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TOP SECRET

**File No.: 2800-143
(TD R484)**

**CSIS'S ROLE IN THE MATTER OF
OMAR KHADR**

(SIRC STUDY 2008-05)

**Security Intelligence Review Committee
July 8, 2009**

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1 INTRODUCTION

In mid-August 2002, Canadian officials were informed by American authorities that Omar Ahmed Khadr, a fifteen-year old Canadian citizen, had been captured by US forces in Afghanistan. A number of Canadian agencies quickly became involved in this matter, including CSIS,

In February and September 2003, Canadian Security Intelligence Service (CSIS) officials travelled to Guantanamo Bay to meet with Khadr. From the Service's perspective, there were compelling operational reasons to interview Khadr given the threat posed by Sunni Islamic extremism in the months following 9/11: Khadr's father, Ahmed, was allegedly the highest-ranking Canadian Al Qaeda member

When the Americans granted Canadian intelligence and law enforcement officials access to Khadr, CSIS seized the opportunity to gather intelligence that would advance its investigation. As such, the goal of interviewing Khadr was to collect intelligence on a potentially serious terrorist threat and to provide advice to the Government of Canada accordingly.

Although SIRC understands CSIS's position that it had reasonable grounds to travel to Guantanamo Bay to gather threat-related information, we found that its decision to interview Khadr was animated primarily by intelligence considerations; as a result, SIRC believes that CSIS failed to give proper attention to two important extra-intelligence considerations.

The first matter relates to the Service's handling of situations where it interacts and shares information with foreign partners when there are potential human rights considerations. When CSIS interviewed Khadr in February 2003, there was widespread media reporting on allegations of mistreatment and abuse of detainees in US custody in Afghanistan and Guantanamo Bay. SIRC did not find any evidence that CSIS took this information into account in deciding to interview Khadr. In the intervening seven years since this matter unfolded, CSIS has implemented several changes with respect to cooperating and sharing information with foreign partners which, SIRC hopes, will aid the Service in carrying out future investigations while taking human rights issues into consideration.

The second issue relates to Khadr's age. It is well recognized in Canadian and international law that youth are entitled to certain fundamental rights because of their status as a minor. SIRC found no evidence that CSIS took Khadr's age into consideration before deciding to interview him at Guantanamo Bay. Consequently
SIRC recommends

that CSIS consider establishing a policy framework to guide its interactions with youth. As part of this, the Service should ensure that such interactions are guided by the same principles that are entrenched in Canadian and international law.

Overall, the Khadr matter suggests that CSIS can no longer carry out its mandate solely from an intelligence-gathering perspective. Political, judicial and legal developments post 9/11 are forcing the Service to take a less insular approach to its work and to consider various extra-intelligence factors prior to undertaking a given activity, especially when this activity takes place outside of Canadian borders. SIRC therefore recommends that the Service take the necessary steps to train and inform its intelligence officers of the importance of integrating these considerations into their daily decision-making routines in order to maintain its own credibility, and to meet growing and evolving expectations of how an intelligence agency should operate and perform in a contemporary democratic society. To that end, it would be helpful if CSIS received guidance and advice from the Minister on how to accomplish this task.

2 OBJECTIVE AND METHODOLOGY

This review assesses CSIS's role in the matter of Omar Khadr. As a result of media and public attention, the Committee decided to conduct a focused, in-depth review of the nature and scope of the Service's involvement with Khadr. The specific objectives include: examining the circumstances surrounding, and decision-making processes associated with, CSIS's interviews with Khadr, including any information that CSIS received from and provided to domestic and foreign agencies in relation to this individual, as well as any changes to practices and/or policies that CSIS has considered or implemented as a consequence of this matter. Because SIRC's mandate is limited to reviewing the activities of the Service, we do not consider aspects of Khadr's situation in which CSIS has no role, such as the legal case against Khadr, whether or not he is a "child soldier," or the Canadian government's stance concerning his repatriation.

SIRC examined all electronic and hard-copy documentation related directly or incidentally to Omar Khadr for the entire review period, which covered May 1, 2002 to September 30, 2005, inclusive. This period preceded Khadr's arrest by American authorities on July 27, 2002, through to the Federal Court of Canada's decision in *Khadr v. Canada*, 2005 FC 1076, which prohibited CSIS from conducting any further interviews or questioning of Khadr. SIRC also held briefings to discuss the Service's activities and involvement with respect to Omar Khadr during the period under review.

3 THE ARREST

In late July 2002, Khadr was captured by US forces near Khost, Afghanistan, and transferred to a military hospital at Bagram Airbase. On August 19, 2002, CSIS learned from [redacted] the Department of Foreign Affairs and International Trade (DFAIT) that an individual by the name of Omar Ahmed Khadr, who was claiming to be a Canadian citizen, had been arrested in Afghanistan by US military forces for throwing a hand grenade. [redacted] noted "please note the family name...it may not be a coincidence...."¹ On the same day, the Department of National Defence (DND) received similar information, which it also shared with CSIS.²

Within days, all relevant parties within the Canadian security and law enforcement community had been apprised of this development and discussions began on Canada's approach to the situation.⁴

In the weeks following news of Khadr's arrest, CSIS liaised with American agencies to gather as much information as possible. Immediately upon learning of Khadr's possible arrest, CSIS also sent an urgent request [redacted] asking for confirmation that the individual arrested was in fact Ahmed Said Khadr's son; CSIS took care to specify that it "was not previously aware of any threat related activity on his behalf" given his young age.

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2 On August 20, DND forwarded information to CSIS

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4 On August 23, CSIS advised the RCMP's Criminal Intelligence Division of Khadr's likely arrest and requested this information be passed to Project A OCANADA.

forwarded information

Within days, CSIS

At the same time,

domestic partners turned to the Service for information and advice. For example, CSIS participated in and contributed to a number of interdepartmental meetings.⁸ At the same time, CSIS explained that it was critical for its Sunni Islamic Extremism investigation that the Service be kept abreast of developments

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⁸ On August 29, CSIS attended a meeting at RCMP HQ with representatives of DFAIT, the Privy Council Office (PCO) and the Department of Justice (DOJ) to discuss the arrest.

In the weeks following news of Khadr's arrest, CSIS acted as a valuable conduit of information by gathering and relaying intelligence from foreign partners to domestic agencies, and providing advice to the Canadian government on the Khadr matter.

⁹ Briefing with CSIS employees (March 11, 2009).

4 ON THE WAY TO GUANTANAMO BAY

Khadr remained in detention at the US military base in Bagram for almost three months, during which time DFAIT tried unsuccessfully to gain access to him through regular diplomatic channels. On August 30, 2002, DFAIT sent a request for access to Khadr to the US State Department.

According to media reporting, DFAIT had been lobbying to keep Khadr out of Guantanamo Bay, but in late October 2002, it learned that its efforts had failed.¹¹ On October 22, 2002, DFAIT informed CSIS that it had been told informally of Khadr's imminent transfer to Guantanamo Bay and that the Canadian Embassy in Washington would plan a visit to Khadr as soon as it was notified of the move.¹² On October 28, 2002, Khadr was transferred to Camp Delta, in Guantanamo Bay, Cuba. DFAIT was informed that Canada could request the opportunity to visit its detainees "for intelligence gathering or law enforcement purposes."¹³ Shortly thereafter, discussions began on how to gain access to Khadr. CSIS, DFAIT and the RCMP met and decided that in order "to take advantage of the possibility of early travel times secured with the assistance of other agencies," DFAIT would coordinate access requests on behalf of Canadian agencies through the American Embassy in Ottawa.¹⁴ **The Canadian**

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11 According to DFAIT, it had fought Khadr's transfer to Guantanamo Bay because of his young age. *Globe and Mail*, "Ottawa Fought Khadr's Transfer to Gitmo" (July 11, 2008).

12 DFAIT asked CSIS and the RCMP, both of whom had previously expressed interest in visiting the detention facility, to coordinate their visits accordingly to avoid conflicts in planning (in the end, however, the RCMP did not go to Guantanamo Bay to interview Khadr). At this time, there was still a mistaken impression that the US would grant Canada consular access to Khadr.

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14 Both CSIS and the RCMP indicated that they had already undertaken preliminary steps with their US interlocutors to arrange visits to the detention center in the near future.

At the meeting, it was also decided that a DFAIT representative would accompany the CSIS delegation as an "intelligence representative," since US authorities

government fully supported CSIS's visit to and interview of Khadr at Guantanamo Bay in February 2003, as this initiative was part of a "whole of government" effort.

Shortly after learning of Khadr's impending transfer, CSIS Executive approved an official request to US authorities to have CSIS representatives "debrief" Khadr at Guantanamo Bay.¹⁵ At this point, attempts to interview Khadr were rolled into existing efforts to access other Guantanamo Bay detainees of operational interest to the Service.¹⁶ In early November 2002, a formal request was sent to American partners to access Guantanamo Bay detainees, one of whom was Khadr. In its request, CSIS informed its American partners that the purpose of the interviews would be to identify any imminent threat-related information, determine the detainees' degree of involvement in terrorist activities in Canada and abroad, identify their extremist contacts in Canada and abroad and determine the nature of their activities since leaving Canada.¹⁷

The objectives stated above make it clear that the driving force behind CSIS's interest in interviewing Khadr, as well as the other detainees, was to gather security intelligence. CSIS explained that, from the beginning, its priority with respect to Guantanamo Bay had been to gain access to individuals with links to Canada; put simply, if there was a Canadian angle, the Service wanted to explore in keeping with its mandate. Khadr's arrival at Guantanamo Bay infused a new sense of urgency to these ongoing efforts for three key reasons: first, he was a Canadian citizen; second, he could potentially offer insight into what was happening on the ground in Afghanistan; and third, he could provide information on the whereabouts and activities of his father,

had made it clear that detainees would not be granted consular access. DFAIT was keen on gaining access to Khadr but when those efforts failed, it worked towards having one of their officials be part of any Canadian delegation that would visit him. At the same time, the Service made it clear that it would not take on other roles (e.g. consular) during its visit; its role would be limited to its intelligence gathering mandate. Briefing with CSIS employees (March 11, 2009).

¹⁵ Briefing Note from DG CT to ADO, "Request for access to Omar Khadr - likely to be transferred to Guantanamo Bay, Cuba, by 2002 10 25" (October 31, 2002).

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¹⁷ On November 13, the diplomatic note was delivered to the US Embassy.

¹⁸ Briefing with CSIS employees (March 11, 2009).

It should be noted that by 2002, the Khadr family had gained much notoriety

Ahmed Said Khadr until his death in 2003, was known to have had close ties to a number of militant and Mujahideen leaders including Osama bin Laden and was alleged to be a senior associate and financier of Al Qaeda. Meanwhile, other Khadr family members had made no secret of their family's ties to Osama bin Laden and Al Qaeda.

At the time of Khadr's arrest in Afghanistan,

The goal of CSIS's interview with Khadr was to collect intelligence on these threats.

Even though the Canadian government endorsed the visit, SIRC inquired whether CSIS gave thought to the legality of these interviews, and specifically, whether it had sought legal advice prior to interviewing Khadr. This question arose following publication of a *Globe and Mail* article which reported that "a senior CSIS official who testified in the Omar Khadr matter said that CSIS and DFAIT lawyers had approved the trip to Guantanamo Bay in advance."²² The Service indicated that a review of documentation did not yield any legal opinion or advice provided by Legal Services to CSIS prior to Khadr's interview, and the counsel assigned to this matter at the time does not recall

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Briefing with CSIS employees
(March 11, 2009).

²¹ Briefing Note from DG CT to ADO, "Request for access to Omar Khadr - likely to be transferred to Guantanamo Bay, Cuba, by 2002 10 25" (October 31, 2002).

²² *Globe and Mail*, "Spy agency says it acted 'appropriately' in Khadr interrogation" (July 17, 2008).

being consulted prior the interview; however, the Assistant Director Legal Services, as a member of the Executive, would have been aware of pertinent issues. Furthermore, DFAIT lawyers were present during CSIS-DFAIT meetings on Khadr.²³

4.1 Information-Sharing with Partners

When the US Government informed CSIS that the delegation had been approved to travel to Guantanamo Bay in February 2003, it outlined several conditions “to protect the interests and ensure the safety of all concerned.” One of these conditions was that the US would videotape and sound record all interviews between CSIS and detainees.²⁴ The recording of Khadr’s interview made it impossible for CSIS to comply with its operational policy that at the onset of an interview, employees should stress its confidential nature.²⁵ It should be pointed out that CSIS did not tell Khadr upon meeting him that their conversation would be private, and therefore did not mislead him. Still, in accepting the condition set by US authorities that all interviews with Khadr would be recorded, CSIS did not follow its usual principle of offering privacy to individuals who voluntarily agree to participate in an operational interview.²⁶

Mindful that its conversations with Khadr were being recorded and that information divulged could potentially be used against him in US proceedings, the Service made a conscious effort during its interview to stay away from topics that would be prejudicial to Khadr, such as his involvement in Al Qaeda.²⁷

²³ Memo from CSIS to SIRC, Response to question 3 (April 9, 2009).

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Briefing with CSIS employees (March 11, 2009).

²⁵ OPS-201.7.1

²⁶ At the beginning of the interview, Khadr was asked if we was willing to talk to the Canadian delegation and answer some questions, to which he responded in the affirmative.

²⁷ Briefing with CSIS employees (March 11, 2009).

In addition to recording all interviews with Khadr, the US made information-sharing a precondition to allowing CSIS to meet him; in fact, CSIS would have to provide “a copy of the final report on the visit, in addition to copies of all tapes, transcripts, records of conversations and other information gathered.” In May and October 2003, as per this condition, CSIS provided the US State Department with reports summarizing its interviews with Khadr. In both exchanges, CSIS attached caveats that the documents were being provided in confidence for internal use and information contained therein could not be disseminated without its consent.²⁹ However, the caveats attached to CSIS’s written disclosures were effectively inconsequential since the information Khadr provided during his interviews was retained on videotapes that were US government property. **Apart from two exchanges with American which fell under conditions set by US authorities, SIRC saw no indication during the review period that CSIS shared information emanating from its interviews with Khadr with any other foreign agency.**

The results of CSIS’s interviews with Khadr were also shared with domestic partners.

After both visits, CSIS also provided copies of its interview reports to the RCMP and DFAIT with the appropriate caveats.³¹ These disclosures fell within section 19(2) (a) and (b) of the *CSIS Act*, which allows the Service to disclose information where it “may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province, to a peace officer

²⁸ Memo from CSIS to SIRC, Answer to question 5 (April 9, 2009).

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having jurisdiction to investigate the alleged contravention” or “relate to the conduct of the international affairs of Canada.”³² **SIRC found that CSIS’s sharing of information with domestic partners relating to the Khadr matter was lawful and appropriate.**

4.2 Intelligence Gains

The Service believes that its interviews of Khadr advanced its investigation into Sunni Islamic extremism and produced important intelligence gains.

Overall, the information Khadr provided was not particularly helpful in terms of offering new investigative leads but rather in gaining insight³³ In the end, CSIS assesses its involvement in this matter as being “highly successful, as evidenced by the quality intelligence information” provided by Khadr.³⁴

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³³ Briefing with CSIS employees (March 11, 2009).

³⁴ Memo from CSIS to SIRC, Answer to question 12 (April 9, 2009).

5 RESPECT FOR HUMAN RIGHTS IN INTELLIGENCE MATTERS

CSIS's exchanges and cooperation with foreign partners have come under closer scrutiny since 9/11, as it has become apparent that intelligence agencies need to work together to combat terrorist threats that transcend geo-political boundaries. Although information-sharing with foreign partners is crucial for CSIS to fulfill its mandate, it has created some new difficulties, namely when working with countries that do not share Canada's respect for human rights. CSIS Director Jim Judd has pointed out that the Service is very much aware that exchanging information "can present a challenge for us in dealing with countries with poor human rights records."³⁵ Although the issues arising from this challenge have, for the most part, come to the fore through legal decisions and commissions of inquiry that occurred after the Service's interview with Khadr, an examination of how they relate to the Khadr matter is still beneficial.

Another instance is the more well-known fact that CSIS travelled to Guantanamo Bay to interview Khadr.

5.1 Open Source Information

International criticism over US treatment of detainees caught in the "war on terror" began to emerge shortly following the US invasion of Afghanistan. For example, in April 2002, *Amnesty International* published a *Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay* reporting allegations by several individuals relating to their treatment by US soldiers after being

³⁵ CSIS Director, Opening Statement to the Public Safety and National Security Committee (October 31, 2006).

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taken into custody in Afghanistan in late 2001 and 2002. This ill-treatment included beatings, being immobilized or tightly bound, being threatened by death and torture, and being restrained in small spaces.³⁷ In the summer of 2002, the international media published reports of alleged torture and sexual abuse in a jail near a military base in southern Afghanistan.³⁸

Meanwhile, the US detention facility at Guantanamo Bay opened its door amidst controversy. In November 2001, the US government issued a Presidential Executive Order that authorized the indefinite detention of foreign nationals at Guantanamo Bay, revoking prisoners' right to legal counsel or to challenge their detention in federal courts. The government's position came under heavy international criticism, as many countries denounced the US's legal treatment of detainees. In January 2003, *Human Rights Watch* made public its annual report criticizing the US for failing to consider human rights in its fight against terrorism, namely in refusing to apply the Geneva Conventions to prisoners detained at Guantanamo Bay.³⁹

The criticism of Guantanamo Bay detainees' legal status was accompanied by criticism over the US's treatment of detainees in the detention facility. In early 2002, an international outcry erupted following publication of an official Pentagon photograph showing a group of detainees in a holding area kneeling in orange jumpsuits with their hands chained behind their backs. In response, the US Defense Secretary said that the treatment of detainees was proper, humane, appropriate and fully consistent with international conventions.⁴⁰ But criticism of US treatment of detainees at Guantanamo

³⁷ Amnesty International, *Memorandum on the rights of people in US custody in Afghanistan and Guantanamo Bay* (p.1-23).

³⁸ Agence France-Presse, "Taliban prisoner cites sex abuse, 'ferocious dogs' in Afghan jail" (July 28, 2002). In 2008, Khadr publicly alleged various forms of mistreatment during his detention at Bagram, including the infliction of severe physical pain, being threatened with rape, being subjected to aggressive interrogation techniques, solitary confinement and the denial of adequate medical treatment.
http://www3.thestar.com/static/pdf/080509_khadr_affidavit_22_feb_2008.pdf

³⁹ In March of the same year, the United Nations human rights chief accused the US of keeping several hundred imprisoned terror suspects at Guantanamo Bay in a "legal black hole" by unfairly holding them indefinitely without charge. The criticism came following a US court ruling that these prisoners were aliens being held outside US sovereign territory and, as such, were not entitled to such constitutional rights as being charged with a crime or having access to a lawyer. *Chronicle-Herald*, "Washington criticized over terror suspects" (March 14, 2003).

⁴⁰ *Washington Times*, "Rumsfeld insists U.S. not harming Cuba detainees" (January 23, 2002).

Bay continued unabated in ensuing months. As the US's interrogation techniques came under attack, the US military defended its practices saying the questioning that went on in the detention facility was within the bounds of normal legal procedures in effect in the US.⁴¹

SIRC notes that there was widespread media reporting on allegations of mistreatment and abuse of detainees in US custody in Afghanistan and Guantanamo Bay prior to CSIS interviewing him at Guantanamo Bay.

5.2 CSIS Knowledge of Conditions

On July 15, 2008, a video of Khadr's February 2003 interrogation at Guantanamo Bay was made public. Khadr is shown asking his CSIS interviewer for protection and removing his shirt to show his wounds. After the tape's airing on national television in Canada, a CSIS spokesperson was quoted as saying that CSIS acted "appropriately," "in good faith" and "within all legal limits" when it interrogated Khadr. Moreover, the Service "had no information prior to its initial meeting with Omar Khadr that he had been mistreated," nor knowledge of previous complaints made by him about being placed in excruciating stress positions by the US military at Bagram before being transferred to Guantanamo Bay.⁴²

In a meeting with SIRC, CSIS reiterated that it was not aware of any specific allegations of torture on Khadr's behalf prior to arriving at Guantanamo Bay, adding that no serious allegations of mistreatment or abuse had been made public at that time.

⁴¹ *Herald-Sun*, "No torture for prisoners" (February, 2002).

⁴² *Globe and Mail*, "Canada's Spy Agency says it acted 'appropriately' in Khadr interrogation" (July 17, 2008). This message was reiterated to SIRC in written answers. Memos from CSIS to SIRC, Response to question 4 (April 9, 2009) and Response to question 9 (April 23, 2009).

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SIRC also inquired into CSIS's response to the allegations made by Khadr during the Service's interview that he had been "treated very badly" by the Americans and that everything he had told previous interrogators was a lie forced out of him by mistreatment. SIRC was told that in reaction to these allegations, the CSIS interviewer tried to calm Khadr down so that he would not incriminate or embarrass himself. The interviewer felt it was obvious that Khadr had been trying to work himself up before the interview and that his behavior was not genuine.⁴⁵ In his report, the interviewer speculated that Khadr "had a large attack of guilt about the information he was disclosing on his father, and or, when he was returned to his cell he was spoken to by older more senior detainees who had disciplined him."⁴⁶

In light of public allegations of mistreatment of detainees, SIRC believes that CSIS failed to give full consideration to Khadr's possible mistreatment by US authorities before deciding to interact with them on this matter.

5.3 Policy Changes

The challenge posed by exchanging information in instances where there are human rights concerns has been discussed by SIRC and thoroughly examined by two Canadian commissions of inquiry, all of whom have urged Canadian officials to pay utmost attention to human rights in the conduct of their activities. In SIRC's report on *The Role of CSIS in the Matter of Maher Arar*, we made a number of recommendations regarding the need to amend operational policy governing information-sharing and cooperation to ensure that CSIS takes into account the human rights records of foreign countries. The *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* re-stated similar principles, namely that CSIS review its policies

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45 Briefing with CSIS employees (March 11, 2009).

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governing the circumstances in which it supplies information to foreign governments with questionable human rights records. As a result, CSIS revised a number of its policies to include consideration of human rights issues in its dealings with foreign agencies, from entering into arrangements with foreign governments and institutions, to undertaking foreign travel and disclosing information.⁴⁷

In late 2008, CSIS's Deputy Director of Operations (DDO) also issued a directive on information sharing with agencies with poor human rights records, pending an ongoing review of policy on international information sharing.

Finally, in response to a recommendation made by Justice O'Connor, CSIS and DFAIT signed a new protocol in the fall of 2007. Its purpose is to promote greater coordination and coherence across government in addressing issues that arise from consular cases involving Canadians detained abroad as part of a national security or terrorism-related case. The protocol outlines how DFAIT and CSIS are to cooperate and keep each other fully apprised of all relevant details of such cases to ensure a coordinated approach, and how each party may request assistance from the other in carrying out its mandate.⁵⁰ The document goes on to detail the procedure for more sensitive cases: where a situation involves "the need for careful coordination between national security

⁴⁷ OPS-402-1, OPS-403-1 and OPS-601

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⁵⁰ For example, in cases where consular access has been denied, DFAIT may request CSIS to approach the foreign government or agency to help facilitate consular access. CSIS may not meet with a Canadian citizen detained abroad until after a consular visit has taken place, unless there are urgent national security or terrorism-related considerations and after consultation with DFAIT has taken place.

and investigative interests, on the one hand, and the obligation to respect both consular and human rights of a detained Canadian on the other, senior officials will be informed," namely the Deputy Ministers of DFAIT and Public Safety, the Director of CSIS, the Commissioner of the RCMP, the National Security Advisor, and if necessary, responsible ministers.⁵¹ SIRC believes that this protocol will assist CSIS in performing its task of collecting intelligence while respecting human rights, particularly if confronted with situations similar to that of Khadr.

⁵¹ Protocol between the Department of Foreign Affairs and International Trade and the Canadian Security Intelligence Service concerning cooperation in respect of consular cases involving Canadians detained abroad as part of a national security or terrorism-related case.

6 CSIS INTERACTIONS WITH YOUTH

In Canadian society, there is long-standing recognition that young people should be treated differently than adults because they have not attained certain decision-making skills and therefore require special protection and guidance. An expression of this principle can be found in Canada's criminal justice system, namely in relation to the *Young Offenders Act*, and more recently in the *Youth Criminal Justice Act (YCJA)*, which was passed in 2002. Youth justice policy is guided by the belief that young people who commit offences require "supervision, discipline and control, but given their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance." The idea that young people are not yet fully mature is supported by research on young people's culpability, ability to participate meaningfully in criminal proceedings, and to understand and appreciate due process rights.⁵²

Consequently, the *YCJA* is designed to balance the needs and rights of young offenders with youth accountability and public protection. For example, the *YCJA* stipulates that no oral or written statement given to police by a person under the age of eighteen can be admissible in court unless the person was given the opportunity to consult with legal counsel, a parent or other adult prior to making the statement, or has had explained in age-appropriate language that any such statement is required to be made in the presence of legal counsel, a parent or other chosen adult.⁵³ Of interest, the right to counsel is one of the areas of enhanced protection for young persons and is one of the most fundamental rights set out in the *YCJA*.⁵⁴

The rights of children are also reflected in international conventions to which Canada is party. The *UN Convention on the Rights of the Child* states that "no child shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment" and that "the arrest, detention and imprisonment of a child shall be in conformity with the law." Moreover, the child has the right to challenge the legality of his detention "before a court or other competent, independent and impartial authority" in the presence of legal or other appropriate assistance.⁵⁵ The conditions of Khadr's detention at Guantanamo Bay, such as the refusal to grant any of the detainees prisoner of war

⁵² Report to the Department of Justice Canada, *Parents' involvement in youth justice proceedings: perspectives of youth and parents*, p.1-3 (2004).

⁵³ *Youth Criminal Justice Act*, Section 146.

⁵⁴ <http://www.rcmp-grc.gc.ca/ycja-lsjpa>

⁵⁵ Defence for Children International - Canada, Joint letter to Prime Minister Stephen Harper urging the repatriation of Omar Khadr (February 25, 2009).

status, to have any disputed status determined by a competent tribunal as required under the Geneva Convention, or to have access to legal counsel, did not meet these international standards. The *Convention* also states that “every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so.” Khadr had been detained in facilities for adults since he was first taken into US custody, and upon transfer to Guantanamo Bay, he was not placed in Camp Iguana, a detention facility for juvenile detainees.

Khadr was arrested by US authorities when he was only fifteen years old; he was sixteen when he arrived at Guantanamo Bay. It should be noted that there are no restrictions on CSIS interviewing a minor, although there is a recognition in operational policy that there are limitations to how young people can be used for certain activities undertaken by the Service.

Although there is no clear indication that CSIS took Khadr’s age into account in deciding whether to interview him, his age did factor into CSIS’s assessment of the information he provided. The CSIS interviewer explained that when he met with Khadr at Guantanamo Bay, he had to be mindful of Khadr’s age to place the information he was providing into perspective.⁵⁷ Moreover, in a post-interview report, he noted that it was obvious that Khadr “viewed his father’s activities through the eyes of a child” claiming he did not know what his father talked about with people, as he was outside playing or was simply not interested. “It should be noted that OK [Omar Khadr] was 15 years of age when captured, and most of the critical years in his father’s association with Al Qaeda figures took place when he was merely a child.”⁵⁸ Moreover, the DG CT produced a briefing note shortly after CSIS’s visit

SIRC’s concern that Khadr’s age did not appear to factor into CSIS’s decision to interview him, nor influence its interview methodology, is compounded by the fact that CSIS was aware that Khadr had been kept incommunicado since his arrival at Guantanamo Bay. In the aftermath of the Khadr interview tapes being made public,

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57 Briefing with CSIS employees (March 11, 2009).

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CSIS declared that it had clear policy with respect to operational interviews.⁶⁰ Indeed, the right to counsel is set out in operational policy,

When SIRC asked how CSIS considered this policy in light of the fact that US authorities refused to grant detainees access to lawyers, we were told that CSIS would not defer or put off an interview if the conditions outlined in policy could not be met. In other words, policy would not prevent an interview from taking place if there were compelling operational reasons to go ahead. The CSIS interviewer added that Khadr was told at the beginning of the interview that his participation was voluntary, and he was asked if he wanted to talk, to which he responded in the affirmative.⁶²

SIRC believes that CSIS failed to take into account that while in US custody, Khadr had been denied certain basic rights which would have been afforded to him as a youth. As well, prior to his interview with the Service, Khadr had received no guidance or assistance from any adult who had his best interests in mind since he had been kept incommunicado and been denied access to legal counsel, consular representation or family members.

SIRC recognizes the challenges of applying policies and procedures that were developed originally to govern domestic operations, to foreign theaters of operation. This task will become ever more difficult as CSIS seeks to strengthen its capacity to operate outside of Canada. Although it may have been impossible for CSIS to comply with policy with respect to legal counsel in Khadr's situation, SIRC believes there are certain underpinnings in policy which CSIS should make every effort to uphold and consider as part of its decision-making process; one such principle is that an individual should have the opportunity to receive legal counsel prior to undertaking discussions in which information provided could lead to him or her being placed under investigation or, at some point in the future, even prosecuted. This principle is especially important in the case of youth, who lack the maturity, judgement and understanding to appreciate the consequences of their actions.

The *International Terrorism Program Plan for 2007-2008* notes that "Islamist extremism has reached from university campuses to high schools, community centres and private homes, and has shown the potential for

⁶⁰ *Globe and Mail*, "Canada's spy agency says is acted 'appropriately' in Khadr interrogation" (July 17, 2008).

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⁶² Briefing with CSIS employees (March 11, 2009).

Islamist extremists to penetrate the fabric of Canadian society to recruit susceptible, at risk youth to their cause.”

In 2008, the Minister issued revised Ministerial Direction on Operations to the Service in which he asked CSIS to ensure

sensitivity in regards to their age and any other circumstances. In recognition of the fact that special considerations should be given when dealing with young Canadians, **SIRC recommends that CSIS develop a policy framework to guide its interactions with youth. As part of this process, the Service should ensure that these interactions are guided by the same kind of principles that are entrenched in Canadian and international law as they relate to youth.**

7 LOOKING AHEAD

The issues brought to the forefront in the matter of Omar Khadr, such as information-sharing with foreign partners, especially in cases where there are human rights concerns, dealing with youth, and interacting with detainees in foreign jurisdictions, do not have easy answers or solutions. Nevertheless, all need to be carefully considered as part of CSIS's decision-making process. Overall, SIRC was disconcerted that there was no apparent meaningful discussion on these issues within CSIS prior to undertaking its travel to Guantanamo Bay to interview Khadr. Although SIRC was told that CSIS "considered all aspects of the issue carefully before deciding to interview Mr. Khadr, including his age and status at Guantanamo", we found no concrete evidence that these important issues were raised or considered as part of any pre-travel assessment.⁶⁴

This observation led SIRC to consider whether there was an internal mechanism in place at CSIS that would have permitted such a discussion to take place. At the time of CSIS's interview with Khadr, there was policy governing CSIS investigative activities outside Canada, which included conducting operational interviews abroad. Prior to undertaking such activities, CSIS employees were required to submit a request for approval

In the course of its review, SIRC found briefing notes that had been submitted prior to each visit to Guantanamo Bay, but these requests fell short of meeting the requirements outlined in policy.⁶⁵ SIRC is of the opinion that these briefing notes did not address the criteria outlined in policy on operational activities abroad or meet the principle underlying this policy, which is to ensure that CSIS senior managers are provided with all relevant information needed to make an informed decision.

⁶⁴ Memo from CSIS to SIRC, Response to question 11 (April 15, 2009).

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⁶⁶ The purpose of the first briefing note was to seek Executive approval to make an official request to US authorities to have CSIS visit Khadr once he was transferred to Guantanamo Bay; the note merely summarized the key developments in the Khadr matter

Meanwhile, the other briefing note sought approval to initiate procedures with DFAIT to arrange a second visit to the facility and only briefly mentioned Khadr. Briefing Note from DG CT to ADO, "Request for access to Omar Khadr - likely to be transferred to Guantanamo Bay, Cuba, by 2002 10 25" (October 31, 2002) and Briefing Note from DG CT to ADO, "Request for a 2nd operational visit to Guantanamo Bay facility in Cuba" (April 24, 2003).

SIRC believes that had CSIS followed policy on investigative activities abroad and prepared a detailed request for approval, it would have compelled a discussion and consideration of factors such as Khadr's age, detention conditions and legal status before deciding to travel to Guantanamo Bay. Although such a discussion might have led to the same decision, it would have ensured that CSIS decisions-makers were provided with a complete picture before making a determination to take part in this activity.

New mechanisms have also been established to encourage such discussions in the future. Changes in operational policy dealing with cooperation with foreign partners, new direction on information-sharing with countries with poor human rights records, and the CSIS-DFAIT protocol on consular cases involving Canadians detained abroad, have all enhanced the framework within which CSIS can cooperate and exchange information with foreign partners. It is becoming apparent, however, that finding a solution to many of these complex post-9/11 issues will entail a thorough re-thinking of intelligence work in light of current socio-political and legal realities.

The issue of information-sharing with countries and partners who have poor human rights records is still largely unresolved. Part of the problem is rooted in a contradiction between the Canadian government's stated position on information obtained from torture, and its own direction to the Service on this issue. In April 2009, the Canadian Public Safety Minister said that the "practice of the government is quite clear, we do not condone the use of torture in any circumstances" in refuting claims made earlier by a senior CSIS employee that the agency would still use information obtained from torture if lives were at stake.⁶⁷

The Khadr matter illustrates how this contradiction has played out in Canadian legal proceedings. In August 2005, Federal Court Judge Konrad von Finkenstein issued an injunction barring Canadian agencies, including CSIS, from interviewing Khadr further.

⁶⁷ *Toronto Star*, "CSIS does not condone torture, Tories insist: Public Safety Minister moves fast to clarify testimony by senior spy agency official" (April 2, 2009).

⁶⁸

Finkenstein found that CSIS and DFAIT agents had violated Khadr's *Charter* rights by interviewing him and turning the resulting information over to US investigators, and that allowing that practice to continue could cause irreparable harm to Khadr.⁶⁹ Later, in May 2008, the Canadian Supreme Court unanimously ruled that CSIS had participated in a foreign process that violated Canada's international human rights obligations. The high court justices found that the violations of human rights identified by the US Supreme Court, namely the illegality of indefinite detention of foreign terrorism suspects and war crimes trials, were sufficient to allow them to conclude that the regime provided for Khadr at the time of CSIS's interviews "constituted a clear violation of fundamental human rights protected by international law."⁷⁰ The courts' message is therefore that CSIS can no longer undertake its activities solely through the insular lens of intelligence-gathering, rather it must consider the wider environment and implications within which its work is carried out. This includes both the Canadian *Charter of Rights and Freedoms* and Canada's obligations under international law.

Justice O'Connor rightly observed that "decisions about how to interact with a country with a poor human rights record [...] can be very difficult and do not lend themselves to simple or prescriptive rules."⁷¹ CSIS can be credited for having taken several steps in recent years towards making the decision-making process surrounding its dealings and exchanges with such countries more transparent and accountable. In the end, however, SIRC believes that until the Service receives clear direction from the government as to how to interact and share information with countries that have poor human rights records, this very difficult issue will continue to plague CSIS decision-makers. More importantly, it will place the organization in an uncertain and vulnerable position when legal proceedings arise, as seen in the Khadr matter.

A related challenge facing the Service is the growing "judicialization" of intelligence, which is forcing intelligence agencies into courtrooms. In a 2008 speech, the CSIS Director pointed out that an increasing number of criminal prosecutions in Canada and abroad within the anti-terrorism realm have had, at their genesis, information collected by intelligence and not law enforcement agencies. This trend has sparked important debates on a range of legal issues, such as disclosure, evidentiary standards, and the

⁶⁹ Khadr v. Canada, 2005 FC 1076 (August 8, 2005).

⁷⁰ Canada (Justice) v. Khadr, 2008 SCC 28 (May 23, 2008). As a result, the Supreme Court ordered the federal government to hand over documents pertaining to those interviews since Canada participated in a process that was contrary to international law.

⁷¹ 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), p.195.

testimony of intelligence personnel in criminal prosecutions. The Director argued that these developments have potentially significant implications and consequences for the conduct of intelligence operations.⁷²

There is no doubt that the investigation into terrorist threats since 9/11 has blurred the line between the work of intelligence and law enforcement agencies, and thus between intelligence and evidence. Information collected by CSIS is undeniably being relied upon more often in criminal proceedings, both at home and abroad. Canadian high court decisions relating to the Khadr case certainly raise awareness of how CSIS intelligence products may be used in future legal proceedings. Intelligence that is found to have been gathered in circumstances that violated domestic laws or international conventions will not only be rendered useless in the courtroom, but more importantly, will bring discredit to the Service.

Finally, these two issues are compounded by the fact that CSIS is expanding its operations and activities abroad. In 2006, the CSIS Director told a public audience that CSIS had to strengthen its capacity to operate effectively outside Canadian borders in support of its core national security mandate since “national borders are only peripherally relevant to the vast majority of threats we deal with now or to the risks to Canadians.”⁷³ As CSIS works more closely with foreign partners, entering into arrangements with new partners or undertaking investigative activities abroad and joint investigations with more trusted ones, the need to resolve the issue of information-sharing and use of information will become more pressing.

Practitioners, intelligence experts and academics all agree that the world of intelligence changed dramatically after 9/11. The Canadian government increased resources for security and intelligence capacities, restructured organizations, mandates and responsibilities to develop better interoperability and cooperation among various agencies in the security and intelligence field, and enacted legislation to help facilitate the campaign against terrorism. The CSIS Director said in 2007 that the international response to the threat of terrorism had stirred some “profound debates, many of them extending well beyond the particular question as to how to best respond to the threat of terrorism.”⁷⁴ In recent years, CSIS has taken important steps to tackle some of the challenges created in the post 9/11 environment.

⁷² Remarks by Jim Judd, Director of CSIS, at the Global Futures Forum Conference in Vancouver (April 15, 2008).

⁷³ Remarks by Mr. Jim Judd, Director, CSIS, to the Canadian Association for Security and Intelligence Studies (October 27, 2006).

⁷⁴ Talking Point for 2007 Raoul Wallenberg International Human Rights Symposium, “How a Democracy should Respond to Domestic terrorism Threats” (January 19, 2007).

The matter of Omar Khadr suggests that changes in policies and procedures are but one component of a broader transition. The time may have come for CSIS to undertake a fundamental re-assessment of how it conducts business, and to undergo a cultural shift in order to keep pace with the political, judicial and legal developments of recent years. Indeed, there is mounting pressure and expectation that CSIS will consider extra-intelligence matters in fulfilling its mandate and carrying out its activities. **As a result, it is incumbent upon CSIS to implement measures to embed the values stemming from recent political, judicial and legal developments in its day-to-day work in order to maintain its own credibility, and to meet growing and evolving expectations of how an intelligence agency should operate and perform in a contemporary democratic society. To that end, it would be helpful if CSIS received guidance and advice from the Minister on how to accomplish this task. In light of ongoing discussions to expand CSIS's mandate to include foreign intelligence collection, it is also important for the Service to demonstrate that it has the professionalism, experience and know-how required to make the difficult decisions that arise when conducting operations abroad.**

SUMMARY OF FINDINGS

- In the weeks following news of Khadr's arrest, CSIS acted as a valuable conduit of information by gathering and relaying intelligence from foreign partners to domestic agencies, and providing advice to the Canadian government on the Khadr matter.
- The Canadian government fully supported CSIS's visit to and interview of Khadr at Guantanamo Bay in February 2003, as this initiative was part of a "whole of government" effort.
- At the time of Khadr's arrest in Afghanistan, CSIS was actively investigating because it had reasonable grounds to believe their activities represented threats to the security of Canada. The goal of CSIS's interview with Khadr was to collect intelligence on these threats.
- Apart from two exchanges with American partners, which fell under conditions set by US authorities, SIRC saw no indication during the review period that CSIS shared information emanating from its interviews with Khadr with any other foreign agency.
- SIRC found that CSIS's sharing of information with domestic partners relating to the Khadr matter was lawful and appropriate.
- SIRC notes that there was widespread media reporting on allegations of mistreatment and abuse of detainees in US custody in Afghanistan and Guantanamo Bay prior to CSIS interviewing him at Guantanamo Bay.
- In light of public allegations of mistreatment of detainees, SIRC believes that CSIS failed to give full consideration to Khadr's possible mistreatment by US authorities before deciding to interact with them on this matter.
- SIRC believes that CSIS failed to take into account that while in US custody, Khadr had been denied certain basic rights which would have been afforded to him as a youth. As well, prior to his interview with the Service, Khadr had received no guidance or assistance from any adult who had his best interests in mind since he had been kept incommunicado and been denied access to legal counsel, consular representation or family members.

- SIRC believes that had CSIS followed policy on investigative activities abroad and prepared a detailed request for approval, it would have compelled a discussion and consideration of factors such as Khadr's age, detention conditions and legal status before deciding to travel to Guantanamo Bay.

RECOMMENDATIONS

- SIRC recommends that CSIS develop a policy framework to guide its interactions with youth. As part of this process, the Service should ensure that these interactions are guided by the same kind of principles that are entrenched in Canadian and international law.
- It is incumbent upon CSIS to implement measures to embed the values stemming from recent political, judicial and legal developments in its day-to-day work in order to maintain its own credibility, and to meet growing and evolving expectations of how an intelligence agency should operate and perform in a contemporary democratic society. To that end, it would be helpful if CSIS received guidance and advice from the Minister on how to accomplish this task. In light of ongoing discussions to expand CSIS's mandate to include foreign intelligence collection, it is also important for the Service to demonstrate that it has the professionalism, experience and know-how required to make the difficult decisions that arise when conducting operations abroad.