

Cooperation a Legal Imperative?

The terrorist actions of September 11, 2001, and subsequent tragedies such as the Madrid and London bombings, have highlighted the threat to our public safety, national security, and our economic security. A recent Deloitte Research Study noted that with “advances in information technology, telecommunications, and transportation [that] have enabled globalization to the point where no global organization in any sector is immune to events that occur halfway around the world,” the “emerging secure economy” is signified by a greater visibility and responsibility across the public and private sectors.

Critical infrastructure (CI), often considered a strategic target of terrorist acts, is one area where public-private arrangements, in the interest of national security, are necessary since much of our CI is privately held. In its *National Security Policy*, the Canadian government recognized its duty to secure CI by stating that, “addressing many of these threats [to national security] requires a coordinated approach with other key partners—provinces, territories, communities, the private sector and allies.” In fact, if governments fail to pursue public-private partnerships to aid in the security of CI, resulting in harm to citizens and/or industry, claims may be sustained by a finding of a neglected duty of care.

For starters, crown immunity will likely continue to be whittled away as Canadian society increasingly recognizes the rights of individuals who have sustained injuries as a result of the negligent acts of government. At the same time, with the growth of fiduciary duties that require persons to act in the interests of others with whom they have a special relationship, there is an increasing obligation to volunteer beneficial information for the advantage of others.

As such, public sector entities that fail to gather, evaluate, and/or disseminate critical

information to the private sector in regards to the protection of CI and national security may face actions in damages. Likewise, operators of CI, put on notice by government through national security related strategies, may have a legal imperative to work cooperatively in partnership to secure CI. Those unable to adequately secure their facilities may also have a duty to seek government assistance in partnership – or risk legal liability.

These propositions flow from a recent United States District Court decision wherein Judge Alvin Hellerstein refused to release Boeing Corporation from liability in the September 11 terrorist attacks. The judge held that “...it was reasonably foreseeable that a failure to design a secure cockpit could contribute to a breaking and entering into, and take-over of a cockpit by hijackers or other unauthorized individuals...”

This ruling suggests that CI sector owners and operators may potentially be held legally liable for damages associated with terrorism stemming from a duty to prevent or mitigate acts of terrorism.

It is worth pondering what, if any, liabilities would have been incurred if the security breach in February 2005 by Radio-Canada at Hydro-Quebec, one of Canada’s largest electricity producers, had been terrorist related and resulted in economic damages rather than a television news segment?

Furthermore, the widespread vulnerability that Canadian provincial governments exhibited towards recent scares such as SARS suggests that they are ill prepared to deal with potential future national security emergencies related to biological and chemical terrorism.

A 2003 Health Canada report, released in the aftermath of SARS, noted potential vulnerabilities. A case is currently before Ontario’s Superior Court of Justice, wherein Mr. Justice Cullity is being asked to consider a matter that ultimately hinges upon

whether public officials who make mistakes can be made accountable to the public and victims where it is shown that a reasonable duty of care is not exercised. In that case, a nurse at North York General Hospital asserts she was infected with SARS because officials removed some of the stringent anti-infection protocols prematurely. At issue, the unique responsibility of government to protect the public.

It appears then, that if a government or government agency, much like Health Canada or Hydro-Quebec, fails to take action to aid in the security of citizens in preventing cascading damages from a terrorist attack or protecting CI, and preventing harm upon citizens or industry, claims may be sustained by a finding of a neglected duty of care.

All this appears to make it imperative that effective public-private partnerships be established and sustained for the purposes of national security. The reality is that they share this responsibility, and both private sector shareholders and public sector taxpayers want to know that public-private collaboration is happening.

If a government or agency fails to pursue such partnerships, or the manner and quality of such partnerships fail to rise to an adequate level of standard of care, then tort claims may be sustained against the government, not to mention the resulting significant political fallout. Industry must also consider their vulnerabilities and, where necessary, address them appropriately with government.

Although what is reasonable today is likely well beyond what existed prior to 9-11, ultimately knowing exactly what legal liabilities would result from a failure to collaborate in the interests of national security, is for the time being, based more on enlightened supposition than hard legal fact. More time is required to better appreciate this legal dimension.

Nevertheless, governments and the private sector should feel obligated to do what they can to reduce risks by increasing their efforts to work much more closely together in protecting the public and securing the economy. ■

Jacques J.M. Shore is a partner in the Advocacy Department and Government Relations Practice Group at the Ottawa Office of Gowling Lafleur Henderson LLP. He graciously acknowledges the research assistance provided by Chris Schafer, a student-at-law at Gowlings.