

COMPLAINT PURSUANT TO SECTION 41 OF THE CANADIAN SECURITY INTELLIGENCE SERVICE ACT
TO THE SECURITY INTELLIGENCE REVIEW COMMITTEE (SIRC) FROM THE
BC CIVIL LIBERTIES ASSOCIATION

APRIL 2, 2009

About the Complainant

1. The B.C. Civil Liberties Association ("BCCLA") is Canada's oldest and most active civil liberties organization. Founded in 1962, the organization has an abiding interest in civil liberties issues generally, and relevant to this complaint, an interest in torture as the most egregious potential civil liberties violation against the individual short of execution.
2. As examples of the recent work of the BCCLA, the association has drafted a proposed *Prevention of Torture Act* which died on the order paper as a private members' bill, but for which the BCCLA continues to advocate. The BCCLA has also been active in opposing Canada's rendition of Afghan detainees to the Afghan government authorities without adequate safeguards against torture, including a judicial review in Federal Court and a complaint to the Military Complaints Commission that has led to the first public hearings into alleged military misconduct since Somalia. The Association had close involvement in the Arar and Iacobucci inquiries.

Facts as Alleged

3. According to media reports attached to this complaint, on March 31, 2009, Geoffrey O'Brian, who represented himself as a lawyer for the Canadian Security Intelligence Service ("CSIS"), told the House of Commons Public Safety Committee ("Committee") that CSIS continues to use information derived from torture in its national security operations.
4. At the time of the filing of this complaint, the transcripts from that meeting are not yet available. The complainant will provide transcript excerpts when those become available to the public.
5. Media reports allege that Mr. O'Brian said the following in his testimony to the Committee:
 - a. "Do we use information that comes from torture? The answer is we only do so if lives are at stake."¹
 - b. There are "unusual" and "almost once-in-a-lifetime situations" where information obtained through torture "can be of value to the national security of the country."²

¹ Maccharles, Tonda, "CSIS defies orders on torture", Toronto Star, 1 April 2009 accessed Online on 1 April 2009 at <http://www.thestar.com/News/Canada/article/611540>

² *Ibid.*

- c. “The simple truth is, if we get information which can prevent something like the Air India bombing, the Twin Towers – whatever, frankly – that is the time when we will use it despite the provenance of that information.”³
- d. “We only do so [use information derived from torture] if lives are at stake.”⁴
- e. That CSIS uses information derived from torture, but that “The premise to that is that it happens rarely in the exchanges of information that we have. Second of all, information that may have been extracted by methods which are less than the kinds of methods we would like applied to people ... the recipient of that information doesn't know how that information was obtained.”⁵

Relevant law and policy

- 6. Canada is a signatory to the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“Convention”), an international agreement that Canada will not tolerate torture against any individual.
- 7. In particular, under the Convention, Canada has committed that:
 - a. No exceptional circumstances whatsoever. . . may be invoked as a justification of torture;⁶
 - b. Canada will 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;⁷
 - c. Canada will criminalize and prosecute acts which constitute complicity or participation in torture with appropriate penalties that take into account the grave nature of such offences.⁸
- 8. The Criminal Code of Canada prohibits, in section 269.1, any official from inflicting torture on any other person. This section specifically prohibits as a defence “exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.”⁹

³ *Ibid.*

⁴ Leblanc, Daniel, “CSIS offers conflicting stance on information derived from torture,” *Globe and Mail*, 1 April 2009, accessed online on 1 April 2009 at <http://www.theglobeandmail.com/servlet/story/LAC.20090401.TORTURE01ART2144/TPStory/National> .

⁵ *Ibid.*

⁶ United Nations, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* Article 2.

⁷ *Ibid.* at Article 15.

⁸ *Ibid.* at Article 4.

⁹ *Criminal Code of Canada*, at s. 269.1.

9. The Supreme Court of Canada, in considering whether government complicity in sending an applicant for refugee status to face torture in another country, made a number of comments concerning whether government actors could legitimately condone torture in a manner consistent with their obligations to conform to the principles of fundamental justice under section 7 of the *Charter*:

It can be confidently stated that Canadians do not accept torture as fair or compatible with justice. [. . .] The Canadian people, speaking through their elected representatives, have rejected all forms of state-sanctioned torture. [. . .] Torture has as its end the denial of a person's humanity; this end is outside the legitimate domain of a criminal justice system [. . .]. We may thus conclude that Canadians reject government-sanctioned torture in the domestic context.¹⁰

10. The Supreme Court made little time for arguments that Canadian government agencies should enjoy protection from Charter scrutiny if they do not themselves perpetrate the torture, if there is "sufficient causal connection between our government's participation and the deprivation ultimately effected." The Court went on to note that:

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.¹¹

11. In his examination of the incident of Maher Arar's rendition to Syria and subsequent torture, and the involvement of Canadian officials in that incident, Justice Dennis O'Connor made a number of recommendations relating to CSIS and its involvement with countries with "questionable human rights records." In particular, he recommended:
- a. That CSIS review its policies so that any possible Canadian complicity in torture is eliminated;¹²
 - b. That CSIS not accept information from countries with questionable human rights records, except after having such action reviewed by the SIRSC, with a particular focus on reliability, in particular to avoid "the risk that the country may provide misinformation or false confessions induced by torture, violence, or threats thereof."¹³

¹⁰ *Suresh v. Canada (Minister of Citizenship and Immigration)*, (2002), 208 D.L.R. (4th) 1 at para 49 – 52.

¹¹ *Ibid.* at para 54.

¹² O'Connor J., *Report of the Events Relating to Maher Arar*, Volume 3 (2006), Canadian Government Publishing at page 345.

¹³ *Ibid.* at 346.

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12. In the submission of the BCCLA, CSIS should never accept information, under any circumstance, known to be the product of torture. This information is notoriously unreliable, and accepting it condones and encourages the activity of those engaging in torture, contrary to Canada's international and domestic legal obligations as set out in this complaint.
13. More specifically, accepting this type of information creates an incentive for countries that engage in torture to continue to engage in such practices to curry favour with the Canadian intelligence community, in particular CSIS.
14. CSIS has made numerous inconsistent statements on its policy relating to accepting information derived from torture, leading the BCCLA to form the opinion that the actual policy of CSIS on information derived from torture has not changed since 2004, prior to the exposure of the full complicity of Canadian government officials in the rendition and torture of Maher Arar, and that public statements to the contrary by CSIS are themselves false and worthy of investigation.
15. In particular, the BCCLA is deeply concerned that CSIS is releasing public information that suggests it is not reliant on information it knows has been derived from torture, while secretly still soliciting and relying on this type of information. This practice does not increase the safety or security of Canadians or citizens in countries whose leaders may be inclined to tolerate torture if countries like Canada are ambiguous about the merits of such practices.
16. The BCCLA requests that SIRC:
 - a. investigate the provenance of Mr. O'Brian's comments, including examining whether CSIS has ever in the past relied on information it knew was derived from torture;
 - b. determine whether CSIS is indeed relying on information derived from torture, and/or soliciting information derived from torture, despite public statements to the contrary;
 - c. determine the actual, as practiced, CSIS policy on using information that is known to be derived from torture; and,
 - d. review these results and provide public recommendations per s.38 of the *Canadian Security Intelligence Service Act*.

All of which is respectfully submitted.



Robert Holmes,
President, B.C. Civil Liberties Association