at the beginning of this section on the O’Connor Inquiry, Part I of the Inquiry is more relevant for the purposes of our work, as Part II (the Policy Review) focused solely on recommendations with respect to an arm’s length review mechanism for the activities of the RCMP concerning national security, which is not directly relevant for the purposes of this paper.

In summation, with respect to the implications for CI information sharing, the following observations and recommendations from the O’Connor Inquiry are relevant:

- different bureaucratic organizational cultures are challenging as they can stifle information sharing. It is important that dedicated effort is made by all personnel in the SILE community and other governmental agencies that share information relating to national security, to develop better understandings and appreciation of the mandate and role of other institutions within the SILE community;
- clear procedures and documentation with respect to information sharing is necessary;
- ground rules for cooperation with foreign agencies in national security investigations need to be clear in advance of any cooperation and preferably in writing;
- controls (i.e. caveats, etc.) are meant to facilitate and promote the orderly flow of information and not impede it;

- clear policy is required for appropriate information sharing and application of that policy on a case-by-case basis;
- broad information sharing is crucial in order to prevent breaches to national security; and,
- government must set and then communicate across government the appropriate direction with respect to setting the balance between protecting security by sharing information and privacy rights of Canadians;

These observations and recommendations need to be addressed by government and the SILE community, in collaboration with the owners and operators of CI. These recommendations, if addressed appropriately, could go some distance in addressing concerns about the obstacles that exist that stifle information sharing.

3. Major Inquiry (see[5])

In May 2006, this Commission was established and mandated to conduct an inquiry into the investigation of the bombing of Air India Flight 182, which happened on June 23, 1985. A bomb exploded on Air India Flight 182 en route from Toronto to London, England, killing all 329 people aboard, a majority of them Canadian of Indian ancestry. The bombing of Air India Flight 182 occurred at the same time as the Narita Airport bombing in Japan. Investigators believe the two bombings were linked and that the bomb exploded at the Narita Airport before it could be loaded on another airplane. Most official accounts place responsibility for the attack on Sikh extremism.

In December 2007, the first Phase 1 Report was issued before the Inquiry was completed. This report dealt with the human side of this terrorist tragedy, detailing the stories of the victims of the bombing and their families. This first report is not relevant for the purposes of our work.

In the second and final report, more relevant for our purposes, Major makes findings and recommendations with respect to a number of items such as aviation security and terrorist financing, etc. It should be noted that given that this particular Inquiry was based on events from over almost 30 years ago, much of the work of the Inquiry was historical in nature and of little relevance to the terms of our engagement today.

Furthermore, the report goes to great lengths laying out how various government departments dealt with terrorist threats historically and presently, which lays a solid foundation for better appreciating the operation of government with respect to information sharing practices historically and at present, which will be useful for subsequent papers.

As it concerns intelligence matters (the SILE community) and sharing of information, the Terms of Reference for this Inquiry noted that the Commissioner examined:

“ if there were problems in the effective cooperation between government departments and agencies, including the Canadian Security Intelligence Service and the Royal Canadian Mounted Police, in the investigation of the bombing of Air India Flight 182, either before or after June 23, 1985, whether any changes in practice or legislation are required to prevent the recurrence of similar problems of cooperation in the investigation of terrorism offences in the future”

The recommendations that are particularly pertinent for the purposes of our paper are as follows:

Recommendations from Volume Three: The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecution²

² Volume Three of the Air India Final Report re “The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions”, which deals with the relationship between intelligence and evidence and the challenges of terrorism prosecutions, evaluates how effectively the government uses resources available to it to deal with the threat of terrorism. In doing so, it also addresses how best to manage the flow of information between government agencies with respect to terrorism, and focuses almost

CSSP-2013-CP-1026

*Chapter II: Coordinating the Intelligence/Evidence Relationship
Recommendation 1*

The role of the National Security Advisor in the Privy Council Office should be enhanced. The National Security Advisor's new responsibilities should be as follows:

- to supervise and, where necessary, to coordinate national security activities, including all aspects of the distribution of intelligence to the RCMP and to other government agencies;*
- to resolve, with finality, disputes among the agencies responsible for national security*

In carrying out these new duties, the National Security Advisor should be assisted by a Deputy and by a staff of secondees from agencies which have national security responsibilities, such as CSIS, the RCMP, the CBSA, and DFAIT. The National Security Advisor should continue to support relevant Cabinet committees and serve as Deputy Minister for the CSE, but these duties could, if necessary, be delegated to the Deputy National Security Advisor or to another official within the office of the NSA.³

*Chapter III: Coordinating Terrorism Prosecutions
Recommendation 10*

The CSIS Act should be amended to reflect the enhanced role proposed for the National Security Advisor and to provide for greater sharing of information with other agencies.

If the National Security Advisor receives security threat information from CSIS, he or she should have the authority, at any time, to provide the information to the relevant policing or prosecutorial authorities or to other relevant officials with a view to minimizing the terrorist threat. The National Security Advisor should make decisions about whether intelligence should be disclosed only after considering the competing demands for disclosure and secrecy. In every case, the decision should be made in the public interest, which may differ from the immediate interests of the agencies involved.

Intelligence prepared to assist the National Security Advisor in his or her deliberations, and the deliberations themselves, should be protected by a new national security privilege. The privilege would be a class privilege similar to that protecting information submitted to assist with Cabinet deliberations.

Recommendations from Volume Four: Aviation Security

Chapter IV: Recommendations

completely on the sharing of information between CSIS and the RCMP, for the purposes of terrorism related criminal prosecutions.

³ According to Major, "The *status quo* is not acceptable because it allows CSIS to decide unilaterally for the Government of Canada when relevant information should or should not be shared with other agencies". See Volume Three: The Relationship Between Intelligence and Evidence. Canada, "Air India Flight 182: A Canadian Tragedy" Volume Three re "The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions" (2010) at pg. 86.

Recommendation 9

Transport Canada must provide timely, relevant and actionable intelligence information to civil aviation stakeholders, with the primary recipients being airport operators, air carriers, pilots, CATSA, FBOs and GA facilities.

- Transport Canada should be guided by the “need to share” principle and should cooperate more closely with key stakeholders to ensure they receive the intelligence information they require.*
- Aviation stakeholders should provide Transport Canada with feedback about the quality and timeliness of intelligence they receive. Where concerns are raised, a collaborative approach to resolving those concerns should be taken.*
- In addition to threats related to airports and air carriers, aviation stakeholders should be kept abreast of changes to the general threat environment. Regular security briefings for all stakeholders, including front-line workers, should occur.*

With respect to the area of National Security Advisor (NSA)⁴, it notes that the NSA:

be given an expanded role, before any police involvement, in managing terrorist threats. In part, this role would see the NSA deciding whether it is possible to respond to a given threat without involving criminal investigations and prosecutions that might lead to the public disclosure of secret information. In other cases, if CSIS hesitates, or is unwilling to pass information to the RCMP, the NSA should have the power to require CSIS to provide the information. In these and other situations, the NSA will act in the public interest, transcending institutional self-interest. It is impossible to resolve these enduring tensions completely. Nevertheless, the manner in which decisions are made about the appropriate balance between secrecy and openness can be improved. (See [6] page 13)

Major went on to note that the “NSA’s present role should be expanded to include responsibility for the strategic coordination of the government’s response to terrorist threats”, (See [6] page 37), principally because terrorist threats engage the mandates of dozens of government entities involved in national security matters, with numerous different government departments and agencies also having important national security responsibilities.

Moreover, “The most important enhanced role might be to ensure coordination of the various agencies responsible for national security, including addressing issues that arise from the distribution of intelligence within government” (See [6] page 37). Commissioner Major expressed concern that unless this was done, “...as more government agencies become involved in national security matters, there is an increased risk of bureaucratic fencing among them”. (See [6] page 17)

In Chapter V: Aviation Security, it is noted that, “After the September 11, 2001, terrorist attacks, Canada’s intelligence community moved away from uncritical adherence to that principle and accepted that, in many circumstances, the need to share must prevail”. (See [7] page 179) This

⁴ A National Security Advisor to the Prime Minister was appointed in late 2003.

concept is important for the purposes of ensuring crucial information is shared in a timely manner, although Major noted the importance that both O'Connor and Iacobucci attached with respect to taking care in how information is shared. (See [6] page 88)

Lastly, while most of the work of the Commission concerned itself with the sharing of information, or lack thereof, and reasons why, between CSIS and the RCMP, as previously noted, this Inquiry also addressed information sharing in other contexts, such as with respect to terrorist financing.

In Volume Five on Terrorist Financing, the Air India Final Report notes that in Canada, privacy considerations have played a significant role in shaping policies and laws on terrorism financing, and that these considerations have been given greater weight in Canada than in some other countries. The Report noted that FINTRAC cannot divulge certain information to private sector reporting entities, and that "FINTRAC cannot compel private sector entities to provide information about a specific transaction that has been identified to FINTRAC in a Voluntary Information Record (VIR)...". (See [8] page 248)

Post Air India Inquiry Follow-up

On December 7, 2010, the federal government issued the *Air India Inquiry Action Plan* in response to the final report of this Inquiry. Among the 17 commitments, the government committed to the following: enhance cooperation among Canada's law enforcement and intelligence agencies, in particular information sharing for national security purposes.

In response, Justice Major stated publicly that if the Air India Inquiry demonstrated anything, it was that communication among agencies is "invaluable because bits and pieces (of information), when you put them together, can form quite a pattern. But bits and pieces left scattered mean nothing". He also noted that the federal government's promise to "enhance cooperation amongst Canada's law enforcement and intelligence agencies, in particular information sharing for national security purposes" is unclear. (See [9])

In July 2011, the federal government issued a *Progress Report* on the above *Action Plan*. In this *Progress Report*, the federal government notes that the "position of the National Security Advisor (NSA) is an example of an effective mechanism that ensures Canada's national security institutions function in a coordinated and coherent manner". This report goes on to note that, "Another example of a mechanism ensuring the coordination of our country's national security apparatus is the newly established Cabinet Committee on National Security". Lastly, this report outlines a commitment to introduce legislation to clarify the authorities for information sharing for the purposes of national security. Public Safety Canada and the Department of Justice have been leading the development of proposals for the introduction of said legislation. (See [10]) In summary, Justice Major makes a number of important recommendations with respect to information sharing:

- the NSA position ought to be enhanced in order to enable this role to supervise and, where necessary, coordinate national security activities, including all aspects of the distribution of intelligence to the RCMP and to other government agencies, and to resolve, with finality, disputes among the agencies that are responsible for national security;

- the NSA should have the power to require CSIS to share information with the RCMP when it hesitates to do so;
- the NSA should play a central coordinating role because as more and more government agencies have taken on national security responsibilities post 9/11, there is an increased risk of “bureaucratic fencing” and “silos” among them;
- secondees from agencies with national security responsibilities (i.e. CSIS, RCMP, DFAIT, etc.) should assist the NSA;
- the NSA should be able to share security threat information received from CSIS with relevant policing or prosecutorial authorities or to other relevant officials with a view to securing national security;
- Transport Canada should be guided by the “need to share” principle and should cooperate more closely with its stakeholders to ensure they receive timely intelligence;
- aviation stakeholders should be kept abreast of changes to the general threat environment and security briefings should occur for all stakeholders, including front-line workers; and,
- federal legislation to clarify the responsibilities for information sharing for the purposes of national security is necessary.

No doubt a number of these recommendations could enhance information sharing between government, the SILE community, and CI owner/operators to effectively enhance national security. Like the concern by O’Connor about different organizational cultures stifling information sharing, the use of secondees as recommended by Justice Major might go some distance to address bureaucratic cultural issues. In addition, vesting a central authority like the NSA with the power to oversee the coordination of information sharing with respect to agencies that have a national security mandate, while also being able to act as a referee of sorts when disputes arise as to whether information ought to be shared, might facilitate enhanced information sharing and protection of information when it ought not to be shared. Most importantly perhaps, is the necessity of federal legislation that clearly spells out the responsibilities for information sharing for the purposes of national security. For a long time, the emphasis has been on privacy and protecting information, without a corresponding emphasis or clarity around the need to share information.

4. Iacobucci Inquiry

This inquiry, established in December 2006, was a response to a recommendation by Justice O'Connor. In the wake of 9/11, some members, including Mr. Arar, of the Muslim and Arab communities in Canada experienced civil liberty violations when they were deported and tortured in countries with questionable human rights records. Justice O'Connor found similarities in the ordeal suffered by Arar and the three men at the focus of the Iacobucci Inquiry (see below), which is why he recommended that their cases also be examined by way of a Commission of Inquiry.

Iacobucci issued two reports in October 2008. One report was public while the other was confidential in order to avoid disclosure of information subject to national security confidentiality. This paper does not review the confidential report, as it was not publicly available. This internal inquiry was set up to determine the following:

1. Whether the detention of Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances;
2. whether there were deficiencies in the actions taken by Canadian officials to provide consular services to Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin while they were detained in Syria or Egypt; and
3. whether any mistreatment of Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances.

Under the Terms of Reference, actions carried out on behalf of three government departments were the focus: CSIS, RCMP, and DFAIT. It must be noted that this Inquiry did not touch on the exchange of information more directly relevant to the protection of critical infrastructure between SILE and CI owner operators, unlike the Major Inquiry which touched on airports and the financial system, for example.

Moreover, Justice Iacobucci does not make any recommendations, though he does provide findings with respect to the actions of Canadian officials in these three cases and the role their actions may have played in the detention and mistreatment of these three individuals at the hands of Syrian and Egyptian authorities.

Iacobucci⁽¹¹⁾ concluded that, with respect to Abou-Elmaati, a dual Canadian-Egyptian citizen, the actions of Canadian officials, specifically the sharing of information, sending of questions by CSIS, and the lack of consular support, likely contributed to his detention in Syria and Egypt, where he was mistreated. With respect to Almalki, a dual Canadian-Syrian citizen, Iacobucci found that the actions of Canadian officials did not directly result in his detention in Syria, where he was mistreated, but the Commissioner could not determine whether his detention was the indirect result of actions by Canadian officials. Iacobucci found that Almalki's mistreatment was

an indirect result of two actions of Canadian officials, specifically the sharing of information with U.S agencies by the RCMP, and the sending of questions to Syria by the RCMP to be answered by Almalki. Lastly, in the case of Nureddin, a dual Canadian-Iraqi citizen, Iacobucci held that his detention in Syria, where he was mistreated, was not the direct result of actions by Canadian officials, but that their actions, including the sharing of information with foreign agencies, likely contributed to his detention and the mistreatment he received.

The most relevant chapter for the purposes of this paper is chapter 3 entitled, “Background and Context”. This chapter provides an overview of CSIS, RCMP, and DFAIT and their roles with respect to Canada’s national security activities and the provision of consular services to Canadians abroad, as they existed at the time of the events examined by this Inquiry, specifically 2001 to 2004⁵. With that said, this chapter is more directly useful as background to how the exchange of information by the three above organizations is facilitated with a foreign state, such as the United States. As noted previously, this research will be particularly useful for a future paper we are preparing concerning a review with respect to CI information sharing in the United States as this research provides a sufficient background, legislatively and otherwise, on the United States.

⁵ Justice Iacobucci notes that from 2001 to 2004, the period his Inquiry examined, there was, “...intense pressure on intelligence and law enforcement agencies, including CSIS and the RCMP, to cooperate and share information with foreign agencies, particularly those of the United States” (See [11] page 34).

5. Conclusion

It must be noted that for the most part, these Inquiries do not directly address the issue of information sharing vis-a-vis CI owners/operators and SILE. With that said, the recommendations and observations stemming from these Commissions of Inquiry provide a number of constructive ideas to improve information sharing between governments and the SILE community, and if implemented, could directly improve information sharing between government and CI owners/operators.

All three Commissions of Inquiry stressed the importance and necessity of sharing information. While caveats are at times necessary to attach to the information shared, none of the Commissions of Inquiry thought that information sharing ought to be lessened or discouraged. In fact, clearer direction from the federal government, perhaps in the form of new legislation, is needed to recalibrate the balance between the “need to know” and the “need to share” and what needs to be shared to protect national security and how that can be done within the confines of existing privacy-based legislation and rights.

With that said, it is imperative that clear procedures, rules, and practices are in place and communicated in writing, in order to more effectively ensure information sharing. Secondments can go some distance to breaking down bureaucratic silos once these clear policies and procedures for information sharing are articulated. When despite this effort information is not shared, a central authority that oversees and coordinates information sharing as it concerns national security, and more importantly, officiates disputes regarding what must be protected and what information must be shared, is important.

These summative statements encapsulate the following general observations/conclusions:

- broad information sharing is essential to effective prevention of terrorism and the enhancement of national security;
- different organizational cultures between different government agencies can impact information sharing;
- clear(er) procedures are needed in regard to information sharing within and between governments and government departments and agencies;
- cooperation with foreign agencies is essential in a post 9/11 world and ground rules for cooperation for information sharing are necessary and must be made clear in advance and preferably put in writing;
- the federal government needs to set clear direction with respect to the balance between security and privacy to ensure information sharing is not weakened;
- the federal government needs an enhanced National Security Advisor (NSA) to supervise and, where necessary, coordinate national security activities, including all aspects of the distribution of intelligence between government agencies and to resolve, with finality, disputes among government agencies for national security; and,

- federal government agencies, acting on the “need to share” principle, should cooperate more closely with key stakeholders across government and the SILE community, including owner/operators of CI in Canada.

References/Bibliography

- [1] Canada Parliament, “Report of the Standing Committee on Public Safety and National Security: Review of the Finding and Recommendations from the Iacobucci and O’Connor Inquiries” by Garry Breitkreuz, MP, (June 2009)
- [2] Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, “Report of the Events Relating to Maher Arar: Analysis and Recommendations”, (2006)
- [3] Melchers, Ronald-Frans. “The Maher Arar Case: Implications for Canada-U.S. Law Enforcement Cooperation” (2006) 6 Journal of the Institute of Justice & International Studies 37
- [4] Lerhe, Eric. “Connecting the Dots’ and the Canadian Counter-terrorism Effort – Steady Progress or Technical, Bureaucratic, Legal and Political Failure”. (2009) Canadian Defence & Foreign Affairs Institute 1
- [5] Canada Parliament, http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/termsofreference/default.htm (Captured Nov 2014). Jacques J.M. Shore was co-lead counsel (along with Normal Boxall) and Chris Schafer was junior counsel to the Air India Victims’ Families Association (AIVFA) at the Air India Inquiry
- [6] Canada, “Air India Flight 182: A Canadian Tragedy” Volume Three re “The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions” (2010)
- [7] Canada, “Air India Flight 182: A Canadian Tragedy” Volume Four re “Aviation Security” (2010)
- [8] Canada, “Air India Flight 182: A Canadian Tragedy” Volume Five re “Terrorist Financing” (2010)
- [9] Tonda MacCharles “Conservative plan baffles Air India inquiry chief; Government rejected key recommendations from three-year probe” Toronto Star. (8 December 2010) A4
- [10] Final Report re Canada, “Air India Flight 182: A Canadian Tragedy” (2010) online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/default.htm>.
- [11] Canada, “internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmed Abou-Elmaati and Muayyed Nureddin” (2008)