



REPORT OF THE EVENTS  
RELATING TO MAHER ARAR

FACTUAL BACKGROUND

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VOLUME II

Commission  
of Inquiry into  
the Actions  
of Canadian  
Officials  
in Relation  
to Maher Arar

The Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar as originally submitted to the Governor in Council included some material which in this published version has been omitted in the interests of national security, national defence or international relations (indicated by [\*\*\*] in the text). The decision to omit this material is made by the Government of Canada, and does not represent the views of the Commission of Inquiry.

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# IV

## RELEASE AND RETURN TO CANADA

### 1. MR. ARAR'S RELEASE

The news that Mr. Arar was about to be released first emerged in the early morning of October 4, 2003 when Minister Graham received a phone call from Syrian Foreign Minister Shara'a. Minister Graham was in Rome for a NATO summit at the time. The Syrian Minister told Mr. Graham that Mr. Arar was being released as a result of the Canadian Prime Minister's request to President Assad.<sup>1</sup> Minister Graham said they were elated by the news, but nervous about hastily announcing it to the public. Mr. Fry of the Minister's office notified Dr. Mazigh and Marlene Catterall, her MP. The message he conveyed to them was that they did not have Mr. Arar yet, but were very optimistic. Mr. Fry also spoke to officials in the Middle East Division of DFAIT, including the Director responsible for Syria, and asked that he be told as soon as there was word that Mr. Arar was actually back in Canadian hands.<sup>2</sup>

The next day, in Damascus, the Syrian Military Intelligence called the Chargé d'Affaires at the Canadian Embassy, Tracy Reynolds. (Mr. Pillarella was no longer the Ambassador to Syria, and Mr. Reynolds was the next most senior official.) The Syrians asked that Mr. Reynolds and Mr. Martel come to General Khalil's office that day.<sup>3</sup> Mr. Martel gave immediate instructions at the Embassy to book a flight, hoping that he and Mr. Arar might leave the country that night.<sup>4</sup>

Mr. Martel and Mr. Reynolds drove to General Khalil's office at the Palestine Branch, without going through the usual routine of meeting downtown and being driven there by the Syrians. Mr. Arar would later tell Mr. Martel that he saw them arriving in a van, and knew then that he was going to be set free.<sup>5</sup>

After an initial meeting with General Khalil and other Syrian officials, Mr. Martel spotted Mr. Arar outside the door, and he was soon brought in to sit

with everybody.<sup>6</sup> General Khalil informed his guests that Mr. Arar had been acquitted by the judge and was free to go.<sup>7</sup> General Khalil then said something, either to the effect that Mr. Arar had been kept for terrorist activities, or that he was now under surveillance for terrorist activities.<sup>8</sup> The two Canadian officials also received the message that documents related to Mr. Arar would be released in November, and documents related to criminal matters would be released to the Embassy later. (These documents were never received, even though the Embassy made further inquiries about them.)<sup>9</sup>

Mr. Martel asked whether Mr. Arar could leave that night, and the General said yes. They stayed about 45 minutes or so, to be polite.<sup>10</sup> Upon leaving, General Khalil reportedly told Mr. Martel, in reference to Mr. Arar, to “watch him, watch him,” to which Mr. Martel replied that he need not worry, Mr. Arar was going with him. Apparently, on departure, General Khalil handed Mr. Reynolds a document to be sent back to Canada. Mr. Martel did not view the document.<sup>11</sup> Then everybody but the General went down to the car together.<sup>12</sup>

Mr. Martel made the following notes while in the car: “Computer returned. Arar is leaving with all of his belongings. [General] ordered him transferred to better prison 45 days ago. [Mr. Arar] says he has really been well treated.”<sup>13</sup>

Ms. Catterall would later learn from Mr. Arar that he had been brought to a court that day, without knowing why. He reportedly was told that he was released, but did not really believe it.<sup>14</sup> Mr. Arar would later report to Mr. Martel that the Syrians likely brought him before a judge to make it legal to let him go.<sup>15</sup> Ms. Pastyr-Lupul also heard that it was not even clear that an actual trial took place on the day Mr. Arar was released. Whatever happened, there was to be no case. Canadian officials were not notified of a trial, no lawyer was present, and no one was ever advised of the charges against Mr. Arar.<sup>16</sup>

Some evidence exists indicating that Mr. Arar was forced to sign a confession prior to release. This is mentioned in a human rights report on Syria prepared by the Canadian Embassy in Syria. Without more information, it is difficult to say whether this is true, or whether this merely refers to the “confession” extracted from Mr. Arar, through torture, earlier on in his detention.<sup>17</sup> Mr. Pardy did testify, however, that being forced to sign a confession before release is almost standard in countries like Syria. The confession is then used as an intimidation factor, possibly against family members, or against Mr. Arar should he wish to return to Syria.<sup>18</sup>

## 2. EXPLANATIONS OF HIS RELEASE

Almost everyone who was asked the question was willing to speculate about the reasons for Mr. Arar's release. Since the Syrian government declined the invitation to participate in this Inquiry, the truth may never be known.<sup>19</sup> The likely answer is that there were numerous contributing factors.

What follows is a list, in no particular order, of some of the factors that have been suggested in testimony before this Inquiry:

- The Syrians were feeling increasingly isolated and looking for support from elsewhere. Among their neighbours, Saddam Hussein (a former ally) was gone, Jordan was an ally of the Americans, Turkey was a member of NATO, and tensions were mounting in Lebanon. In the West, Europe was placing pressure on Syria, and relations with the United States were deteriorating, despite the Syrians' earlier hopes that co-operation with the United States would somehow be beneficial. One likely reason for the deterioration in U.S.-Syrian relations was the threat of American sanctions against Syria, aimed at restoring Lebanese sovereignty.<sup>20</sup>
- The Syrians saw Canada in a favourable light because it was not participating in the Iraq war; this made up, perhaps, for Canada's earlier listing of Hezbollah as a terrorist organization in the *Criminal Code of Canada*.<sup>21</sup>
- The Syrians had no evidence that implicated Mr. Arar in terrorism, and, in accordance with previous public statements of the Syrian ambassadors to Ottawa and Washington, Mr. Arar might have been released once this was firmly established.<sup>22</sup>
- The Syrians thought that by releasing Mr. Arar, they would somehow improve their human rights reputation.<sup>23</sup>
- The Prime Minister's letter to President Assad influenced the Syrians, as it amounted to a clear articulation of a position from the very top of the Canadian government, and was delivered by Senator De Bané, who, according to Mr. Parfy, had "entrée" with senior leaders in the Middle East. As noted, this letter was cited by the Syrian Foreign Minister when he announced the release to Minister Graham. In the same vein, the months of work by Canadian officials to secure Mr. Arar's release likely had an effect, although the early mixed messages coming from Canadian officials might have slowed Mr. Arar's return.<sup>24</sup>
- Minister Graham's conversation with the Secretary General of the Arab League, shortly before Mr. Arar's release, may have had some effect. He

was a powerful person in the Arab world, and a call from him would have carried weight.<sup>25</sup>

- Some witnesses said the public pressure, media strategies and the public campaign in Canada made things worse, and others said it had a positive effect in securing Mr. Arar's release. Those who supported the public campaign pointed out that the Prime Minister's letter likely came as a result of public pressure, that the August 14, 2003 consular visit, and subsequent transfer of Mr. Arar to Sednaya Prison, may have been a direct result of public speculation of torture, and that, in some cases, quiet diplomacy does not work. Those who worried about the negative consequences of publicity pointed out that embarrassing a foreign government was dangerous, and often caused them to harden their stance.<sup>26</sup> Mr. Parady pointed to the loss of control that occurs with media involvement, leading, for example, to positive as well as negative stories about Mr. Arar. He felt that the effect of publicity in this case was "entirely negative."<sup>27</sup>

### 3.

#### THE TRIP HOME

When Mr. Arar was released on October 5, Mr. Martel took him to the Canadian Embassy in order to make travel arrangements for that evening. Once everything was in order, they headed to a shopping centre, where Mr. Arar was able to purchase shoes, and then on to Mr. Martel's home to allow Mr. Arar to prepare for departure. The two men arrived at Damascus Airport around 10 p.m.<sup>28</sup>

The trip back to Canada took over 24 hours, as they travelled from Damascus to Amman, Jordan,<sup>29</sup> then to Paris and finally to Montreal.<sup>30</sup> They arrived in Montreal on the evening of October 6.<sup>31</sup>

Myra Pastyr-Lupul, the case management officer for the Middle East Region at DFAIT Headquarters, was thrilled to hear about Mr. Arar's release. After she had spoken with Mr. Martel, it was agreed that he would make contact once they arrived in Paris for a layover. When they arrived in Paris, Ms. Pastyr-Lupul arranged for Mr. Arar to speak to his wife, with whom he had not spoken for more than a year.<sup>32</sup>

The next morning, Ms. Pastyr-Lupul arranged for a van to take Dr. Mazigh, Mr. Arar's family and other members of Mr. Arar's support team to Montreal. She also arranged for a private lounge in which the Arar family could meet as soon as he left the plane.<sup>33</sup> Konrad Sigurdson, the new Director General of the Consular Affairs Bureau, Ms. Pastyr-Lupul and the two members of Parliament who had visited him in prison, Marlene Catterall and Sarkis Assadourian, were also at the airport.<sup>34</sup>

When Mr. Arar arrived in Montreal, he was quickly reunited with his family, after which he made a brief statement to the assembled media. (Mr. Arar told Mr. Martel during the trip home that he did not want a press conference as soon as he returned to Canada because he was concerned about other Canadians still in Syrian detention.) The family, his supporters and the government representatives then attended a homecoming celebration at the family home in Montreal.<sup>35</sup>

### 3.1

#### MR. ARAR'S STATEMENTS TO MR. MARTEL

During the trip home, Mr. Arar revealed bits and pieces about his time in Syrian detention to Mr. Martel. It was obvious to the consul that Mr. Arar had been through a lot and did not want to fully discuss his experience at that time. Mr. Martel was aware that his mandate was to accompany Mr. Arar, to give him support and to ensure that he arrived home. Therefore, he did not ask Mr. Arar many questions. He let Mr. Arar speak when it suited him and he did not take notes of their discussions.<sup>36</sup>

The trip home was the first opportunity for Mr. Martel and Mr. Arar to speak privately, outside the reach of the Syrian authorities. Mr. Martel broached the subject of torture by telling Mr. Arar that there had been press reports about him being stuffed into a tire and subjected to electric shocks. Mr. Arar told him that these allegations were unfounded but then said "they have other means." He did not elaborate.<sup>37</sup> He did tell the consul that he had a "difficult time" in the first two weeks of detention and said something to the effect that "they hit me from time to time, but nothing really serious." Mr. Arar also said that after the initial interrogation, they got everything and then left him alone.<sup>38</sup>

Mr. Martel believed that Mr. Arar placed less importance on his physical treatment than on the conditions of detention at the Palestine Branch. What Mr. Martel heard from Mr. Arar about the detention conditions was, in the words of Mr. Martel, "appalling."<sup>39</sup>

Mr. Arar told him he was kept in an underground cell in darkness, except for the light that would come in through a small opening on the top of the cell. Cats would sometimes walk over the small opening and relieve themselves on him. The only time he saw daylight was when he was brought to see Mr. Martel for a consular visit. His cell measured 3' x 6' x 7' and he slept on a thin mattress on the floor. He was given two bottles: one to drink from and one to relieve himself in. The toilets were outside the cell and he could use them only three times a day. He was allowed to do his laundry only once a week, in the toilet area in darkness.<sup>40</sup>

As noted in the previous chapter, General Khalil kept his promise and transferred Mr. Arar to Sednaya Prison six days after the last consular visit on August 14, and this transfer surprised Mr. Arar. Apparently, during the last consular visit, when General Khalil and Mr. Arar had a direct conversation in Arabic, Mr. Arar expressed his unhappiness with the detention conditions, and this led to the move to Sednaya.<sup>41</sup> Mr. Arar remained there until his release.

(Mr. Arar's counsel disputed Mr. Martel's interpretation that Mr. Arar placed less importance on the abuse that he suffered at the start of his detention. Mr. Martel agreed that it was possible that what Mr. Arar conveyed to him was that he had been in detention for so long that the beatings in the first two weeks became less significant as the days, weeks and months went by, alone in a cell in deplorable conditions. Nevertheless, he still felt that during their discussion Mr. Arar placed less emphasis on the early period of his detention.)<sup>42</sup>

Mr. Arar also offered some comments on his time in Jordanian custody. Although the Syrian authorities acknowledged receiving Mr. Arar on October 21, Mr. Arar told Mr. Martel that he spent only about eight hours in Jordan. The Jordanian authorities were rough with him during this brief period until he informed them that he had an important relative in the Jordanian government.<sup>43</sup>

All in all, Mr. Martel said that he had no reason to doubt that Mr. Arar was telling him the truth about his experience.<sup>44</sup>

#### 4.

### THE OCTOBER 7 DEBRIEFING

On October 7, Mr. Martel met with officials from DFAIT Headquarters to debrief them on Mr. Arar and his treatment in Syria. As has been mentioned, Mr. Martel did not take any notes during his discussions with Mr. Arar on his way home. Therefore, he spoke from memory at the meeting.<sup>45</sup>

The notes taken by various participants at the debriefing were fairly consistent in documenting what Mr. Martel had to say about how Mr. Arar was treated and the conditions of his detention. Mr. Martel did not dispute his colleagues' record of what he said. In regard to Mr. Arar's treatment, Mr. Martel told them that Mr. Arar was "beaten" occasionally during his first two weeks in Syrian detention, that he was not forced into a tire or subjected to electric shocks, and that he had suffered mentally.<sup>46</sup>

The information shared with DFAIT officials during the debriefing soon reached CSIS. A CSIS official circulated an e-mail within CSIS about what he had learned from a conversation with a DFAIT official who had attended the meeting. This e-mail stated that Mr. Arar claimed that he was not physically abused, except for being slapped a few times while in Jordanian custody and by the

Syrian authorities during the initial period of detention. However, Mr. Arar was held in a small dark cell for over a year, which had a serious effect on his health and mental well-being. The e-mail ended with the conclusion that, based on what came out of the debriefing, “[Mr. Arar] was not subject to the physical abuse that is commonly associated with torture.”<sup>47</sup>

## 5.

### MR. ARAR MEETS WITH THE MINISTER — OCTOBER 29

Mr. Arar and Dr. Mazigh met with Minister Graham and officials from the office of the Minister and DFAIT on October 29. The meeting was first limited to a 30-minute face-to-face encounter of Mr. Arar and Dr. Mazigh with Minister Graham and Robert Fry, his senior policy adviser. The meeting was later expanded to include, among others, Mr. Sigurdson; John McNee, Assistant Deputy Foreign Minister for the Middle East; Alex Neve of Amnesty International; James Lockyer, a criminal lawyer; and Kerry Pither, Coordinator of the Solidarity Network.<sup>48</sup>

During the private meeting between the Arars and Minister Graham, Mr. Arar shared information about his detention that was similar to what Mr. Martel had described to DFAIT officials at the debriefing. Mr. Arar also asked the government to make clear that not everything that the media reported about him was true.<sup>49</sup>

The larger meeting with the Arars was attended by about 20 people. Minister Graham left partway through the meeting.<sup>50</sup> During the second meeting, the issue of a public inquiry was discussed, as well as the leaks of information about Mr. Arar and the cases of Messrs. Almalki and El Maati (who were still in detention in Syria and Egypt, respectively).<sup>51</sup>

All participants at the October 29 meeting agreed to keep it confidential until Mr. Arar chose to address the media about his experience. The next day, however, it was reported in the press that Mr. Arar had told the Canadian government that he had been tortured.<sup>52</sup>

Mr. Arar contacted Mr. Fry to express his displeasure with the government. He had shared information with them in confidence and now felt betrayed. Mr. Fry was not sure how the media had obtained the information but he was confident that the leak did not come from the Minister’s office. In any event, Mr. Fry immediately sent an e-mail to senior DFAIT officials, reminding them to keep quiet about the meeting.<sup>53</sup>

## 6.

### MR. ARAR'S PRESS CONFERENCE

Mr. Arar revealed his story to the media for the first time at a press conference on the morning of November 4.<sup>54</sup> Before the press conference, DFAIT officials were provided with a written copy of Mr. Arar's chronology of events from September 26, 2002 to October 5, 2003.<sup>55</sup>

Reading from a prepared statement, Mr. Arar briefly discussed his background and then gave a detailed account of what had happened to him from his arrival in New York until his release from Syrian detention.<sup>56</sup> Both Minister Graham and Mr. Fry, who had met with Mr. Arar privately on October 29, testified that what Mr. Arar said at his press conference was fairly consistent with what he had told them in private.<sup>57</sup>

Shortly after the press conference, Minister Graham met the press informally. During this scrum, he said that he would call in Syria's ambassador to Canada to express Canada's concerns about Mr. Arar's treatment.<sup>58</sup>

As promised, that same day, Minister Graham met with the Syrian ambassador and registered Canada's protest against Mr. Arar's treatment. After the meeting, the Minister's office issued a press release calling on the Syrian government "to take [the] allegations of torture seriously and to act quickly to investigate all of the details of Mr. Arar's detention, as well as those of other Canadians being held in Syria."<sup>59</sup>

Even after the meeting with the Syrian ambassador, the push for a response from Syria continued. On November 5, DFAIT Headquarters instructed Brian Davis, the new Canadian ambassador in Damascus, to follow up on the request in the press release with Syria's Ministry of Foreign Affairs. It was suggested that a meeting be arranged with the Deputy Foreign Minister, Mr. Mouallem. Ottawa wanted to stress six points with Mr. Mouallem, including the need for a prompt and thorough investigation by the Syrian authorities of Mr. Arar's allegations of torture.<sup>60</sup>

A meeting was finally arranged between Ambassador Davis and Mr. Mouallem for November 30. A diplomatic note dated the same day from the Canadian Embassy to Syria's Ministry of Foreign Affairs was also prepared. The diplomatic note mentioned that Mr. Arar had made allegations of torture and mistreatment against the Syrian authorities at his press conference on November 4. Then the following request was made: "Given the seriousness of these allegations, which, if true, would be inconsistent with Syria's obligations under the International Covenant on Civil and Political Rights, the Government of Canada requests a formal investigation into the allegations and an official reply to this

note on the results of that investigation.”<sup>61</sup> Ambassador Davis intended to present this diplomatic note to the Deputy Foreign Minister during the meeting.<sup>62</sup> However, when he arrived at the Ministry of Foreign Affairs on November 30, he was told that Mr. Mouallem was out of town and unable to return in time for the meeting. It was rescheduled for December 9.<sup>63</sup>

Mr. Martel testified that he did not know whether the Syrian government ever responded to the diplomatic note.<sup>64</sup>

7.

## MR. MARTEL'S MEMORANDA

As mentioned in Section 6, prior to Mr. Arar's press conference, DFAIT officials were provided with a copy of his chronology of events. Mr. Fry noticed that Mr. Arar's account of the August 14 consular visit stated that he had confirmed to the Canadian consul that he had been tortured. Shortly after the visit, Minister Graham reassured the public that Mr. Arar had not been tortured. Mr. Fry knew that if this inconsistency was picked up by the media, the Minister's office would be asked to explain which of the two versions of events was true.<sup>65</sup>

In preparation for Mr. Arar's press conference, Mr. Fry assembled talking points for Minister Graham. It was unusual for Mr. Fry to do this, but he felt it was necessary under the circumstances. The talking points were only a page long. Not surprisingly, most of the points addressed the August 14 consular visit.<sup>66</sup> As a further step, which Mr. Fry also described as unusual, he contacted Mr. Martel in Damascus to see if he could help sort out the inconsistency.<sup>67</sup>

Around the same time that the Minister's office was dealing with Mr. Arar's chronology, the media was reporting that Mr. Arar had been tortured during the first two weeks of his detention in Syria. This prompted DFAIT Headquarters to e-mail the Canadian Embassy in Damascus on October 31. The e-mail noted that the torture allegation seemed to be inconsistent with statements made by Mr. Arar to Mr. Martel during the consular visit on August 14 (as detailed in the consular report and an e-mail to Ms. Pasty-Lupul on the same date) and on October 6 while en route to Canada. The Canadian Embassy was asked to confirm the information filed by Mr. Martel on August 14 and Mr. Arar's comments during his travel back to Canada. The Embassy was also asked to provide its assessment of the conditions of detention, which could be considered "degrading" or "inhumane." Furthermore, Mr. Martel was to provide his notes from the August 14 meeting.<sup>68</sup>

A memorandum in reply was drafted by Mr. Martel, approved by Ambassador Davis and sent to DFAIT Headquarters on November 3. In it, Mr. Martel stood by the content of his consular report and his e-mail to

Ms. Pastyr-Lupul on the August 14 consular visit. However, he emphasized that Mr. Arar had been speaking in the presence of Syrian officials, and the nature of the conversation had to be taken in the context of what was “apparent freedom of speech.” He noted that Mr. Arar told him after his release that he decided from the first consular visit that he had to protect regular consular access, without which he would have committed suicide. For this reason, Messrs. Martel and Davis felt that more credence should be given to what Mr. Arar said after his release than to what he had said in the presence of Syrian Military Intelligence officers.<sup>69</sup>

Mr. Martel wrote that, after Mr. Arar’s release, he pressed him for answers on the question of torture. According to Mr. Martel, Mr. Arar confirmed that he had not been beaten. Instead, he said “they have other means,” but did not elaborate. He did say that his time in detention had destroyed him mentally. Mr. Arar also gave details about the prison conditions. (These details are similar to what is written above in Section 3.1.) Mr. Martel wrote that they were unable to verify the accuracy of the information about the prison conditions because access to the cells was not authorized.<sup>70</sup>

Mr. Martel also wrote that the press stories relating to the tire ordeal or the use of electric shocks were unfounded, as Mr. Arar had stated during their private conversation. He noted that, as mentioned at the October 7 debriefing, torture can be defined in several ways. In the Middle East, solitary confinement for months, in the conditions described by Mr. Arar, would be the norm but would certainly be called inhumane in Canadian society.<sup>71</sup>

Near the end of the memorandum, Mr. Martel indicated that the Canadian Embassy shared Headquarters’ concern about the possibility of Mr. Arar going public and claiming that he had been tortured.<sup>72</sup>

Mr. Martel’s reply that Mr. Arar confirmed that he had not been beaten was in marked contrast to what he told DFAIT officials in early October. At the October 7 debriefing, Mr. Martel told officials that Mr. Arar had said that he was beaten during the first two weeks of his detention. Mr. Martel explained that both the October 7 debriefing and the November 3 memorandum were constructed from memory. He did not make any notes at the October 7 debriefing and he did not see the notes of the other participants. He acknowledged that various participants at the meeting recorded what he had to say about Mr. Arar being beaten; therefore, he must have said it. He had a vague recollection of Mr. Arar telling him that he had been hit in the beginning but that it was not very serious. For this reason, when writing the memorandum a month later, he simply forgot what Mr. Arar had told him and what he had reported at the October 7

debriefing. He also mentioned that Ottawa wanted an urgent reply; thus, the memorandum was written quickly.<sup>73</sup>

Mr. Martel testified that omitting the reference to Mr. Arar telling him that he was beaten from the memorandum was not to protect the Syrian government or to cover for failing to report that Mr. Arar had been mistreated. The omission came down to a failure to remember what he had been told.<sup>74</sup>

The November 3 memorandum did not settle the matter of what exactly Mr. Arar had told Mr. Martel about his treatment in Syria, and it continued to be an issue for DFAIT Headquarters. The focus this time was on the contents of Mr. Arar's chronology, which claimed that Mr. Arar had confirmed to Mr. Martel during the August 14 consular visit that he was tortured at the beginning of his detention. In a series of e-mails between Ottawa and Mr. Martel on November 17 and 18, he stated that the consular report of August 14 accurately reflected what Mr. Arar had told him during the consular visit, including that he had not been beaten or tortured. Mr. Martel also repeated earlier comments that, during the trip back to Canada, Mr. Arar never mentioned that he had been beaten during the first two weeks of his detention and instead had said "they have other means."<sup>75</sup>

When Mr. Martel was again confronted with the statements he made to DFAIT officials at the October 7 debriefing, he again pointed to a memory lapse to explain the contradictory statement in the e-mail. He repeated that he had forgotten that Mr. Arar had told him that he had been hit at the beginning of his detention because Mr. Arar had told him that the beating was not serious. Mr. Martel replied to the inquiry from Ottawa without having the benefit of seeing anyone's notes from the October 7 debriefing, and he insisted that he was not trying to conceal anything.<sup>76</sup>

Mr. Martel repeatedly stated in his testimony that he believed what Mr. Arar told him concerning his treatment in Syria and that his omissions in the November 3 and November 17-18 reports to DFAIT officials were not deliberate. However, a conversation between Mr. Martel and a Canadian official in early 2004 appeared to call into question whether Mr. Martel believed Mr. Arar.

A Canadian official prepared a report summarizing his conversation about Mr. Arar with Mr. Martel at the Canadian Embassy in Damascus on February 8, 2004,<sup>77</sup> and this official believes that his report accurately reflects what Mr. Martel told him.<sup>78</sup>

According to the report, during the conversation, Mr. Martel said that the information that Mr. Arar shared with him in interviews just before he was released from Syrian detention contradicted the information that Mr. Arar was then giving to the media. Mr. Martel told the Canadian official that he believed the

information he had received from Mr. Arar was likely more accurate because it was “fresher” and not tainted by the spectre of big money and lawsuits. Mr. Martel allegedly called Mr. Arar a liar and said that if he was asked to attend an inquiry, he would gladly testify about the inconsistencies and irregularities involving Mr. Arar.<sup>79</sup>

Mr. Martel disputed this record of events. He believed that this portion of the report did not accurately capture what he was trying to communicate to the official. Mr. Martel testified that, at the time of the conversation, a civil lawsuit was on his desk. It had been filed by Mr. Arar against the Government of Canada for the way in which he was represented during his ordeal. Mr. Martel was named as a defendant in the lawsuit. He was trying to point out to the Canadian official that what Mr. Arar had told Mr. Martel in previous interviews did not match what was alleged in the lawsuit.<sup>80</sup>

Mr. Martel’s testimony further suggested that the lawsuit the Canadian official saw on his desk prompted the discussion of lawsuits and money. In relation to the lawsuit, the official asked Mr. Martel why Mr. Arar would now change his story. Mr. Martel told him that this was a question which only Mr. Arar could answer. He then speculated that perhaps money was an issue. The conversation did not go any further on this point.<sup>81</sup>

Mr. Martel was adamant that he never called Mr. Arar a liar. Mr. Martel considered his own reputation to be tarnished in the lawsuit, and he was trying to express to the official that what was alleged in the lawsuit in relation to the service he had provided Mr. Arar during his detention was a “big lie.” During his testimony, Mr. Martel wanted to state clearly that he did not believe Mr. Arar ever lied to him.<sup>82</sup>

Mr. Martel’s explanation that his comments were directed at a lawsuit filed by Mr. Arar hit a snag during his testimony. Mr. Arar’s lawsuits against the Government of Canada (including Mr. Martel) in both the federal and provincial courts were filed on April 2, 2004,<sup>83</sup> two months after the conversation between Mr. Martel and the Canadian official took place. As of February 8, 2004, Mr. Arar had not yet filed a lawsuit against the federal government.

Early in his testimony, Mr. Martel stated that he could not confirm that the meeting took place on February 8, 2004, but he did not dispute it either. He knew that he met with the official twice and during the second meeting the lawsuit was on his desk.<sup>84</sup> Later, when presented with the April 2 date for the filing of the lawsuits, and the report and testimony of the official confirming the February 8 date of the meeting, Mr. Martel said that the February 8 date might not be correct. He insisted that all he could say for certain was that the Federal Court lawsuit was on his desk when he had the conversation with the official.<sup>85</sup>

The Canadian official testified that, during the same meeting, they also discussed the case of Muayyed Nureddin, another Canadian who was released from Syrian detention in January 2004.<sup>86</sup> In fact, in addition to the report filed on Mr. Arar, the Canadian official filed a second report detailing what Mr. Martel had told him about Mr. Nureddin at this meeting.<sup>87</sup> When Mr. Martel was asked if he remembered discussing both Messrs. Arar and Nureddin at the same meeting, he said that the official's recollection might be correct but he could not be certain. Regardless, he repeated that a lawsuit was on his desk when he met with the official and he was not simply trying to rationalize his comments about Mr. Arar by pointing to information he received after the meeting took place.<sup>88</sup> Mr. Martel did not produce the statement of claim to which he referred repeatedly, and did not shed any light on where this document could be found.<sup>89</sup>

Although he was not certain that Mr. Nureddin had been discussed at this particular meeting with the Canadian official, Mr. Martel did point to Mr. Nureddin's case when trying to explain certain comments recorded by the Canadian official in his report on Mr. Arar. Mr. Martel believed the official was confusing the stories of Mr. Arar and Mr. Nureddin.<sup>90</sup>

The comments in question related specifically to the treatment that Mr. Arar received from his Syrian jailers. According to the report, Mr. Arar told the consul that during his first two weeks in Syrian custody, "they got everything and then they left me alone." During this period, the Syrian authorities used some physical punishment on him by beating with a thick black plastic cable the soles of his feet, his elbows and places where there would be no scarring. Mr. Arar said that the Syrians appeared to be satisfied with his answers and did not use any more physical punishment or interrogate him further after this. Mr. Martel pointed out to the official that Mr. Arar was now saying that he had been tortured for longer periods and more brutally. He opined that this change in story was likely linked to lawsuits or to certain pressure groups with political agendas.<sup>91</sup>

When asked to explain this portion of the report, Mr. Martel acknowledged telling the official something about Mr. Arar facing mistreatment during the first two weeks of his detention.<sup>92</sup> But he insisted that the details of the mistreatment laid out in the report applied to Mr. Nureddin, not Mr. Arar.<sup>93</sup> An examination of reports on Mr. Nureddin filed by both Mr. Martel and the Canadian official (based on his discussion with Mr. Martel) did not clear up Mr. Martel's testimony.<sup>94</sup>

Mr. Martel believed that it was Mr. Nureddin, not Mr. Arar, who told him that the Syrians appeared to be satisfied with his answers and did not use any more physical punishment or interrogate him after this. However, he was unable

to support this assertion with information in his report on Mr. Nureddin.<sup>95</sup> The Inquiry has also seen notes taken by DFAIT officials at the October 7 debriefing in which Mr. Martel told them that the Syrian authorities were rough with Mr. Arar early on and then left him alone.<sup>96</sup>

As for the sentence stating that Mr. Arar was now saying that he was tortured for longer periods of time and more brutally, Mr. Martel said that he might or might not have said this to the official. He was aware that there had been press reports offering a more detailed account of Mr. Arar's treatment. Mr. Martel believed it was possible that the official had picked this up from the press reports on his own or Mr. Martel might have mentioned the press reports.<sup>97</sup>

The remainder of the Canadian official's report of their conversation was clearly focused on Mr. Arar, as it covered such topics as Mr. Arar's transfer from the United States to Jordan and then to Syria, and his consular visits with Mr. Martel.<sup>98</sup>

Near the end of the report, the Canadian official wrote that Mr. Martel was annoyed by suggestions that Canada did not do enough to release Mr. Arar. Mr. Martel told him that Mr. Arar received more attention, including input from the Prime Minister, parliamentarians and other senior DFAIT officials, than any other consular case in his many years of consular service.<sup>99</sup>

Mr. Martel refuted any suggestions that he thought Mr. Arar should be grateful to DFAIT officials. Mr. Martel said that Mr. Arar was a consular client and was entitled to all of the services under the consular regulations. Although the Canadian official wrote that Mr. Martel was annoyed, Mr. Martel explained that what he expressed to the official was disappointment that DFAIT was being criticized for not having done enough for Mr. Arar. At one point, he told the official: "Under the circumstances that we found ourselves in, imposed by the country Syria, I think that we did the maximum and beyond. Never had we devoted so much time collectively to a single case, to my knowledge." Thus, although the official wrote that Mr. Martel was annoyed, Mr. Martel insisted that this is not what he had said.<sup>100</sup>

## 8.

### THE AMERICAN POSITION ON MR. ARAR'S DETENTION AND REMOVAL, NOVEMBER-DECEMBER 2003

On November 5, 2003, the day after Mr. Arar's press conference, Minister Graham telephoned Secretary Powell about the case.<sup>101</sup> Robert Wright, of the PCO, testified that Minister Graham's message was twofold: first, that the Minister needed more details on the U.S. allegation that Canada was involved in Mr. Arar's detention and removal; and second, that Mr. Arar had given a

powerful press conference, and that the Canadian government was under pressure to call a public inquiry into the case.<sup>102</sup>

The Minister said that after Mr. Arar's press conference, the United States looked complicit in sending him to Syria to be tortured, and mentioned that Mr. Arar had been denied a lawyer in New York. Secretary Powell responded that his understanding was that U.S. law enforcement officials had contacted Canadian consular officials in New York and that there had been consular access. Minister Graham agreed, but said that the immigration hearing had taken place without Canada's knowledge and without Mr. Arar's lawyer's knowledge.<sup>103</sup> Minister Graham also wanted to know how the United States had received Mr. Arar's lease.<sup>104</sup>

The Minister indicated that after Secretary Powell told him that information had been provided by Canadian authorities, he had talked to various agencies concerned. When his investigation revealed nothing,<sup>105</sup> the Prime Minister had charged him with calling Secretary Powell to get assistance from him and Attorney General Ashcroft to determine the identity of the alleged Canadian source.<sup>106</sup> Minister Graham was thus in the awkward position of asking the U.S. Secretary of State to look into who in the Canadian government might have provided the Americans with information.<sup>107</sup> Secretary Powell undertook to look into the matter immediately.<sup>108</sup>

Minister Graham testified that as of November 5, 2003, Secretary Powell's position was still that somebody in Canada was involved,<sup>109</sup> despite the fact the American Embassy had contradicted that suggestion in August.<sup>110</sup>

During the call, Minister Graham emphasized his concern that the Arar case could have a negative impact on bilateral relations between Canada and the United States, especially if things progressed to the stage of a public inquiry. According to an internal DFAIT report, Secretary Powell replied in agreement.

*Ambassador Kergin Is Called to the U.S. National Security Council,  
November 6, 2003*

Events moved quickly in early November 2003. In the House of Commons Question Period on November 5, the Prime Minister announced the essence of the Graham-Powell telephone call,<sup>111</sup> i.e., that the Government had asked the American authorities for more information on Canadian involvement in Mr. Arar's arrest and/or removal. In Mr. Graham's words, "So the Prime Minister ratcheted it up. The Prime Minister's level, that, as you can imagine, got the attention of the Ambassador and everybody else."<sup>112</sup>

The Prime Minister's comments generated wide media coverage. On November 6, the *Ottawa Citizen* ran an article entitled "PM to U.S.: Name moles

in Arar case: PM wants names of tipsters behind torture of Canadian.”<sup>113</sup> The article stated that the Prime Minister had asked the United States to hand over the names of Canadian law enforcement officials who might have provided intelligence that led to Mr. Arar’s deportation to Syria. It also reported that the Prime Minister told the House of Commons that Secretary Powell had promised to reveal the “Canadian mole” who had provided security information on Mr. Arar to the U.S. intelligence community. The article quoted the Prime Minister as saying, “We want to know the name of the person who might be involved. If such a name exists, they will give it to Canada... The name will be given and we will act accordingly.”<sup>114</sup>

The *Toronto Star* ran a related article entitled “Chrétien blames the U.S. for deporting Arar to Syria; Syrian envoy says Canadian jailed as favour to U.S. ‘We believe there is no case against him,’ diplomat says.”<sup>115</sup> The article reported that “Prime Minister Jean Chrétien blames the United States for deporting Canadian citizen Maher Arar to Syria, where he was jailed and tortured for 10 months as a suspected terrorist,” and quoted the Prime Minister as saying in the House of Commons, “fists clenched,” “The people who are responsible for the deportation of this gentleman to Syria are in the government of the United States, not the government of Canada.”<sup>116</sup> It also stated that the Prime Minister had announced that Secretary Powell had promised to hand over the names of any Canadians involved in Mr. Arar’s arrest or deportation in 2002.

Also on November 6, Michael Kergin, Canada’s Ambassador to the United States,<sup>117</sup> was called to a meeting at the National Security Council with Frances Townsend, the U.S. National Director for Combating Terrorism and Deputy National Security Advisor.<sup>118</sup> Two other people were present: Tom Shannon, United States Senior Director for Western Hemisphere Affairs, and Peter Boehm, Canada’s Minister for Political and Public Affairs at the Embassy in Washington, D.C.<sup>119</sup> Mr. Kergin testified that to be called in by the National Security Council in such circumstances was unusual.<sup>120</sup>

Ms. Townsend transmitted to Ambassador Kergin the substance of a meeting that had taken place that morning at the White House. She indicated that senior administration officials were irritated that Prime Minister Chretien had stated that the decision to remove Mr. Arar was made unilaterally by U.S. officials. In their view, it was a joint decision.

Ms. Townsend’s message was that “Arar’s name had ‘popped up’ in the watch listing and had accordingly been discussed with ‘members of the Government of Canada’ as had been the practice in our good intelligence relationship.”<sup>121</sup> Ambassador Kergin was advised that the U.S. Government in

removing Mr. Arar to Syria attached a condition that he not be harmed which was conveyed to the Syrians.<sup>122</sup>

Mr. Boehm's report on the meeting details the Canadian Embassy's response: first, that the message of presidential concern had been noted and would be conveyed; second, that the Arar case had assumed a high public profile in Canada and that the government wished to avoid a public inquiry; and third, that the Arar case had to be managed jointly and that there were no instant solutions, as intelligence issues are always particularly sensitive.<sup>123</sup>

After the meeting, Mr. Kergin telephoned the Deputy Minister of Foreign Affairs, Peter Harder, and reported on the discussion. Mr. Harder advised Mr. Kergin to follow up on who in the Canadian government was party to this joint decision. Mr. Kergin followed up with Ms. Townsend but never heard back from her or other U.S. officials as to who in the Canadian government was party to any joint decision.

Several steps were taken in response to the presidential concern. Jim Wright spoke with the U.S. Embassy in Ottawa; and Robert Wright from PCO had discussions with American counterparts. At this time Ambassador Cellucci was starting to acknowledge publicly that the U.S. decision to remove Mr. Arar was unilateral.<sup>124</sup>

In a chance meeting with Ambassador Cellucci in Washington, D.C. on November 13, Mr. Kergin was advised by the Ambassador that Canadian officials were in no way implicated in the decision to deport Mr. Arar.

Mr. Kergin also reported that Deputy Prime Minister Manley had spoken with U.S. Homeland Security Secretary Tom Ridge on November 11, and that Secretary Ridge had made it clear that Secretary Powell would be the designated channel for discussion of the Arar issue.

*Solicitor General Easter Meets Attorney General Ashcroft — November 18, 2003*

During his tenure as Solicitor General, from mid-October 2002 to mid-December 2003, Wayne Easter met with United States Attorney General Ashcroft several times.<sup>125</sup> At the first meeting, on December 17, 2002, Mr. Easter did not raise the case of Mr. Arar; he testified that this was more appropriately the responsibility of the Minister of Foreign Affairs.<sup>126</sup> Nor did he raise the Arar case in a meeting with Mr. Ashcroft on July 14, 2003, although his meeting briefing materials provided a recommended response "in relation to issues surrounding the deportation of Maher Arar to Syria," and noted that a request to the U.S. for additional information on Mr. Arar was outstanding.<sup>127</sup>

At a November 18, 2003 meeting in Washington, D.C., the issue was at last discussed by the Canadian Solicitor General and the American Attorney General. Mr. Easter testified that he “raised very strenuously my concerns over the Arar issue.”<sup>128</sup>

Mr. Easter also testified that Mr. Ashcroft told him that only a small part of the information used by the United States against Mr. Arar had come from the RCMP.<sup>129</sup> Mr. Easter later publicly acknowledged that Canada had contributed information that led to Mr. Arar’s arrest.<sup>130</sup>

*“I Was Mistaken”-Secretary Powell’s Last Position, December 1, 2003*

On December 1, 2003, Secretary Powell telephoned Minister Graham with a number of answers to Mr. Graham’s prior questions. He confirmed that the United States alone, without consulting Canada, had made the decision to remove Arar to Syria, and that the decision had been based on information from various sources, chief among them the RCMP and CSIS.<sup>131</sup> To Minister Graham’s knowledge, this is the last statement of the Secretary of State’s position as to what happened in respect of Mr. Arar.<sup>132</sup>

A DFAIT chronology summarizes that call as follows:

Powell informs that (1) the Arar affair was triggered by enquiries by Canadian sources and that Arar would not have been on the US radar screen had he not been the subject of attention by Canadian agencies; (2) contrary to what he had alleged, Arar had not been inoculated with any substance while in US custody; (3) US law enforcement officials had informed the RCMP about Arar’s detention and the RCMP had informed the Consulate General in New York; and (4) no Canadian officials were consulted prior to the US decision to deport Arar. [Minister Graham] refers to a meeting the previous week of Solicitor General Easter and Attorney General Ashcroft when Easter raised the possibility of a bilateral protocol to deal with such cases in the future.<sup>133</sup>

Minister Graham recalls that Secretary of State Powell consistently said that “your guys knew what we were doing all along’ until the very end, when he said, ‘I was mistaken.’”<sup>134</sup>

## 9. LEAKS TO THE MEDIA

### 9.1 LEAKS PRIOR TO MR. ARAR'S RETURN

The evidence shows that over an extended period of time classified information about Mr. Arar was selectively leaked to the media by Canadian officials. The leaks date from July 2003, before Mr. Arar's return to Canada, to July 2005, during the course of this Inquiry.

By the summer of 2003, Monia Mazigh's efforts to bring her husband home had alerted the Canadian public to his predicament in Syria, and pressure was building on the Canadian government to secure his release. It was in this context that the first major leak to the media occurred.

On Thursday, July 24, 2003, page A1 of the *Ottawa Citizen* featured an article by Robert Fife entitled "Terror Threats in Ottawa: Two kinds of fear: Report says Syrian intelligence helped U.S. to foil al-Qaeda plot on target in Ottawa."<sup>135</sup> The article cited American journalist Seymour Hersh as reporting that Syrian intelligence had helped the United States avert a suspected attack against an American target in Ottawa.

The article went on to refer specifically to the deportation of Maher Arar to Syria the previous September, and to his continued detention there. Crediting anonymous Canadian officials, Mr. Fife wrote: "One official would only tell CanWest News Service that Mr. Arar, a 36-year-old Ottawa engineer, is a 'very bad guy' who apparently received military training at an al-Qaeda base." The article also noted that the unnamed government official refused to provide further details, attributing the need for secrecy to ongoing intelligence operations.

### 9.2 LEAKS FOLLOWING MR. ARAR'S RETURN

#### 9.2.1 The Graham Fraser and Jeff Sallot Articles

There were a number of information leaks following Mr. Arar's return to Canada on October 6, 2003.

An October 9, 2003 article by Graham Fraser in the *Toronto Star*<sup>136</sup> reported on the circumstances of Maher Arar's detention in the United States and deportation to Syria, citing extensive comments from "an official closely involved in the case." Speaking "on condition that he not be quoted by name," the official

said that the United States contacted Canadian security officials when Mr. Arar's name was noted on a passenger flight list. According to the unnamed official, the Canadians were asked "if you have anything on him [Arar]," and the United States was told in response, "Yes indeed... he is watched because he has been to Afghanistan several times."

The source said the Americans then asked if Mr. Arar would be charged if he was transferred back to Canada. Canadian officials responded that he would not. After some discussion of Mr. Arar's having lived in Boston at one time, and the requirements for charges under Canadian law, the unnamed official said that the conversation ended with the following statement by the Americans: "Obviously we can do nothing with you." According to the source, Mr. Arar was then transported to Jordan, without any notification to Canadian consular officials.

The next day, October 10, 2003, the *Globe and Mail* published an article by Jeff Sallot entitled "Arar was not tortured, officials say; Engineer held in 'very bad' conditions, suffered psychological stress."<sup>137</sup> The article cites unnamed Canadian government sources as saying Mr. Arar complained he was "roughed up" in Jordan and held in appalling physical conditions in a Syrian prison, but not physically tortured.

### 9.2.2

#### The CTV News Leak

On October 23, 2003, CTV broadcast an item entitled: "The case of Maher Arar takes more twists and turns"<sup>138</sup> on its 11 o'clock news program. Journalist Joy Malbon reported that "senior government officials in various departments" told the network that Mr. Arar had provided information to the Syrians about al-Qaeda, the Muslim Brotherhood, and radical cells operating in Canada.

Malbon also reported that "government sources say" Mr. Arar provided information to the Syrians about four other Canadians: Arwad al Bushi and Abdullah al Malki, both being held in a Syrian jail; Ahmed Abu al Maati, in custody in Egypt; and Mohamed Harkat.<sup>139</sup> According to the sources, Mr. Arar's revelation of this information led to his release from Syria.

This was the first time Mr. Arar was publicly alleged to have divulged information about other Canadians held in detention abroad, during interrogations by the Syrians.

The CTV News item also revealed that Canadian officials had received information as a result of Mr. Arar's interrogations in Syria, stating that "sources say CSIS has received the transcripts of the Syrian interrogation of Arar, but won't say what will be done with that information."

The CTV leak was reported in the *Globe and Mail's* October 24, 2003 morning edition. In an article entitled "Officials allege Arar gave data on al-Qaeda, report says," Daniel LeBlanc cited senior Canadian officials as alleging that Mr. Arar provided crucial information on the al-Qaeda terrorist network and on cells operating in Canada during his year-long detention in Syria.<sup>140</sup>

An *Ottawa Citizen* article published the following day, October 25, 2003,<sup>141</sup> noted that the leaks about what Mr. Arar might or might not have said to his Syrian interrogators were "particularly worrisome" and potentially hugely dangerous, not only for the Arar family, but also for the individuals allegedly named by Mr. Arar and still in detention abroad in countries known to practise torture.

This leak was timed to implicate Mr. Arar in a terrorist scheme just after his return to Canada. Obviously, being called a terrorist in the national media will have a severe impact on someone's reputation.<sup>142</sup>

### 9.2.3

#### **The Kurt Petrovic Report**

On October 29, 2003, officials from the Department of Foreign Affairs (DFAIT), who were meeting with Mr. Arar, Dr. Mazigh, and others, promised Mr. Arar that what he said would remain confidential until he chose to divulge it at a press conference.<sup>143</sup> Notwithstanding this commitment, the following day, October 30, Kurt Petrovic reported on CBC Newsworld that Mr. Arar had met with Foreign Affairs Minister Bill Graham, and had told the Canadian government he had been tortured while detained in Syria.<sup>144</sup>

Mr. Arar called Robert Fry at DFAIT to complain about the release of information to the CBC. According to Mr. Fry, Mr. Arar said he was very unhappy and felt betrayed because he had spoken to DFAIT officials in confidence, and the next day his comments had appeared in the media.<sup>145</sup> Mr. Fry was embarrassed and sent an e-mail to the DFAIT officials who attended the meeting, letting them know how upset Mr. Arar was, and telling them they had to be very careful.<sup>146</sup> On the telephone, Mr. Fry reassured Mr. Arar, saying: "...it didn't come from us. We don't know how this got out into the news."<sup>147</sup>

### 9.2.4

#### **The Juliet O'Neill *Ottawa Citizen* Leak**

Four days after Mr. Arar's press conference on November 4, information from secret documents was published in the *Ottawa Citizen*. The front-page article on November 8 by Juliet O'Neill was entitled "Canada's dossier on Maher Arar: The existence of a group of Ottawa men with alleged ties to al-Qaeda is at the root of why the government opposes an inquiry into the case." The article contained

an unprecedented amount of previously confidential information. It was also published in shorter form in the *Vancouver Sun* on November 8.<sup>148</sup>

“There is said to be a sign in an office at the RCMP,” the article begins, “that reads like this: ‘Beware rogue elephants - the Easter Bunny.’” This was a reference to then-Solicitor General Wayne Easter’s previous comments about “rogue elements” in the RCMP, who might have passed information to the United States about Mr. Arar. Inspector Coons, the senior officer at “A” Division INSET, confirmed that those words were written on a white board in the interior INSET office sometime over the 2003 summer holidays.<sup>149</sup> (Access to the INSET office was restricted to those involved in national security investigations; only INSET and Project A-O Canada members had passes allowing them entry.<sup>150</sup> Inspector Coons testified that a fairly large number of people without passes could have visited the office, but because of the sign-in requirement, their identities should be known.<sup>151</sup>)

Ms. O’Neill reported that the RCMP had “caught Mr. Arar in their sights” while investigating members of an alleged al-Qaeda logistical support group in Ottawa. The article names the investigation’s main target — Abdullah Almalki — and describes the circumstances of a meeting between Mr. Almalki and Mr. Arar.

Ms. O’Neill wrote that “it was in defence of their investigative work — against suggestions that the RCMP and the Canadian Security Intelligence Service, had either bungled Mr. Arar’s case or, worse, purposefully sent an innocent man to be tortured in Syria — that security officials leaked allegations against him in the weeks leading to his return to Canada.”

The article mentions that “one of the leaked documents” contained information about what Mr. Arar allegedly told the Syrian Military Intelligence during the first few weeks of his incarceration (i.e., his “confession”), and goes on to describe this information. As described in the Juliet O’Neill article, the document indicated that Mr. Arar trained in Afghanistan at the Khalden camp in 1993, then travelled to neighbouring Pakistan at the behest of Montreal members of the Pakistani Jamaat Tabligh [*sic*], an Islamic missionary organization. Mr. Arar met Mr. Almalki at a family gathering and considered a joint business venture with him, but rejected the idea because the Ottawa business environment was too competitive. According to the article, under torture in Syria, Mr. Arar confessed to training in Afghanistan, agreeing to the name of an Afghan camp at random.

Ms. O’Neill’s article described the RCMP’s investigation into Mr. Arar, including the interview attempt by the RCMP in Ottawa in January 2002. Interestingly, the article indicated that Mr. Arar declined to be interviewed — a

misstatement found in Project A-O Canada documents. It also cited “a security source” for the proposition that a suspected Ottawa-based al-Qaeda cell was at the root of opposition by the Canadian government to a full public inquiry into Arar’s case.

Gar Pardy, recently retired as Director General of Consular Affairs, was quoted in the article as saying: “The RCMP and the security people, that’s where the division came down. ... They were saying we have our responsibilities and we don’t agree. I think it delayed our efforts to get him out of there to some extent, although I don’t think by a heck of a lot quite frankly.”

### 9.2.5

#### The December 30, 2003 Leak

The situation escalated as calls for a public inquiry into Mr. Arar’s case grew more intense. On December 30, 2003, an article by Robert Fife, provocatively titled “U.S., Canada ‘100% sure’ Arar trained with al-Qaeda: Family spokeswoman accuses intelligence officers of anonymous smear campaign” appeared on page A1 of the *Ottawa Citizen*.<sup>152</sup>

The article cited “high-level sources in Canada and the United States who have had access to an extensive secret intelligence file on Mr. Arar” as alleging that Mr. Arar travelled to Pakistan in the early 1990s and then entered Afghanistan to train at the Khalden camp. It also quoted a “senior Canadian intelligence source” as saying about Mr. Arar: “This guy is not a virgin... There is more than meets the eye here.”

The source said that the United States had made an error in deporting Mr. Arar, rather than allowing the RCMP to monitor his activities upon his return from Tunisia. The source added that the United States had an extensive dossier on Mr. Arar, and that “[if] the Americans were ever to declassify the stuff there would be some hair standing on end.”<sup>153</sup> The article then discussed Ahmed Ressam and Abdurahman Khadr, who both trained at the Khalden camp, and Omar Khadr, who was imprisoned at Guantanamo Bay. The effect was to draw a clear link between Mr. Arar and individuals associated with terrorist acts or al-Qaeda training.

### 9.2.6

#### Canadian Coverage of the CBS “60 Minutes II” Story

Media coverage of the Arar case flared up again in late January, when CBS’s “60 Minutes II” broadcast an extensive dossier on Mr. Arar’s deportation from the United States and treatment in Syria. Robert Fife reported the CBS story in the *Ottawa Citizen* on January 23, 2004.<sup>154</sup> The Fife article reported that “intelligence

sources” had said the RCMP and American officials were in regular contact after Mr. Arar was arrested in New York. These sources also said American officials had offered to send him home if the RCMP would charge him, but the Americans were informed that Canada did not have enough evidence against Mr. Arar.

The article repeated information disclosed in the CBS report, including that Canadian intelligence officials were told about, and approved of, the U.S. decision to deport Mr. Arar to Syria. It also reported on reactions to the case and calls for a public inquiry by Prime Minister Chrétien and Anne McLellan, then-Minister of Public Safety and Emergency Preparedness. At the time, both the Conservative and the NDP leaders were urging the Prime Minister to call a full public inquiry. The article stated that opposition MPs said the CBS report reinforced what they had long believed - that the RCMP had a role in Mr. Arar’s removal, despite the government’s denials.

On January 28, 2004, the Deputy Prime Minister announced the government’s decision to call a public inquiry into the actions of Canadian officials in relation to Mr. Arar under Part I of the *Inquiries Act*.<sup>155</sup>

### 9.2.7

#### Leaks During the Public Inquiry

There was at least one further leak during the course of this Inquiry. On June 9, 2005, previously unpublished information appeared in an article by James Travers in the *Toronto Star*. Mr. Travers wrote that CSIS had travelled to Syria to sign an information-sharing agreement between Canada and Syria. The article also referred to the *in camera* hearings, stating that: “Behind closed doors O’Connor, who now knows all that is ever likely to be known about Arar’s case, has been warned those sources will evaporate if Canada signals that information sent here in confidence may not remain confidential.”<sup>156</sup>

This leak has troubling implications. It is very disturbing that a government official or officials chose to breach the confidentiality that was essential in conducting the Inquiry’s *in camera* hearings.

## 9.3

### MR. ARAR’S RESPONSE

Following these leaks, Mr. Arar felt the need not only to tell his story of detention and treatment in Syria, but also to clear his name by dispelling the implication that he was involved in terrorist activities.<sup>157</sup>

Mr. Arar responded to the allegations in the CTV News leak through Kerry Pither, spokesperson for himself and his family. In the CTV report, Ms. Pither stated: “What [Mr. Arar] has asked me to say to you tonight is that he

is outraged that high-level sources are leaking information about him to the media. ....” Mr. Arar alleged that the leaks were part of an orchestrated smear campaign by informed government officials.<sup>158</sup>

As discussed above, Mr. Arar went public with his story in a press conference on November 4, 2003. In his remarks, he firmly denied any association to terrorism and allegations that he had ever visited Afghanistan or attended an al-Qaeda training camp:<sup>159</sup>

I am not a terrorist. I am not a member of al-Qaeda and I do not know anyone who belongs to this group. All I know about al-Qaeda is what I have seen in the media. I have never been to Afghanistan. I have never been anywhere near Afghanistan, and I do not have the desire to ever go to Afghanistan.

### 9.3.1

#### Effects on Mr. Arar

This Inquiry did not hear from Mr. Arar directly about the personal impact of the leaks. However, Dr. Donald Payne, Board Member of the Canadian Centre for Victims of Torture and expert witness before the Inquiry, testified that the experience would normally have the effect of “retraumatizing” someone in Mr. Arar’s position.<sup>160</sup>

In addition, on July 27, 2005, this Inquiry appointed Stephen J. Toope, Professor of Law at McGill University, as Fact Finder.<sup>161</sup> His mandate was “to investigate and report to the Commission on Mr. Arar’s treatment during his detention in Jordan and Syria, and its effects upon him and his family.”<sup>162</sup>

In considering the psychological effects of Mr. Arar’s experiences in Syria, Professor Toope noted that some of Mr. Arar’s most difficult psychological challenges arose from his experiences following his return to Canada.<sup>163</sup> He is still distrustful, and continues to fear a recurrence of his ordeal. He is also afraid that his story will not be believed, and that he will not be able to resume a normal life.<sup>164</sup>

Professor Toope found that the leaks caused further psychological damage to Mr. Arar:

[Mr. Arar] was particularly disturbed by certain “leaks” from sources allegedly inside the Canadian Government that cast him in a negative light. These events compounded his sense of injustice dating from his detention and torture in Syria. All his advisers that I interviewed emphasized that Mr. Arar was “devastated” by these leaks. Some described him as “hysterical.” He simply could not control his emotions, and it took many hours of constant conversation to calm him down each time new information surfaced in the press that he thought to be misleading and unfair.<sup>165</sup>

Professor Toope also linked the leaks to Mr. Arar's feeling of social isolation from the Muslim community:

[Mr. Arar] told me that he is disappointed with the reaction of many Muslims to him and his story. Whereas other Canadians sometimes come up to him on the street to share a sense of solidarity, most Muslims stay far away from him. Mr. Arar thought that this distancing was exacerbated after the press "leaks" mentioned previously.<sup>166</sup>

Finally, Professor Toope describes the economic effect of Mr. Arar's ordeal on the Arar family as "close to catastrophic."<sup>167</sup> Insofar as the leaks paint Mr. Arar as a terrorist, it is reasonable to infer that they have contributed to his ongoing difficulty in finding gainful employment in his field.

## 9.4

### GOVERNMENT INVESTIGATIONS OF THE LEAKS

#### 9.4.1

##### The First PCO-Directed Investigation: The CTV News Leak

Certain government officials were evidently concerned about the leaks, and sought to identify their source. In late October 2003, Rob Wright, then at the Privy Council Office (PCO), requested that the government departments involved in the Arar case conduct internal investigations into the "CTV News" leak.<sup>168</sup> The investigation was managed by Gerry Deneault, Director of Security Operations (DSO) at PCO, whose other responsibilities included liaising with security officers in every department.<sup>169</sup>

On October 27, PCO's Security and Intelligence Secretariat sent a fax to the DSOs at DFAIT and the Solicitor General's department. PCO requested that the DSOs determine who in their organizations had access to information about the Arar investigation, and that they interview each person to determine who might have spoken with the media. The Solicitor General's department was asked to transmit the request to DSOs at CSIS and the RCMP.

Later that day, PCO sent another fax to the same officials, asking them to review the *Globe and Mail* article to confirm its accuracy. If they determined it to be factual, they were asked to conduct a damage assessment and find out who had access to the information and might have leaked it to the media.<sup>170</sup>

On October 28, DFAIT reported that the department's information, consisting of reports from its embassy in Damascus (including information passed to the embassy when Mr. Arar was released), was not completely consistent with the newspaper article. For example, the story referred to four individuals

(Messrs. Al-Bushi, Al Malki, El-Maati and Harkat), whereas DFAIT's information referred only to Messrs. Al Malki and Abul Ma'ati, as well as a third Canadian citizen.

DFAIT noted that the information in the *Globe and Mail* story did not damage its interests directly. However, the information could conceivably place Mr. El Maati, who was incarcerated in Egypt at the time, at greater risk. DFAIT also warned that the leak could damage Canada's relations with the United States if it interfered with any future investigations.<sup>171</sup>

PCO responded by requesting that DFAIT interview all personnel who had access to the information referred to in the article.<sup>172</sup> On November 3, the department reported that interviews had been conducted, and that the leaked information did not come from DFAIT.<sup>173</sup> The response noted that the media reports suggested a link between Messrs. Al-Bushi, Harkat and Arar, information that was not contained in the documents circulated in DFAIT.<sup>174</sup>

PCO did not ask DFAIT to conduct any further investigation regarding the CTV leak or the *Globe and Mail* article of October 24.

On November 7, the Solicitor General's department (SolGen) submitted a report to Gerry Deneault at PCO on the results of its own investigations, as well as those at the RCMP and CSIS.<sup>175</sup> Individual reports from each of the three organizations were included in the SolGen report.

The SolGen investigation into the alleged leak of information consisted of interviews with five officials: three in the National Security Directorate, and two in the Policing and Law Enforcement Branch. According to the department's report, the information in question was not available within the department, and those interviewed had not spoken with the media. As a result, no further interviews were deemed necessary.<sup>176</sup>

The RCMP report, dated October 31, 2003, stated that senior officers with knowledge of the Arar case had been interviewed, and that none had communicated with the media about this issue.<sup>177</sup> In his testimony, Deputy Commissioner Loepkky confirmed that only senior RCMP officers were interviewed as part of the investigation.<sup>178</sup>

The RCMP report indicated that on October 23, 2003, the day that CTV News broadcast the leaked information, CTV journalist Craig Oliver had requested a confirmation of the events related to Mr. Arar's case from RCMP media relations. In reply, the RCMP said it could neither confirm nor deny any of the information referred to by Mr. Oliver.<sup>179</sup> The report suggested that Mr. Oliver's request demonstrated that the leak came from a source outside the RCMP.

Evidence at this Inquiry revealed that on the day of the leak, October 23, the RCMP's Anti-Terrorist Financing Group prepared a briefing note for the

RCMP Commissioner highlighting the following issue: “Potential CTV News report tonight (2003-10-23) quoting unnamed government sources as saying Maher ARAR was part of an AL QAEDA cell in Canada and was only released from Syrian custody because he agreed to tell about other members of his cell.”<sup>180</sup> The note recommended the following media response: “The RCMP can neither confirm nor deny these allegations.”<sup>181</sup>

In his testimony, Deputy Commissioner Loepky offered an explanation of why the briefing note might have been prepared prior to the actual leak. He noted that before a journalist goes public with a story, he or she will often telephone the communications department to ask if the RCMP has any comments. He concluded that this might have been the case in this instance.<sup>182</sup>

On November 4, Deputy Commissioner Loepky confirmed by fax an agreement reached between the RCMP and the Solicitor General’s department about the RCMP’s investigation into the CTV leak.<sup>183</sup> They agreed that the interview questions and the results would be disclosed in the PCO report, but that the names and positions of the officers interviewed would not. The fax also stated that the RCMP did not have the information published by the media, and that it was through the media that the RCMP first became aware of it.<sup>184</sup>

On November 7, Deputy Commissioner Loepky ordered that “A” Division not speak to the media at all about the Arar case, and that all media comments be coordinated through RCMP Headquarters.<sup>185</sup> In testimony, Deputy Commissioner Loepky explained that although “A” Division wished to respond to coverage on the leaks, management felt it best to channel this input through Headquarters so that the organization would “speak with one voice.”<sup>186</sup> At the same time, however, Deputy Commissioner Loepky testified that he did not believe anyone in “A” Division had already spoken to the media.<sup>187</sup>

The CSIS report, dated November 4, 2003,<sup>188</sup> stated that it was responding to the PCO request to determine the accuracy of the leaked information, the degree of damage as a result of the leak, and the identity of CSIS officials with access to the leaked information.<sup>189</sup>

The report traced the media coverage of the four people identified in the CTV story. It also noted that DFAIT had provided CSIS with information received from Syrian intelligence sources on November 3, 2002; this information was translated and added to the CSIS holdings on November 12, 2002. CSIS members met with members of DFAIT and the RCMP on November 6, 2002 to discuss the Arar case, and the ensuing report was entered into the holdings as well. The Syrian Military Intelligence also provided information obtained from questioning Mr. Arar directly to CSIS; this information was shared with RCMP CID and DFAIT Security and Intelligence Bureau.

The CSIS report concluded that some of the leaked information had a basis in fact. However, for various reasons, CSIS concluded that the leak did not come from CSIS. It postulated that the leaked information may have come from several different places.

There are indications that the PCO-mandated internal reviews relating to the CTV leak were terminated on or about November 10, 2003, a decision made by William Elliott, then Assistant Secretary to Cabinet, Security and Intelligence, in consultation with Rob Wright, then National Security Advisor to the Prime Minister.<sup>190</sup>

However, by November 10, the Juliet O'Neill leak was already making media headlines.

#### 9.4.2

##### **The Second Series of PCO-Mandated Investigations: The Juliet O'Neill Leak**

On November 12, four days after the publication of the Juliet O'Neill article, PCO sent a fax to DFAIT and the Solicitor General's department, formally requesting that each department conduct a new round of internal interviews.<sup>191</sup> The request was similar to that issued 16 days before regarding the CTV leak. The fax noted that at least part of the information contained in the articles was similar to a "SECRET" (C4) document dated October 13, 2003 that originated in Damascus. Departments were to conduct an administrative inquiry in accordance with an enclosed questionnaire.<sup>192</sup> PCO requested preliminary findings by November 14, 2003.

Rob Wright testified that this second administrative investigation was significantly more intense than the first. He asked the deputy heads of each department/organization to provide assurance to PCO that it was not a leak from their organization.<sup>193</sup>

Specifically, PCO requested that each department: 1) review the Juliet O'Neill article and determine if any part might have been extracted from documentation/information that is/was in its possession, as well as to confirm what portions, if any, were known to be accurate; 2) advise if any of the information was "Special Operational Information" as defined in the *Security of Information Act*; 3) conduct a damage assessment from the organization/department's perspective; 4) arrange for interviews of any officials who had possession of "leaked" information; 5) assess whether the leak, "if any," either "did not/may/is likely/is unlikely" to have occurred from within the organization; 6) if it was possible the leak might have occurred from within the organization, provide

corrective measures that would be put in place to prevent recurrences; and 7) report back to PCO as soon as possible.<sup>194</sup>

The report stated that the document was shared with “CCRA, CSIS, CSE, IC, DND, PCO/IAS, PCO/S&I, RCMP, TC, SolGen, and Justice”, through a classified system. An informatics search revealed that eight people had accessed the document through this system in October. According to the report, interviews were ongoing with those in the department who might have seen the document.

The report of the Solicitor General’s department on the second internal investigation followed on November 19.<sup>195</sup> It stated that the department was not in possession of the information in question, and therefore was not in a position to confirm the contents of the article, or to identify the source of the leak.<sup>196</sup>

### 9.4.3

#### **The RCMP Criminal Investigation into the Juliet O’Neill Leak**

As early as November 8, 2003, RCMP officers were considering whether to launch a criminal investigation into the Juliet O’Neill leak.<sup>197</sup> Deputy Commissioner Loepky met with Assistant Commissioner Richard Proulx sometime after November 8, and decided to undertake an investigation under the *Security of Information Act*.<sup>198</sup> The launch of a criminal investigation by the RCMP effectively deferred or terminated departmental administrative inquiries into the Juliet O’Neill leak.<sup>199</sup>

Deputy Commissioner Loepky told Rob Wright of PCO that, in the RCMP’s assessment, there was a fairly clear correlation between the leaked information and information in the possession of the RCMP and other departments. Based on this, there was cause for a criminal investigation.<sup>200</sup>

When testifying, Mr. Wright was asked if there were concerns about the RCMP investigating itself. He said the RCMP had taken measures to address this issue, including bringing in outside investigators - for example, officers from New Brunswick. He stated he had been told how the RCMP proposed to structure the investigation, and he thought it appropriate in the circumstances. However, because it was a criminal investigation, the RCMP did not keep PCO advised of its status on an ongoing basis.<sup>201</sup>

At the time of closing submissions to this Inquiry, the criminal investigation into the Juliet O’Neill leak was ongoing under the *Security of Information Act*, and related proceedings were before the Superior Court of Ontario.<sup>202</sup>

Regarding the Jim Travers leak, while CSIS has acknowledged that the article’s publication constituted a breach of security, it also concluded there was nothing CSIS could reasonably do to identify those responsible.<sup>203</sup> Although the released information originated in classified CSIS reports, it was shared with

other government departments, resulting in an unmanageable number of potential interviewees for an administrative investigation.<sup>204</sup>

## 10. PROJECT A-O CANADA'S CONTINUING INVESTIGATION

### 10.1 OVERVIEW

Project A-O Canada's criminal investigation did not cease upon news of Mr. Arar's removal to Syria. First of all, Project A-O Canada maintained its interest in other individuals, and the alleged threat against a major Canadian target remained a serious concern. As for Mr. Arar, if anything, he became more interesting to Project A-O Canada as a result of the Americans' actions.<sup>205</sup>

Internally, the RCMP conducted several reviews of Project A-O Canada in respect of Mr. Arar, both before and after his return from Syria. Externally, the RCMP was called upon to respond to inquiries about Mr. Arar from other government agencies and the media. Then, in February 2004, the Government of Canada established a full-fledged public inquiry into the actions of Canadian officials in relation to Mr. Arar.

RCMP Headquarters also attempted to impose greater centralized control on Project A-O Canada's activities in the period after Mr. Arar's removal to Syria.

### 10.2 INVESTIGATION WHILE MR. ARAR WAS IN SYRIA

#### *October 2002*

As discussed previously, during Mr. Arar's detention in the United States in October 2002, Project A-O Canada investigated his whereabouts,<sup>206</sup> attempted to find out more about him, and considered interviewing him in New York.

After Mr. Arar was sent to Syria, the FBI continued to request assistance and information about him from the RCMP.

The following is a summary of Project A-O Canada's investigative activities in October 2002 in relation to Mr. Arar, after it was discovered he had been sent to Syria:

- On October 11, an RCMP officer sought background inquiries and information on Mr. Arar's brother Hassan, who was living in Mississauga. Hassan Arar was eventually interviewed on January 28, 2003.<sup>207</sup>

- Around October 15, Corporal Buffam began analyzing documents on Mr. Arar received from the Americans.
- On October 17, Project A-O Canada informed the RCMP liaison officer to Syria that it was interested in Mr. Arar. Inspector Michel Cabana agreed in testimony that the message to the Rome LO overstated the relationship between Mr. Almalki and Mr. Arar.
- On October 18, Superintendent Wayne Pilgrim of CID was called upon to respond to questions from DFAIT regarding what information had been shared with the United States concerning Mr. Arar. He replied that RCMP investigators had maintained an open line of communication with Canadian and American partners, and that all information obtained by Project A-O Canada had been shared with CSIS, the FBI and other U.S. agencies.<sup>208</sup>
- Also on October 18, a briefing note relating to Mr. Arar's removal to Syria was prepared for Commissioner Zaccardelli. The briefing note stated that Mr. Arar had left for Tunisia "shortly" after being approached for an interview. In fact his departure was five or six months after this approach. The report also appeared to overstate already unreliable information about Mr. Arar.<sup>209</sup>
- On October 21, Jim Gould from DFAIT ISI asked Project A-O Canada to explain the nature of the Project's interest in Mr. Arar. Inspector Cabana said that Project A-O Canada was simply interested in Mr. Arar because of his association with Mr. Almalki. They wished to speak to him, but no charges were contemplated. Inspector Cabana also related that they had intelligence and evidence regarding both Mr. Arar and Mr. Almalki that they would be prepared to share with the Syrian authorities if they felt it could assist their investigation.<sup>210</sup>
- Also by October 21, Project A-O Canada began to work on a lengthy timeline in respect of Mr. Arar, in response to questions from RCMP Headquarters about RCMP involvement during his detention in New York.<sup>211</sup>
- As early as October 22, Project A-O Canada was conscious of media coverage and scrutiny of the Project's possible involvement with Mr. Arar's situation.<sup>212</sup> By October 25, there is reference to Mr. Arar's situation becoming the subject of worldwide media attention.<sup>213</sup>
- On October 24, Project A-O Canada began to hear news about Mr. Arar's situation in Syria from the Canadian Ambassador to Syria. The Syrian authorities related that Mr. Arar had allegedly confessed to links to terrorism, and based on that confession, his return to Canada was unlikely.<sup>214</sup>

- On October 25, Project A-O Canada received from DFAIT Mr. Martel's consular report detailing his first visit with Mr. Arar. Staff Sergeant Corcoran had requested this information the previous day.<sup>215</sup>
- On October 29, Project A-O Canada conducted a license plate search on Mr. Arar.<sup>216</sup>

Now that Mr. Arar was in Syria, Project A-O Canada added him to the list of individuals they wanted to interview overseas. However, as discussed in Chapter III, Section 6.4, Project officials never did interview Mr. Arar.

In October 2002, Inspector Cabana met with Inspector Warren Coons, then the head of "A" Division INSET, to discuss the effective date for transferring Project A-O Canada to the "A" Division INSET unit.<sup>217</sup> At the same time, Inspector Coons was becoming more involved with the Project A-O Canada investigation, reading prior situation reports and attending meetings.<sup>218</sup>

### *November 2002*

- On November 4, Project A-O Canada received news from DFAIT in Damascus about discussions with General Khalil of the Syrian Military Intelligence. General Khalil had reportedly confirmed links between Mr. Arar and al-Qaeda, and that Mr. Arar had undergone training in Afghanistan. On November 7, Project A-O Canada received from DFAIT a synopsis of the results of Mr. Arar's interrogation (the *bout de papier*).<sup>219</sup> The synopsis was only three paragraphs long, so Project A-O Canada tried to determine whether more information was available. Staff Sergeant Corcoran understood that CSIS was going to Syria on unrelated business, but would nonetheless see what could be found out about Mr. Arar and other matters.<sup>220</sup>
- Contradicting the testimony of numerous officers that Mr. Arar was still only a person of interest at the time, an "Investigational Summary on Ahmed ELMAATI [sic]" dated November 18, 2002, refers to Mr. Arar as a "Principal Target" and "trained jihadist."<sup>221</sup>
- On November 20, Project A-O Canada gave a presentation to RCMP senior management (including Deputy Commissioner Garry Loepky and Assistant Commissioner Richard Proulx) and Jack Hooper from CSIS, in which the Arar situation was discussed.<sup>222</sup> In fact, the full-length presentation was like that given to the Americans in May 2002. Project A-O Canada discussed the threat to a major Canadian target, Mr. Almalki's activities and Project A-O Canada's future plans. According to Staff Sergeant Kevin Corcoran,

RCMP senior management applauded Project A-O Canada's efforts to date, and Mr. Hooper took the opportunity to compliment Project A-O Canada.

- As discussed in Chapter III, Section 3.7, Dr. Mazigh was subjected to a secondary examination on November 14. On November 22, Project A-O Canada received the report from Canada Customs.<sup>223</sup>
- Also on November 22, in a meeting with Corporal Rick Flewelling, Assistant Commissioner Proulx expressed concern that Project A-O Canada had directly contacted the French Embassy in Canada without going through a liaison officer, as is customary. He then requested an in-depth report on Project A-O Canada and Project O Canada, focusing in particular on which subjects of interest related to which RCMP division.<sup>224</sup>

As discussed in Chapter III, Section 3.8.1, in November 2002 Michael Edelson, representing Mr. Arar, sought a letter from Project A-O Canada stating among other things that Mr. Arar was not wanted in Canada for any offence, that there was no warrant for his arrest, and that he was not suspected of a terrorism-related crime. Project A-O Canada would not accede to this request.

#### *December 2002*

- Around December 3, Project A-O Canada received a report from CSIS on the recent CSIS trip to Syria. Although CSIS had not met with Mr. Arar, the report contained more detailed information from Mr. Arar's interrogation.
- On December 9, the newly-commissioned Inspector Jamie Jagoe, from RCMP "O" Division, was assigned to coordinate the national aspect of Project O Canada. Inspector Cabana questioned his need to remain on Project A-O Canada, given this new layer of management, and also why the Project could not be transferred to the INSET unit. Inspector Jagoe was appointed to facilitate coordination, however, not to direct the Project A-O Canada investigation, and for the moment at least, Inspector Cabana remained on the job.<sup>225</sup>
- Around December 18, Project A-O Canada received a copy of the report on Mr. Arar stemming from the CSIS trip to Syria.<sup>226</sup>
- On December 19, FINTRAC (Financial Transactions and Reports Analysis Centre of Canada) notified the RCMP of a transaction from Mr. Arar to Tunisia. Although the RCMP was precluded by law from making such requests, Inspector Reynolds explained that the RCMP voluntarily sends information to FINTRAC on cases in which they are interested. He assumed that, at some point, such a report had been sent to FINTRAC concerning Mr. Arar.<sup>227</sup>

In December 2002, attempts to interview Messrs. Almalki and Arar began to heat up. These events have been discussed in Chapter III, Sections 6.3 and 6.4.

### *January 2003*

- On January 7, Staff Sergeant Corcoran met with a CSIS representative who summarized the information he had received while in Syria and discussed Mr. Arar's admissions.
- On January 16, Project A-O Canada learned from the Ottawa Police that Dr. Mazigh's car had been broken into and that she had moved to a new address. Staff Sergeant Callaghan testified that this was not the result of a direct inquiry about Mr. Arar's family: the Project had received this information because Mr. Arar's name was on CPIC.<sup>228</sup>

January 2003 was also the month that Inspector Cabana withdrew from Project A-O Canada. By February 4, 2003, he was no longer the Officer in Charge (OIC).<sup>229</sup> His departure stemmed partly from a concern that RCMP Headquarters was making decisions that eliminated the possibility of Project A-O Canada travelling to Guantánamo Bay to interview detainees — or at least risked delaying such interviews for months. Part of the problem may have been that RCMP Headquarters disapproved of non-RCMP officers, such as staff sergeants Pat Callaghan and Kevin Corcoran, going to Cuba to do the interviews, despite the fact that Project A-O Canada was an integrated project and these two officers knew the file. RCMP Headquarters wanted at least one RCMP officer present.<sup>230</sup> Tensions rose between Project A-O Canada and RCMP CID, related once again to a perception by Project A-O Canada management that Headquarters interfered too much in the Project A-O Canada investigation.

Inspector Cabana suggested transferring the file to INSET, as had long been the plan. Project A-O Canada was officially transferred to RCMP "A" Division INSET sometime in January or February 2003, although it remained a relatively autonomous investigation.<sup>231</sup> Different explanations for this transition were offered, none of which relate to Mr. Arar's situation. The reporting relationship did change, however. Staff sergeants Callaghan and Corcoran began to report to Inspector Coons, the INSET OIC.<sup>232</sup>

### *February 2003*

On February 5, members of Project A-O Canada met with CID and CSIS personnel at RCMP Headquarters. Superintendent Pilgrim informed the group that there would be increased centralization and coordination of national security, a return to the previous way of doing things. In particular, he said that dealings

with foreign forces, particularly the American agencies, would be handled through CID.<sup>233</sup>

- A presentation Corporal Flewelling gave to Assistant Commissioner Proulx on February 19 mentions Mr. Arar's name, along with Messrs. Almalki and El Maati. Mr. Arar is described as a "target" of Project A-O Canada who had "Mujehedeen [*sic*] training in Afghanistan." A picture of him behind bars appears at the end of the presentation, to indicate his incarceration in Syria.<sup>234</sup> In reference to this presentation, Corporal Flewelling testified that he felt it was interesting that Mr. Arar appeared to be linked to just about every other person of interest to the investigation.<sup>235</sup>

### *March to May 2003*

- On April 25, Amnesty International contacted Corporal Buffam for information on Mr. Arar. Corporal Buffam referred the request to RCMP media relations.<sup>236</sup>
- On April 30, Project A-O Canada met with the Americans, who had no new information on Mr. Arar. The investigators present also discussed other individuals.
- A situation report for the end of April 2003 refers to news in the media that Mr. Arar might be charged in Syria. Project A-O Canada contacted the RCMP LO to DFAIT to ensure that all relevant information on Mr. Arar was being passed to Project A-O Canada, in light of the fact that the Project still wished to interview Mr. Arar in Syria.<sup>237</sup>
- On April 30, RCMP Headquarters asked Project A-O Canada to prepare a position paper on Mr. Arar. Headquarters anticipated political pressure on the Prime Minister to intercede on Mr. Arar's behalf.<sup>238</sup>
- A briefing note to Commissioner Zaccardelli, dated April 30, 2003, states the following about Mr. Arar's status:

ARAR continues to be a person of interest in the Project A-O CANADA investigation. At present time there is insufficient evidence to contemplate criminal charges against ARAR. Regardless, ARAR is a highly connected individual associated with several suspected criminal extremists. [\*\*\*]<sup>239</sup>

### *June to September 2003*

- On July 28, Staff Sergeant Callaghan was asked directly by Inspector Rick Reynolds whether anyone from Project A-O Canada had asked the Americans to arrest Mr. Arar, or had somehow insinuated that Project A-O Canada did not care what happened to Mr. Arar. Staff Sergeant

Callaghan emphatically told Inspector Reynolds that no one with Project A-O Canada had done such a thing. He felt so strongly about it, in fact, that he offered to take a polygraph test to prove it. Despite this, Staff Sergeant Callaghan testified that he learned the next day that Inspector Reynolds had assigned an officer from the Financial Intelligence Branch to review Project A-O Canada material on Mr. Arar to see if there was innuendo or suggestion to this effect.<sup>240</sup>

- On July 30, as a result of questions from Commissioner Zaccardelli, Chief Superintendent Wayne Watson also inquired about Project A-O Canada's role in Mr. Arar's arrest and removal. He prepared a list of questions to be asked of several Project A-O Canada investigators. Chief Superintendent Watson concluded from his review that Project A-O Canada members had acted "in a thoroughly professional manner. ... Nothing I have heard or read ... suggests that the decision to detain or deport Mr. Maher Arar stemmed from any communications from Project A-O Canada."<sup>241</sup>

After numerous discussions with RCMP management (Inspector Coons at "A" Division INSET and Inspector Reynolds at RCMP Headquarters), it was ultimately decided in the summer of 2003 that Project A-O Canada was not to have any direct contact with certain U.S. agencies.<sup>242</sup>

Very little activity concerning Mr. Arar took place in the months immediately preceding his return to Canada.

### 10.3

#### INVESTIGATION AFTER MR. ARAR'S RELEASE

As before, Project A-O Canada's work relating to Mr. Arar following his release resulted partly from requests for information from the RCMP and other agencies, and partly from a perceived investigative need to dig deeper.

##### *October 2003*

- On October 5, Project A-O Canada officers heard through the media that Mr. Arar was being released from jail in Syria. In light of his release, they decided that day that the Customs lookout on Mr. Arar should be deactivated prior to his return. They felt a secondary examination would not be useful under the circumstances.<sup>243</sup>
- On October 6, Project A-O Canada held a team meeting. They contemplated interviewing Mr. Arar, including doing so right away at the airport, but decided against it for several reasons. One was that Mr. Arar's return had attracted a lot of media attention, and the details of an interview might be

reported in the media, thereby harming the Project A-O Canada investigation. Another reason was that Mr. Edelson had previously placed restrictive conditions on any interview. Project A-O Canada decided they would approach him later on.<sup>244</sup>

- In early October 2003, Project A-O Canada became the subject of yet another administrative review. Chief Superintendent Dan Killam, from RCMP Headquarters, was asked to review Project documents, conduct interviews and report on his findings. According to Staff Sergeant Callaghan, this review was more formal and broader in scope than previous reviews.<sup>245</sup> As with previous reviews, Chief Superintendent Killam found that Project A-O Canada had behaved appropriately.<sup>246</sup>
- On October 27, three events occurred:
  - Project A-O Canada received information on the date that Mr. Arar had become a Canadian citizen.<sup>247</sup>
  - The Project prepared one of its lengthiest timelines to date on Mr. Arar.<sup>248</sup>
  - The RCMP received from DFAIT the document provided to the chargé d'affaires when Mr. Arar was released from Syrian custody. It is not clear whether this document was forwarded to Project A-O Canada.<sup>249</sup>
- On October 28, Project A-O Canada met with Mr. Edelson. Mr. Edelson was no longer representing Mr. Arar, but “undertook to notify ARAR of [Project A-O Canada’s] availability for a future interview.”<sup>250</sup>
- Also on October 28, Project A-O Canada inquired with DFAIT about whether “an “intelligence package” on Mr. Arar, referred to by the Syrian Ambassador to Canada in a *Globe and Mail* article, had in fact been provided to Canadian officials. If this package was in DFAIT’s possession, the RCMP wanted to have it.<sup>251</sup>
- In the latter half of October 2003, Project A-O Canada learned that the RCMP Public Complaints Commission had launched an investigation into RCMP involvement in the Arar matter. This is discussed in Chapter V, Section 5.1 (“The Garvie Report”).

### *November 2003*

- On November 3, 2003, Staff Sergeant Corcoran spoke to Officer Jean-Pierre Thériault of Canada Customs about Mr. Arar’s travels, particularly to the United States.<sup>252</sup>

- On November 4, Mr. Arar gave his press conference. This resulted in increased activity for Project A-O Canada as Mr. Arar's situation garnered even more press attention,<sup>253</sup> and as more people sought information on Project A-O Canada's role in the whole affair. Project A-O Canada would also take issue with the veracity of some of Mr. Arar's public statements, and would set out to determine whether certain things Mr. Arar had said in public were true.
- On November 5, a Project A-O Canada situation report revealed that the Killam review was ongoing. Project A-O Canada learned that James Lockyer was Mr. Arar's counsel. In a phone conversation that same day, Mr. Lockyer was told that Project A-O Canada was not interested in speaking with Mr. Arar unless he had more to add to what he had said during his press conference.<sup>254</sup> In reference to Mr. Arar's press conference the previous day, Project A-O Canada indicated that Mr. Arar's comments would be "reviewed by investigators as they relate to this project."<sup>255</sup> One of the chief questions arising from the press conference was whether Project A-O Canada had actually provided U.S. officials with a copy of Mr. Arar's rental application and lease.<sup>256</sup>
- The RCMP was now more concerned than ever about what information had been passed to U.S. authorities. For example, on November 6, 2003, Inspector Reynolds wrote to Inspector Coons, asking when the Project A-O Canada database had been shared with the Americans, and who had authorized the release.<sup>257</sup>
- Likewise, a sense of urgency emerged around Arar-related tasks. For example, on November 10, mention was made in a Project A-O Canada meeting of the "need to complete the tasks previously assigned on Arar and finish them. Need to review his press conference." A total of twenty Arar-related tasks are listed.<sup>258</sup> Staff Sergeant Callaghan explained in his testimony that all the work had to do with the fact that 1) Mr. Arar had come back to Canada and was making public statements; and 2) it was Project A-O Canada's responsibility to answer all the Arar-related questions that would be asked. He disagreed that Project A-O Canada was somehow out to get Mr. Arar.<sup>259</sup>
- By November 19, staff sergeants Callaghan and Corcoran began to show frustration at the number of inquiries and insinuations being directed at them. They complained to their immediate supervisor, Inspector Coons, that they did not want to have to listen to insinuations that they had somehow pushed the Americans to deport Mr. Arar to Syria. Inspector Coons testified that he felt the officers no longer wanted to be part of an

investigation that wasn't an investigation, but more a case of defending themselves at every turn.<sup>260</sup>

- On November 21, Deputy Commissioner Loeppky and RCMP Commissioner Zaccardelli met with "A" Division staff and Project A-O Canada members to discuss staff morale. The allegations of leaks, the media articles and the continuing high profile of the investigation over the previous 8 to 10 months had begun to cause concern and anxiety among RCMP officers. The two senior officials sought to reassure them, telling them to stay the course, remain professional and move ahead with their investigative efforts. According to Deputy Commissioner Loeppky, it was a show of corporate support.<sup>261</sup>
- On November 25, Project A-O Canada sent a request for information on Mr. Arar to the FBI via RCMP Headquarters. Project A-O Canada wished to know whether Mr. Arar was part of any prior FBI investigation. Inspector Coons did not recall receiving a response.<sup>262</sup>
- A situation report dated November 26 contains the following comment, indicating the extent to which Project A-O Canada was preoccupied with Arar-related inquiries:

Project investigators have been tasked almost exclusively with tasks and requests in relation to the issues surrounding Maher ARAR.

- On November 27, Corporal Buffam prepared another internal memo that dealt with Mr. Arar's PDA and further analysis of that information.<sup>263</sup>

#### *December 2003 to March 2004*

- Throughout December 2003, Project A-O Canada continued to work on dozens of Arar-related tasks.<sup>264</sup>
- On February 4, 2004, Project A-O Canada attempted, unsuccessfully, to interview Mourad Mazigh's ex-wife, who was listed as an administrator of CIM2000.<sup>265</sup>
- On February 5, the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar was established. Even after the Inquiry had been called, the investigation of Mr. Arar continued.
- A February 17 Project A-O Canada document considered the next step for the Project. The document states that, while not a specific target of Project A-O Canada, Mr. Arar had been, and continued to be, an individual of concern. Although not specifically implicated in the commission of a criminal offence, he had associations and connections to individuals of grave concern to Project A-O Canada. Project A-O Canada's position was that "to

properly prepare for the inquiry process we must answer all outstanding questions in relation to ARAR.” The Project needed to be able to “articulate our concerns when called upon to testify.”<sup>266</sup> The document then recommended a course of action involving approximately 35 tasks related to Mr. Arar to be completed in the next three to four months.<sup>267</sup>

#### *August 2004*

In August, Project A-O Canada produced several pages of documents, both personal and commercial, indicating contact between the following individuals and companies: Abdullah Almalki, Youssef Almalki, Safa Almalki, Nazih Almalki, Maher Arar, Mourad Mazigh, and CIM2000. The documentation ranged in date from 1996 to 2002, often related to computer equipment.

#### *September 2004 to the End of Testimony*

The Commission does not have any evidence of a continued investigation of Mr. Arar during this time period.

### 10.4

#### CURRENT STATUS

The Arar investigation might have been put somewhat on hold because of this Inquiry, but at the time of testimony, Mr. Arar remained a person of interest and an individual Project A-O Canada wanted to interview.<sup>268</sup>

According to Project A-O Canada, Mr. Arar’s status will be determined at the end of this Inquiry, but until the RCMP gets the answers it needs, the investigation of Mr. Arar, along with Messrs. Almalki and El Maati, will continue. Staff sergeants Callaghan and Corcoran seemed to indicate that only a decision from RCMP management, after appropriate input from the Project, would put an end to the investigation.<sup>269</sup>

Deputy Commissioner Loeppky, on the other hand, indicated that Headquarters depends heavily on the investigative officers to use their judgment about when to stop an investigation. A direct order to stop an investigation might be seen as “interference in the independence of police officers and senior people.”<sup>270</sup> Deputy Commissioner Loeppky agreed that Mr. Arar might have the impression that the investigation is only continuing today to avoid having to disclose information to him, but he still felt there were areas where the RCMP was searching for answers.<sup>271</sup>

As for staff sergeants Callaghan and Corcoran continuing to investigate Mr. Arar despite themselves being under investigation for their actions in relation to Mr. Arar, Deputy Commissioner Loeppky agreed that there might appear to

be a conflict of interest. He felt, though, that it was a resource issue. It would not do to pull investigators off a file too quickly where, as in this case, no evidence of bad faith exists.<sup>272</sup>

Deputy Commissioner Loeppky referred to the Air India investigation, which took a very long time, but ultimately resulted in a prosecution. The Project Canada investigations are ongoing and active, and Mr. Arar's role therein has yet to be fully determined, he testified.<sup>273</sup>

## 11. CSIS' CONTINUING INVESTIGATION

CSIS' interactions with both domestic and international agencies regarding Mr. Arar before and during his detention in Syria have been described in previous chapters.

With respect to Mr. Arar's current status, CSIS Assistant Director Jack Hooper testified that CSIS has an unequivocal policy that it will not confirm or deny the existence of a security intelligence investigation or whether a person constitutes a threat to the security of Canada.<sup>274</sup> In his opinion, such a disclosure to the public would be injurious to national security.<sup>275</sup>

## 12. THE TUNISIAN INQUIRIES

As discussed earlier, Project A-O Canada learned in July 2002 that Mr. Arar and his family had departed Canada for Tunisia. There is no evidence indicating that Project A-O Canada intended to contact Tunisian authorities in regard to Mr. Arar.

Two years later, in August 2004, Mr. Arar's brother-in-law and father-in-law were apparently approached by the Tunisian military intelligence and asked whether Mr. Arar had moved to Tunisia permanently in the summer of 2002, or if he was merely there on vacation. This was the first time that either man had been approached by the Tunisian military intelligence. It is noteworthy that this Inquiry was underway at this point; Mr. Arar's brother-in-law was in Canada in July 2004, at which time he met Commission Counsel as a possible witness.

None of the government witnesses were aware of anyone in the Canadian government inducing, suggesting, requesting or in any way encouraging Tunisian authorities to visit Mr. Arar's family in Tunisia respecting matters before this Inquiry.<sup>276</sup> Rob Wright, the Privy Council Office's Security and Intelligence Coordinator and the Prime Minister's National Security Advisor, also testified that he had no knowledge of any communications between the Canadian and Tunisian governments on this issue.<sup>277</sup>

### 13. ASSESSING THE IMMINENCE OF THREATS — OCTOBER 2001-FEBRUARY 2004

As discussed in Chapter III, when Project A-O Canada was set up in October 2001, its focus was on a possible second wave of terrorist attacks. This threat became more specific in the fall of 2001, when the Project learned through confidential sources of a threat to a prominent building in the National Capital Region. From that time on, this threat was factored into the decisions made by Project A-O Canada officers. Witnesses from “A” Division and RCMP Headquarters were asked to explain how it had affected their work as the investigation progressed. This section reviews their evidence to show how the RCMP’s assessment of the threat evolved over time.

Following the RCMP’s receipt of information about the threat in the fall of 2001, Superintendent Wayne Pilgrim directed CID’s Threat Assessment Section to conduct an assessment of the situation.<sup>278</sup> The Section’s mandate was to collect, assess and analyze any information regarding a potential threat to a Canadian institution, in support of the RCMP’s protective policing operations. To gather information, members of the Section would liaise with external agencies like CSIS, the Department of National Defence and local police. This information would become part of a threat assessment report providing an objective assessment of potential threats, as well as the factual basis for the analysis.<sup>279</sup>

An assessment report dated November 22, 2001 set the threat to the prominent building in the National Capital Region as “high,”<sup>280</sup> but concluded that the RCMP did not anticipate an imminent attack. Nevertheless, “extreme vigilance” was recommended.<sup>281</sup>

The threat assessment reports prepared at RCMP Headquarters were shared with the Threat Assessment Units that formed part of the National Security Investigations Section/Integrated National Security Enforcement Team’s (NSIS/INSETs) at the divisional level.<sup>282</sup> It is believed that they were also shared with CROPS officers in the divisions and, in turn, would have found their way to Project A-O Canada. According to Superintendent Pilgrim, the threat assessments would have been available on the Secure Criminal Intelligence System (SCIS) as well.<sup>283</sup>

To help determine the accuracy of the information received in the fall of 2001, the Project A-O Canada team compared it to the information they already had. Certain details were identified as specifically relevant to the threat; other details were also verified. This was the extent of the Project’s information about the threat until the summer of 2002.

Witnesses from “A” Division had differing opinions about whether the threat of a terrorist attack was still seen as imminent by the summer of 2002. One factor that had diminished the threat’s imminence was that Messrs. Almalki, El Maati and Arar were no longer in Canada at that time. In any event, members of Project A-O Canada did not believe that the threat had been eliminated, as too many questions remained unanswered.<sup>284</sup>

In contrast, witnesses from RCMP Headquarters were clear that the threat presented in the fall of 2001 was no longer imminent by the summer of 2002.<sup>285</sup> Corporal Flewelling’s testimony underscores this point. As noted earlier in this report, Corporal Flewelling was assigned responsibility for monitoring Project A-O Canada on behalf of CID in or around June 2002. He testified that one of his assignments had been to reinstate RCMP policies that applied before 9/11, as CID no longer believed that an allegedly imminent threat justified continued deviation from these policies.<sup>286</sup>

Around November 2002, when Messrs. Almalki, El Maati and Arar were all in custody overseas, Project A-O Canada and Project O Canada began to differ in their opinions regarding the threat to a prominent building in the National Capital Region. Although these differences reflected the recurring jurisdictional dispute between the Toronto and Ottawa projects, they also reinforced the contradictory opinions about this threat among various sections of the RCMP.

On November 21, 2002, two members of Project A-O Canada met with a CID analyst<sup>287</sup> assigned to draft a report on the status of the anti-terrorism investigations in Toronto, Ottawa and Montreal. Both officers felt that the analyst was sceptical about the threat.<sup>288</sup> More importantly, they believed that his opinion had been influenced by a disagreement between the two teams on whether the threat was directed toward an Ottawa target or a Toronto-area target. However, Project A-O Canada officers were adamant that they had been tasked with investigating a threat in the National Capital Region. Until they received instructions to the contrary, they would continue to investigate that threat,<sup>289</sup> regardless of conflicting opinions from those outside the Project.

Also in November 2002, Osama Bin Laden made a public statement identifying Canada (and other Western nations) as an al-Qaeda target. A revised threat assessment report from RCMP Headquarters, dated December 10, 2002, stated: “At this time, Canadians and Canadian interests are likely to be directly or indirectly targeted by terrorism. It should be noted that this designation is *unprecedented* [emphasis in original].”<sup>290</sup>

The assessment referred to reports of several possible Canadian targets, one of which was a prominent building in the National Capital Region, but indicated that, based on the RCMP’s investigation, there was no specific, perceptible or

immediate threat to any of these targets.<sup>291</sup> The report concluded that, “at this time, there still exists no actionable information/intelligence pertaining to any specific attacks on Canadians or Canadian interests.” Nevertheless, now that Canada is in Al-Qaida’s crosshairs, all readers are requested to maintain utmost vigilance, and report any information of a threat nature to law enforcement [emphasis in original].<sup>292</sup>

About the time of the Bin Laden threat, Project A-O Canada prepared an investigational planning report on the threat, dated November 18, 2002. The report concluded: “Project A-O Canada investigators believed that the information [received] represents the truth and that [it] was a real threat.”<sup>293</sup> On December 6, 2002, the report was sent to the Threat Assessment Section at RCMP Headquarters.<sup>294</sup>

A few days later, on December 10, the Threat Assessment Section dropped the level of the threat from “high” to “medium,”<sup>295</sup> making no reference to the need for vigilance. The rationale was that the threat was more than a year old and the main player was in foreign custody. Threat assessments remained at “medium” into the spring of 2004.<sup>296</sup>

Meanwhile, Project A-O Canada continued its investigation. The team was particularly interested in interviewing Mr. El Maati, and was taking steps to gain access to him in Egypt.

Project A-O Canada still considered the threats to be real in 2004. Although the threats were thought to be less imminent, many questions remained unanswered.<sup>297</sup> One witness pointed out that it could take years for an attack to be carried out after a target was selected,<sup>298</sup> therefore, they could not discount the threat.

## NOTES

- <sup>1</sup> [P] Graham testimony (May 30, 2005), pp. 4300-4301; [P] Fry testimony (June 13, 2005), pp. 6536-6538.
- <sup>2</sup> Ibid.; ibid.
- <sup>3</sup> [IC] Martel testimony (April 25, 2005), pp. 15892-15896 and [P] [ET] (August 30, 2005), pp. 11172.
- <sup>4</sup> Ibid. and [P] [ET] (August 30, 2005), pp. 11175.
- <sup>5</sup> [IC] Martel testimony (April 25, 2005), pp. 15894-15896; Exhibit C-281.
- <sup>6</sup> [IC] Martel testimony (April 25, 2005), pp. 15894-15897.
- <sup>7</sup> Ibid., pp. 15895-15896; Exhibit C-281.
- <sup>8</sup> [P] Martel testimony [ET] (August 30, 2005), pp. 11177-11178; Exhibit C-281.
- <sup>9</sup> [IC] Martel testimony (April 25, 2005), p. 15896; Exhibit C-281; [P] Martel testimony [ET] (August 31, 2005), pp. 11452.

- <sup>10</sup> [IC] Martel testimony (April 25, 2005), pp. 15896-15899.
- <sup>11</sup> [P] Martel testimony [ET] (August 30, 2005), pp. 11180-11181 and [P] [ET] (August 31, 2005), pp. 11455-11457.
- <sup>12</sup> Ibid. One of the people who walked Mr. Arar and the Canadian officials to their car was a Syrian official known only as “George”. According to Mr. Martel, everybody was happy, and shook hands before they separated. Then Mr. Arar reportedly remarked to Mr. Martel that “George” was crying when they left. Mr. Martel did not recall George crying. When Mr. Martel was asked whether he had any sort of personal relationship with any of the members of the Syrian Military Intelligence, he replied that he was not allowed to have any type of relationship with them, and they did not have that right either. He said that he could not even have breakfast with them. He had a contact person, but that person was subject to change. As for the Ambassador’s relationship with the Syrian Military Intelligence, Mr. Martel only knew that Ambassador Pillarella had met with General Khalil on a few occasions, but did not know “George”. He did not think that the relationship between Ambassador Pillarella and General Khalil was personal. [P] Martel testimony [ET] (August 31, 2005), pp. 11565-11567.
- <sup>13</sup> [IC] Martel testimony (April 25, 2005), pp. 15892-15896; [P] Martel testimony [ET] (August 30, 2005), pp. 11187-11191; Exhibit C-281.
- <sup>14</sup> [P] Catterall testimony (June 1, 2005), p. 4723.
- <sup>15</sup> [IC] Martel testimony (April 25, 2005), pp. 15897-15898.
- <sup>16</sup> [P] Pasty-Lupul testimony (July 29, 2005), pp. 9236-9237.
- <sup>17</sup> Exhibit P-242.
- <sup>18</sup> [P] Pardy testimony (June 2, 2005), pp. 5058-5060.
- <sup>19</sup> [P] Pillarella testimony (June 15, 2005), pp. 7115-7118.
- <sup>20</sup> [P] Martel testimony [ET] (August 31, 2005), pp. 11593-11597; [P] Pardy testimony (May 25, 2005), pp. 3775-3781.
- <sup>21</sup> Ibid.; *ibid.*, pp. 3830-3831; [P] Graham testimony (May 30, 2005), pp. 4219-4221.
- <sup>22</sup> Exhibit P-89; [P] Pardy testimony (May 24, 2005), pp. 3428-3429. Exhibit P-89 is a document obtained through an access to information request in the United States by counsel for Mr. Arar. It is a record of a conversation between an American political officer and a Syrian representative. Neither of the individuals testified at this Inquiry.
- <sup>23</sup> Exhibit P-89; [P] Pardy testimony (May 24, 2005), pp. 3429-3432.
- <sup>24</sup> [P] Pardy testimony (May 25, 2005), pp. 3757, 3775-3781, 3783-3792 and [P] (October 24, 2005), pp. 12197-12199; [P] Pillarella testimony (June 15, 2005), pp. 7177-7184 and 7202-7204; [IC] Graham testimony (August 3, 2005), pp. 16751-16754.
- <sup>25</sup> [P] Graham testimony (June 2, 2005), pp. 4927-4928.
- <sup>26</sup> An example of this is the negative reaction of the Syrian Military Intelligence official who was with Syrian Foreign Minister Shara’a and Minister Graham at their meeting in New York. The intelligence official was clearly upset by the negative publicity in Canada and questioned why they should ever release Mr. Arar.
- <sup>27</sup> [P] Pardy testimony (May 25, 2005), pp. 3775-3781 and [P] (May 26, 2005), pp. 3842-3847; [P] Pillarella testimony (June 15, 2005), pp. 7204-7207.
- <sup>28</sup> [P] Martel testimony [ET] (August 30, 2005), pp. 11180-11182 and 11183.
- <sup>29</sup> Mr. Arar only learned of the stopover in Amman once the plane had taken off from Damascus, and he was understandably upset by the announcement. Mr. Martel managed to calm him down by reassuring him that they would not have to disembark from the plane. However, once they arrived, they were told that there was a problem and all passengers would have to leave the aircraft to identify their luggage. Fortunately, Mr. Arar and Mr. Martel were not traveling with any. They disembarked quickly and then reboarded the plane. [P] Martel testimony [ET] (August 31, 2005), pp. 11552-11555.

- 30 Ibid., p. 11183.
- 31 Ibid., p. 11548.
- 32 [P] Pasty-Lupul testimony (July 29, 2005), pp. 9145-9148.
- 33 Ibid., pp. 9148-9149.
- 34 [IC] Martel testimony (April 25, 2005), p. 15921.
- 35 Ibid., p. 15919; [P] Pasty-Lupul testimony (July 29, 2005), pp. 9149-9150.
- 36 [P] Martel testimony [ET] (August 30, 2005), p. 11184.
- 37 [IC] Martel testimony (April 25, 2005), pp. 15913-15915.
- 38 Ibid., pp. 15916-15917 and (August 30, 2005), p. 11185.
- 39 [IC] Martel testimony (April 25, 2005), pp. 11185-11186.
- 40 Exhibit P-242, Tab 17, p. 2; [IC] Martel testimony (April 25, 2005), p. 15913 and [P] [ET] (August 30, 2005), pp. 11186-11187. The discussion during the journey back to Canada was the first time it was confirmed for Mr. Martel that Mr. Arar was indeed being kept in the basement of the Palestine Branch, the same location where they would meet for consular visits. [IC] Martel testimony (April 25, 2005), p. 15913.
- 41 [P] Martel testimony [ET] (August 30, 2005), pp. 11187-11188.
- 42 [P] Martel testimony [ET] (August 31, 2005), pp. 11457-11458.
- 43 [IC] Martel testimony (April 25, 2005), p. 15916.
- 44 [P] Martel testimony [ET] (August 31, 2005), p. 11456.
- 45 [P] Martel testimony [ET] (August 30, 2005), pp. 11198 and 11200-11201.
- 46 Exhibit P-242, Tab 1; [P] Martel testimony [ET] (August 30, 2005), pp. 11198-11206.
- 47 Exhibit C-1, Tab 238; [IC] Martel testimony (April 25, 2005), pp. 15938-15940.
- 48 Exhibit P-242, Tab 14, p. 1.
- 49 Ibid., Tab 15; [P] Fry testimony (June 13, 2005), pp. 6545-6547.
- 50 [P] Fry testimony (June 13, 2005), p. 6549.
- 51 [P] Lockyer testimony (June 17, 2005), pp. 7587-7589.
- 52 [P] Fry testimony (June 13, 2005), pp. 6559-6560.
- 53 Exhibit P-42, Tab 630; [P] Fry testimony (June 13, 2005), pp. 6559-6560.
- 54 Exhibit P-42, Tab 693.
- 55 Exhibit P-242, Tab 17.
- 56 Exhibit P-42, Tab 693.
- 57 [P] Graham testimony (May 30, 2005), p. 4306; [P] Fry testimony (June 13, 2005), pp. 6561-6562.
- 58 Exhibit P-42, Tab 648, p. 1.
- 59 Exhibit C-206, Tab 650, pp. 3-4. Interestingly enough, in an October 31 e-mail to the Canadian Embassy in Damascus, DFAIT Headquarters gave them the heads-up that if Mr. Arar were to claim publicly that he had been tortured, there might be pressure on the Department of Foreign Affairs to take the matter up with the Syrian authorities. At the same time, Headquarters told the Embassy that it was mindful of the cases of two other Syrian-born Canadians who remained in Syrian detention and the delicate situation this presented if a public controversy with Syria were to erupt. Exhibit P-199, p. 2, para. 4.
- 60 Exhibit C-206, Tab 650.
- 61 Ibid., Tab 748.
- 62 Exhibit P-242, Tab 18.
- 63 Exhibit C-206, Tabs 750 and 760.
- 64 [IC] Martel testimony (April 26, 2005), pp. 15991-15992.
- 65 [P] Fry testimony (June 13, 2005), pp. 6557-6559.
- 66 Exhibit P-42, Tab 649; [P] Fry testimony (June 13, 2005), pp. 6563-6565. The Minister's main message would be to emphasize that he reported on August 14 what he had been told about the consular visit. The only point of clarification would be in regard to his prior statements that

Canadian officials met independently with Mr. Arar. This time around, he would be clear that all the meetings that Canadian officials had with Mr. Arar were in the presence of Syrian officials. Exhibit P-42, Tab 649.

67 [P] Fry testimony (June 13, 2005), pp. 6557-6559.

68 Exhibit P-242, Tab 14, p. 1.

69 Ibid., Tab 16.

70 Ibid.

71 Ibid.

72 Ibid.

73 [P] Martel testimony [ET] (August 30, 2005), pp. 11213-11215.

74 Ibid., pp. 11219-11220.

75 Exhibit P-42, Tab 725. Ms. Pasty-Lupul tried to contact members of Mr. Arar's support team to sort out the discrepancy between DFAIT's account of the events of August 14 and Mr. Arar's, but to no avail. Exhibits P-200 and P-201; [P] Pasty-Lupul testimony (July 29, 2005), pp. 9158-9160.

76 [P] Martel testimony [ET] (August 30, 2005), pp. 11224-11225.

77 Exhibit C-21, Tab 32. The report was dated February 9, 2004 and stated that the conversation took place on January 8, 2004. The Canadian official testified that the date of January 8, 2004 was an error. The conversation actually took place on February 8, 2004. [IC] Testimony (September 21, 2004), p. 1409.

78 [IC] Testimony (September 21, 2004), pp. 1421-1427.

79 Exhibit P-243.

80 [P] Martel testimony [ET] (August 30, 2005), pp. 11237-11238.

81 Ibid., pp. 11239-11240.

82 [P] Martel testimony [ET] (August 30, 2005), pp. 11241-11243 and [P] [ET] (August 31, 2005), pp. 11560 and 11562-11563. Mr. Martel was particularly rankled by allegations in the lawsuit that he was too busy to visit Mr. Arar more often when he was in detention in Syria. During his testimony, Mr. Martel repeatedly referred to this point in particular as an example of a "big lie." [IC] Martel testimony (April 26, 2005), pp. 16024-16025 and [P] [ET] (August 30, 2005), pp. 11241-11242.

83 Exhibit P-248; Exhibit P-249.

84 [IC] Martel testimony (April 26, 2005), p. 16021.

85 [P] Martel testimony [ET] (August 31, 2005), pp. 11346-11348.

86 [IC] Testimony (September 21, 2004), p. 1420

87 Exhibit C-23.

88 [P] Martel testimony [ET] (August 31, 2005), pp. 11348-11350 and 11352-11354. Mr. Martel denied that what he was really reacting to was the contents of Mr. Arar's chronology, which he had already seen. Ibid., p. 11356.

89 Ibid., pp. 11350-11352.

90 Ibid., p. 11268.

91 Exhibit P-243.

92 [P] Martel testimony [ET] (August 31, 2005), p. 11269.

93 Ibid., pp. 11281, 11283 and 11290-11291.

94 Both reports on Mr. Nureddin mentioned that the Syrian jailers "doused" or "poured" cold water on him. This information was not included in the Canadian official's report on Mr. Arar. Also, both reports mentioned that he was beaten on the soles of his feet with a thick black plastic cable. This was not mentioned in any reports filed by Mr. Martel on Mr. Arar or in Mr. Arar's press conference or chronology. Finally, neither report mentioned Mr. Nureddin being beaten on the elbows and in other places where there would be no scarring. This was

similar, however, to what Mr. Arar wrote in his chronology about his experience at the start of his detention. See Exhibits P-42, Tab 693, P-242, Tab 17, P-244 and P-245.

95 Exhibit P-245; [P] Martel testimony [ET] (August 31, 2005), pp. 11270-11272.

96 Exhibit P-242, Tab 1.

97 [P] Martel testimony [ET] (August 31, 2005), pp. 11274-11276.

98 Exhibit P-243.

99 Ibid.

100 [P] Martel testimony [ET] (August 31, 2005), pp. 11357-11361.

101 [IC] Wright testimony (March 29, 2005), p. 13093.

102 Ibid., p. 13108.

103 Ibid., pp. 13104-13105.

104 Ibid., p. 13101.

105 Exhibit C-206, Tab 650.

106 [P] Graham testimony (May 30, 2005), pp. 4307-4308.

107 Ibid.

108 Exhibit C-206, Tab 650, p. 1.

109 [P] Graham testimony (May 30, 2005), p. 4311.

110 On August 1, 2003, the *Ottawa Citizen* ran a story entitled "RCMP didn't turn in Arar; U.S. Embassy statement conflicts with claims by Powell and Cellucci." According to reporter Robert Fife, Embassy officials had told the media the previous day that the RCMP had no direct role in the U.S. decision to arrest Mr. Arar and deport him to Syria. The Embassy statement said that "The U.S. and Canadian law enforcement agencies consult and exchange information all the time, but, however, in the case of the detention of Maher Arar, the U.S. did not consult with any Canadian law enforcement organization."

The article continued: "The denial yesterday comes after the RCMP faced allegations of helping the U.S. to deport a Canadian citizen to a country known for torture and calls for a parliamentary inquiry from Amnesty International and the American Islamic Relations Council. ... The official denial of any Canadian participation in Mr. Arar's deportation was made under pressure from the RCMP, sources say, and conflicts with statements made by U.S. Ambassador Cellucci and U.S. Secretary of State Colin Powell." Exhibit P-44.

111 Ibid.

112 [P] Graham testimony (May 30, 2005), pp. 4310-4311.

113 Exhibit P-31, Robert Fife, "PM to U.S.: Name moles in Arar case: PM wants names of tipsters behind torture of Canadian," *Ottawa Citizen* (November 6, 2003), A1.

114 Exhibit P-31; [IC] Kergin testimony (April 5, 2005), pp. 14228-14229.

115 Exhibit P-32, Susan Delacourt, "Chrétien blames the U.S. for deporting Arar to Syria; Syrian envoy says Canadian jailed as favour to U.S. 'We believe there is no case against him,' diplomat says." *Toronto Star* (November 6, 2003), A7.

116 [IC] Kergin testimony (April 5, 2005), p. 14230.

117 Mr. Kergin held the post from mid-September 2000 to the end of February 2005. Ibid., p. 14174.

118 Ibid., p. 14221; [IC] Wright testimony (March 29, 2005), p. 13116.

119 [IC] Kergin testimony (April 5, 2005), p. 14221.

120 Ibid., p. 14236.

121 Exhibit C-206, Tab 661, e-mail from Peter Boehm dated November 6, 2003, subject: "Arar: Meeting at NSC."

122 [IC] Kergin testimony (April 5, 2005), p. 14232.

123 Exhibit C-206, Tab 661; [IC] Kergin testimony (April 5, 2005), pp. 14233-14234.

124 Ibid., pp.13118-13119.

- 125 Mr. Easter also met with U.S. Ambassador Cellucci, on December 2, 2002. Mr. Easter testified that he could not recall whether Mr. Arar's case was raised. In a memorandum for the Deputy Solicitor General, it was noted that "[d]uring this meeting, the Ambassador may raise the Arar case." Mr. Easter also said that he was "pretty confident" that the issue was not brought up, that "to raise this issue would be more the role of the Minister of Foreign Affairs, not myself." According to his recollection, no one suggested to Mr. Easter that he should raise the Arar case on his own. Mr. Easter testified that the meeting was "basically a get to know you meeting" with the Ambassador, and it "would have been really inappropriate for me to raise it." See Exhibit C-324, Tab 30; [IC] Easter testimony (August 11, 2005), pp. 17747-17749.
- 126 [IC] Easter testimony (August 11, 2005), pp. 17750 and 17782.
- 127 Exhibit C-324, Tab 10. [IC] Easter testimony (August 11, 2005), pp. 17778-17779.
- 128 Ibid.; *ibid.*, p. 17797.
- 129 Ibid., p. 17802.
- 130 Ibid., p. 17803.
- 131 Exhibit C-206, Tab 749, C4 e-mail from Karen McDonald. See also P-105 (heavily redacted).
- 132 [P] Graham testimony (May 30, 2005), pp. 4321-4322.
- 133 Exhibit P-106, p. 2 (DFAIT Chronology); [P] Graham testimony (May 30, 2005), pp. 4320-4321.
- 134 [P] Graham testimony (May 30, 2005), p. 4149.
- 135 Exhibit P-80, p. 2.
- 136 Exhibit P-116. Graham Fraser, "U.S. urged Canada to hold Arar; Canada refused to make arrest Americans sent him to Syria," *Toronto Star*, October 9, 2003, A1.
- 137 Exhibit P-247.
- 138 Exhibit C-29. "The case of Maher Arar takes more twists and turns," CTV, (October 23, 2003), P-39. Re-broadcast on "CTV Newsnet Morning," October 24, 2003.
- 139 These names are variously spelled throughout the report.
- 140 Exhibit P-117, Tab 47, p. 6.
- 141 Exhibit P-80, p. 4; Norma Greenaway, "Supporters say Arar target of smear campaign," *Ottawa Citizen*, October 25, 2003, A3.
- 142 In their closing submission to this Inquiry, Mr. Arar's counsel stated that "These leaks have irreparably damaged Mr. Arar's reputation." Closing Submissions, Mr. Arar, p. 210, para. 483.
- 143 [P] Fry testimony (June 13, 2005), p. 6559.
- 144 A rough transcript of Mr. Petrovic's report is included in an e-mail from Joseph de Mora to Karen Matthias, October 30, 2003; unredacted DFAIT document RCRD.BCD.BCF.0003.0253. Mr. Petrovic's report is also referenced in [P] Fry testimony (June 13, 2005), p. 6559.
- 145 [P] Fry testimony (June 13, 2005), pp. 6559-6560.
- 146 Exhibit C-206, Tab 630. E-mail from Konrad Sigurdson to Myra Pastyr-Lupul, December 5, 2004, containing an e-mail from Robert Fry to Isabelle Savard, John McNee, Colleen Swords, Konrad Sigurdson, France Bureau, and Owen Teo, sent October 30, 2003.
- 147 Ibid.
- 148 Exhibit P-80, pp. 5-6; Exhibit C-221, Tab 49, pp. 3-6. The *Vancouver Sun* article appeared on p. A5 under the title "RCMP could expose terror investigations; Scrutiny could expose allegations of an al-Qaida plot to bomb U.S. embassy." [The *Vancouver Sun* article appears only in Exhibit C-221, not in Exhibit P-80.]
- 149 [IC] Coons testimony (December 8, 2004), p. 7462.
- 150 Ibid., pp. 7461 and 7463.
- 151 Ibid., p. 7464.
- 152 Exhibit P-80, pp. 7-8. The article's source was CanWest News Service. A similar version of the story appeared in the *Montreal Gazette* on December 30, 2003 entitled "No doubt Al-Qa'ida

- trained Arar, officials say: Suspect's family calls accusation a smear," by Robert Fife, A1; Exhibit P-80, pp. 9-10.
- 153 This statement suggests that the source knew of American information about Mr. Arar. There is no evidence to support the proposition that Canadian officials ever received such information.
- 154 Exhibit P-80, pp. 12-13. Robert Fife, with files from Mark Kennedy and Anne Dawson, "Arar deported after RCMP told U.S. he would go free here: Mounties had no evidence to lay charges; Martin hints he may call public inquiry," *Ottawa Citizen*, January 23, 2004, A3.
- 155 R.S., 1985, c. I-11.
- 156 Motion by Mr. Waldman, June 13, 2005, pp. 6365-66.
- 157 [P] Waldman testimony (September 12, 2005), p. 11680.
- 158 Exhibit P-80, p. 5. Norma Greenaway, "Supporters say Arar target of smear campaign," *Ottawa Citizen*, October 25, 2003, A3.
- 159 Exhibit C-121.
- 160 [P] Payne testimony (June 8, 2005), pp. 6102-6106.
- 161 Appendix 7, "Report of Stephen J. Toope, Fact Finder," October 14, 2005 (Toope Report).
- 162 The Fact Finder's appointment and terms of reference were issued pursuant to the Commissioner's "Ruling on Process and Procedural Issues," May 12, 2005.
- 163 Toope Report, pp. 813-817.
- 164 Ibid., p. 814.
- 165 Ibid.
- 166 Ibid., p. 816.
- 167 Ibid.
- 168 [IC] Wright testimony (April 6, 2005), pp. 14451-14452.
- 169 Ibid., p. 14452.
- 170 Exhibit C-245; [IC] Wright testimony (April 6, 2005), pp. 14454-14455.
- 171 Exhibit C-221, Tab 43.
- 172 Exhibit C-246; [IC] Wright testimony (April 6, 2005), pp. 14456-14457.
- 173 Exhibit C-221, Tab 44; [IC] Wright testimony (April 6, 2005), p. 14457.
- 174 [IC] Wright testimony (April 6, 2005), p. 14457.
- 175 Exhibit C-221, Tab 4, p. 1; Exhibit P-117, Tab 56, p. 1.
- 176 Exhibit C-221, Tab 47, p. 3; Exhibit P-117, Tab 47, p. 9.
- 177 Exhibit C-221, Tab 47, p. 11.
- 178 [P] Loepky testimony (July 27, 2005), p. 8644.
- 179 Exhibit C-221, tab 47, p. 5.
- 180 Exhibit P-84, p. 133. The briefing note was recommended by Inspector Rick Reynolds, OIC NSIB, and approved by Assistant Commissioner Richard Proulx, CID, October 23, 2003.
- 181 [P] Loepky testimony (July 27, 2005), pp. 8639-8640.
- 182 Ibid., pp. 8640-8641.
- 183 Exhibit C-221, Tab 47, pp. 6-7.
- 184 Ibid., p. 78.
- 185 [P] Loepky testimony (July 27, 2005), p. 8646.
- 186 Ibid., p. 8647.
- 187 Ibid.
- 188 Exhibit C-221, Tab 47, pp. 2-6.
- 189 The damage assessment was conducted as set out in the CSIS policy on Violations and Breaches of Security (s.102).
- 190 Letter from Gregory S. Tzemenakis, McCarthy Tetrault, to Lara Tessaro, Commission Counsel, Re PCO Undertaking, dated September 29, 2005, marked "Delivered by Hand."

- 191 Exhibit P-117, vol. 2, Tab 60, p. 1; Exhibit C-221, Tab 49; [IC] Wright testimony (April 6, 2005),  
p. 14470.
- 192 Exhibit C-221, Tab 49, p. 2.
- 193 [IC] Wright testimony (April 6, 2005), p. 14470.
- 194 Exhibit P-117, vol. 2, Tab 60, p. 2. At DFAIT, the first and second investigations into the leaks  
were consolidated into one internal administrative review. On November 14, 2003, PCO se-  
curity sent a fax to DFAIT regarding the leak investigations, confirming that the department  
would “handle all previous requests as one administrative review/case,” and explaining that  
they [PCO] will send along new media articles as they appear. Exhibit C-206, vol. 6, Tab 719.
- 195 Exhibit C-221, Tab 56, pp. 1-3.
- 196 *Ibid.*, p. 3.
- 197 [P] Loeppky testimony (July 27, 2005), p. 8650.
- 198 Exhibit P-83, Tab 2, p. 132; [P] Loeppky testimony (July 27, 2005), pp. 8649-8650.
- 199 [IC] Wright testimony (April 6, 2005), p. 14486; [P] Livermore testimony (May 18, 2005),  
p. 2759.
- 200 [IC] Wright testimony (April 6, 2005), p. 14486.
- 201 *Ibid.*, pp. 14487-14488.
- 202 [P] Barbara McIsaac (September 12, 2005), p. 11804.
- 203 Exhibit P-241.
- 204 *Ibid.*
- 205 [P] Cabana testimony (June 29, 2005), p. 8032.
- 206 Exhibit C-30, Tab 280.
- 207 [IC] Testimony (November 17, 2004), pp. 5539 and 5546-5549.
- 208 Exhibit C-30, Tab 309.
- 209 *Ibid.*, Tab 301.
- 210 [IC] Cabana testimony (November 1, 2004), pp. 3243-3244.
- 211 Exhibit C-30, Tabs 316 and 318; [IC] Callaghan testimony (November 8, 2004), pp. 4228-4229.
- 212 Exhibit C-30, Tab 322; [IC] Cabana testimony (November 1, 2004), pp. 3256-3257. See also  
Exhibit C-30, Tab 325, a Project A-O Canada situation report stating that a news reporter had  
contacted Corporal Buffam to request an interview about Mr. Arar.
- 213 Exhibit C-30, Tab 342.
- 214 [IC] Corcoran testimony (November 15, 2004), pp. 4918-4919.
- 215 [IC] Roy testimony (December 6, 2004), pp. 6926-6927.
- 216 Exhibit C-30, Tab 344.
- 217 As discussed earlier in this Report, INSETs (Integrated National Security Enforcement Teams)  
replaced the former NSIS (National Security Investigations Section) units in Ottawa, Toronto,  
Montreal and Vancouver. National security investigations were normally conducted by INSET  
units, Project A-O Canada being an exception to the rule. [IC] Cabana testimony (October 25,  
2004), pp. 2342-2343; [IC] Clement testimony (January 18, 2005), pp. 8880-8881; [IC] Pilgrim  
testimony (January 26, 2005), p. 10328.
- 218 [IC] Cabana testimony (November 1, 2004), pp. 3265-3266.
- 219 Exhibit C-30, Tab 355.
- 220 [IC] Corcoran testimony (November 15, 2004), pp. 4927-4928. The CSIS visit to Syria is dis-  
cussed at length in Chapter III, Section 4.
- 221 Exhibit C-115.
- 222 Exhibit C-30, Tab 382.
- 223 [IC] Lemay testimony (November 17, 2004), pp. 5554-5555.
- 224 [IC] Flewelling testimony (January 20, 2005), pp. 9570-9578.
- 225 [IC] Cabana testimony (November 1, 2004), pp. 3348-3351.

- 226 Exhibit C-30, Tab 410.
- 227 [IC] Reynolds testimony (February 1, 2005), pp. 10880-10888.
- 228 [IC] Callaghan testimony (November 8, 2004), pp. 4258-4259.
- 229 [IC] Cabana testimony (November 1, 2004), pp. 3380-3381.
- 230 [IC] Corcoran testimony (November 15, 2004), pp. 4948-4950.
- 231 [IC] Coons testimony (December 8, 2004), p. 7369.
- 232 [IC] Callaghan testimony (November 8, 2004), p. 4258. Staff Sergeant Callaghan added that no new training took place, and no new policies related to national security investigation became applicable.
- 233 [IC] Walsh testimony (November 30, 2004), pp. 6196-6199. It appears that Superintendent Pilgrim believed from this point on that contact between certain U.S. agencies, and Project A-O Canada was prohibited. As discussed below, however, the contact continued for some time. [IC] Pilgrim testimony (January 26, 2005), pp. 10462-10464.
- 234 Exhibit C-30, Tab 435.
- 235 [IC] Flewelling testimony (January 21, 2005), pp. 9755-9758.
- 236 [IC] Buffam testimony (December 1, 2004), pp. 6465-6466.
- 237 Exhibit C-83.
- 238 [IC] Walsh testimony (November 30, 2004), pp. 6199-6202.
- 239 Exhibit C-30, Tab 451
- 240 [IC] Callaghan testimony (November 8, 2004), pp. 4285-4292.
- 241 Ibid., pp. 4288-4292; Exhibit C-77; Exhibit C-30, Tab 482.
- 242 [IC] Corcoran testimony (November 15, 2004), p. 4975.
- 243 Ibid., p. 4996.
- 244 [IC] Callaghan testimony (November 8, 2004), p. 4302; [IC] Corcoran testimony (November 15, 2004), pp. 4996-4997; [IC] Coons testimony (December 8, 2004), pp. 7437-7439.
- 245 [IC] Callaghan testimony (November 8, 2004), pp. 4303-4306. Chief Superintendent Killam was OIC of the National Security Intelligence Branch at this time.
- 246 Exhibit C-143.
- 247 Exhibit C-30, Tab 512.
- 248 Ibid., Tab 519.
- 249 Ibid., Tab 513.
- 250 [IC] Callaghan testimony (November 8, 2004), p. 4306; Exhibit C-30, Tab 516.
- 251 Exhibit C-30, Tab 514.
- 252 Corcoran notes, p. 287.
- 253 Corporal Buffam alone was contacted approximately 10 to 15 times after Mr. Arar's November 2003 press conference.
- 254 Exhibit C-30, Tab 525.
- 255 Ibid.
- 256 Project A-O Canada wrote to the FBI to inquire whether they had received a copy of the lease documents. Exhibit C-30, Tab 527.
- 257 Ibid., Tab 528.
- 258 Callaghan notes, pp. 653-654.
- 259 [IC] Callaghan testimony (November 8, 2004), pp. 4339-4341.
- 260 [IC] Coons testimony (December 8, 2004), pp. 7496-7498.
- 261 Exhibit C-30, Tab 555; [IC] Loeppky testimony (April 20, 2005), pp. 15263-15265
- 262 Exhibit C-30, Tab 554.
- 263 Ibid., Tab 557.
- 264 Corcoran notes, p. 308.
- 265 Exhibit C-30, Tab 589.

- 266 Ibid., Tab 591.
- 267 Ibid.
- 268 [IC] Corcoran testimony (November 15, 2004), p. 4977.
- 269 [IC] Callaghan testimony (November 9, 2004), pp. 4426-4427 and [IC] (November 15, 2004), p. 5092.
- 270 [IC] Loeppky testimony (April 20, 2005), pp. 15271-15273.
- 271 Ibid., p. 15281.
- 272 Ibid., pp. 15310-15314.
- 273 Ibid., pp. 15367-15370.
- 274 [IC] Hooper testimony (September 23, 2004), pp. 1805-1807.
- 275 Ibid., pp. 1798-1807. Mr. Hooper explained that if CSIS did this for Mr. Arar, it would receive similar requests from lawyers for other individuals asking that the same statement be made concerning their clients.
- 276 [IC] Testimony (September 15, 2004), pp. 502-503; [IC] Testimony (September 29, 2004), pp. 2198-2199; [IC] Cabana testimony (November 1, 2004), pp. 3520-3521; [IC] Callaghan testimony (November 9, 2004), pp. 4428-4429; [IC] Corcoran testimony (November 15, 2004), pp. 5056-5057; [IC] Walsh testimony (November 30, 2004), pp. 6146-6147; [IC] Buffam testimony (December 2, 2004), p. 6623; [IC] Coons testimony (December 8, 2004), p. 7542; [IC] Hovey testimony (January 17, 2005), p. 8797; [IC] Pilgrim testimony (January 28, 2005), pp. 10590-10591; [IC] Reynolds testimony (February 1, 2005), p. 11050; [IC] Loeppky testimony (April 20, 2005), p. 15316.
- 277 [IC] Wright testimony (April 6, 2005), p. 14571.
- 278 [IC] Pilgrim testimony (January 26, 2005), p. 10406.
- 279 [IC] Pilgrim testimony (January 28, 2005), pp. 10638-10641.
- 280 Exhibit P-12, Tab 39. According to the RCMP Operational Manual (IV.10 - National Security Investigations Policy), threat warnings can be set (from highest to lowest) at imminent, high, medium, low or no threat recognized. A "high" rating signifies that although no specific target has been identified, there is information about an individual or group in Canada with the stated intent and capability to commit a serious act of violence against Canadians or their property.
- 281 Exhibit C-180.
- 282 [IC] Pilgrim testimony (January 26, 2004), p. 10430.
- 283 Ibid., pp. 10420-10421 and [IC] (January 28, 2005), pp. 10648-10649; [IC] Cabana testimony (August 8, 2005), pp. 17332-17333.
- 284 [IC] Cabana testimony (October 27, 2004), p. 2895; [IC] Buffam testimony (December 1, 2004), pp. 6492-6494; [IC] Clement testimony (January 19, 2005), pp. 9299-9304.
- 285 [IC] Flewelling testimony (January 20, 2005), p. 9361; [IC] Reynolds testimony (February 1, 2005), pp. 10856-10857.
- 286 [IC] Flewelling testimony (January 20, 2005), pp. 9360-9361.
- 287 Russell Weissman.
- 288 Corcoran notes, p.176; [IC] Corcoran testimony (November 15, 2004), pp. 4933 and 4935; Buffam notes, p. 229.
- 289 [IC] Corcoran testimony (November 15, 2004), pp. 4938-4940; [IC] Buffam testimony (December 1, 2004), pp. 6512-6515.
- 290 Exhibit C-180.
- 291 Ibid.; [IC] Pilgrim testimony (January 26, 2005), p. 10416.
- 292 Exhibit C-180. There was no threat level attached to the assessment because it did not address a specific target. In assessing how such a threat would have been perceived, a witness from RCMP Headquarters explained that it would not necessarily have been at the highest level

(imminent), but would have been at a relatively high level. [IC] Pilgrim testimony (January 28, 2005), pp. 10648-10649.

<sup>293</sup> Exhibit C-115.

<sup>294</sup> Exhibit C-180.

<sup>295</sup> Exhibit P-12, Tab 39. A “medium” rating signifies that there is intelligence or information about an individual or group in Canada with the stated intent or capability of committing acts of serious violence, but that there is no intelligence or information indicating such an act is forthcoming.

<sup>296</sup> Ibid. Threat assessments for May 21, 2003, September 24, 2003 and March 30, 2004 were provided to the Commission. All of these threat assessments set the threat to the prominent building at “medium.”

<sup>297</sup> [IC] Callaghan testimony (November 9, 2004), pp. 4508-4509; [IC] Corcoran testimony (November 15, 2004), pp. 4940-4941, 5054-5056 and 5104-5105.

<sup>298</sup> [IC] Callaghan testimony (November 9, 2004), p. 4509.



# V

## MISCELLANEOUS MATTERS

### 1. RENDITION

“Rendition” refers to the act of surrendering or handing over a person from one country to another country — typically outside normal legal channels.<sup>1</sup>

Prior to 9/11, renditions were carried out for the express purpose of prosecution.<sup>2</sup> More recently, the term “extraordinary rendition,” or “rendition to risk of torture” has been used to describe any transfer of a person to a country where he or she is at risk of being tortured, whether the transfer is within or outside a legal procedure.<sup>3</sup>

#### *American Practices*

Relatively little is known about the American practices of rendition prior to 9/11. From what is known, the practice was recognized in a series of Presidential Decision Directives (PDDs), beginning in the late 1980s during the administration of President George H.W. Bush.<sup>4</sup>

Initially, the American practice of rendition involved what has been termed “rendition to justice”. The first of these PDDs, which remains classified, provided for a process whereby U.S. officials from various agencies apprehended terrorist and drug suspects outside of the U.S., for the purpose of bringing them to the U.S. for prosecution.<sup>5</sup>

In June 1995, President Clinton issued PDD-39, which confirmed that, with prior White House approval, terrorist suspects and others wanted for prosecution in the U.S. could be apprehended in other countries by U.S. operatives without those countries’ consent or cooperation. Although heavily redacted, the PDD states in part:

When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of highest priority ... If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government, consistent with the procedures outlined in NSD-77, which shall remain in effect.<sup>6</sup>

This policy was reiterated in May 1998 with a new directive, PDD-62.<sup>7</sup>

Testifying before the U.S. Senate Judiciary Committee in September 1998, then FBI Director Louis Freeh stated that during the 1990s the U.S. had “successfully returned” 13 suspected international terrorists to stand trial in the U.S. for completed or planned acts of terrorism against U.S. citizens.<sup>8</sup> George Tenet, the former Director of Central Intelligence, testified at the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) that more than 80 individuals were rendered to the U.S. prior to September 11, 2001.<sup>9</sup>

It appears that the American practice of rendition changed significantly in the aftermath of 9/11. According to media reports, a few days after September 11, 2001, President George W. Bush issued a new PDD that gave the CIA expansive new discretionary authority to carry out renditions without White House approval in each individual case. In addition, the majority of renditions carried out since then have not been “renditions to justice.” Instead, they have involved the transfer of individuals to other countries for one of two purposes: intelligence gathering through coercive interrogation, or warehousing of individuals considered to constitute a threat to U.S. national security.<sup>10</sup>

Human rights organizations became aware of the change in American rendition practice in late 2001, after men were rendered from Sweden to Egypt, with American involvement.<sup>11</sup> At the same time, articles began appearing in major U.S. newspapers, describing how men were “snatched” and transferred to third countries outside legal channels, calling this “extraordinary rendition”.<sup>12</sup>

In her testimony at this Inquiry, Ms. Julia Hall of Human Rights Watch<sup>13</sup> estimated that between 9/11 and June, 2005, there were approximately 100 to 150 renditions.<sup>14</sup> Research by Human Rights Watch indicates that the primary country of destination for those rendered was Egypt, and that there have also been renditions to Syria, Jordan and Uzbekistan.<sup>15</sup> Additional destinations identified by investigative journalists are Morocco, Saudi Arabia and Yemen.<sup>16</sup> All of these countries have been implicated by the U.S. State Department in using torture in interrogation.<sup>17</sup> Referring to flight logs of aircraft apparently used by the CIA to carry out rendition of terrorism suspects to those countries, *Newsweek* reported

that by 2004, the CIA was running a covert airline for the purpose of moving prisoners.<sup>18</sup>

Human rights advocates strongly suspect that the U.S. chooses to have terrorism suspects interrogated by officials in those countries because there are both domestic and international legal obligations that impinge on the ability of the U.S. to use coercive means of interrogation.<sup>19</sup> There is an expectation that there will be a better opportunity to gain intelligence by sending people to Egypt or Syria, for example.

Governments, including the U.S. government, have explained that they do not prosecute these terrorism suspects either because they have insufficient evidence, or because disclosure would reveal sensitive intelligence information.<sup>20</sup>

Ms. Hall testified that these global transfers of terrorism suspects after 9/11 involve a common set of features. The person subject to the transfer is labelled a terrorist, someone associated with terrorists or a threat to national security. The person so labelled is denied access to the evidence against him or her, and so cannot challenge it. The countries to which the person is transferred include states with well-documented histories of human rights abuses and in particular, the use of torture or other cruel, inhuman or degrading treatment during interrogation and detention. The sending state justifies such transfers by securing diplomatic assurances of humane treatment by the receiving state. Finally, the transfers are carried out in secrecy.<sup>21</sup>

Human Rights Watch has labelled Mr. Arar's case a rendition, and places it in the context of other post-9/11 renditions having these features.<sup>22</sup> However, Mr. Arar's rendition has certain unique features, including his Canadian citizenship and his expedited removal from the U.S. on security-related grounds under section 235(c) of the U.S. *Immigration and Nationality Act*.<sup>23</sup>

The U.S. referred to its practice of obtaining assurances from foreign governments to which detainees are being transferred in its report to the United Nations Committee Against Torture, submitted on May 6, 2005.<sup>24</sup> In fact, the U.S. is one of the few legal systems that provides in law for the use of diplomatic assurances in the context of its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). A U.S. federal regulation provides that the Secretary of State may secure assurances from a government that a person subject to return will not be tortured. In consultation with the Attorney General, the Secretary of State determines whether the assurances are "sufficiently reliable" to allow the person's return in compliance with the CAT.<sup>25</sup>

Historically, European countries (and, more recently, Canada) have sought diplomatic assurances prior to the return to the U.S. of criminal suspects who

could otherwise face the death penalty.<sup>26</sup> In those instances, the European countries and Canada have requested assurances that the person being returned to the U.S. would not be subject to the death penalty.<sup>27</sup> Compliance with such diplomatic assurances can be readily monitored.<sup>28</sup>

In the rendition context, human rights advocates see the use of diplomatic assurances by the U.S. and other countries as an end-run around their absolute obligation not to return a person to a risk of torture (the “*nonrefoulement* obligation”).<sup>29</sup> In their view, diplomatic assurances provide no effective safeguard against torture, but are unreliable and unenforceable.<sup>30</sup> They note that diplomatic assurances are always negotiated at the diplomatic level, by officials who must take a number of competing considerations into account, and that human rights concerns may not be a priority.<sup>31</sup> They also question why states known to abuse human rights should be trusted to honour their international obligations not to engage in torture,<sup>32</sup> and point out that neither the sending nor the receiving country has any incentive to find that a diplomatic assurance has been breached.<sup>33</sup>

Reporting to the United Nations General Assembly in September 2004, the outgoing Special Rapporteur on Torture, Theo van Boven, expressed concern that the practice of relying on assurances “is increasingly undermining the principle of *nonrefoulement*.” He questioned whether this practice “is not becoming a politically inspired substitute for the principle of *nonrefoulement*, which ... is absolute and nonderogable.”<sup>34</sup> Quoting the Commissioner for Human Rights of the Council of Europe, the Special Rapporteur commented, “The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment.”<sup>35</sup> He stated that in circumstances where a person would otherwise be returned to a country where torture was systematic, “the principle of *nonrefoulement* must be strictly observed and diplomatic assurances should not be resorted to.”<sup>36</sup>

The current Special Rapporteur on Torture, Manfred Nowak, has echoed Mr. van Boven’s denunciation of the use of diplomatic assurances for returns to countries where torture is systematic. Mr. Nowak pointed out that there is “no way or very, very little possibility of the sending country to actually – as soon as the person is in the other country – to make sure that this type of diplomatic assurances are complied with.”<sup>37</sup> This reality was recognized by the U.S. Director of Central Intelligence, Porter J. Goss. In February 2005, Mr. Goss testified before Congress that although the U.S. has a responsibility of trying to ensure that transferees are properly treated, “of course, once they’re out of our control, there’s only so much we can do.”<sup>38</sup>

In a recent decision, the Committee Against Torture held that Swedish authorities knew or ought to have known that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.<sup>39</sup> The Committee held that in the circumstances of that case, Sweden's expulsion of a terrorism suspect violated Article 3 of the CAT, and that obtaining unenforceable diplomatic assurances was insufficient to protect against the manifest risk that he would be tortured in Egypt.<sup>40</sup>

## 2. THE MONTERREY PROTOCOL: A FORMAL UNDERSTANDING ON REMOVALS

### 2.1 DEVELOPMENT

Following Mr. Arar's removal from the United States to Syria via Jordan, DFAIT began developing a protocol, or understanding, with the United States on the issue of removals. The starting point for the Canada/U.S. Understanding on Removals (the "Monterrey Protocol") was a briefing note to Minister Graham dated November 13, 2002, for his November 14 visit with Secretary Powell.<sup>41</sup> The note stated that the Minister would want to register Canada's serious concerns about the Americans' handling of the Arar matter and that Canada hoped there would be appropriate consultations before such decisions were taken.<sup>42</sup>

Jim Wright, ADM for Global and Security Policy at DFAIT, explained that DFAIT spent a good part of 2002 and early 2003 trying to determine exactly what had happened in Mr. Arar's case.<sup>43</sup> It was only when the United States began to acknowledge its responsibility for the unilateral decision to remove Mr. Arar that it was "judged to be propitious to proceed with this kind of understanding."<sup>44</sup> Mr. Wright developed the protocol together with his colleagues in the Legal Bureau and in consultation with a number of other departments and agencies.<sup>45</sup> The initiative was taken to ensure that Canada did not have another case like Mr. Arar's in the future.<sup>46</sup>

In its initial drafts, DFAIT "sought in a sense a veto in the U.S. decision-making process with respect to deportation of Canadian nationals to third countries," Mr. Wright testified.<sup>47</sup> However, DFAIT understood that it was highly unlikely that U.S. authorities would ever agree to this because a sovereign state has the right to remove an individual to another state.<sup>48</sup>

Many communications and much negotiating took place in late 2003, with DFAIT attempting to finalize the protocol for the meeting between

Prime Minister Martin and President Bush in Monterrey, Mexico, in mid-January. Robert Wright of the Privy Council Office (PCO) laid the groundwork for a formal understanding on November 18 when he met with U.S. officials in Washington, including George Tenet, Director of the CIA, who supported the idea.<sup>49</sup> On November 20, Jim Wright advised Steve Kelly, U.S. Embassy Deputy Head of Mission, that Canada was developing a reciprocal consular understanding on removals and would be sharing the details with them shortly.<sup>50</sup> The draft protocol in the form of an exchange of letters was delivered to the U.S. State Department on November 28.<sup>51</sup>

During December and January, Jim Wright spoke often with U.S. officials to ensure that the protocol was finalized as quickly as possible and in advance of the Monterrey meeting.<sup>52</sup> He also raised the protocol issue when he met with U.S. officials on his December 12 visit to Washington, since DFAIT had received no official response from the United States at that time.<sup>53</sup> On January 8, Mr. Wright sent his counterpart in the U.S. State Department a revised version of the draft exchange of letters clearly stipulating that Canada was not looking for a veto in the U.S. decision-making process, but merely notification and consultation.<sup>54</sup>

Mr. Wright testified that the initial objectives for proper notification and expeditious consultation were achieved by the final version of the exchange of letters,<sup>55</sup> and this was done within six weeks.<sup>56</sup> The final letters were exchanged between Minister Graham and Secretary of State Powell on January 13, and the protocol concluded by Prime Minister Martin and President Bush at Monterrey, Mexico, the same day.<sup>57</sup>

## 2.2

### PURPOSE

The Monterrey Protocol ensures that when a known Canadian national is to be subject to involuntary removal from the United States to a country other than Canada, the United States will advise the Canadian principal point of contact, the Director General of the Consular Affairs Bureau of DFAIT, of the intended removal.<sup>58</sup> The two countries also undertake to consult expeditiously upon request by either country concerning a case of removal.<sup>59</sup>

As Jim Wright explained, the main objective of the protocol is to protect the interests of Canadians detained in the United States.<sup>60</sup> However, he acknowledged that the three concerns of protecting bilateral relations, protecting the flow of information between the two countries and doing what was available to avoid a public inquiry were associated with the main objective, and “certainly come up time and time again in terms of the documentation.”<sup>61</sup> Robert Wright

noted that the “whole logic of argument wasn’t just ‘We have to do this understanding so we don’t have a public inquiry’” — the broader context was that there was a gap in the way Canada managed its information and its implications for citizens, and Canada should deal with it.<sup>62</sup>

### 2.3 EFFECTIVENESS

The Monterrey Protocol is not a legally binding treaty. Jim Wright explained that the procedure for arriving at a legally binding treaty would have been much more arduous (requiring Senate approval in the United States), and Canada might have come up with absolutely nothing in the end.<sup>63</sup>

Mr. Wright believed that an understanding like the protocol would make it much more difficult, if not impossible, for the United States to unilaterally remove a Canadian citizen to a third country.<sup>64</sup> While the United States still retained the right to do so, the understanding would require a discussion between the governments, which would make it much more difficult for the Americans to proceed.<sup>65</sup> According to Robert Wright, the protocol provides extremely helpful protection for Canadian citizens but “[t]here is never a guarantee of these things...the President himself made it very clear that the U.S. is going to do what is right for their citizens.”<sup>66</sup> Canada’s ambassador to the United States, Michael Kergin, noted that the United States probably retained the absolute right in its own view to remove someone to a third country, but the extensive negotiation process and the exchange of letters gave the protocol a lot more weight, making it difficult for the United States to ignore the consultation process.<sup>67</sup>

Minister Graham testified that while the protocol is “clearly not as effective as an outright undertaking not to deport anybody under these circumstances,” the best arrangement Canada could get was an agreement to consult.<sup>68</sup> He believed that consultation creates an opportunity to bring other people into the picture; alarm bells then go off, and the issue can be raised to the prime ministerial/presidential level if necessary.<sup>69</sup> There would be a whole host of immediate responses moving it up to an action level, making it very unlikely that the United States would go ahead in light of a Canadian government objection.<sup>70</sup> While Minister Graham acknowledged that if the United States was determined to go ahead with such a removal, Canada could do nothing to stop it, he believed the understanding provided a very effective protection for Canadians, given how things work in international practice.<sup>71</sup>

Stephen Yale-Loehr, an expert witness on U.S. immigration law, stated that the protocol did not go far enough. He wished the United States would agree not to remove a Canadian citizen to a third country unless Canada explicitly

agreed in advance and in writing,<sup>72</sup> and he believed Canada should have a veto power over the United States on such decisions.<sup>73</sup> Julia Hall, an expert on the U.S. practice of rendition, testified that the Monterrey Protocol has the same status in law as diplomatic assurances, which are found to be ineffective, not abided by, legally unenforceable and operationally unworkable.<sup>74</sup> However, she acknowledged that the protocol is better than nothing.<sup>75</sup>

### 3. CONSULAR PROTECTION AND DUAL NATIONALITY

#### 3.1 INTRODUCTION

This section examines the right of consular protection for people with dual nationality, such as Maher Arar.

Traditionally, consular access has been understood to be one form of diplomatic protection for nationals detained in other countries.<sup>76</sup> Consular access is expressly provided for by the Vienna Convention on Consular Relations, which states that consular officials are “free to communicate with nationals of the sending State and to have access to them.” Nationals of the “sending State” have a corresponding right to communicate with, and have access to, consular officials of that state. Once notified that one of its nationals has been detained, a state’s consular officials have the right to visit and converse with their national and arrange for legal representation.

Dual citizenship or dual nationality complicates and may completely frustrate Canada’s ability to afford consular protection to any of its nationals detained abroad in countries of which they are also nationals. However, international law jurisprudence and scholarship suggest that Canada may have the ability to afford consular protection where the dual national’s dominant nationality is Canadian.<sup>77</sup>

#### 3.2 CONSULAR PROTECTION

In international law, states are under no obligation to afford their citizens diplomatic protection,<sup>78</sup> and citizens generally have no *right* of consular protection.<sup>79</sup> However, a recent decision concerning a Guantanamo Bay detainee (*Khadr v. Canada (Minister of Foreign Affairs)* [2004] F.C.J. No. 1391) suggests that such a right might exist in Canadian law.<sup>80</sup>

Article 36 of the Vienna Convention on Consular Relations provides that consular officers can communicate with their nationals and have access to them,

and that the nationals have the right to contact consular officials.<sup>81</sup> There are two aspects involved. First, when a national of a “sending state” (a state that has “sent” its representative or national out) is detained by a “receiving state” (the state that has “received” that representative or national), the receiving state is obliged to inform that person of the right to contact consular officials, without delay.<sup>82</sup> This obligation to inform arises as soon as the receiving state’s authorities become aware or suspect that the person is a foreign national.<sup>83</sup> Second, if the national of the sending state requests access to a consular official, the receiving state is obliged to grant that access, or at least inform the consular official that access has been requested.<sup>84</sup>

Adjudication of disputes between states concerning alleged violations of Article 36 is problematic. While Canada is among the 167 parties to the Vienna Convention on Consular Relations, it is not among the 45 parties to the Optional Protocol<sup>85</sup> that provides that disputes respecting the application or interpretation of the Convention between states that are parties to both the Convention and the protocol may be settled by the International Court of Justice.<sup>86</sup> Syria has not signed the Protocol, nor has it accepted the compulsory jurisdiction of the International Court of Justice,<sup>87</sup> and although the United States signed the Optional Protocol, it withdrew from it in March 2005.<sup>88</sup> Consequently, the only way Canada could bring a case against the United States or Syria in relation to an alleged violation of Article 36 would be with the consent of the other country or through the use of another international legal instrument, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>89</sup>

### 3.3

#### DUAL NATIONALITY

According to Statistics Canada, the self-identification counts from the 2001 Census indicate that there are 552,880 Canadian citizens who are also citizens of at least one other country,<sup>90</sup> and an additional 4,000 who are citizens of two or more other countries.

Special problems arise in affording diplomatic protection to dual nationals. Article 4 of the 1930 Hague Convention on Conflict of Nationality Laws would preclude a sending state from affording diplomatic protection to one of its nationals who is being held in a receiving state in which that person also holds citizenship (“A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses”).<sup>91</sup> This is known as the “non-responsibility rule.”<sup>92</sup> Syria’s view that it had principal jurisdiction over Mr. Arar (and therefore was under no obligation to provide consular access)

while he was detained within that country is consistent with the non-responsibility rule.<sup>93</sup>

The non-responsibility rule is essentially a rule of standing. It denies one state standing to assert a claim based on a wrong perpetrated to one of that state's nationals (or "espouse" the claim) or to afford diplomatic protection against a state whose nationality that person also possesses.<sup>94</sup>

However, the Commission heard evidence that the non-responsibility rule contained in Article 4 of the Convention does not represent the international law on consular protection of dual nationals today.<sup>95</sup> Even at the time the Convention was adopted, this rule was not part of customary international law.<sup>96</sup> Moreover, since then, the concept of genuine connection or effective (or dominant) nationality has evolved as a means of giving primacy to a particular nationality.<sup>97</sup> Dominant nationality is assessed by reference to criteria such as where a person is domiciled, where the person was educated, where family connections are, and what languages the person speaks.<sup>98</sup> This concept has recently been endorsed by the International Law Commission, which would permit the state with the predominant link to the individual to extend diplomatic protection.<sup>99</sup>

One means of giving effect to this dominant nationality principle is through bilateral consular agreements and bilateral consular treaties.<sup>100</sup> Canada has entered into several bilateral consular agreements, including one with China.<sup>101</sup> The Chinese government will not seek to apply Chinese nationality in cases where a dual Canadian-Chinese national enters China using a Canadian passport that has been stamped or otherwise recognized by the Chinese government.<sup>102</sup> There is also scope for bilateral agreements to settle individual cases involving dual nationals.<sup>103</sup> Some states may be willing to quietly provide Canada with access to dual nationals, but do not want that to be seen as establishing a precedent.<sup>104</sup>

In recognition of the practical difficulties that arise in affording diplomatic protection to dual nationals, the Citizenship and Immigration Canada website advises dual nationals that if they are in difficulty in the other country of citizenship, "Canadian officials may be entirely unable to help...[because] that country will be dealing with one of its own citizens and probably will not welcome outside interference."<sup>105</sup> It is appropriate that the public receive such a warning.<sup>106</sup>

In the case of a dual national who is detained in a third country, there is no law or practice that recognizes which of the two countries of nationality is to be notified.<sup>107</sup>

### 3.4

#### “CLINGING” NATIONALITIES

International law provides little guidance about the circumstances under which one should be able to rid oneself of a nationality. Article 15 of the Universal Declaration of Human Rights provides that no one shall be denied the right to change nationality, but this was intended to be a statement of objective rather than an obligation on individual states.<sup>108</sup> Consequently, there is no international right to renounce a citizenship.<sup>109</sup> The ability to renounce citizenship is governed by the law of individual states. The result is that, as a matter of international law, unwanted citizenship can “cling” to a person.<sup>110</sup>

All of the countries to which the United States has rendered terrorism suspects impose significant bars to renunciation of citizenship.<sup>111</sup> For example, a U.S. survey of citizenship laws indicates that voluntary renunciation of Syrian citizenship is so complicated that it is best not even attempted.<sup>112</sup> In any event, former Syrian citizens “probably maintain an unofficial dual citizenship status and would be subject to Syrian law should they return to Syria.”<sup>113</sup> In addition, anyone of military service age is not permitted to renounce citizenship.<sup>114</sup>

## 4.

### THE RCMP’S RELATIONSHIP WITH THE MUSLIM COMMUNITY

The following section examines the RCMP’s knowledge of and sensitivity to the Muslim community’s beliefs and customs, in relation to the investigations discussed in this Report.

#### 4.1

##### TRAINING

Members of Project A-O Canada received little or no training to make them sensitive to the Muslim or Sunni Muslim community and aware of their cultural particularities.

Chief Superintendent Antoine Couture testified that formal training in this area had not been considered necessary. Even though Project A-O Canada’s investigation involved Sunni Islamic extremism and the targets and persons of interest were almost exclusively Muslim, the main recruiting focus in assembling the team had been on investigators with experience in major case management. Furthermore, given the expertise of the investigators and Canada’s multicultural composition, Chief Superintendent Couture thought that Project A-O Canada

investigators would have had some awareness of potential challenges in this regard.<sup>115</sup>

Although he didn't believe that formal training was required, Chief Superintendent Couture did seek some outside expertise. Within two months of 9/11, Chief Superintendent Couture requested that "A" Division bring in an independent consultant on Middle Eastern affairs to assist with the investigations related to terrorism. A professor at Concordia University was identified as someone who could fill this role and conduct presentations to investigators within the division. It is unclear what became of this request.<sup>116</sup>

To Inspector Michel Cabana's knowledge, the RCMP did not provide training on Islam.<sup>117</sup> When referred to a booklet entitled *Islam & Muslims: What Police Need to Know*, prepared in 2002 by the Winnipeg Police Service, the Edmonton Police Service and the Canadian Council on American-Islamic Relations (CAIR-CAN), Inspector Cabana said that he had never seen it before. The booklet offered a superficial introduction to the Muslim community, addressing such topics as Muslim worship, dress code, and names and phrases. Inspector Cabana indicated that the booklet would not have been available at the start of the investigation.<sup>118</sup> Sergeant Randal Walsh was the only Project A-O Canada witness who testified that he had read the booklet.<sup>119</sup>

Project members did have an opportunity near the start of the Project to learn more about Muslim culture in relation to their investigative duties. In early November 2001, an offer was extended to Project members to join with investigators in "A" Division's National Security Investigations Section (NSIS) in attending a proposed two-hour presentation by a CSIS official specializing in Middle Eastern affairs. The sender of the e-mail invitation noted that with the realignment of investigators to deal with terrorism tied to Middle Eastern groups, some investigators were not necessarily familiar with the Muslim culture and Islamic religion. The sender even mentioned the practical example of unfamiliarity with names and surnames leading to confusion for certain North American investigators. Inspector Cabana believed members of his team attended this presentation but was unsure as to the number.<sup>120</sup>

Inspector Cabana also testified that Project A-O Canada had requested and received background information on terrorism in the Muslim community from CSIS and American agencies,<sup>121</sup> and that Project staff realized very quickly that they were dealing with something out of their ordinary experience. Officers investigating a drug-trafficking or criminal organization would normally know what to look for, according to the type of offence they were investigating. After 9/11, Project A-O Canada learned from American authorities that the terrorists had given no indication of what was being planned. On the surface, they were

law-abiding citizens who went about their daily business.<sup>122</sup> Project A-O Canada also asked CSIS for contacts within the community.<sup>123</sup>

The information acquired from other agencies, however, tended to focus on terrorist activities in the Muslim community, rather than on Muslim cultural values and habits or the need for sensitivity when dealing with this community.<sup>124</sup> Specific efforts by Project A-O Canada team members to read the materials provided by other agencies or materials that they picked up on their own were uneven at best. Only two investigators mentioned reading literature on Muslim culture.<sup>125</sup>

Moreover, two of the three examples witnesses offered of training in matters related to the Muslim community related to presentations that took place one and a half years after the Project's inception.

In February 2003, the Hate Crimes Section of the Ottawa Police Service (OPS) organized a one-day seminar on the Muslim community, although only the Project's assistant managers mentioned that they attended it.<sup>126</sup> Two investigators also attended a half-day workshop on terrorism in Ottawa in February 2003, at which Riad Saloojee of CAIR-CAN gave a presentation on Muslim culture and sensitivities and identified some issues of which police officers should be aware when dealing with this community.<sup>127</sup> Staff Sergeant Corcoran testified that some Project A-O Canada investigators had attended a one-day seminar offered by CSIS.<sup>128</sup> However, he did not mention a date for when this seminar took place, nor did he elaborate on the attendees.

Inspector Cabana had indicated that he was willing to release members of the team so that they could attend various seminars and workshops to further their understanding of cultural issues, but he could not release all members, as they were still operating in a crisis situation.<sup>129</sup>

Some Project A-O Canada witnesses considered additional cultural sensitivity training unnecessary. Inspector Cabana made it clear that, leaving aside efforts to increase members' knowledge about the Muslim community, it was important to note that "[Project A-O Canada] was not investigating the Muslim community."<sup>130</sup>

This view was supported by Staff Sergeant Callaghan, one of the Project's assistant managers. Asked if formal training in Muslim customs would have significantly altered any of the steps he had taken in the investigation, he indicated that such training might have made him more sensitive to Muslim issues, but police officers did not base their investigations on a person's religion. He explained that "an investigation is based on reasonable grounds to believe a crime has been committed, and what evidence is out there that [the police] can gather in the normal police procedures under the laws of Canada." He did not believe that

sensitivity training would have altered the way he had assessed any of the evidence that Project A-O Canada had obtained. Summing up, Staff Sergeant Callaghan stated: "... Cultural sensitivity training would have been a benefit, but ... this investigation was not about religion. It was about individuals being involved in possible terrorist activities."<sup>131</sup>

The following two examples from the testimony of Project A-O Canada witnesses illustrate Project A-O Canada investigators' inexperience and lack of training in dealing with the Muslim community. When responding to a question about how members of the Muslim or Syrian immigrant community connected with each other, one officer disputed the notion that such connections could be interpreted in different ways.<sup>132</sup> In another instance, a surveillance package prepared for Mr. Arar's anticipated return in October 2002 referred to the Ottawa Sikh Society in a section on mosques likely attended by Mr. Arar.<sup>133</sup> The officer who prepared the surveillance package stated that listing such mosques was a mistake by a team member.<sup>134</sup> When another officer was asked why mosques would be included, he replied that "it is important for the [surveillance unit] to have locations where individuals may go" and "none of this is based on religion."<sup>135</sup> Yet the officer who prepared the surveillance package stated that the mosques had been chosen as places frequented by Mr. Arar's associates.<sup>136</sup>

Notwithstanding all of the above, the evidence does not suggest that the officers of Project A-O Canada acted in bad faith or with any malice in their dealings with the Muslim community. Indeed, during the searches on January 22, 2002, RCMP officers believed that efforts were made to respect Muslim culture. Officers were instructed to take off their shoes before entering a home, stuffed animals were provided for any children present, and residents were permitted to pray before searches were conducted.<sup>137</sup>

Despite these efforts, the response to the RCMP search was problematic. There were media reports that the Muslim community felt targeted and treated insensitively by RCMP officers. It was pointed out to Sergeant Walsh that some members of the Muslim community were from countries run essentially as military states, and having law enforcement or intelligence personnel coming to their doors would likely cause great fear and anxiety. Sergeant Walsh replied that he had come to learn about the Muslim community's lack of trust in law enforcement and agreed that if members did not trust the RCMP, they were less likely to come forward with tips or to co-operate as witnesses. However, he pointed out that this was true of any investigation.<sup>138</sup>

The Commanding Officer of "A" Division, Assistant Commissioner Dawson Hovey, testified that he was aware of the Muslim community's reaction to executing the search warrants, but did not recall the RCMP taking specific steps to

alleviate their concerns. Instead, Assistant Commissioner Hovey met with the head of the OPS, Chief Vince Bevan, to discuss the issue. According to Assistant Commissioner Hovey, Chief Bevan felt that the appropriate course of action for the OPS was to meet with representatives of the Muslim community to inform them of its involvement in the searches (which he did). The RCMP did not feel that such a meeting with the Muslim community was appropriate at that time, given the ongoing criminal investigation.<sup>139</sup>

Chief Superintendent Couture testified that dealing with different cultural groups is always challenging. It is difficult to recruit members of these groups for law enforcement work and to convince them to testify or even to tell police what they know, he said.<sup>140</sup>

Asked what steps the RCMP was taking to meet these challenges, Chief Superintendent Couture replied that efforts were being made to recruit members of the Muslim community. As well, the RCMP had staff to liaise with these communities and help them understand policing in Canada. These efforts were producing results, but very slowly.<sup>141</sup>

The Commission also heard evidence about efforts by “A” Division to maintain more regular contact with the Muslim community. The Commanding Officer of “A” Division had had meetings with members of the Muslim community and of other ethnic and cultural groups in Ottawa. Asked if these regular meetings and consultations with the Muslim community would assist investigations like Project A-O Canada by building trust in the community, one RCMP witness replied that he hoped that the goodwill being developed with community leaders was building bridges throughout the community.<sup>142</sup>

## 4.2

### STAFFING

The Project A-O Canada team had one Muslim investigator, seconded from the OPS, who provided guidance about how to approach Muslims, as well as two Arabic translators.<sup>143</sup> Inspector Cabana testified that these efforts at inclusion were made to ensure that any steps taken during the investigation did not create problems in dealing with the Muslim community.<sup>144</sup>

The Muslim investigator was on the Project for only a short time; he left in late December 2001 and was not replaced.<sup>145</sup> However, he did return briefly to assist with the January 22 searches. In addition, two Muslim officers from the Sûreté du Québec were brought in to help deal with the material seized in the searches.<sup>146</sup>

### 4.3

## CONTACTS

### 4.3.1

#### Attendance at Mosques

On November 28, 2001, surveillance officers informed Project A-O Canada that Abdullah Almalki's parents, wife and children were headed for Dorval Airport. Not realizing that Mr. Almalki had already left the country, Project A-O Canada officers spent the next two days trying to find him.<sup>147</sup>

In the efforts to locate Mr. Almalki, the Muslim officer involved in Project A-O Canada was sent to a local mosque in the afternoon of Friday, November 30, to see if he was there. The officer reported to Staff Sergeant Callaghan that he did not see Mr. Almalki at the mosque, but did see one of Mr. Almalki's brothers, an associate of Mr. Almalki and possibly Mr. Arar.<sup>148</sup>

Staff Sergeant Callaghan instructed the officer to attend the mosque. He did not see any problem with entering a place of worship to look for a police target. He pointed out that this investigative step was not contrary to proper procedure. He also pointed out that whether it was a Muslim mosque, a Catholic church or a Buddhist temple, he could see nothing wrong with entering such a building. According to Staff Sergeant Callaghan, it was very important that they find Mr. Almalki.<sup>149</sup> Inspector Cabana, the Project's OIC, was not involved in giving the direction to go to the mosque, but was not surprised this step had been taken. He too felt that it was appropriate if the purpose was to find Mr. Almalki.<sup>150</sup>

In November 2003, the Solicitor General issued a ministerial direction on national security investigations to the RCMP. Concerning sensitive sectors, the direction states:

Recognizing there are no sanctuaries from law enforcement, special care is required with respect to the RCMP investigations conducted with respect to matters ... which have an impact on, or which appear to have an impact on, fundamental institutions of Canadian society. Primary among these institutions are those in the sectors of academia, politics, religion, the media and trade unions.<sup>151</sup>

It also states:

It is the responsibility of the Assistant Commissioner, Criminal Intelligence Directorate at the RCMP National Headquarters, or in his/her absence, his/her ap-

pointed designate, to approve all RCMP investigations involving the sensitive sectors of Canadian society.<sup>152</sup>

Inspector Cabana questioned the relevance of this ministerial direction to Project A-O Canada's investigation. He believed that the direction concerned national security investigations; therefore, it would apply to criminal investigations only on a case-by-case basis. Furthermore, he did not believe that sending someone to a mosque to confirm if a target was there was necessarily covered by the direction. He testified that, based on what he had seen, the direction is concerned with the operations of the institutions in question (for example, an undercover operation to investigate the management of a mosque), which is completely different from going to a mosque to look for someone.<sup>153</sup>

As for the relevance of the ministerial direction to future criminal investigations such as that conducted by Project A-O Canada, Inspector Cabana testified that it would not apply if the investigation involved determining whether a target attended a particular mosque, but would apply if the investigation was looking into the possibility the mosque was involved in a terrorist cell. Thus, in his opinion, the ministerial direction could apply in some instances to criminal investigations as well as to national security investigations.<sup>154</sup>

### 4.3.2

#### Interviews

During the January 22, 2002 searches, RCMP officers interviewed Mr. Almalki's brother, Youssef. The interview was conducted in the presence of Youssef's lawyer and focused on Abdullah. Youssef was questioned on whether Abdullah was moderate or extreme in his religious beliefs.<sup>155</sup> Youssef's lawyer interjected to point out that questions linking Muslim fundamentalism to extremism could be deemed offensive to practising Muslims. He noted that a person could be a fundamentalist Muslim without being an extremist. The officers did not ask questions about Muslim fundamentalism.<sup>156</sup>

Deputy Commissioner Garry Loepky, the RCMP's Chief Operational Officer, stated that religious observance is not linked to terrorist or criminal activity; therefore, it is totally inappropriate for an officer to try to determine someone's religious practices for personal information. However, on occasion, to further an investigation, questions involving religious practice could be asked that could connect it with terrorist or criminal activity.<sup>157</sup>

### 4.3.3

#### Community Relations

Using the OPS as an example, Dr. Sheema Khan, Chair of CAIR-CAN, testified on the usefulness of law enforcement officials being proactive in their relations with Muslim and Arab communities. Although relations between these communities and the OPS had been somewhat strained due to the Arar affair, community leaders had told her positive things about their relations with the local police service. She said that after the Inquiry was called in 2004, Ottawa Police Chief Bevan voluntarily acknowledged to the local Muslim and Arab communities that the OPS had been part of the investigation into Mr. Arar. His willingness to share this information with the community before it was brought out by the Inquiry was seen as proactive and constructive.<sup>158</sup> (Another example of the OPS' willingness to communicate with the local Muslim population on a sensitive issue directly affecting them, namely the January 22 searches, was described above in Section 4.1.)

The Commission was provided with reference materials on the RCMP's training and outreach efforts related to cultural diversity and bias-free<sup>159</sup> policing. These materials show a multi-faceted approach to sensitizing officers to cultural diversity and the importance of bias-free policing, including the need to consult ethnic and minority communities.<sup>160</sup> Many of the examples in the materials, however, relate to broad objectives. For instance, regarding commanding officers, the RCMP's Bias-free Policing Policy states: "Where circumstances warrant, consult with community leaders to resolve culturally sensitive issues. Consider establishing community partnerships for early intervention or prevention (i.e. community leaders, community consultative groups, outreach programs)."<sup>161</sup> The materials do not explain how some of the broad objectives were being achieved.

The reference materials also outline specific efforts to reach out to local Muslim and Arab communities. Most of the examples refer to steps taken by INSET/NSIS units, which are specifically trained to deal with national security files. For instance, the INSET in "C" Division in Montreal has a full-time community relations officer to help establish links with the Muslim community. The INSET in "E" Division in Vancouver has established a direct point of contact with each mosque and a liaison with British Columbia's Muslim Association. Examples of efforts involving the wider Force focus more generally on RCMP participation at conferences and community events, and the meetings of the Commissioner's Advisory Committee on Visible Minorities, which are held twice yearly.<sup>162</sup>

## 5.

### OTHER INVESTIGATIONS IN RELATION TO MR. ARAR

Media coverage of Mr. Arar's story generated significant public controversy about the possible role of Canadian officials in his detention and deportation. As a result, there were three other investigations of the handling of Mr. Arar's case, in addition to this Inquiry:

- The RCMP ordered an operational review of Project A-O Canada as it related to Mr. Arar; it was conducted by Chief Superintendent Dan Killam.<sup>163</sup>
- Chief Superintendent Brian Garvie also conducted an internal RCMP investigation, pursuant to the review process set out in the *Royal Canadian Mounted Police Act*.<sup>164</sup>
- The Security Intelligence Review Committee (SIRC), the arm's-length review body established by the *Canadian Security Intelligence Service Act*,<sup>165</sup> carried out a review on the role that CSIS played in events relating to Mr. Arar.

While this Commission's mandate does not extend to reporting on these review processes, in the interest of completeness, the following sections summarize the more salient aspects of the reports prepared by Chief Superintendent Garvie and by SIRC.

#### 5.1

#### THE GARVIE REPORT

##### 5.1.1

##### The CPC Process

The *RCMP Act* creates a statutory review mechanism by which either the Chair of the Commission for Public Complaints (CPC) or a member of the public may initiate a complaint regarding RCMP conduct.<sup>166</sup>

A complaint by a member of the public may be disposed of informally,<sup>167</sup> or may be dismissed by the Commissioner of the RCMP as: 1) more appropriately dealt with under another Act; 2) trivial, frivolous, vexatious, or made in bad faith; or 3) unnecessary or not reasonably practical.<sup>168</sup>

However, if a complaint proceeds to the investigation stage, the investigation is conducted by members of the RCMP, in accordance with rules made by the RCMP Commissioner.<sup>169</sup> The review process is internal, in the sense that it is conducted by members of the RCMP and reported to the RCMP Commissioner.

Once the investigation is complete, the Commissioner forwards a report or letter of disposition to the complainant, which includes a summary of the results of the investigation and any action taken or to be taken in resolving the issue.<sup>170</sup> Neither the investigative report itself nor the supporting evidence is disclosed to the complainant.<sup>171</sup>

If unsatisfied with the Commissioner's disposition, the complainant may refer the complaint in writing to the CPC.<sup>172</sup> The Chair of the CPC may accept the RCMP's report, in which case the investigation ends there.<sup>173</sup> Alternatively, the Chair may reject the RCMP's disposition, in which case the Chair may notify the Minister, request further investigation by the RCMP, or conduct her own investigation or hearing into the conduct underlying the complaint.<sup>174</sup>

Two public complaints were lodged respecting the RCMP's conduct in relation to Mr. Arar: one by Shirley Heafey, Chair of the CPC; and the other by the Canadian Civil Liberties Association (CCLA). Similar in scope, the two complaints alleged that unidentified members of the RCMP acted improperly in their investigation of Mr. Arar and in their consequent relations with other domestic and foreign government agencies.<sup>175</sup>

Ms. Heafey's complaint was initiated on October 23, 2003, under subsection 45.37(1) of the *RCMP Act*. She wrote that, based on media accounts, she was satisfied there were reasonable grounds to investigate the conduct of unidentified RCMP officers with respect to the following allegations:

- that unidentified members of the RCMP improperly encouraged U.S. authorities to deport Mr. Arar to Syria; or, alternatively, that they failed to discourage his deportation by the U.S. to Syria;
- that unidentified members of the RCMP improperly divulged information and/or conveyed inaccurate or incomplete information about Mr. Arar to U.S. and/or Syrian authorities;
- that unidentified members of the RCMP improperly impeded the efforts of the Canadian government and others to secure the release of Mr. Arar from detention in Syria.<sup>176</sup>

The CCLA's complaint, forwarded to the Commissioner pursuant to subsection 45.35(3) of the *RCMP Act*, noted that the public controversy regarding the Arar case had raised a number of allegations concerning the RCMP's conduct. The CCLA therefore requested that the Commission investigate the following allegations:

- that the RCMP employed inappropriate criteria and procedures to commence and conduct an investigation against Mr. Arar;

- that RCMP officers passed on information to the U.S. authorities about Mr. Arar that led to his detention in the U.S. and eventual deportation to Syria;
- that RCMP officers knowingly and wrongfully attempted to facilitate Mr. Arar's deportation to torture;
- that RCMP officers failed to take all reasonable and necessary steps to forestall Mr. Arar's deportation to Syria; and
- that RCMP officers failed to provide Foreign Affairs and other branches of government with a full, fair, and timely account of the case so as to ensure Mr. Arar's expeditious return to Canada.<sup>177</sup>

Chief Superintendent Brian Garvie, a senior RCMP officer not affiliated with either "A" Division or the Criminal Intelligence Directorate (CID) at RCMP Headquarters, was assigned to investigate the allegations and report on them. Following the process outlined above, the investigation was led on behalf of Commissioner Zaccardelli, and was reported to the Assistant Commissioner and Commanding Officer of "A" Division, Gessie Clément.<sup>178</sup>

### 5.1.2

#### Chief Superintendent Garvie's Investigation

Chief Superintendent Garvie's investigation of the two complaints consisted of a review of all files and documentation relevant to Mr. Arar at Headquarters and at "A," "O," and "C" Divisions.<sup>179</sup> He also interviewed RCMP personnel at each of the offices above, including retirees. Some members declined to be interviewed, stating that they intended to wait until called to testify at the public inquiry.<sup>180</sup> Chief Superintendent Garvie also made inquiries at CSIS, DFAIT and the American agencies primarily responsible for terrorist activities in the U.S.<sup>181</sup> The U.S. agencies did not respond, but Chief Superintendent Garvie met with representatives of both CSIS and DFAIT.

DFAIT refused Chief Superintendent Garvie's request to interview Maureen Girvan, the consular officer who had met with Mr. Arar in New York. However, on January 20, 2004, Donna Blois, counsel for DFAIT, forwarded a written response to a list of questions provided by Chief Superintendent Garvie. These answers are reproduced in the report.<sup>182</sup>

Mr. Arar chose not to be interviewed by Chief Superintendent Garvie, noting problems with the CPC process.<sup>183</sup> However, he did meet with him on January 23, 2004, responding to Chief Superintendent Garvie's request to explain the process and attempt to negotiate an interview.<sup>184</sup> Mr. Arar's lawyer, Lorne Waldman, subsequently provided a letter explaining why Mr. Arar was

unwilling to be interviewed, citing the following reasons: the credibility of a process in which the RCMP investigates itself; the transparency of the process; and the definition of terms.<sup>185</sup>

### 5.1.3 The Garvie Report's Conclusions

In late February 2004, Chief Superintendent Garvie produced one report addressing both complaints, comprising a detailed chronology of RCMP actions with respect to Mr. Arar, a discussion of key issues, a series of conclusions, and answers to the specific complaints.<sup>186,187</sup>

In his report, Chief Superintendent Garvie makes 40 enumerated conclusions. He begins with an introductory statement that his conclusions should be considered in the context of the public, political and national security environment after 9/11. He writes: "The ability of the RCMP to deal with that terrorist act, and to manage the expectations as a result of it, was to a large extent limited. At that time, both at headquarters and the in *[sic]* field, the RCMP did not have sufficient investigative expertise, nor did they have the capacity to efficiently and effectively deal with national security investigations overall."<sup>188</sup>

For ease of reading, a summary of Chief Superintendent Garvie's conclusions are grouped below under subheadings.

#### *The RCMP's Investigation of Mr. Arar*

Chief Superintendent Garvie reported that Project A-O Canada had legitimate reasons to initiate an investigation with respect to Mr. Arar. He was a "person of interest" who had direct and indirect links with other individuals who were suspected of being associated with al-Qaeda.<sup>189</sup>

#### *The Minto Lease*

The lease and rental application should have been obtained with a search warrant, as Project A-O Canada was a criminal investigation. The RCMP wrongly identified Mr. Almalki as "a reference" on the lease agreement in a meeting with the FBI on May 31, 2002 in Washington DC. In fact, the lease lists Mr. Almalki as an emergency contact.<sup>190</sup>

#### *The Lookout List*

The RCMP requested that Mr. Arar and his wife Monia Mazigh be entered into Canadian and U.S. Customs/Immigration databases as "lookouts." Chief Superintendent Garvie found there was sufficient justification for this request with respect to Mr. Arar, but not for Dr. Mazigh.<sup>191</sup>

*Caveats*

Chief Superintendent Garvie concluded that correspondence between the RCMP and the American agencies did not have the appropriate caveats/conditions included, and was not in accordance with RCMP policy. Such correspondence was also sent directly to American agencies without an appropriate supervisor's signature.<sup>192</sup>

*Information Passed to the U.S Authorities*

CDs containing all of the Project A-O Canada Supertext documentation up to April 2, 2002 were shared with the American agencies, including disclosure letters from CSIS. There were no caveats or conditions included, and CSIS' consent was not obtained to share the disclosure letters.<sup>193</sup> In addition, RCMP officers failed to properly transpose information from the CSIS disclosure letter in written communications with the Americans by failing to accurately note the reliability of the information.<sup>194</sup>

*The Americans' Understanding of Mr. Arar*

The RCMP was aware that the Americans had identified Mr. Arar as an al-Qaeda operative, but to the RCMP's knowledge, there was no substantiation for this statement.<sup>195</sup> Mr. Arar was told on October 2, 2002 that the United States considered him to be a member of al-Qaeda. Chief Superintendent Garvie wrote that the RCMP was not asked to refute this allegation, nor was the RCMP aware that the assertion had been made and formally documented.

*Project A-O Canada-RCMP Headquarters Relationship*

There was no senior management input on the RCMP response to the Americans' question of whether the RCMP had information that could be used for U.S. law enforcement proceedings.<sup>196</sup> Chief Superintendent Garvie found that there was an acrimonious relationship between Project A-O Canada investigators and RCMP Headquarters CID; attempts by Headquarters to monitor the investigation and provide direction were resented.<sup>197</sup>

*Project A-O Canada's Relationship With the American Agencies*

Chief Superintendent Garvie concluded that Project A-O Canada's relationship with the American agencies was "not at arms length and served to exacerbate the relationship between the RCMP and CSIS."<sup>198</sup> There were too many points of contact within the RCMP, resulting in a lack of coordination about information sharing.<sup>199</sup>

### *RCMP Knowledge of Mr. Arar's Deportation*

The RCMP first learned there was a possibility that Mr. Arar could be deported to Syria on October 8, 2002, from Inspector Roy. By then, Mr. Arar had already been deported.<sup>200</sup>

### *RCMP Activities While Mr. Arar Was in Syria*

Chief Superintendent Garvie concluded that “[t]he RCMP did not contribute in any way to torture or interrogation of Maher Arar in Syria.”<sup>201</sup> The RCMP liaison officer (LO) responsible for Syria did not discuss Mr. Arar with Syrian authorities.<sup>202</sup>

### *Other Reviews of the Project A-O Canada Investigation*

Chief Superintendent Garvie concurred with Chief Superintendent Wayne Watson’s review, which found that the U.S. decision to deport or detain Mr. Arar did not stem from Project A-O Canada. He also concurred with Inspector Pierre Perron’s review of the actions and involvement of CID with respect to Mr. Arar. Inspector Perron found that the United States had made a unilateral decision to deport Mr. Arar. However, Chief Superintendent Garvie disagreed with aspects of the report by Chief Superintendent Dan Killam, Director General National Security, CID.<sup>203</sup> Chief Superintendent Garvie could not concur with the finding that the investigation was well managed and conformed to existing policy and guidelines, citing the sharing of information with U.S. authorities without caveats or third-party conditions.<sup>204</sup>

Based on the above findings, Chief Superintendent Garvie concluded that Ms. Heafey’s first complaint was unfounded. Specifically, members of the RCMP did not improperly encourage U.S. authorities to deport Mr. Arar to Syria, and they did not fail to discourage U.S. authorities from deporting him.

With regard to the second complaint, however, the picture was less clear. The RCMP provided intelligence information to U.S. agencies “as was permitted by jurisprudence and policy,” but “the manner in which the information was provided was not in accordance with RCMP policy” as caveats/conditions were not included. Chief Superintendent Garvie also wrote that the RCMP failed to respect caveats/conditions that were placed on CSIS intelligence, which was also shared with American agencies. Even more explicitly, Chief Superintendent Garvie concluded that the reliability assessment of information passed to the U.S. agencies was inaccurate.<sup>205</sup>

Chief Superintendent Garvie concluded that Ms. Heafey’s third complaint was also unfounded: he wrote that the RCMP did not improperly impede the

efforts of the Canadian government and others to secure the release of Mr. Arar from detention in Syria.

Turning to the CCLA complaint, Chief Superintendent Garvie dismissed the first, third, fourth and fifth complaints: RCMP officers did not employ inappropriate criteria to commence and conduct an investigation into Mr. Arar, nor did they knowingly facilitate his deportation to Syria, fail to take all reasonable and necessary steps to forestall his deportation to Syria, or fail to provide other government departments with appropriate information in a timely manner.

However, Chief Superintendent Garvie did not dismiss the second complaint. With regard to the allegation that RCMP officers passed information to U.S. authorities that led to Mr. Arar's detention and deportation, he noted that the RCMP had requested Mr. Arar be listed on the U.S. Treasury Enforcement Communication System (TECS) database as a "lookout." He again concluded that the RCMP did not respect the rules regarding caveats/conditions, adding that "the detention was not based solely on information obtained from the RCMP, but also that "[i]nformation provided by the RCMP was used in the INS hearing that resulted in Maher Arar's deportation to Syria."<sup>206</sup>

#### 5.1.4

##### **Assistant Commissioner Clément's Report**

As noted, Chief Superintendent Garvie's report was prepared for the RCMP Commissioner, via Assistant Commissioner Clément, Commanding Officer of "A" Division. On February 17, 2004, Chief Superintendent Garvie advised Project A-O Canada managers that his report had been completed and would be forwarded to Assistant Commissioner Clément on February 20, 2004.<sup>207</sup> It would then be her responsibility to provide a summary of the findings, and report on any action taken in respect of those findings to the complainants, Ms. Heafey and the CCLA.<sup>208</sup>

On April 7, 2004, six weeks after Chief Superintendent Garvie completed his report, Assistant Commissioner Clément wrote a letter of disposition to Ms. Heafey.<sup>209</sup> Referring to the threat of post-9/11 attacks in the United States, Assistant Commissioner Clément first reviewed the creation of multi-agency and multidisciplinary national security teams at "A" Division. She went on to advise that, due to the national security context, she was restricted regarding the level of detail and extent to which she could disclose relevant information. However, she provided assurances that the complaint had been fully investigated.

Responding to Ms. Heafey's specific complaints, Assistant Commissioner Clément wrote first that she could find no indication any member of the RCMP had encouraged U.S. authorities to deport Mr. Arar to Syria.

Second, in response to the allegation that RCMP members failed to discourage Mr. Arar's deportation to Syria, Assistant Commissioner Clément concluded that RCMP members and U.S. authorities did not discuss whether Mr. Arar ought or ought not to be deported to Syria. She wrote that no RCMP members "ever encouraged or discouraged U.S. authorities to deport Mr. Arar to Syria."<sup>210</sup>

Third, Assistant Commissioner Clément provided a longer response with regard to information sharing, reviewing the law and policy guiding RCMP action on this point, including the Act, its regulations, and the *RCMP Operational Manual*.

Her conclusion on this point took a markedly different tone from that of Chief Superintendent Garvie:

My review determined that there were few instances where the exchanges of information were not consistent with existing RCMP policy on the use of caveats. However, I did not determine that the exchange of information in these situations was improper. I am satisfied that such inconsistencies did not result in improper divulgence nor the conveyance of inaccurate information. Furthermore, the investigation did not reveal what action US authorities took as a result of the information provided by the RCMP.<sup>211</sup>

Fourth, Assistant Commissioner Clément concluded that there is no evidence members of the RCMP improperly impeded the efforts of the Canadian government and others to secure the release of Mr. Arar from detention in Syria.

The conclusion to her letter noted that, in light of the instances where exchanges of information were inconsistent with RCMP policy, she would recommend that RCMP Headquarters CID implement an orientation program for all investigators assigned to national security investigations.

Referring specifically to this Inquiry, Assistant Commissioner Clément advised the complainant that "[a]s the terms of reference for the Commission of Inquiry reflect the subject matter of your complaint, I am confident the Report of Mr. Justice O'Connor will address several of the issues you have raised."<sup>212</sup>

## 5.2

### THE SIRC REPORT

#### 5.2.1

##### The SIRC Process

The oversight body for CSIS, the Security Intelligence Review Committee (SIRC) was established by Subsection 34(1) of the *CSIS Act*. The Committee consists of

a Chair and between two and four other members, all of whom are appointed by the Governor in Council from among the members of the Queen's Privy Council for Canada.<sup>213</sup>

SIRC's function is to review and monitor the performance by CSIS of its duties and functions, and to arrange for or conduct reviews or investigations related to CSIS activities.<sup>214</sup> SIRC is an arm's-length body, independent of CSIS, with the power to review top secret CSIS information. Only Cabinet confidences may be withheld from SIRC in the course of a review or investigation.<sup>215</sup>

Section 54 of the *CSIS Act* provides that SIRC may, of its own initiative, furnish the Minister with a report concerning any matter that relates to CSIS' performance of its duties and functions.<sup>216</sup> In October 2003, SIRC determined that the events concerning Maher Arar were sufficiently important to warrant such a review, and the review was publicly announced on January 22, 2004.<sup>217</sup>

SIRC began by asking CSIS to provide access to all the information it held on its involvement in Mr. Arar's case.<sup>218</sup> After reviewing this information, SIRC proceeded with a second independent review of the CSIS documentation by SIRC's senior counsel. It also forwarded written questions to CSIS and held two meetings with the Director of CSIS and senior staff.<sup>219</sup> The SIRC study covers the period of November 18, 1993 to October 10, 2003.<sup>220</sup>

Jack Hooper, CSIS Deputy Director, testified that CSIS considers any of its members who are seconded to other government departments to be outside the jurisdiction of SIRC, as they are, in effect, employees of the other department.<sup>221</sup>

## 5.2.2

### The SIRC Report's Conclusions

The SIRC report made 14 findings and seven recommendations.

The first finding relates to SIRC's own task. SIRC found that its inability to determine the full extent of the RCMP's involvement in the case, and therefore its inability to pursue certain areas of inquiry, demonstrates the limitations of existing review mechanisms for national security investigations. SIRC endorsed the government's commitment to establish an independent review committee for the RCMP's national security functions.<sup>222</sup>

The findings of the SIRC review were consistent with CSIS' position that it had no prior knowledge of the American authorities' plan to detain or deport Mr. Arar.<sup>223</sup>

SIRC found that RCMP situation reports dated September 26, 2002 and September 27, 2002, which were added to the CSIS holdings shortly after, on September 27 and 30, respectively, indicated the FBI's intention to detain and interrogate Mr. Arar in New York and to deny him entry into the United States.<sup>224</sup>

However, SIRC writes that, according to CSIS, it only learned of Mr. Arar's detention on October 2, 2002, through contact with DFAIT. CSIS informed SIRC that it had not actually read the RCMP situation reports until after October 2, 2002.<sup>225</sup>

CSIS then sought information regarding Mr. Arar's status and arrest from [\*\*\*] via the CSIS security liaison officer (SLO) in Washington. The written request was not delivered [\*\*\*] until October 10, 2002. SIRC was told that the SLO would have made a verbal request [\*\*\*] prior to that date.<sup>226</sup>

[\*\*\*].<sup>227</sup>

SIRC did not find any record of CSIS approval for the RCMP to disclose CSIS information about Mr. Arar to a third party.<sup>228</sup>

However, SIRC did find that CSIS received an invitation on November 4, 2002, via DFAIT, from the Syrian Military Intelligence to travel to Syria to review information provided to them by Mr. Arar. CSIS agreed to go.<sup>229</sup> SIRC also found that existing CSIS policy did not require consideration of the lawfulness of Mr. Arar's detention, or the likelihood that he had been subject to torture, as part of the authorization process for CSIS' travel to Syria.<sup>230</sup>

SIRC made seven strongly worded recommendations following its findings:<sup>231</sup>

- 1) that CSIS examine its agreements and policies with the RCMP to determine whether they provide the necessary protection against third-party disclosure, while still recognizing the importance of information sharing between the two organizations;
- 2) that the O'Connor Commission determine whether the RCMP shared CSIS-obtained information with American agencies;
- 3) that CSIS amend an operational policy in relation to foreign travel proposals including consideration of human rights concerns;
- 4) that CSIS amend an operational policy to require consideration of human rights issues when seeking to use information for targeting approval;
- 5) that SLOs maintain written records when requests for information are transmitted to foreign intelligence agencies and that formal letters be sent to confirm verbal requests;
- 6) that CSIS identify an effective means of prioritizing sensitive requests to their Washington SLOs, and explore ways to reduce delays when seeking information from U.S. agencies; and
- 7) that CSIS examine its practices relating to the receipt, prioritization, and review of RCMP reports to ensure more timely identification of time-sensitive or important information.<sup>232</sup>

The authors of the SIRC report were well aware of the limitations on SIRC's power of review. They identified particular areas of concern outside their mandate, and recommended that these be examined by this Inquiry. In particular, they wrote:

... the role of other federal departments and agencies in Arar's rendition to Jordan by U.S. authorities and his subsequent detention and interrogation in Syria, whether CSIS information was included in the RCMP files that were shared with American authorities, and how the United States came into the possession of Arar's 1998 rental lease agreement, all warrant closer examination by the O'Connor Commission. ...[The] Commission may also choose to comment on the new consular understanding between Canada and the United States announced... on January 13, 2004 [the Monterrey Protocol].

### 5.2.3

#### Implementation of the Recommendations

In its closing *in camera* submissions to this Inquiry, the Government of Canada indicated that CSIS had implemented several of SIRC's recommendations.

On June 29, 2005, a CSIS operational policy was amended to expressly include consideration of the human rights record of a foreign state or agency when information received from that foreign state or agency will be used in an application for targeting approval.<sup>233</sup>

Also on June 29, 2005, an operational policy that governs the information to be included in a foreign travel proposal was amended to expressly include consideration of the human right records of foreign states or agencies in relation to incoming visits and travel abroad.<sup>234</sup>

## NOTES

- <sup>1</sup> Hall testimony (June 7, 2005), p. 5565; Exhibit P-120, Tab 3, p. 2.
- <sup>2</sup> Ibid., p. 5569.
- <sup>3</sup> Ibid., p. 5552.
- <sup>4</sup> Ibid., pp. 5567–5568.
- <sup>5</sup> Ibid.
- <sup>6</sup> Exhibit P-120, Tab 3, p. 3.
- <sup>7</sup> Ibid.
- <sup>8</sup> Ibid., Tab 12, pp. 12–13.
- <sup>9</sup> Ibid., Tab 3, p. 4.
- <sup>10</sup> Hall testimony (June 7, 2005), pp. 5571–5572; Exhibit P-120, Tab 3, p. 7.
- <sup>11</sup> Hall testimony (June 7, 2005), p. 5764.
- <sup>12</sup> Ibid., pp. 5565 and 5582.

- <sup>13</sup> Human Rights Watch is a nongovernmental organization dedicated to protecting human rights around the world.
- <sup>14</sup> Hall testimony (June 7, 2005), p. 5573.
- <sup>15</sup> Ibid., pp. 5573–5574.
- <sup>16</sup> Exhibit P-120, Tab 12, p.8.
- <sup>17</sup> Ibid.
- <sup>18</sup> Hall testimony (June 7, 2005), p. 5574; Exhibit P-120, Tab 12, p. 8.
- <sup>19</sup> Ibid., pp. 5575–5576.
- <sup>20</sup> Ibid., pp. 5576–5577.
- <sup>21</sup> Ibid., pp. 5553–5554.
- <sup>22</sup> Ibid., p. 5553.
- <sup>23</sup> Yale-Loehr testimony (June 7, 2005), pp. 5622, 5817 and 5833; Hall testimony (June 7, 2005), pp. 5760–5761 and 5833.
- <sup>24</sup> Exhibit P-120, Tab 3, p. 12.
- <sup>25</sup> Ibid., Tab 10 , p. 15.
- <sup>26</sup> Hall testimony (June 7, 2005), pp. 5605–5606.
- <sup>27</sup> Ibid., p. 5607.
- <sup>28</sup> Ibid., pp. 5606–5607.
- <sup>29</sup> Ibid., p. 5554.
- <sup>30</sup> Ibid., p. 5555; Exhibit P-120, Tab 3, p. 24.
- <sup>31</sup> Hall testimony (June 7, 2005), pp. 5609–5610.
- <sup>32</sup> Ibid., p. 5610.
- <sup>33</sup> Ibid., pp. 5610–5611.
- <sup>34</sup> Exhibit P-120, Tab 3, pp. 24–25; Exhibit P-120, Tab 19, p. 9.
- <sup>35</sup> Ibid., Tab 19, p. 9.
- <sup>36</sup> Ibid., Tab 3, p. 25 and Tab 19, p. 11.
- <sup>37</sup> Ibid., Tab 9, p. 17.
- <sup>38</sup> Ibid., Tab 9, p. 37.
- <sup>39</sup> Ibid., Tab 21, p. 34.
- <sup>40</sup> Ibid., pp. 34–35.
- <sup>41</sup> [IC] Wright testimony (March 24, 2005), pp.13003–13007; Exhibit C-206, Tab 199.
- <sup>42</sup> Exhibit C-206, Tab 199.
- <sup>43</sup> [IC] Wright testimony (March 24, 2005), pp. 13003–13007.
- <sup>44</sup> [IC] Wright testimony (March 29, 2005), p. 13236.
- <sup>45</sup> Ibid., pp. 13109–13111.
- <sup>46</sup> Ibid.
- <sup>47</sup> Ibid., p. 13112 According to Mr. Wright, DFAIT did not use the particular word “veto,” but used language suggesting that Canada would have a very direct say in U.S. decisions to deport Canadian nationals to a third country.
- <sup>48</sup> Ibid.
- <sup>49</sup> Ibid., pp. 13149–13157 and [IC] (April 6, 2005), pp. 14505–14509.
- <sup>50</sup> Exhibit C-206, Tab 732; [IC] Wright testimony (March 29, 2005), pp. 13161–13165.
- <sup>51</sup> Exhibit C-221, Tab 60; [IC] Wright testimony (March 29, 2005), pp. 13170–13174.
- <sup>52</sup> [IC] Wright testimony (March 29, 2005), pp. 13175–13183. Exhibit C-221, Tabs 67 and 68; Exhibit C-206, Tab 780; Exhibit C-224 documents his conversations with U.S. officials on this matter.
- <sup>53</sup> Exhibit C-223; [IC] Wright testimony (March 29, 2005), pp. 13184–13186.
- <sup>54</sup> Exhibit C-224; [IC] Wright testimony (March 29, 2005), pp. 13193–13194 and 13196.
- <sup>55</sup> [IC] Wright testimony (March 29, 2005), pp. 13216–13222.

- 56 Ibid., pp. 13239–13240.
- 57 Exhibit C-206, Tab 791.
- 58 Ibid. The protocol also places the onus on Canada to do the same in return.
- 59 Exhibit C-206, Tab 791.
- 60 [IC] Wright testimony (March 29, 2005), pp. 13233–13235.
- 61 Ibid.
- 62 [IC] Wright testimony (April 6, 2005), pp. 14535–14538.
- 63 [IC] Wright testimony (March 29, 2005), pp. 13175–13183.
- 64 Ibid., pp. 13218–13222.
- 65 Ibid.
- 66 [IC] Wright testimony (April 6, 2005), pp. 14535–14538.
- 67 [IC] Kergin testimony (April 5, 2005), pp. 14255–14256.
- 68 [P] Graham testimony (May 30, 2005), pp. 4323–4326.
- 69 Ibid., p. 4324.
- 70 Ibid., p. 4325.
- 71 Ibid.
- 72 Exhibit P-120, Tab 4; [P] Yale-Loehr testimony (June 7, 2005), pp. 5562–5563.
- 73 [P] Yale-Loehr testimony (June 7, 2005), pp. 5648–5650.
- 74 [P] Hall testimony (June 7, 2005), pp. 5801–5816.
- 75 Ibid., pp. 5815–5816.
- 76 [P] Forcese testimony, (June 6, 2005), p. 5520.
- 77 Ibid., p. 5522–5523.
- 78 Ibid., pp. 5397 and 5515–5516.
- 79 Ibid.; also [P] Forcese testimony, (June 6, 2005), p. 5508.
- 80 [P] Copithorne testimony, (June 6, 2005), pp. 5395–5397; [P] Forcese testimony (June 6, 2005), p. 5516.
- 81 [P] Forcese testimony, (June 6, 2005), p. 5403.
- 82 Ibid., p. 5404.
- 83 Ibid., p. 5408.
- 84 Ibid., p. 5404; [P] Copithorne testimony (June 6, 2005), p. 5515.
- 85 [P] Forcese testimony, (June 6, 2005), p. 5473; [P] Copithorne testimony (June 6, 2005), p. 5475.
- 86 [P] Forcese testimony, (June 6, 2005), p. 5474.
- 87 Ibid., p. 5477.
- 88 Ibid., p. 5475.
- 89 Ibid., pp. 5512–5513.
- 90 Ibid., p. 5411.
- 91 Ibid., p. 5425.
- 92 Ibid.
- 93 Ibid., pp. 5427 and 5516–5518.
- 94 Ibid., p. 5500.
- 95 Ibid., p. 5428.
- 96 Ibid.
- 97 Ibid., pp. 5428–5429.
- 98 Ibid., p. 5423.
- 99 Ibid., pp. 5429–5430.
- 100 [P] Copithorne testimony (June 6, 2005), p. 5467.
- 101 Ibid., pp. 5468–5469.
- 102 Ibid., p. 5470.

- 103 Ibid., p. 5489.
- 104 Ibid., p. 5490.
- 105 [P] Forcese testimony, (June 6, 2005), pp. 5456–5457.
- 106 [P] Copithorne testimony, (June 6, 2005), p. 5459.
- 107 [P] Forcese testimony, (June 6, 2005), p. 5409.
- 108 Ibid., p. 5439; [P] Copithorne testimony (June 6, 2005), pp. 5443–5444.
- 109 [P] Forcese testimony (June 6, 2005), p. 5439.
- 110 Ibid., p. 5439.
- 111 Ibid., pp. 5439–5440.
- 112 Ibid., pp. 5440–5441.
- 113 Ibid., p. 5442.
- 114 Ibid.
- 115 [IC] Couture testimony, (December 6, 2004), pp. 7034–7035.
- 116 Exhibit P-169; [P] Cabana testimony (June 29, 2005), p. 7848.
- 117 [IC] Cabana testimony (November 1, 2004), p. 3500. Although Inspector Cabana could not point to specific courses on Islam, he did mention that the RCMP offered cross-cultural courses on different ethnic groups. He had not taken any of them, but knew that some team members had. [P] Cabana testimony (June 29, 2005), pp. 7837–7838.
- 118 Exhibit P-12, Tab 47; [IC] Cabana testimony (November 1, 2004), p. 3500.
- 119 [IC] Walsh testimony (November 29, 2004), p. 5952.
- 120 Exhibit P-169; [P] Cabana testimony (June 29, 2005), pp. 7844–7848.
- 121 [IC] Cabana testimony (October 25, 2004), p. 2407, and [IC] (November 1, 2004), pp. 3500–3501.
- 122 [IC] Cabana testimony (October 25, 2004), pp. 2407–2408.
- 123 Ibid., p. 2409.
- 124 Exhibit C-63, “Terrorism: Travel Patterns of Al Qa’ida Members Outside and Inside of Afghanistan,”; Exhibit P-10, Tab 3, “Bin Laden’s November 2002 Statement: What Does It Mean?” and Tab 4, “Al Qaida: One Year After 9/11.”
- 125 [IC] Lang testimony (November 18, 2004), pp. 5771–5772; [IC] Walsh testimony (November 29, 2004), p. 5952.
- 126 [IC] Callaghan testimony (November 3, 2004), p. 3873; [IC] Corcoran testimony (November 9, 2004), p. 4646.
- 127 [IC] Walsh testimony (November 29, 2004), pp. 5951–5952 and [IC] (November 30, 2004) p. 6249; Buffam notes, p. 259; [IC] Buffam testimony (December 1, 2004), pp. 6349–6350 and 6517–6518.
- 128 [IC] Corcoran (November 9, 2004), pp. 4646 and 4648. In mid-December 2001, Project A-O Canada investigators were invited to attend a half-day presentation at CSIS, which would cover Middle Eastern names. The Project was also invited to submit specific questions on Middle Eastern terrorism in advance of the presentation. The two e-mails documenting this invitation were provided to the Commission near the end of the hearings. It is possible that this presentation was the one referred to by Staff Sergeant Corcoran. Exhibit C-382.
- 129 [P] Cabana testimony (June 29, 2005), pp. 7839–7840.
- 130 [IC] Cabana testimony (November 1, 2004), p. 3501.
- 131 [IC] Callaghan testimony (November 9, 2004), p. 4475.
- 132 [IC] Callaghan testimony (November 8, 2004), pp. 4134–4138 and [IC] (November 9, 2004), p. 4572.
- 133 RCMP, Tab 266, p. 3, Surveillance Request Form. The section of the surveillance request form dealing with mosques that Mr. Arar might attend identified five locations, two of which were not mosques.

- 134 [IC] Lemay testimony (November 17, 2004), pp. 5523–5526.
- 135 [IC] Callaghan testimony (November 8, 2004), pp. 4322–4323.
- 136 [IC] Lemay testimony (November 17, 2004), pp. 5515–5517.
- 137 [IC] Callaghan testimony (November 9, 2004), p. 4571.
- 138 [IC] Walsh testimony (December 1, 2004), pp. 6329–6331.
- 139 [IC] Hovey testimony (January 17, 2005), pp. 8737–8741.
- 140 [IC] Couture testimony (December 7, 2004), pp. 7328–7329.
- 141 *Ibid.*, pp. 7329–7330.
- 142 [IC] Walsh testimony (December 1, 2004), pp. 6335–6336. The RCMP's Chief Operational Officer, Deputy Commissioner Garry Loepky, testified that, since 9/11, virtually every RCMP division has had an outreach program with the Muslim community to ensure that the RCMP understands their concerns and that the Muslim community in turn understands the RCMP's mandate. According to Deputy Commissioner Loepky, outreach efforts are not new to the RCMP. It has been involved in community outreach since 1986, when the Commissioner of the day established the Commissioner's Advisory Committee on Visible Minorities, on which representatives from different visible minority communities meet with the RCMP Commissioner twice a year. [P] Loepky testimony (July 6, 2004), pp. 1239–1241.
- 143 [IC] Cabana testimony (October 25, 2004), pp. 2409–2410.
- 144 [IC] Cabana testimony (November 1, 2004), p. 3503.
- 145 [IC] Callaghan testimony (November 3, 2004), p. 3912.
- 146 [IC] Corcoran testimony (November 10, 2005), p. 4747 and [IC] (November 16, 2004), p. 5198.
- 147 [IC] Cabana testimony (October 26, 2004), pp. 2637–2639.
- 148 Callaghan notes vol 1, pp. 71–72; [IC] Callaghan testimony (November 3, 2004), pp. 3909–3910.
- 149 [IC] Callaghan testimony (November 3, 2004), pp. 3910–3912.
- 150 [IC] Cabana testimony (November 1, 2004), pp. 3501–3502.
- 151 Ministerial Direction National Security Investigations in Sensitive Sectors. Exhibit P-12, Tab 24, p. 9, para B.
- 152 *Ibid.*, p.10, para. D.
- 153 [IC] Cabana testimony (November 1, 2004), pp. 3507–3508.
- 154 *Ibid.*, pp. 3509–3510.
- 155 Exhibit C-30, Tab 106, pp. 16–17 and 19–20.
- 156 *Ibid.*, p. 19.
- 157 [P] Loepky testimony (July 6, 2004), p. 1242.
- 158 [P] Khan testimony (June 9, 2005), pp. 6209–6210.
- 159 Bias-free policing is defined by the RCMP as “any police action that is not based on race, nationality or ethnic origin, colour, religion, sex or sexual orientation, marital status, age, mental or physical disability. Rather, the police action is based on behaviour or information that leads the police to a conclusion that a particular individual, group or organization is, has been or may be engaged in unlawful activity.” RCMP: Cultural Diversity Training. Exhibit P-130, Tab B, Appendix B.
- 160 Exhibit P-130.
- 161 *Ibid.*, Tab B, Appendix B.
- 162 Exhibit P-130, Tab J.
- 163 Exhibit C-143. The operational review was ordered by Richard Proulx, Assistant Commissioner, Criminal Intelligence Division (CID), carried out by Chief Superintendent Dan Killam, Director General National Security, CID, and completed on December 30, 2003.
- 164 R.S.C. 1985, c. R-10, as amended (the *RCMP Act*).
- 165 *Ibid.*, c. C-23, as amended (the *CSIS Act*).

166 Subsection 45.29 of the *RCMP Act* establishes the Royal Canadian Mounted Police Public Complaints Commission. Subsection 45.35(1) provides that any member of the public having a complaint concerning the conduct, in the performance of any duty or function under the *RCMP Act* or the *Witness Protection Program Act*, of any member or other person appointed or employed under the authority of the *RCMP Act* may make a complaint, whether or not that member of the public is affected by the subject matter of the complaint. Subsection 45.37 provides for a complaint mechanism instituted by the Commission Chairman, where the Chair is satisfied that there are reasonable grounds to investigate the conduct of any member or other person appointed or employed under the authority of the *RCMP Act* in the performance of any duty or function under the Act.

167 *RCMP Act*, ss. 45.36(1), (2), (3).

168 This is not the exact language of the *RCMP Act*. See ss. 45.36 (5)(a), (b), (c).

169 For complaints by members of the public, see the *RCMP Act*, ss. 45.36(4); for complaints by the Chair of the CPC, ss. 45.37(4); for the RCMP Commissioner's rule-making power, ss. 45.38. *RCMP Act*, ss. 45.4.

171 There is one exception: if the Chair of the CPC is the complainant, and subsequent to the RCMP's investigation, the Chair decides to refer the complaint to the CPC, the Commissioner must furnish the Chair with "...such other materials under the control of the Force that are relevant to the complaint." *RCMP Act*, ss. 45.41(2)(b).

172 *Ibid.*, ss. 45.41(1).

173 *Ibid.*, ss. 45.42(2). The Chair must prepare and send a report to that effect to the Minister, the Commissioner, the person whose conduct is the subject matter of the complaint, and the complainant.

174 *Ibid.*, ss. 45.42(3).

175 The complaints are reproduced in the Garvie Report, Exhibit C-87, P-19, pp. 2-3 (Garvie Report). The Heafey complaint is identified as File No: PC-2003-1803; the CCLA complaint is File No: PC-2003-2049; and the Garvie Report is RCMP File # 2003A-5075 (Garvie Report, p. 1).

176 See News Release: "Commission for Public Complaints against the RCMP Initiates Complaint into RCMP Conduct in Relation to the Deportation and Detention of Mr. Maher Arar. (October 23, 2004). Exhibit P-14, Tab 9.

177 Exhibit C-87, pp. 3-4.

178 Exhibit C-79, Project A-O Canada SITREP 2004-01-12 to 2004-02-18, authored by P. Callaghan and approved by K. Corcoran. Exhibit C-206, DFAIT e-mail.

179 Garvie Report, p. 54.

180 Chief Superintendent Garvie conducted 22 separate RCMP interviews from December 16, 2003 through February 13, 2004. It was on January 28, 2003, that the Deputy Prime Minister announced the government's intention to undertake a public inquiry under the *Inquiries Act*. The Garvie interview transcripts are Exhibit C-98; the public version is Exhibit P-83, Tab 3.

181 Garvie Report, pp. 54 and 58-60.

182 Chief Superintendent Garvie met with Donna Blois, counsel for DFAIT, on December 22, 2003. Garvie Report, pp. 62-64.

183 Chief Superintendent Garvie met with Mr. Arar's then-lawyer, James Lockyer, on December 15, 2003, and gave him proposed interview questions for Mr. Arar. *Ibid.*, pp. 61-62.

184 *Ibid.*, p. 54.

185 *Ibid.*

186 *Ibid.*

187 Exhibit C-79: Project A-O Canada SITREP 2004-02-12 to 2004-02-18.

188 Garvie Report, p. 67.

- 189 Ibid., Conclusions 1 and 2.
- 190 Ibid., Conclusions 3, 4 and 6.
- 191 Ibid., Conclusion 7.
- 192 Ibid., Conclusions 8 and 9.
- 193 Ibid., Conclusion 10.
- 194 Ibid., Conclusion 12.
- 195 Ibid., Conclusion 11.
- 196 Ibid., Conclusion 14.
- 197 Ibid., Conclusion 31.
- 198 Ibid., Conclusion 32.
- 199 Ibid., Conclusion 33.
- 200 Ibid., Conclusion 23.
- 201 Ibid., Conclusion 25.
- 202 Ibid., Conclusion 26.
- 203 Exhibit C-143. Killam Operational Review (8 pages).
- 204 Garvie Report, Conclusions 34, 35, 36, 37, 38 and 39.
- 205 Ibid., p. 74.
- 206 Ibid., p. 75.
- 207 Exhibit C-79. Project A-O Canada SITREP 2004-01-12 to 2004-02-18, authored by  
P. Callaghan and approved by K. Corcoran.
- 208 As required by the *RCMP Act*, ss. 45.4.
- 209 Final version is Exhibit P-15 (Clément letter); an earlier draft version is P-14, Tab 10.
- 210 Clément letter, p. 2.
- 211 Ibid., p. 5.
- 212 Ibid., p. 6.
- 213 Members of the House of Commons and the Senate are ineligible. Prior to any appointment,  
the Prime Minister must consult with the Leader of the Opposition in the House of Commons,  
as well as the leader of each party having at least twelve members in the House of Commons.  
*CSIS Act*, ss. 34(1).
- 214 *CSIS Act*, ss. 38(a), (b), (c).
- 215 *CSIS Act*, ss. 39; Exhibit C-003. SIRC, “The Role of CSIS in the Matter of Maher Arar,” (SIRC  
Study 2003-06), May 19, 2004, p. 2 (SIRC Report).
- 216 *CSIS Act*, ss. 54. See also ss. 40.
- 217 SIRC Report, pp. 1 and 11.
- 218 Ibid., p. ii.
- 219 Ibid., p. ii.
- 220 Ibid., p. 2.
- 221 [IC] Hooper testimony (September 23, 2004), pp. 1753–1754.
- 222 SIRC Report, p. vii. Finding #1.
- 223 Ibid., Finding #4.
- 224 Ibid., Finding #5.
- 225 Ibid., Finding #6.
- 226 Ibid., Finding #7.
- 227 Ibid., Finding #9.
- 228 Ibid., Finding #11.
- 229 Ibid., Finding #13.
- 230 Ibid., p. ix; Finding #14.
- 231 Ibid., pp. x–xi.
- 232 Ibid. This is not the exact wording of the recommendations in the SIRC Report.

<sup>233</sup> In Camera Closing Submissions of the Attorney General of Canada, Tab 2, para. 75, p. 16.  
(Attorney General)

<sup>234</sup> *Ibid.*, para. 92, p. 19.

ANNEX 1SUMMARY OF INFORMATION ON MR. ARAR  
PROVIDED TO AMERICAN AUTHORITIES  
PRIOR TO SEPTEMBER 26, 2002*Border Lookouts*

- On October 31, 2001, Project A-O Canada sent a request to U.S. Customs asking that individuals, including Mr. Arar and his wife, be included as lookouts in the TECS system. The request described the individuals as a “group of Islamic Extremist individuals suspected of being linked to [the] Al Qaeda terrorist movement.”<sup>1</sup>

*November 2, 2001 Request for Information from the FBI*

- On November 2, 2001, Project A-O Canada wrote to the FBI to request information on Mr. Arar. In doing so, they related the following information about Mr. Arar:
  - 1) He had listed Mr. Almalki as his emergency contact on his rental application.
  - 2) He was a “close associate” of Mr. Almalki.
  - 3) He had recently met with Mr. Almalki [presumably the Mango’s Café meeting].
  - 4) He was believed to be residing in the United States.
  - 5) Biographical data on Mr. Arar, including birthdate, date of arrival in Canada, American social security number, addresses and employment in the United States, and education.

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<sup>1</sup> It is possible, but not certain, that the lookout request was provided by U.S. Customs to the FBI at the time it was sent. In any event, Project A-O Canada provided it in April 2002, when it gave the entire Supertext database to the American agencies.

*February 2002 Meeting and Transfer of Hard Drives*

- Staff Sergeant Corcoran was certain that Project A-O Canada transferred copies of the hard drives seized during the January 22, 2002 searches to American agencies by February 8, 2002.<sup>2</sup>

*February 2002 FBI Visit*

- The FBI sought and received access to Project A-O Canada files during this three- to four-day visit, and spent three days engaged in a rigorous review of Project A-O Canada information. During this time, two FBI agents reviewed two binders of information on Mr. Arar. The binders contained the following information:<sup>3</sup>
  - 1) The rental application and lease that may have been shown to Mr. Arar when he was detained in the United States.
  - 2) A profile of Mr. Arar.
  - 3) A photo of Mr. Arar and his home.
  - 4) Immigration photos of Mr. Arar and his wife.
  - 5) Police reports, i.e., complaints made by Mr. Arar to the police department.
  - 6) Past employment information.
  - 7) NSIS inquiries on Mr. Arar.
  - 8) A surveillance report from October 12, 2001.
  - 9) The Canada Customs lookout on Mr. Arar, Dr. Mazigh and Mr. Arar's vehicle.
  - 10) Other investigative materials on or related to Mr. Arar.
- Shortly after the visit, on February 25, 2002, Corporal Lemay requested that the FBI conduct inquiries about Mr. Arar's travels between January 5 and January 19, 2000.

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<sup>2</sup> Corcoran testimony (November 10, 2004), p. 4755. In any event, Inspector Cabana's notes reflect that, by February 21, 2002, American agencies had the hard-drive information in their possession. Cabana testimony (January 18, 2005), p. 9095.

<sup>3</sup> Although the FBI was free to copy the binders if they had asked, it does not appear they did so.

*The Supertext Database*

- The government estimates that the three CDs of Supertext material transferred to the American agencies contained a total of 3,737 files, 120 of which were identified as relating to Mr. Arar.<sup>4</sup> All told, on receipt of the CDs, the Americans had access to practically all of the material that Project A-O Canada had accumulated on Mr. Arar up to that point.
- The CDs contained the following information on Mr. Arar:
  - 1) Detailed biographical material, including Mr. Arar's immigrant visa and record of landing, client history and request for record of landing.
  - 2) Canada Customs and Revenue Agency materials, including the material obtained from the November 29, 2001 and December 20, 2001 secondary examinations of Mr. Arar at the Canadian border.
  - 3) The Project A-O Canada letter to U.S. Customs, dated October 31, 2001, requesting TECS checks and lookouts on Mr. Arar, Dr. Mazigh and others (the request that described Mr. Arar, Dr. Mazigh and the others as a "group of Islamic Extremist individuals suspected of being linked to the al-Qaeda terrorist movement").
  - 4) Various Project A-O Canada and Project O Canada materials, including chronologies, an information request to the FBI, situation reports, faxes, investigative plans mentioning Mr. Arar, analytical material, operational plans, interview notes, surveillance reports, CPIC person queries, photos, and investigators' notes.
  - 5) Faxes, business materials, address books, phone lists, and an agenda.
  - 6) Several references to Mr. Arar as a "suspect," "principal subject," target or important figure.<sup>5</sup>

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<sup>4</sup> Exhibit C-85.

<sup>5</sup> The following are examples of such references:

- 1) A document providing an explanation for the missed Customs lookout on Mr. Arar upon his return from Tunisia after the January 22, 2002 searches refers to Mr. Arar as a "suspect." Exhibit C-86, Vol. III, Tab 4.
- 2) Another document refers to Mr. Arar as a "Principal Subject" of the investigation. Exhibit C-86, Vol. I, Tab 41.
- 3) A Project A-O Canada situation report for October 23, 2001 refers to Mr. Almalki's connection to Mr. Arar as "important." Exhibit C-86, Vol. I, Tab 43.
- 4) An analytical diagram entitled "Bin Laden's associates: al-Qaeda Organization in Ottawa" has Mr. Almalki at its centre, and Mr. Arar directly linked to him. Exhibit C-86, Vol. II, Tab 4.

- 7) Information that Mr. Almalki was listed as Mr. Arar's emergency contact on a "lease" dated December 27, 1998 (the actual Minto rental application and lease were not on the CDs).
- 8) Information that Mr. Arar applied for a gun permit in 1992 (which Corporal Lemay referred to as a "strange thing").
- 9) Speculation (to be confirmed by Project A-O Canada) that Mr. Arar might be President of The MathWorks, Inc. (which turned out to be incorrect).
- 10) The erroneous notes taken by RCMP officers during the interview of Youssef Almalki on January 22, 2002, indicating that Youssef Almalki said that Mr. Arar had a business relationship with Mr. Almalki, but he did not know the details. (Youssef Almalki actually said that he was "not sure" if his brother had a business relationship with Mr. Arar.)
- 11) A situation report from "O" Division mentioning the Mango's Café meeting, but erroneously stating that Mr. Arar travelled from Quebec to meet Mr. Almalki. (Mr. Arar was living in Ottawa at the time.)
- 12) Information on Project A-O Canada's failed attempt to interview Mr. Arar on January 22, 2002 (although not the details of negotiations with Mr. Arar's lawyer about an interview after the fact).
- 13) An analysis of the names found on Mr. Arar's personal digital assistant (PDA) seized by Customs on December 20, 2001, in which the analyst speculated that some of the people whose names were found on the PDA might have links to extremist activity.

#### *April and May 2002 Questions and Meetings*

- On April 1, 2002, Corporal Lemay prepared and sent questions to the FBI. His list included a request for all information on Mr. Arar's residence in Massachusetts, and his MathWorks, Inc. workplace. This was a follow-up request to Corporal Buffam's unanswered request of November 2, 2001.
- On April 18, 2002, Project A-O Canada met with the FBI in Ottawa and made a number of further requests for information on Mr. Arar's activities while in the United States, and the possibility of other communications with Mr. Almalki.
- On May 22, 2002, Corporal Lemay sent a letter to the FBI in Ottawa, in which he again lists information about Mr. Arar (business and work addresses, information on Mr. Arar's company – SimComm Inc.), and requested material on Mr. Arar and others, including his "green card."

*Project A-O Canada Presentations to the Americans*

- Project A-O Canada’s presentation to the American agencies and the U.S. Department of Justice on May 31, 2002 stated the following about Mr. Arar.
  - 1) He was a “business associate of Abdullah Al Malki.”
  - 2) The lease agreement for Mr. Arar’s Ottawa residence listed Abdullah Almalki as a reference (in fact, it was a lease application, and Mr. Almalki was his emergency contact).
  - 3) He had travelled extensively to the United States.
  - 4) He was a contract employee of The MathWorks, Inc. in Boston.
  - 5) He had refused an interview request (which was incorrect — Mr. Arar’s lawyer had attached conditions to an interview).
  - 6) Mr. Arar, along with Nazih Almalki and two other individuals, might be part of an investigative hearing under Bill C-36 (a hearing limited to people who might be witnesses).

*June 2002 Questions to the Americans*

- On June 26, 2002, Chief Superintendent Couture addressed a letter to the U.S. Embassy, on behalf of Project A-O Canada, in which he set out several outstanding requests for information. He relayed the RCMP’s belief that further communications existed, but had yet to be found, and stated that the “... information [was] significant as the role of ARAR [had] yet to be firmly established.”<sup>6</sup>

*Arar’s Departure for Tunisia*

- On July 15, 2002, Project A-O Canada informed the Americans of Mr. Arar’s earlier departure for Tunisia, and discussed the possible reason for his departure, including whether it was as a result of the investigation, or had already been planned.

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<sup>6</sup> Exhibit C-30, Tab 185.

ANNEX 2PUBLIC SOURCES OF INFORMATION ON SYRIA'S  
HUMAN RIGHTS REPUTATION1.  
OVERVIEW

This Annex summarizes the information on Syria's human rights record contained in the U.S. State Department Country Reports on Human Rights Practices and Amnesty International annual reports at the time of Maher Arar's detention. It highlights the following points, because they frame Mr. Arar's experience while in detention in Syria and his claims of torture and ill-treatment after his return:

- The role of security services in Syria, especially the Syrian Military Intelligence (SMI), which was Canadian officials' main contact in Damascus for the Arar case;
- The significance of the Muslim Brotherhood in light of the Syrians' allegations that Mr. Arar was affiliated with this organization;
- The practice of arbitrary arrests and incommunicado detentions. Mr. Arar was arrested without charges and held incommunicado when he first arrived in Syria;
- Prison conditions, especially at the Palestine Branch where Mr. Arar said he was detained while in Syria;
- The use of torture to coerce confessions and whether this tactic was used on dual citizens. Mr. Arar, a Canadian-Syrian citizen, claims he was tortured while detained in Syria and that, as a result, he gave a false confession about attending a training camp in Afghanistan; and
- Prosecutions before the Supreme State Security Court. Canadian officials learned that Mr. Arar's trial would take place before this court.

## 2.

### U.S. STATE DEPARTMENT COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES IN SYRIA<sup>1</sup>

The U.S. State Department produces annual Country Reports on Human Rights Practices that are prepared and released by the Bureau of Democracy, Human Rights, and Labor. In addition, region-specific bureaus at the U.S. State Department prepare Background Notes for countries, describing the geography, government, economy, history and political conditions. These reports are accessible on the U.S. State Department website. Canadian officials often incorporated the U.S. State Department reports when assessing Syria's human rights situation.

#### 2.1

##### GOVERNMENT AND POLITICAL CONDITIONS IN SYRIA

Putting Syria's human rights record in context warrants a brief background of the country's government and political conditions. The following comes from the U.S. State Department reports.

Syria has been a republic under the Arab Socialist Ba'ath Party regime since March 1963. The U.S. State Department describes Syria as a military regime with virtually absolute authority in the hands of the President.<sup>2</sup> The President and his senior aides, particularly those in the military and security services, make key decisions with a limited degree of public accountability.<sup>3</sup> Security services play a powerful role in the Syrian government in light of the state of emergency and martial law that has been in place since 1963 that allows them to operate outside the legal system.<sup>4</sup> In 2002 and 2003, the security services continued to be responsible for human rights violations, including torture.<sup>5</sup>

The government considers militant Islam a threat and closely follows its adherents.<sup>6</sup> In the late 1970s, the government was seriously challenged by

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<sup>1</sup> Exhibit P-27 is the U.S. State Department Human Rights Report for 2002, released March 31, 2003. Exhibit P-28 is the U.S. State Department Human Rights Report for 2003, released February 24, 2004.

<sup>2</sup> Exhibit P-27, p. 1, Exhibit P-28, p. 1. Syria's current president is Bashar al-Assad, the son of Hafez al-Assad, who held presidency in Syria from 1970 until his death in 2000. Bashar al-Assad was elected as president on July 10, 2000, and has held this position to the present.

<sup>3</sup> Exhibit P-26, pp. 6 and 10.

<sup>4</sup> Exhibit P-27, p. 1; Exhibit P-28, p. 1. Syria justifies martial law by the state of war that continues to exist with Israel and by continuing threats posed by terrorist groups.

<sup>5</sup> Exhibit P-26, p. 6; Exhibit P-27, p. 1.

<sup>6</sup> Exhibit P-27, p. 9; Exhibit P-28, p. 7.

fundamentalist Sunni Muslims, who rejected the secular Ba'ath program and rule by the minority Alawis,<sup>7</sup> whom they considered heretical. The Muslim Brotherhood led an armed insurgency against the regime from 1976 to 1982.<sup>8</sup> The government crushed this opposition, leaving many thousands dead and wounded<sup>9</sup> and arresting many as political prisoners.<sup>10</sup> In 1999 and 2000, there were large-scale arrests, and torture in some cases, of Syrian and Palestinian Islamists affiliated with the Muslim Brotherhood and the Islamic Salvation Party.<sup>11</sup>

The Inquiry heard expert testimony that even after the Muslim Brotherhood was brutally repressed in 1982, the current Syrian regime has continued to view the organization as the principal source of opposition, on an underground basis inside Syria and in exile outside of Syria.<sup>12</sup> Although Syria would view al-Qaeda as a threat to its internal security, al-Qaeda has never explicitly targeted the Syrian regime for attack or overthrow in the way it has targeted other regimes in the Arab world, and it would not be seen as the principal threat to Syria's internal security.<sup>13</sup>

This Inquiry also heard expert testimony about Syria's co-operative relationship with the United States — and in particular the CIA — in the “war on terror.” Flynt Leverett was called by Ambassador Pillarella and Leo Martel as an expert witness on Syrian politics from 1963 to the present and on U.S.-Syrian relations. He testified that in the weeks following 9/11, the Syrians approached the United States and offered to share intelligence that Syrian security services had collected on various Sunni extremist groups with links to al-Qaeda. The Syrian motive for doing this was to prove itself to be a useful partner to the United States in conducting its “war on terror,” which would deflect pressure that might otherwise come from the United States on matters of bilateral concern.<sup>14</sup> As a result of the Syrians' offer of intelligence, the United States opened an intelligence-sharing relationship between the CIA and the Syrian Military Intelligence (SMI).

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<sup>7</sup> Sunni Muslims constitute the majority of Syria's population (74 percent). While government policy officially disavows sectarianism of any kind, in the case of Alawis, religious affiliation can facilitate access to influential and sensitive posts. Members of the President's Alawi sect hold a predominant position in the security services and military, well out of proportion to their percentage of the population, estimated at 12 percent.

<sup>8</sup> Exhibit P-26, p. 4.

<sup>9</sup> Ibid.

<sup>10</sup> Exhibit P-27, p. 4; Exhibit P-28, p. 4.

<sup>11</sup> Exhibit P-27, p. 9.

<sup>12</sup> [P] Leverett testimony (November 9, 2005), pp. 12243–12244.

<sup>13</sup> Ibid., pp. 12242–12243.

<sup>14</sup> Ibid., p. 12236.

CIA officials would travel to Damascus to meet with General Khalil and other officials of the SMI, and would receive information from the Syrians about various Sunni extremist groups.<sup>15</sup> In matters relating to internal security, General Khalil was more important than Foreign Minister Shara'a.<sup>16</sup> This intelligence-sharing channel ran from the end of 2001 to the eve of the Iraq war in early 2003.<sup>17</sup>

## 2.2

### SYRIA'S HUMAN RIGHTS PRACTICES

The 2002 and 2003 U.S. State Department Country Reports on Human Rights Practices found that the Syrian government's human rights record remained poor. The reports also describe continuing serious abuses, including "the use of torture in detention; poor prison conditions; arbitrary arrest and detention; prolonged detention without trial; fundamentally unfair trials in the security courts; and infringement on privacy rights."<sup>18</sup> Both the 2002 and 2003 reports state that incommunicado detentions occurred.<sup>19</sup>

According to the U.S. State Department, there was credible evidence that security forces continued to use torture in 2002 and 2003. Torture was most likely to occur while detainees were being held at one of the many detention centres run by the various security services throughout the country, especially while authorities were attempting to extract a confession or information. Reported torture methods included administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim was suspended from the ceiling; hyper-extending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine.<sup>20</sup> In the 2003 report, a foreign citizen with dual Syrian nationality reported that he had been tortured while in prison.<sup>21</sup>

Where the State's case against a detainee was based on a confession, the defendant was not allowed to argue in court that the confession was coerced.

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<sup>15</sup> *Ibid.*, p. 12237. Mr. Leverett did not know if the CIA also gave the SMI intelligence.

<sup>16</sup> [P] Leverett testimony (November 10, 2005), p. 12493.

<sup>17</sup> [P] Leverett testimony (November 9, 2005), p. 12237.

<sup>18</sup> Exhibit P-28, p. 1; Exhibit P-27, p. 1.

<sup>19</sup> Exhibit P-27, p. 2; Exhibit. P-28, p. 2.

<sup>20</sup> *Ibid.*

<sup>21</sup> Exhibit P-27, p. 2.

There was no known instance in which a court ordered a medical examination for a defendant who claimed that he had been tortured.<sup>22</sup>

The Syrian government has denied that it uses torture and claims that it would prosecute anyone believed guilty of using excessive force or physical abuse.<sup>23</sup>

## 2.3

### PRISON CONDITIONS AND THE JUSTICE SYSTEM IN SYRIA

The U.S. State Department described prison conditions as poor and below international standards for health and sanitation. Pre-trial detainees, particularly those held for political or security reasons, were usually held separately from convicted prisoners.<sup>24</sup> Facilities for political or national security prisoners were generally worse than those for common criminals. The government did not permit independent monitoring of prison or detention centre conditions, although diplomatic or consular officials were granted access in some cases.<sup>25</sup>

Other key findings included significant problems in arbitrary arrest and detention as authorized by the Emergency Law in Syria. In cases involving political or national security offences, suspects could be detained incommunicado for prolonged periods without charge, trial or access to a lawyer. There have been reliable reports in the past that the government did not notify foreign governments when their citizens were arrested or detained.<sup>26</sup>

Syria's Constitution provides for an independent judiciary; however, the U.S. State Department reported that security courts were subject to political influence.<sup>27</sup> It also notes that the security court that tries political and national security cases — the Supreme State Security Court (SSSC) — operates under the state of emergency and not ordinary law, and did not observe constitutional provisions safeguarding the rights of the accused. For example, under SSSC procedures, defendants are not present at the preliminary or investigative phase of the trial during which the prosecutor presents evidence; trials are usually closed to the public; and lawyers are not ensured access to their clients before the trial and are excluded from the court during their client's initial interrogation by the prosecutor.

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<sup>22</sup> *Ibid.*, p. 5; Exhibit P-28, pp. 2 and 4.

<sup>23</sup> *Ibid.*, p. 2; *Ibid.*, p. 9.

<sup>24</sup> *Ibid.*, p. 2.; *Ibid.*, p. 2.

<sup>25</sup> *Ibid.*, pp. 2–3; *Ibid.*

<sup>26</sup> *Ibid.*, p. 3; *Ibid.*, pp. 2–3.

<sup>27</sup> *Ibid.*, p. 1; *Ibid.*, p. 1.

## 3.

**AMNESTY INTERNATIONAL REPORT 2002**

Amnesty International (AI) produces annual reports on human rights practices in several countries. The reports are accessible on AI's website. Canadian officials often relied on AI's reports when assessing Syria's human rights situation.

In 2002, AI reported that torture and ill-treatment continued to be used routinely against political prisoners in Syria, especially during incommunicado detention at the Palestine Branch and Military Interrogation Branch detention centres. No investigations were known to have been carried out into recent or past allegations of torture.<sup>28</sup>

Mr. Arar has publicly stated that he was detained in the Palestine Branch, which makes references in AI's report to this detention centre relevant. The report describes the treatment of a family who was held incommunicado at the Palestine Branch based on allegations that the father was involved with unauthorized Islamist groups. The father was reportedly tortured in a metal chair with moving parts that stretches the spine and causes severe pressure on the neck and legs; given electric shocks; and beaten with cables while held in solitary confinement. The two daughters, also confined at the Palestine Branch, were severely beaten and ill-treated.

Amnesty International also reported that procedures before the courts in Syria fell short of international fair trial standards and frequently noted unfair trials before the Supreme State Security Court.

When AI was preparing its 2002 report on Syria, Syrian authorities ignored repeated requests from the organization to visit the country to speak with officials and carry out research.<sup>29</sup> The Syrian government last met with Amnesty International in 1997.<sup>30</sup>

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<sup>28</sup> Exhibit P-29, pp. 1–2. The report covered the period of January to December 2001.

<sup>29</sup> *Ibid.*, p. 3.

<sup>30</sup> Exhibit P-27, p. 11; Exhibit P-28, p. 9.

### ANNEX 3

## THE DEPARTMENT OF FOREIGN AFFAIRS AND CANADIANS DETAINED ABROAD

### 1. OVERVIEW OF THE DEPARTMENT

The Department of Foreign Affairs has evolved over the years from a small Canadian presence in the 1950s through expansion in the 1970s to the present global network of about 174 posts abroad. Most of the staff of Canadian missions abroad are hired locally and Canadians are clearly the minority.<sup>1</sup>

Until December 12, 2003, the Department of Foreign Affairs included international trade. On that day, the trade function in the Department was separated from the rest of Foreign Affairs. As a result, the Department was renamed Foreign Affairs Canada (FAC) instead of the Department of Foreign Affairs and International Trade (DFAIT).<sup>2</sup>

DFAIT's mandate as outlined in the *Department of Foreign Affairs and International Trade Act* is to advance and protect the interests and values of Canada and Canadians in Canada's foreign policy. These interests must be managed in an increasingly complex world.<sup>3</sup> In exercising the powers and carrying out the duties and functions of the Minister of Foreign Affairs, the *Act* states that the incumbent shall:

- Coordinate the direction given by the Government of Canada to the heads of Canada's diplomatic and consular missions; and
- Have the management of Canada's diplomatic and consular missions.<sup>4</sup>

The Minister of DFAIT during Mr. Arar's incarceration in the U.S. and Syria was the Hon. Bill Graham. The Minister was assisted by the chief public servant

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<sup>1</sup> [IC] Livermore testimony (March 7, 2005), p. 12124.

<sup>2</sup> During the relevant period of Mr. Arar's detention in the U.S. and Syria and subsequent release in October 2003, the full name of the Department of Foreign Affairs in the Government of Canada was the Department of Foreign Affairs and International Trade (DFAIT). Therefore, the acronym used in this report for Foreign Affairs Canada is DFAIT.

<sup>3</sup> [IC] Livermore testimony (March 7, 2005), pp. 12117–12118.

<sup>4</sup> *Department of Foreign Affairs and International Trade Act*, section 10(2); Exhibit P-11, Tab 7.

in the Department, the Deputy Minister of Foreign Affairs (USS)<sup>5</sup>, Gaetan Lavertu, and the Associate Deputy Minister (DMA), Paul Thibault.<sup>6</sup> In addition, DFAIT has a number of branches, each headed by an assistant deputy minister.

Apart from the administrative branches, there are two types of branches within DFAIT: the geographic branches and the functional branches.<sup>7</sup> The geographic branches manage the bilateral relations of Canada with the rest of the world and include Africa and the Middle East, the Americas, Asia–Pacific and Europe. The Assistant Deputy Minister for the Africa and Middle East Branch was John McNee (MJM). The functional branches deal with specific issues such as arms control, human security and land mines. The key functional branches relevant to this inquiry are the Global and Security Policy Branch and the Corporate Services, Passport, and Consular Affairs Branch. During the relevant time period, the Assistant Deputy Minister for the Global and Security Policy Branch was James Wright (MJW) and the Assistant Deputy Minister for the Corporate Services, Passport, and Consular Affairs Branch was Kathryn McCallion (MKM).

Each branch has a number of bureaus headed by a director general.<sup>8</sup> For example, the Security and Intelligence Bureau under the Global and Security Policy Branch was led by Dan Livermore, Director General (ISD). The Consular Affairs Bureau falls under the Corporate Services, Passport, and Consular Affairs Branch and was led by Gar Pardy and later by Konrad Sigurdson, Director General (JPD).

Finally, each bureau may have several divisions, each headed by a director. Most work is signed off at the division level, with the director of a division as the principal signing authority. A more detailed discussion of the work of the bureaus and divisions follows.

In summary, the following DFAIT agencies were involved in Mr. Arar's case in some way: Consular Affairs Bureau, Security and Intelligence Bureau, Middle East Division, Legal Bureau, and U.S. Bureau.<sup>9</sup>

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<sup>5</sup> DFAIT has a detailed system of acronyms that refer to departmental structures and positions, avoiding recourse to long titles. These acronyms are noted throughout the report.

<sup>6</sup> [IC] Livermore testimony (March 7, 2005), p. 12118.

<sup>7</sup> *Ibid.*, pp. 12119–12120; Exhibit P-11, Tab 2.

<sup>8</sup> *Ibid.*, p. 12119, Exhibit P-24.

<sup>9</sup> *Ibid.*, pp. 12187–12188.

## 2. RELEVANT POLICIES FOR CANADIANS DETAINED ABROAD

Consular officials working in missions abroad have access to the Manual of Consular Instructions, which provides guidance on the provision of consular services. The cases facing consular officials vary widely. Therefore, in dealing with each case, the guidelines in the Manual must be supplemented by the discretion, good judgment and past experience of the officials concerned and, where necessary, the input of DFAIT Headquarters.<sup>10</sup>

Legal problems of a criminal or civil nature often arise in consular matters. However, consular officials cannot give legal advice on Canadian or foreign laws. They are limited to assisting Canadian nationals in finding legal representation.<sup>11</sup> In criminal matters, consular officials are to advise Canadians charged with a criminal offence of their right to consult a lawyer; arrange for family or friends of the accused to be informed so that they may have an opportunity to provide financial assistance; and inform the accused if free legal aid is available.<sup>12</sup>

In general, consular officials are called on to offer protection and assistance to Canadians abroad. As stated in the Manual, the principles underlying their protection responsibilities are as follows:

A prime function of Canadian missions is to protect the lives, rights, interests, and property of Canadian citizens ... when these are endangered or ignored in the territory of a foreign state. The basis of protection is a compromise between two conflicting principles ... the territorial sovereignty of states, and the personal jurisdiction of states ... over all persons who are its nationals, wherever they may be.<sup>13</sup>

The Manual directs consular officials to treat requests for protection (and assistance), even if ostensibly unreasonable, with courtesy, tact and good judgment. This includes offering information and advice within their competence and authority; avoiding commitments that the mission or DFAIT cannot fulfill; and ensuring that the mission has adequate information on local legislation, regulations and practices which might affect the interests of Canadians.<sup>14</sup>

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<sup>10</sup> [P] Sigurdson testimony (June 23, 2004), pp. 659–660 and p. 663.

<sup>11</sup> Manual of Consular Instructions, Chapter 1 Legal Matters, Section 1.0.1. Exhibit P-11, Tab 21.

<sup>12</sup> *Ibid.*, Chapter 1, Section 1.0.2.

<sup>13</sup> *Ibid.*, Chapter 2, Section 2.3.1.

<sup>14</sup> *Ibid.*, Chapter 2, Section 2.3.2.

An applicant for protection should have exhausted all local remedies before consular officials approach local officials to resolve a problem. According to the Manual:

The right of a consular official to intervene with local authorities on behalf of a Canadian who appears to have been the victim of unlawful (under domestic or international law) discrimination or denial of justice is well established in international law. Consistent with Canada's commitment to fundamental human rights, consular officers do what they can to protect Canadians against violation of these rights. It is a basic principle of international law that whatever a state's treatment of its own subjects, aliens must be accorded an international minimum standard of treatment, including freedom from arbitrary arrest, due process in the determination of legal rights, and respect for human rights generally. The movement for international protection of human rights has produced a number of conventions and instruments to which Canada is a party.... Violation of the standards established in these instruments may constitute grounds for the exercise of diplomatic or consular protection by Canada on behalf of its citizens.<sup>15</sup>

Canadians who have been arrested or detained have the right to be visited by consular officials, if they so request. This right is supported by article 36 of the *Vienna Convention on Consular Relations* (VCCR).<sup>16</sup> Consular officials should make contact with an arrested or detained Canadian within 24 hours of notification of the detention.<sup>17</sup>

Consular officials are expected to report to the mission or DFAIT Headquarters if they are refused access, or if Canadian detainees are refused communication with them. They are also expected to impress on the local authorities the necessity of Canadian consular officials interviewing Canadians who are arrested or detained. The interviews should preferably be in private, consistent with normal security precautions.<sup>18</sup>

As for access to persons of dual nationality who have been arrested or detained, the Manual instructs consular officials that the VCCR is silent on consular access when such persons are arrested or detained in the country of their other citizenship. The right of consular officials to intervene on the dual

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<sup>15</sup> Ibid., Chapter 2, Section 2.4.1.

<sup>16</sup> Ibid. Chapter 2, Section 2.4.4(5).

<sup>17</sup> Exhibit P-11, Tab 20 [Schedule: Protection and Assistance p. 1 of 4]; [P] Sigurdson testimony (June 23, 2004), pp. 674–675.

<sup>18</sup> Manual of Consular Instructions, Chapter 2, Protection and Assistance, Section 2.4.4(5). Exhibit P-11, Tab 22.

national's behalf is limited and may require consultation with DFAIT Headquarters.<sup>19</sup>

Incarcerated Canadians can also receive consular services.<sup>20</sup> A detailed description of DFAIT's guidelines on the provision of consular services to incarcerated Canadians is laid out in an appendix to the Manual.<sup>21</sup>

Some of the assistance that consular officials provide to prisoners includes:

- Visiting or maintaining contact with the prisoner, although the frequency will depend on the location of the prison, the conditions in the prison, the number of Canadians incarcerated, the size of the consular staff and the competing priorities at the Canadian mission. In countries where prison conditions are good and communication with the outside world is easier, visits may be made only on request;
- Attempting to obtain case-related information to the extent that the prisoner cannot obtain it directly, provided the prisoner so requests; and
- Providing available information on such matters as the local judicial and prison systems, approximate time requirements for court action, typical sentences for the alleged offence, bail provisions, procedures for transferring offenders (if applicable) and methods of transferring funds.<sup>22</sup>

Some forms of assistance that consular officials provide in liaising with local authorities during the period of incarceration includes:

- Where appropriate, seeking immediate and regular access to the Canadian prisoner from the time of arrest until release;
- Verifying that conditions of detention are at least comparable to the best standards applicable to nationals of the country of incarceration; and
- Obtaining information about the status of the prisoner's case and encouraging local authorities to process the case without unreasonable delay.<sup>23</sup>

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<sup>19</sup> Ibid., Chapter 2, Section 2.4.4(6).

<sup>20</sup> Ibid., Chapter 2, Section 2.4.9.

<sup>21</sup> See Manual of Consular Instructions, Annex D-2, A Guide to Services Provided to Canadians Detained or Imprisoned in Foreign Countries. Exhibit P-11, Tab 22.

<sup>22</sup> Ibid., Annex D-2, Section 4(a).

<sup>23</sup> Ibid., Annex D-2, Section 5(a).

### 3. THE ROLE OF THE AMBASSADOR

Each mission abroad is directed by a head of mission (HOM). The title of that person is ambassador, consul-general or, in the case of Commonwealth countries, high commissioner.

The HOM is appointed to his or her position by an Order in Council, which means that the Prime Minister and Cabinet appoint the ambassador. Under the *Foreign Affairs and International Trade Act*, the HOM is responsible not only for the activities of DFAIT, but also for the activities of other departments and agencies of the Government of Canada in his or her area of accreditation. The *Foreign Affairs and International Trade Act* describes the HOM's duties as follows:

Except as otherwise instructed by the Governor in Council, a head of mission shall have the management and direction of his mission and its activities and the supervision of the official activities of the various departments and agencies of the Government of Canada in the country or portion of the country or at the international organization to which he is appointed.<sup>24</sup>

The head of mission in Damascus from November 1, 2000 to September 13, 2003 was Ambassador Franco Pillarella.<sup>25</sup> He was responsible for the conduct of bilateral relations. In principle, everything that transpired between Canada and the host country, Syria, should have been done with the Ambassador's knowledge and guidance.<sup>26</sup> The Director of ISD, Dan Livermore, who was formerly the Canadian Ambassador to Guatemala (and concurrently to the Republic of El Salvador) from 1996 to 1999,<sup>27</sup> testified that in being charged with the management and direction of the embassy in a host country, the HOM maintains coherence in the relationship and guides its development. To do so, the HOM relies on deep knowledge of the interests which Canada may have in that relationship, an understanding of how the host country and society function, the networks which the embassy maintains with influential people and decision-makers, and his or her skills of persuasion and leadership.<sup>28</sup>

Liaison officers who represent the RCMP and CSIS and have many accreditations outside their country of residence are expected to report to the head of

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<sup>24</sup> Exhibit P-11, Tab 7.

<sup>25</sup> Exhibit P-85, volume 4, Tab 125.

<sup>26</sup> [IC] Livermore testimony (March 7, 2005), p. 12125.

<sup>27</sup> Exhibit P-65.

<sup>28</sup> [IC] Livermore testimony (March 7, 2005), p. 12126.

mission when visiting another post and to be guided by the HOM's instructions while carrying out their responsibilities for the home agency.<sup>29</sup>

The HOM is expected to exercise latitude and initiative in carrying out his or her responsibilities. He or she is expected to know the main players in his country of accreditation, both public and private, and to learn quickly on arriving in his host country who the real decision-makers in that country are.

The HOM is expected to play a major role in interpreting that country to Canada, both inside and outside government. The Canadian HOM in Syria would be expected to analyze Syria's influence in the Middle East peace process, its attitudes towards its neighbours and its foreign policy objectives more generally, and to explain them to the Government of Canada.

Mr. Livermore testified that the influence and leadership that the HOM can exercise both in the country of residence and in Canada is a major factor in the success of his or her mission.<sup>30</sup>

For management purposes, the specific objectives of a HOM are worked out by a geographic branch at DFAIT, in consultation with the functional branches and other government departments. In the case of Syria, the ambassador seeks guidance and assistance from the Middle East Bureau. Other relevant branches, bureaus or divisions also add instructions, depending on their areas of responsibility in relation to the Syrian mission.<sup>31</sup>

The *Manual of Consular Instructions* provides some direction on police liaison programs at missions abroad and on how any appearance of conflict of interest with consular programs should be managed, including HOM consultation with headquarters.

... These programs should not conflict, any more than, for example, law enforcement and legal aid programs in Canada, and missions should ensure that conflict is avoided both in reality and appearance. Potential conflicts of interest, including perceived precedence of responsibility in police liaison and consular matters, should be adjudicated by the Head of Mission, who must weigh the merits of any case in the context of relations with the country concerned and of the rights and interests of the Canadian citizen involved, in consultation with Headquarters (Consular Policy Division – JPP, Consular Operations Division – JPO, Legal Advisory Division – JLA, Security Division – ISS).<sup>32</sup>

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<sup>29</sup> Ibid., pp. 12126–12127.

<sup>30</sup> Ibid., pp. 12128–12129.

<sup>31</sup> Ibid., pp. 12127–12128.

<sup>32</sup> Exhibit P-11, Tab 22, p. 13 of 75, section 2.4.10: Police Liaison Programs.

When asked about the relationship between an ambassador and the Consular Affairs Bureau, Ambassador Pillarella testified that he took direction on consular cases from the Consular Bureau, which would act in consultation with the geographic and legal bureaus. With respect to Mr. Arar, Ambassador Pillarella was responsible for executing Mr. Pardy's directions and for exercising his discretion with Syrian authorities.<sup>33</sup> Similarly, Mr. Pardy testified that, particularly when more than one interest of the Canadian government is engaged, such as consular, law enforcement and security intelligence responsibilities, headquarters instructs the ambassador on how to proceed. If different government objectives conflict, headquarters must make a decision and issue instructions, in consultation with the relevant political division and, if necessary, the Deputy Minister or the Minister.<sup>34</sup> Mr. Livermore contrasted "tactical" with "strategic" decisions. Ambassadors are expected to manage day-to-day tactical decisions, while Ottawa determines the strategic directions and objectives.<sup>35</sup>

The ambassador does not have discretion to make decisions that would adversely affect others, especially in a country with a poor human rights record.<sup>36</sup> For example, the question of sharing information about a Canadian detained in such a country with the authorities there should be referred to headquarters. The ambassador uses his judgment before referring a matter to headquarters. Mr. Pardy testified that in exercising that judgment, the ambassador should apply a test of possible injury, especially when the fate of an individual is concerned.<sup>37</sup>

#### 4. THE ROLE OF CONSULAR OFFICIALS

The Department handles approximately 700,000 consular cases annually. Consular officials working at missions abroad are employees of DFAIT. The ambassadors are their direct supervisors, but they also receive day-to-day guidance as required from the headquarters divisions concerned in DFAIT. In 2002, Mr. Martel was receiving headquarters guidance from the Middle East desk officer in the Consular Bureau, Myra Pasty-Lupul.<sup>38</sup> Given the high profile of the Arar file, Mr. Martel was also receiving guidance from Mr. Pardy.

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<sup>33</sup> [IC] Pillarella testimony (March 30, 2005), pp. 13310–13312.

<sup>34</sup> [IC] Pardy testimony (August 4, 2005), pp. 16830–16831.

<sup>35</sup> [P] Livermore testimony (May 17, 2005), pp. 2439–2440.

<sup>36</sup> [IC] Pardy testimony (August 4, 2005), pp. 16931–16932.

<sup>37</sup> [IC] Pardy testimony (August 4, 2005), pp. 16945–16948.

<sup>38</sup> [IC] Livermore testimony (March 7, 2005), p. 12126.

Mr. Livermore testified that the consular function is considered one of DFAIT's core services. While it is becoming an increasingly specialized function, nearly all experienced foreign service officers in the Department have worked on consular issues over the course of their careers, either in Canada or at posts abroad. This is important because it means that even those outside the Consular Bureau know how consular issues have to be managed and what DFAIT's obligations are.<sup>39</sup>

The role of consular officials is complicated when they provide consular services for dual nationals in the country of these individuals' other nationality. While Canada offers the same range of services to all its citizens, whether or not they have any other nationality, a variety of practical and legal issues often arise in the countries where they hold dual citizenship. In such cases, consular officials may have to rely on the good will of that country and on personal relationships built over the years.<sup>40</sup>

Mr. Pardy describes the standard approach to detention cases as threefold:

- to ensure the well-being of the person detained and to provide a channel of communication with his or her family;
- to help the detained Canadian receive equitable treatment; and
- to have charges adjudicated as quickly as possible by an appropriate judicial body.<sup>41</sup>

The Consular Affairs Bureau does not pass judgment on the detainee's guilt or innocence and does not seek preferential treatment for Canadians.<sup>42</sup> Mr. Pardy testified that while this latter statement is legally correct, in practice, at least while he was the Director General, Consular Affairs did seek some measure of preferential treatment for Canadians, whether it was to expedite the laying of charges or the timing of a trial or to improve prison conditions.<sup>43</sup>

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<sup>39</sup> Ibid., p. 12134.

<sup>40</sup> Ibid., pp. 12134–12135.

<sup>41</sup> Exhibit P-42, Tab 317; [P] Pardy testimony (May 25, 2005), pp. 3632–3633.

<sup>42</sup> Ibid.; [P] Pardy testimony (May 25, 2005), p. 3633.

<sup>43</sup> [P] Pardy testimony (May 25, 2005), pp. 3634–3635.

## 5. THE ROLE OF DFAIT ISI

The Security and Intelligence Bureau has existed in DFAIT in various forms for more than 60 years. The Bureau has two sides: security (of personnel, physical assets and information systems) and intelligence. The intelligence division of the Bureau is the one that is relevant to this inquiry.

The Foreign Intelligence Division (ISI) is headed by a director. During the relevant period of this inquiry, he was Scott Heatherington. The Deputy Director of Intelligence Policy in ISI was Jim Gould. The ISI includes a three-member policy unit that works within and outside the Department to coordinate intelligence policy. It prepares for meetings of Cabinet on intelligence matters and it oversees the Department's contributions to common intelligence work. This small unit also oversees the work of 11 political officers at Canadian missions abroad, under the aegis of the Global Security Reporting Program (GSRP). This program was created in 2002 in the aftermath of 9/11, to create more focused reporting from our posts abroad on terrorism, non-proliferation and similar security issues. These political officers are not intelligence operatives.<sup>44</sup>

The ISI draws on intelligence and information largely from open-source materials, possibly privileged but not covert, and not gathered by the surreptitious means of intelligence agencies like CSIS. More specifically, this includes information from local newspapers and magazines, contacts in local communities, and professional contacts with various ministries and agencies in the host government. One witness described this type of intelligence as "small-I intelligence," as distinct from "big-I intelligence," which includes information from wiretaps, human sources and other covert means of an intelligence agency. While ISI works with organizations that are involved in "big-I intelligence" and part of the Security and Intelligence Bureau's mandate involves coordination of "big-I" materials, the mandate of DFAIT generally is concerned with "small-I intelligence".<sup>45</sup>

ISI has one liaison officer from CSIS and one from the RCMP. They secure information from their respective agencies and solicit information from DFAIT on requirements from their organizations.

ISI has a three-person unit consisting of policy advisers who follow intelligence on critical international issues and provide assessments to ministers or senior managers as needed. They focus on current intelligence, that is, fast-breaking information involving short-term judgments.<sup>46</sup>

<sup>44</sup> [IC] Livermore testimony (March 7, 2005), pp. 12139–12141.

<sup>45</sup> *Ibid.*, pp. 12142–12143.

<sup>46</sup> *Ibid.*, pp. 12146–12147.

The Security and Intelligence Bureau is best described as a client service bureau. It provides support and assistance to a wide variety of other bureaus and divisions within DFAIT. This includes receiving and distributing intelligence materials to clients and assisting clients in deciphering intelligence. In some cases, ISD may directly help to manage files with an important intelligence dimension, in co-operation with the relevant bureau or division.<sup>47</sup>

ISD receives intelligence from a number of sources. The key intergovernmental sources of intelligence are CSIS, DND, CSE, the RCMP, the Integrated Threat Assessment Centre and the Privy Council. ISI has arrangements to receive intelligence from foreign sources — mainly the United States and the United Kingdom, but also Australia, New Zealand and some other countries. At any given time, ISD may provide support to dozens of different parts of DFAIT involved in a range of policy issues. The Middle East peace process, elections in Ukraine, terrorism in Southeast Asia and the tsunami in South Asia are all examples of policy areas where other bureaus or divisions have the lead but ISD plays an important role.<sup>48</sup>

ISD plays an identical role in relation to the Consular Affairs Bureau. Often, the Consular Bureau will receive word from a family that an individual is missing. While the consular net goes out to our embassies abroad, ISD can do a parallel search among their intelligence sources, both Canadian and foreign. In many cases, the Consular Bureau seeks help from others in DFAIT to understand the complexities of a given consular situation, such as why a certain individual was detained, what the complications of his or her continued detention are, who holds power in that country and how Canadian influence might best be used to meet its consular obligations. In trying to assist, ISD draws on a wide range of information and a considerable group of individuals within and beyond the Government of Canada.<sup>49</sup> Occasionally, ISD assists with personnel, helping directly to manage case files in the consular area or assisting with the management of crises or other issues.

The actual number of staff who deal in “big-I” intelligence at DFAIT is small, and they are essentially confined to ISI and ISD.<sup>50</sup> Those who deal in small-I intelligence are far more numerous, because that is the business of almost all geographic branches in the Department.

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<sup>47</sup> Ibid., pp. 12148–12149.

<sup>48</sup> Ibid., pp. 12149–12150.

<sup>49</sup> Ibid., pp. 12150–12151.

<sup>50</sup> Ibid., p. 12164.

## APPENDICES

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## APPENDIX 1

# MANDATE

### APPENDIX I(A)

## TERMS OF REFERENCE

P.C. 2004-48

The Committee of the Privy Council, on the recommendation of the Solicitor General of Canada styled Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness, advise that a Commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Dennis R. O'Connor, Associate Chief Justice of Ontario, as Commissioner

- (a) to investigate and report on the actions of Canadian officials in relation to Maher Arar, including with regard to
  - (i) the detention of Mr. Arar in the United States,
  - (ii) the deportation of Mr. Arar to Syria via Jordan,
  - (iii) the imprisonment and treatment of Mr. Arar in Syria,
  - (iv) the return of Mr. Arar to Canada, and
  - (v) any other circumstance directly related to Mr. Arar that the Commissioner considers relevant to fulfilling this mandate,in this Order referred to as the “factual inquiry”, and
- (b) to make any recommendations that he considers advisable on an independent, arm’s length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security based on
  - (i) an examination of models, both domestic and international, for that review mechanism, and
  - (ii) an assessment of how the review mechanism would interact with existing review mechanisms,

in this Order referred to as the “policy review”,

and the Committee do further advise that

- (c) pursuant to section 56 of the *Judges Act*, the Honourable Dennis R. O'Connor be authorized to act as a Commissioner on the inquiry referred to in paragraphs (a) and (b) (in this Order referred to as “the inquiry”);
- (d) the Commissioner be directed to conduct the inquiry under the name of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar;
- (e) the Commissioner be authorized to adopt any procedures and methods that he may consider expedient for the proper conduct of the inquiry, and to sit at any times and in any places in Canada that he may decide;
- (f) the Commissioner be authorized to grant to any person who satisfies him that he or she has a substantial and direct interest in the subject-matter of the factual inquiry an opportunity during that inquiry to give evidence and to examine or cross-examine witnesses personally or by counsel on evidence relevant to the person's interest;
- (g) the Commissioner be authorized to conduct consultations in relation to the policy review as he sees fit;
- (h) the Commissioner be authorized to recommend funding, in accordance with approved guidelines respecting rates of remuneration and reimbursement and the assessment of accounts, to a party who has been granted standing at the factual inquiry, to the extent of the party's interest, where in the Commissioner's view the party would not otherwise be able to participate in that inquiry;
- (i) the Commissioner be authorized to rent any space and facilities that may be required for the purposes of the inquiry, in accordance with Treasury Board policies;
- (j) the Commissioner be authorized to engage the services of any experts and other persons referred to in section 11 of the *Inquiries Act*, at rates of remuneration and reimbursement that may be approved by the Treasury Board;
- (k) the Commissioner be directed, in conducting the inquiry, to take all steps necessary to prevent disclosure of information that, if it were disclosed to

the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security and, where applicable, to conduct the proceedings in accordance with the following procedures, namely,

- (i) on the request of the Attorney General of Canada, the Commissioner shall receive information *in camera* and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information would be injurious to international relations, national defence or national security,
  - (ii) in order to maximize disclosure to the public of relevant information, the Commissioner may release a part or a summary of the information received *in camera* and shall provide the Attorney General of Canada with an opportunity to comment prior to its release, and
  - (iii) if the Commissioner is of the opinion that the release of a part or a summary of the information received *in camera* would provide insufficient disclosure to the public, he may advise the Attorney General of Canada which advice shall constitute notice under section 38.01 of the *Canada Evidence Act*;
- (l) the Commissioner be directed, with respect to the preparation of any report intended for release to the public, to take all steps necessary to prevent the disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security;
  - (m) nothing in this Order shall be construed as limiting the application of the provisions of the *Canada Evidence Act*;
  - (n) the Commissioner be directed to follow established security procedures, including the requirements of the *Government Security Policy* with respect to persons engaged pursuant to section 11 of the *Inquiries Act* and the handling of information at all stages of the inquiry;
  - (o) the Commissioner be directed to perform his duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization and to ensure that the conduct of the inquiry does not jeopardize any ongoing criminal investigation or criminal proceedings;
  - (p) the Commissioner be directed to submit a report or reports in both official languages to the Governor in Council; and

- (q) the Commissioner be directed to file the papers and records of the inquiry with the Clerk of the Privy Council as soon as reasonably possible after the conclusion of the inquiry.

### APPENDIX 1(B)

## RULING ON JURISDICTIONAL ISSUE

Counsel for a recipient of a notice given under s. 13 of the *Inquiries Act*<sup>1</sup> (the “Applicant”) filed a motion, alleging in part that the Commission lacks jurisdiction to inquire into the actions of Canadian officials in relation to Maher Arar. On the motion’s return date, August 9, 2005, the Commission was engaged in *in camera* proceedings. Because the jurisdictional issue affected all participants in the Factual Inquiry, I directed that submissions on this issue be made in closing argument, that they be distributed to other participants and that other participants be given an opportunity to make submissions. Consequently, in making this ruling, I have the benefit of submissions from the Applicant and from counsel for the Attorney General of Canada and Mr. Arar, both of whom oppose the Applicant’s request for a declaration that the Commission is improperly constituted and that the section 13 notice issued to the Applicant is of no force and effect.

The Applicant contended that the *Inquiries Act* (the “Act”) contemplates Part I public inquiries and Part II departmental investigations, but does not contemplate a hybrid of the two. The Applicant submitted that Order in Council PC 2004-48 (the “Order in Council”) creates such a hybrid by using the phrase “to investigate and report on” the actions of Canadian officials in relation to Mr. Arar in regard to the matters identified in subparagraphs (a)(i) through (v). This was said to track the language used in Part II of the *Act*. The Applicant contrasted this language with that used in the orders-in-council that created the Somalia Inquiry and the Inquiry into the Blood System. It was also argued that the manner in which the Commission was established (on the recommendation of the Minister of Public Safety and Emergency Preparedness), receipt of substantial

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1 Section 13 of the *Inquiries Act*, R.S.C. 1985, c. I-11 provides as follows:

13. No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

portions of testimony *in camera* and Mr. Arar's examination by a fact finder correspond more closely with a departmental investigation under Part II of the *Act* than they do to a public inquiry.

For the reasons set out below, I reject these arguments and decline to grant the declaration sought by the Applicant.

## STRUCTURE AND SCHEME OF THE INQUIRIES ACT

The *Inquiries Act* (long title: "An Act respecting public and departmental inquiries") is comprised of four parts: Part I (consisting of ss. 2 through 5), which bears the heading, "Public Inquiries"; Part II (ss. 6 through 10), "Departmental Investigations"; Part III, "General" (ss. 11 through 13); and Part IV (s. 14), "International Commissions and Tribunals".

Section 2 of the *Act* provides that a Part I inquiry may be established "whenever the Governor in Council deems it expedient (to) cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof." This may be contrasted with the power to establish departmental investigations under s. 6, which empowers the minister presiding over any federal government department to appoint a commissioner to investigate and report on the state and management of the business of the department, either in the inside or outside service thereof, and the conduct of any person in that service. While made by the minister pursuant to s. 6, such appointments are under the authority of the Governor in Council.

Although it is accompanied by a heading that refers to public inquiries, Part I does not require that an inquiry be conducted exclusively in public, nor does it purport to abrogate confidentiality or privilege. In fact, it makes no mention of the inquiry being held in public at all. This is consistent with the flexibility that public inquiries must possess in order to be fair and efficient. Correspondingly, Part II contains no requirement that departmental investigations be conducted in private.

Moreover, giving the *Act* the fair, large and liberal construction that s. 12 of the *Interpretation Act*<sup>2</sup> requires, I conclude that the circumstances in which a Part I inquiry or a Part II investigation may be created are not mutually exclusive. Had Parliament intended otherwise, it would have said so in clear and unambiguous terms.

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2 R.S.C. 1985, c. I-21

I conclude that the specific power in Part II of the *Inquiries Act* to “investigate and report on the state and management of the business of the department”, does not diminish the power of the Governor in Council to establish a public inquiry under Part I to investigate and report on the actions of Canadian officials in relation to Mr. Arar. Finally, I note that where the Executive has more than one power to establish an inquiry, it may choose one or the other freely.<sup>3</sup>

#### MANDATE CONFERRED BY ORDER IN COUNCIL PC 2004-48

I accept the Attorney General’s submission that provided that the intention of the Governor-in-Council is readily discernible, no specific language is necessary for an Order in Council to be valid. This submission is borne out by a comparison of the words used in the Order in Council with those used in orders-in-council establishing other commissions.<sup>4</sup> I also accept that the words, “investigate and report on” do not necessarily connote a Part II departmental investigation rather than a Part I public inquiry.

Referring to remarks made in the House of Commons by the Minister of Public Safety and Emergency Preparedness,<sup>5</sup> the Applicant submitted that the fact that I was consulted regarding the Commission’s terms of reference was significant in that it pointed to an intention to create a departmental investigation and was, in an unspecified way, “unfair to all participants”. I disagree. In my view, there is no significance to the fact that I reviewed the terms of reference before Order in Council PC 2004-48 was finalized. This was done as part of a practice that has evolved when governments ask someone to undertake the task of being a commissioner. Adherence to this practice is not unfair, nor does it create an appearance of unfairness.

Counsel for Mr. Arar points out that the mandate for the Commission’s factual inquiry is to “investigate and report on the actions of Canadian officials in

<sup>3</sup> *Wagstaff v. Secretary of State for Health*, [2001] 1 W.L.R. 292; [2000] E.W.J. No. 4098 (Q.B.) at para. 49.

<sup>4</sup> For example, the operative words in the federal Order in Council establishing the Commission of Inquiry into the Contamination of the Blood System (1993) were “review and report on”: see P.C. 1993-1879, October 4, 1993. P.C. 1995-442, the federal Order in Council establishing the Commission of inquiry into the Canadian Forces’ Deployment to Somalia (1995) used the words “inquire into and report on”. The provincial Order in Council establishing what became known as the Walkerton Inquiry (2000) used the words “inquire into”: see O.C. 1170-2000. Like the present commission, P.C. 2004-110, the federal Order in Council creating the Commission of Inquiry into the Sponsorship Program and Advertising Activities (2004) used the words “investigate and report on.”

<sup>5</sup> See *Commons Debates*, 37th Parliament, 3rd Session, 56 (2:1420)

relation to Maher Arar” including having regard to his detention in the U.S., his deportation to Syria via Jordan, his imprisonment and treatment in Syria, his return to Canada, and any other circumstance directly related to Mr. Arar that I consider relevant to fulfilling this mandate. The Commission’s terms of reference are not limited to investigating and reporting on the state and management of the business of any particular department of the federal government, nor even to federal government employees. A departmental investigation could not be convened in relation to the Prime Minister’s office, the offices of ministers of the Crown or the Privy Council Office, because these parts of the executive branch of government are not departments. In addition, whether CSIS employees or RCMP officers could be the subject of departmental investigations may be open to debate. Of course, municipal and provincial police officers who were seconded to Project A-O Canada were not employees of a federal government department. Yet all are Canadian officials for the purposes of the mandate conferred upon this Commission.

I conclude that the Commission’s terms of reference do not confine this inquiry to a departmental investigation of employees of federal government departments because such a limit would be inconsistent with the very nature of the inquiry that I have been asked to undertake.

### **SIGNIFICANCE OF MINISTER’S RECOMMENDATION TO THE GOVERNOR IN COUNCIL**

In support of the submission that the establishment of this commission followed processes expected in departmental investigations created under Part II of the *Act*, the Applicant pointed to the Order in Council’s reference to “the recommendation of the Solicitor General of Canada styled Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness”. The Applicant submitted that this was consistent with creation of a departmental investigation, under section 6 of the *Act*, which empowers the minister presiding over a department of the federal public service appoint a commissioner or commissioners to investigate and report on the state and management of the department’s business. That provision can be compared to section 2 of the *Act*, which provides that the Governor in Council may cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of its public business.

However, every Order in Council must be recommended by a Minister of the Crown. Although orders-in-council establishing commissions of inquiry are commonly issued on the Prime Minister’s recommendation, this practice is not

invariable.<sup>6</sup> I conclude that the Order in Council's reference to the recommending minister does not change the legal character of this public inquiry.

### DOES RECEIVING TESTIMONY *IN CAMERA* CHANGE THE LEGAL CHARACTER OF A PUBLIC INQUIRY?

The Applicant has submitted that paragraph (k) of the Order in Council is contrary to the purpose and spirit of a public inquiry set up under Part I of the *Act*. Paragraph (k) requires me to take all steps necessary to prevent public disclosure of information that would, in my opinion, be injurious to international relations, national defence or national security. On the Attorney General's request and where in my opinion such disclosure would be injurious to international relations, national defence or national security, it compels me to receive information *in camera* and in the absence of any party and their counsel. This resulted in a significant portion of the evidence being heard *in camera*, at least in the first instance.

I disagree with the Applicant's submission that paragraph (k) gives me "absolute discretion" to hear testimony *in camera*. It is an express direction to me to receive information *in camera* in the circumstances that it describes. Because of this requirement's impact on the commission's hearing process, I appointed *amicus curiae* with the mandate of testing the government's requests that evidence be heard *in camera*. In determining whether to receive information *in camera* and in the absence of parties and their counsel, I have derived very substantial assistance from the involvement of *amicus curiae*.

The Applicant's submission leaves unanswered the question of how national security confidentiality – or, for that matter, any kind of confidentiality – can be accommodated in a public inquiry process. My review of the *Inquiries Act* discloses that in no respect does the *Act* purport to take precedence over other federal statutes. It establishes no hierarchy. For that reason, it is essential that any commission's hearing process accommodate national security confidentiality, and all forms of privilege.

The English Court of Queen's Bench has recognized that there will be circumstances in which public inquiries will be compelled to conduct some portion of their proceedings in private:

No one doubts that there are circumstances when freedom to receive information or freedom of expression may have to be curtailed in the public interest ... The

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<sup>6</sup> For example, the Order in Council establishing the Commission of Inquiry into the Canadian Forces' Deployment to Somalia was issued on the recommendation of the Minister of National Defence: see P.C. 1995-442, March 20, 1995.

same may apply in relation to national security, medical records or disciplinary proceedings, but where these freedoms are to be curtailed the case for restriction must be strictly proved.<sup>7</sup>

I conclude that my compliance with the requirements of paragraph (k) of the Order in Council has not deprived this commission of its jurisdiction to inquire into the actions of Canadian officials in relation to Mr. Arar.

### DOES APPOINTMENT OF THE FACT FINDER CHANGE THE LEGAL CHARACTER OF A PUBLIC INQUIRY?

I do not accept the Applicant's contention that "the manner of Mr. Arar's examination" – that is, through the fact finder appointed under my ruling of May 9, 2005 – "has corresponded with the procedure set out in ... Part II of the *Inquiries Act*." In making this submission, the Applicant has referred to s. 9 of the *Act*, which enables commissioners conducting departmental investigations to authorize someone to take evidence and report it to the commissioners.

Section 11 of the *Act* (which is in Part III, applicable to both public inquiries and departmental investigations) empowers a commissioner, whether appointed under Part I or Part II if authorized by the commission issued in the case, to engage the services of experts and assistants as deemed necessary, and experts "or any other qualified persons" may "inquire into any matter within the scope of the commission" as the commissioner may direct.<sup>8</sup> Paragraph (j) of the Order in Council provides that "the Commissioner be authorized to engage the services of any experts and other persons referred to in section 11 of the *Inquiries Act* ..."

In addition, paragraph (e) empowers me to adopt any procedures and methods that I consider expedient for the proper conduct of the inquiry. The flexibility provided by that paragraph is consistent with the Supreme Court of Canada's description of commissions of inquiry as "unconnected to normal legal criteria" and based upon and flowing from "a procedure which is not bound by the evidentiary or procedural rules of a courtroom".<sup>9</sup>

I have stressed that any decision as to whether Mr. Arar will testify before the Commission and be subject to cross-examination has been deferred until release of the interim report.<sup>10</sup>

<sup>7</sup> *Wagstaff, supra*, note 3 at para. 99

<sup>8</sup> Ss. 11(2).

<sup>9</sup> *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 at para. 34

<sup>10</sup> *Ruling on Process and Procedural Issues*, May 9, 2005, p. 2

I conclude that appointment of the fact finder to examine Mr. Arar is authorized by s. 11 of the *Inquiries Act* and the terms of reference for this commission, and does not change the legal character of this inquiry.

### CONCLUSION

The motion for a declaration that the commission is improperly constituted and that the notice issued to the Applicant pursuant to s. 13 of the *Inquiries Act* is of no force and effect is dismissed.

January 3, 2006

A handwritten signature in black ink, appearing to read "D. O'Connor", with a long horizontal flourish extending to the right.

Justice Dennis R. O'Connor  
Commissioner

APPENDIX 2  
PROCEDURE AND PRACTICE

APPENDIX 2(A)  
RULES OF PROCEDURE AND PRACTICE

1. The Commission proceedings will be divided into two parts. The first part, the “Factual Inquiry”, will focus on the actions of Canadian officials in relation to Maher Arar, including the following:
  - (a) The detention of Mr. Arar in the United States;
  - (b) The deportation of Mr. Arar to Syria via Jordan;
  - (c) The imprisonment and treatment of Mr. Arar in Syria;
  - (d) The return of Mr. Arar to Canada; and
  - (e) Any other circumstance directly related to Mr. Arar which the Commissioner considers relevant to fulfilling his mandate.

The Commissioner will conduct hearings in relation to the Factual Inquiry as set out in these Rules.

2. The second part of the Inquiry is a policy review directed at making recommendations for an independent arm’s length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security (the “Policy Review”) based on:
  - (a) An examination of models, both domestic and international, for that review mechanism, and
  - (b) An assessment of how the review mechanism would interact with existing review mechanisms. The Commissioner will conduct consultations in relation to the Policy Review as set out in these Rules.
3. In these Rules, “persons” refers to individuals, groups, governments, agencies or any other entity.

## I. RULES - FACTUAL INQUIRY

### A. General

4. Hearings will be convened in Ottawa to address issues related to the Factual Inquiry.
5. Insofar as he needs to hear evidence, the Commissioner is committed to a process of public hearings to the greatest extent practicable. However, the Terms of Reference direct the Commissioner to take all steps necessary to prevent disclosure of information that, if it were disclosed to the public would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security. The procedure which will govern hearings where such issues may arise is addressed in the section on "National Security Confidentiality".
6. Applications may also be made to proceed *in camera* for reasons of personal confidentiality, referred to as "Personal Confidentiality" in these Rules. Such applications should be made in writing at the earliest possible opportunity.

### B. Standing

7. Commission counsel, who will assist the Commissioner to ensure the orderly conduct of the Factual Inquiry, have standing throughout the Factual Inquiry. Commission counsel have the primary responsibility for representing the public interest at the Factual Inquiry, including the responsibility to ensure that all matters that bear upon the public interest are brought to the Commissioner's attention.
8. The Commissioner will grant standing to all persons who satisfy the Commissioner that they have a substantial and direct interest in the subject-matter of the Factual Inquiry. Persons with standing are referred to as parties in these Rules.
9. The Commissioner will determine on what terms and in which parts of the Factual Inquiry a party may participate, and the nature and extent of such participation.
10. Persons who apply for standing will be required to provide written submissions explaining why they wish standing, and how they propose to contribute to the Factual Inquiry. Persons who apply for standing will also be given an opportunity to appear in person before the Commissioner in order to explain the reasons for their application.

11. The Commissioner may direct that a number of applicants share in a single grant of standing.
12. Counsel representing witnesses called to testify before the Commission may participate during the hearing of such evidence as provided in these Rules.

### **C. Funding**

13. The Commissioner may recommend funding for a party, to the extent of the party's interest, where in the Commissioner's view the party would not otherwise be able to participate in the Factual Inquiry.
14. A party seeking funding shall apply to the Commissioner in writing, demonstrating that he or she does not have sufficient financial resources to participate in the Factual Inquiry without such funding.
15. Where the Commissioner's funding recommendation is accepted, funding shall be in accordance with Treasury Board guidelines respecting rates of remuneration and reimbursement and the assessment of accounts.

### **D. Evidence**

16. The Commissioner may receive any evidence which he considers to be helpful in fulfilling his mandate whether or not such evidence would be admissible in a court of law.

#### **(a) Preparation of Documentary Evidence**

17. As soon as possible after being granted standing, all parties shall provide to the Commission all documents having any bearing on the subject matter of the Inquiry. Upon the request of Commission Counsel, parties shall provide originals of relevant documents.
18. All documents received by the Commission will be treated as confidential, unless and until they are made part of the public record or the Commissioner otherwise directs. However, Commission counsel are permitted to produce such documents to proposed witnesses and parties and their counsel upon receipt of the appropriate undertaking.

#### **(b) Witness Interviews**

19. Commission counsel may interview people who have information or documents which have any bearing upon the subject matter of the Inquiry.

People who are interviewed are entitled, but not required, to have a legal counsel present.

20. If Commission counsel determines that a person will be called as a witness following an interview, Commission counsel will prepare a statement of the witness' anticipated evidence. Commission counsel will provide a copy of the statement of anticipated evidence to the witness for review before the witness testifies before the Commission.
21. After a proposed witness has reviewed the statement of anticipated evidence, Commission counsel will provide copies to parties having an interest in the subject matter of the proposed evidence. Before being given a copy of statements of anticipated evidence, parties will be required to sign an undertaking that they will use the statements only for the purposes of the Inquiry.

**(c) Witnesses**

22. All Government entities, agencies and officials and all witnesses shall cooperate fully with the Commission and shall make available all documents and witnesses relevant to the mandate of the Commission.
23. Witnesses who testify will give their evidence at a hearing under oath or upon affirmation.
24. Commission counsel may issue and serve a subpoena or summons upon each witness before he or she testifies. Witness may be called more than once.
25. Witnesses who are not represented by counsel for parties are entitled to have their own counsel present while they testify. Counsel for a witness will have standing for the purpose of that witness' testimony to make any objections thought appropriate and for other purposes set out in these Rules.
26. Parties are encouraged to advise Commission counsel of the names, addresses and telephone numbers of all witnesses they wish to have called and, if possible, to provide summaries of the information the witnesses may have.
27. If the proceedings are televised, applications may be made for an order that the evidence of a witness not be televised or broadcast.

**(d) Oral Examination**

28. In the ordinary course Commission counsel will call and question witnesses who testify at the Inquiry. Counsel for a party may apply to the Commissioner to lead a particular witness' evidence in-chief. If counsel is granted the right to do so, examination shall be confined to the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commissioner.
29. Commission counsel have a discretion to refuse to call or present evidence.
30. The order of examination in the ordinary course will be as follows:
  - (a) Commission counsel will lead the evidence from the witness. Except as otherwise directed by the Commissioner, Commission counsel are entitled to ask both leading and non-leading questions;
  - (b) Parties will then have an opportunity to cross-examine the witness to the extent of their interest. The order of cross-examination will be determined by the parties and, if they are unable to reach agreement, by the Commissioner;
  - (c) After the cross-examinations by the parties, counsel for a witness may then examine the witness;
  - (d) Commission counsel will have the right to re-examine last.
31. Except with the permission of the Commissioner, no counsel other than Commission counsel may speak to a witness about the evidence that he or she has given until the evidence of such witness is complete. Commission counsel may not speak to any witness about his or her evidence while the witness is being cross-examined by other counsel.
32. When Commission counsel indicate that they have called the witnesses whom they intend to call in relation to a particular issue, a party may then apply to the Commissioner for leave to call a witness whom the party believes has the evidence relevant to that issue. If the Commissioner is satisfied that the evidence of the witness is needed, Commission counsel shall call the witness, subject to Rule 27.

**(e) Use of Documents at Hearings**

33. In advance of a witness' testimony, Commission counsel will endeavour to provide to the parties and the witness a statement of that witness' anticipated evidence and associated documents, subject to National Security Confidentiality.

34. Parties shall provide Commission counsel with any documents that they intend to file as exhibits or otherwise refer to during the hearings at the earliest opportunity, and in any event shall provide such documents to Commission counsel no later than the day before the document will be referred to or filed.
35. Before using such a document for purposes of cross-examination, counsel shall provide a copy to the witness and to all parties having an interest in the subject matter of the evidence not later than the day prior to the testimony of the witness, subject to the discretion of the Commissioner.

(f) **National Security Confidentiality**

36. This section of the Rules addresses issues relating to the disclosure of information that would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security (“National Security Confidentiality”), including the process regarding the *in camera* hearings in the absence of parties and their counsel pursuant to paragraph (k) of the Terms of Reference.
37. After the standing hearing, parties with standing may make written submissions to the Commissioner with respect to the relevant case law and principles which they submit the Commissioner should apply when making determinations of National Security Confidentiality as to which evidence should be heard *in camera* and in the absence of parties and their counsel. The procedure shall be as follows:
  - (a) The Government and all parties who may seek to have evidence heard *in camera* on the grounds of National Security Confidentiality shall make written submissions about the principles the party submits the Commissioner should apply, relevant case law, and whether the principles differ with respect to the separate elements of National Security Confidentiality (injurious to international relations, national defence or national security). The party shall file one written copy of the submissions and supporting documentation with the Commission offices no later than May 14, 2004, and shall provide the Commission with an electronic copy of the submissions. These submissions will be posted on the Commission’s web site.
  - (b) Other parties with standing may make written submissions about the principles the party submits the Commissioner should apply, relevant case law, and whether the principles differ with respect to the separate

elements of National Security Confidentiality (injurious to international relations, national defence or national security).

- (c) The Government and parties who filed submissions in accordance with paragraph 38 (a) of these Rules may file responding submissions. The party shall file one written copy of the submissions and supporting documentation with the Commission offices no later than May 21, 2004, and shall provide the Commission with an electronic copy of the submissions. These submissions will be posted on the Commission's web site.
38. Commission counsel shall indicate to the Attorney General of Canada which documents or portions thereof, and which aspects of the evidence Commission counsel deems relevant and may introduce into evidence.
39. The Attorney General of Canada shall then indicate, with reasons, which documents or portions thereof, and which aspects of the proposed evidence, he claims are subject to National Security Confidentiality.
40. The Commissioner shall convene an *in camera* hearing, in the absence of parties and their counsel, to consider the request by the Attorney General of Canada or by a party that specific evidence is subject to National Security Confidentiality. The Attorney General of Canada or any party seeking an *in camera* hearing shall bear the burden of establishing why it is necessary.
41. The Commissioner will appoint an independent legal counsel to act as an *amicus curiae* to appear in these *in camera* hearings to make submissions with respect to the request for *in camera* hearings. The counsel shall be independent of Government and shall be a person with a background in security and intelligence. His or her mandate shall be to test *in camera* hearing requests on the grounds of National Security Confidentiality.
42. The hearings shall be held periodically as necessary throughout the Inquiry, although it is contemplated that major portions of the evidence can be addressed before the evidentiary hearings begin. They are currently scheduled to begin on June 14, 2004.
43. The Commissioner shall rule on a request for National Security Confidentiality. In his rulings, the Commissioner will set out the test and principles that he applied in determining whether or not the evidence was to be heard *in camera*. He will also refer, in general terms, to the anticipated evidence that he rules should be heard in public and his reasons for denying a claim for confidentiality when such a claim was made. In addition, to the extent possible, the Commissioner will refer to the types of evidence that he ruled must be heard *in camera*, and the principles and reasons that he applied to such decisions. The Commissioner's rulings and

reasons as set out in this paragraph will be made public and posted on the Commission's web site.

44. The Commissioner may also wish to issue confidential reasons referring to specific evidence that he has ruled should be heard *in camera*, with specific reasons for such rulings. Those reasons would not be made available to the public.
45. The Commissioner shall hear evidence that is subject to National Security Confidentiality *in camera* and in the absence of parties and their counsel, to the extent necessary to protect National Security Confidentiality. Witnesses shall provide the evidence taken *in camera* under oath or upon affirmation. Commission counsel will thoroughly test the evidence heard *in camera* by examination in chief or by cross-examination where deemed appropriate.
46. Prior to going *in camera* Commission counsel shall, to the extent possible and in accordance with directions from the Commissioner, advise parties of the general nature of the evidence to be heard. Parties are invited to raise with Commission counsel specific areas for questioning. Commission counsel shall, following an *in camera* session, advise counsel for parties whether or not those areas were covered.
47. After hearing evidence *in camera*, the Commissioner shall prepare a summary of that evidence to the fullest extent possible without breaching National Security Confidentiality, and shall provide the Attorney General of Canada ("Attorney General") with an opportunity to comment on the summary prior to its release. The applicable procedure with respect to release of the summary is as follows:
  - (a) if the Attorney General takes issue with the proposed summary, the Attorney General of Canada may apply to court for a determination under section 38 of the *Canada Evidence Act*, or
  - (b) if the Attorney General agrees with the proposed summary, the summary shall be marked as a public exhibit, published on the Commissioner's web site, and will form part of the record of the inquiry.
48. If the Commissioner is of the view that notwithstanding National Security Confidentiality, such evidence should be disclosed publicly, the Commissioner may prepare a separate summary of the evidence. The Commissioner shall advise the Attorney General and provide the summary to the Attorney General, which shall constitute notice under section 38.01 of the *Canada Evidence Act*.

(g) Personal Confidentiality

49. Any witness may apply to the Commissioner for a grant of “Personal Confidentiality”. For the purposes of the Inquiry, Personal Confidentiality shall include the right of the witness to have his or her identity disclosed only by way of non-identifying initials, and, if the Commissioner so rules, the right to testify before the Commission *in camera*.
50. A witness who is granted Personal Confidentiality will not be identified in the public records and transcripts of the hearing except by non-identifying initials. Any reports of the Commission using the evidence of witnesses who have been granted Personal Confidentiality will use non-identifying initials only.
51. Media reports relating to the evidence of a witness granted Personal Confidentiality shall avoid references that might reveal the identity of the witness. No photographic or other reproduction of the witness shall be made either during the witness’ testimony or upon his or her entering and leaving the site of the Inquiry.
52. Any witness who is granted Personal Confidentiality may either swear an oath or affirm to tell the truth using the non-identifying initials given for the purpose of the witness’s testimony.
53. All parties, their counsel and media representatives shall be deemed to undertake to adhere to the rules respecting Personal Confidentiality. A breach of these rules by a party, counsel to a party or media representative shall be dealt with by the Commissioner as he sees fit.

(h) Access to Evidence

54. All evidence shall be categorized and marked P for public sittings and C for sittings *in camera*.
55. Copies of the P transcript of evidence will be made available on the Inquiry’s website. One copy of the P transcript and the P exhibits of the public hearings will be made available for public review at the Commission offices.
56. Only those persons authorized by the Commission, in writing, shall have access to C transcripts and exhibits.

## II. RULES - POLICY REVIEW

### A. General

57. The Policy Review will proceed in three phases:
- (a) The Commission will publish a research paper (the “Research Paper”). The Research Paper will examine existing models, both domestic and international, which might serve as a basis for an independent arm’s length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security; provide a description of existing review mechanisms; and describe the manner in which the proposed models would interact with existing review mechanisms.
  - (b) Persons with an interest in the subject matter of the Policy Review may make submissions in writing (the “Public Submissions”) to the Commission about any matter relevant to the Policy Review, including specific proposals for the recommendations to be made by the Commissioner.
  - (c) The Commissioner will convene public and private consultations (the format of which may vary) to hear submissions on the matters raised in the Policy Review. The participants in the public consultations may, at the Commissioner’s discretion, include any person whom the Commissioner concludes will contribute to the process.

### B. Research Paper

58. The Commission will publish the Research Paper on the Commission’s web site.

### C. Public Submissions

59. Any interested person may make a Public Submission, in writing, to the Commission dealing with any matter related to the Policy Review including responses to any matter raised in the Research Paper.
60. The Commissioner will set a deadline by which all Public Submissions must be received. The Public Submissions will be made available for public review either on the Commission’s web site or at the Commission’s offices.

#### D. Public Consultations

61. Once all Public Submissions have been reviewed the Commissioner will convene public consultations relating to the major topics addressed in the Policy Review. The format of the public consultations will be tailored to the topics discussed, and may vary. The public consultations may include persons invited by the Commissioner, where the Commissioner concludes such persons would contribute to the discussion based upon the contents of the Public Submissions.
62. The public consultations shall be recorded.
63. At his discretion, the Commissioner may also conduct private consultations.

#### III. OTHER

64. All parties, witnesses and counsel shall be deemed to undertake to adhere to these Rules, which may be amended or dispensed with by the Commissioner as he sees fit. Issues of non-compliance with the Rules may be raised with the Commissioner.
65. The Commissioner shall write two reports. One shall be a private report which incorporates matters of National Security Confidentiality. The other shall be a public report. In his public report, the Commissioner shall make the greatest possible reference to matters heard *in camera*, and conclusions which he has made with respect thereto.

#### APPENDIX 2(B)

### RULING: RULES OF PROCEDURE AND PRACTICE

I have received submissions from the parties and intervenors with respect to the Draft Rules of Procedure and Practice. Copies of those submissions are available in the Commission's office. I have incorporated many of the suggested changes in the revised Rules which will be posted on the Commission's website shortly. I would like to thank the parties and intervenors for the time and effort they have put into their submissions. I think that the Rules have been improved as a result of this process.

In this Ruling I want to comment on some of the more important aspects of the Rules.

First the Rules must reflect the Terms of Reference. The effect of some submissions would be to alter or expand my mandate. That, of course, is not something that comes within my authority.

In formulating the Rules I have been guided to the extent possible by four principles: thoroughness, expedition, openness to the public, and fairness. I discussed the importance of each of those principles in the Report of the Walkerton Inquiry, Part One – Chapter 14.

The Terms of Reference for this Inquiry present challenges with respect to the principles of openness and fairness. Paragraph k of those Terms directs that I take steps to prevent public disclosure of information that would be injurious to international relations, national defence or national security (national security confidentiality). As a result, it is inevitable that some of the evidence will have to be heard *in camera* and in the absence of parties and their counsel. Unfortunately, there is nothing that I can do to avoid having some *in camera* hearings.

The Terms of Reference provide for a two-stage process for determining which documents and evidence need to be heard *in camera*. At the first stage, an *in camera* hearing will take place at which the government will bear the onus of establishing that disclosure would be injurious to national security confidentiality. If I agree with the government's submissions, I will hear the evidence *in camera*. The second stage of the process will involve a determination of whether the release of a part or summary of the information received *in camera* would provide insufficient disclosure to the public. I will elaborate on this stage of the process in my Ruling on the principles that apply to the *in camera* hearings.

In designing the Rules I have attempted to minimize, to the extent possible, the impact of the *in camera* hearings on the principles of openness and fairness. For example, I provided the parties and intervenors with an opportunity to make submissions on the principles that will guide my decisions on what evidence needs to be heard *in camera*. In addition, I have appointed Mr. Ronald Atkey, who has expertise in national security matters, as *amicus curiae* to test the government's submissions about the need for *in camera* hearings. Mr. Atkey's participation is intended to help ensure that the government's submissions are subject to rigorous scrutiny. In my Rulings with respect to the *in camera* hearings, I will make clear the principles that I have adopted in reaching my decisions and, to the extent possible, I will describe the types of evidence that will be heard *in camera*.

The Rules also provide that before evidence is heard *in camera* Commission Counsel will, to the extent possible, advise the parties and

intervenor of the nature of the anticipated evidence. The parties and intervenors will be able to advise Commission Counsel of areas of evidence that they wish to be covered and after the hearings will be informed if those areas were in fact addressed. In addition, after the hearing of evidence *in camera*, I will prepare and publish a summary of the evidence heard, to the extent that I am able to do so, without breaching national security confidentiality.

Insofar as fairness is concerned, when writing my Report, I will bear in mind that I should not make findings adverse to the interest of any person on the basis of evidence that that person has not had an opportunity to hear and challenge.

No doubt the conduct of this Inquiry presents special challenges. However, despite the constraints that are placed on the Inquiry process by virtue of concerns about national security confidentiality, I remain confident that I can fully address the issues raised by the mandate and that I will be able to report publicly and in sufficient detail for those involved and for the public to understand the role that Canadian officials played in the events relating to Mr. Arar.

A number of intervenors have raised a concern that the Policy Review is to be run concurrently, not consecutively, with the Factual Inquiry. Some take the view that the Policy Review should be conducted only after I have released my Report setting out my findings in the Factual Inquiry. Others say that the Policy Review should be carried out concurrently so that the evidence of the Factual Inquiry, not necessarily my findings of fact, is available to inform consideration of the issues in the Policy Review.

I agree with the second position. Let me expand upon the procedure that I have adopted for the Policy Review. With the assistance of the Advisory Panel, the Commission is preparing and will be publishing a consultation paper designed to provide a factual background for the Policy Review and to help focus the public consultation process that will take place next fall. A draft outline for the consultation paper including a draft list of issues has been published on our website for public comment.

The Commission intends to publish the consultation paper by late summer. At that time, the parties and the public will be asked to comment on the paper and the Commission will be calling for public submissions on the recommendations to be made in the Policy Review part of the mandate. Currently, it is planned that public meetings will be held in the months of October and November, 2004 to discuss those submissions.

In my view, it would not be in the public interest to have the Policy Review process await the publication of my findings from the Factual Inquiry. Although the findings of the Factual Inquiry may inform the Policy Review, the

considerations which will be assessed in the Policy Review will go far beyond the scope of the Factual Inquiry. Indeed, I assume that many submissions to the Policy Review will be made without reference to the Factual Inquiry. Moreover, the submissions from the Policy Review will not be due until after most, if not all, of the public hearings in the Factual Inquiry are completed so that those submissions may be informed by the evidence from the public hearings. If any matter arises from the summaries I publish for the *in camera* hearings on which someone wishes to comment, there will be an opportunity to supplement the submissions to the Policy Review with those additional comments. I am satisfied that informed and useful submissions can be made to the Policy Review before my factual findings in the Factual Inquiry are published. It is in the public interest to report to the government in a timely manner and I am hopeful that the procedure I have adopted will ensure that this is done. If, however, having heard the evidence in the Factual Inquiry and the submissions from the Policy Review I consider that there is benefit to delaying the completion of the Policy Review until after the publication of my Report from the Factual Inquiry, I will do so.

A number of intervenors made submissions requesting very detailed Rules to address what they see as a possibility of unfairness arising from circumstances that may or may not occur. For the most part I have not revised the Rules to reflect these types of concerns. Instead I have made it clear in Rule 5 that I retain an overriding discretion to conduct the Inquiry so as to ensure that it is thorough, fair and timely. Applications in writing can be made to me, as deemed necessary, to achieve these objectives.

June 15, 2004



Justice Dennis R. O'Connor  
Commissioner

APPENDIX 3  
STANDING AND FUNDING

APPENDIX 3(A)

NOTICE OF HEARINGS FOR APPLICATION FOR STANDING

Commission of Inquiry into the  
Actions of Canadian Officials  
in Relation to Maher Arar



Commission d'enquête sur les  
actions des responsables canadiens  
relativement à Maher Arar

**PRESS RELEASE**

Attention News Editors

**Dates set for Hearings for Application for Standing and for General Public Hearings in the Arar Inquiry**

**Ottawa, March 29, 2004** - Mr. Justice Dennis R. O'Connor, Commissioner for the Inquiry into the Actions of Canadian Officials in Relation to Maher Arar will hear applications for Standing on Thursday, April 29<sup>th</sup> and Friday April 30<sup>th</sup>, 2004.

The hearings will take place in the Annex Room at the Government Conference Centre, 2 Rideau Street in Ottawa from 10 a.m. to 1 p.m. and will resume at 2:30 p.m. until 4:30 p.m.

No evidence will be heard during those hearings. However, the Commissioner may grant standing to any person or group who can establish that they have a substantial and direct interest in the subject matter of this inquiry. Standing before a Commission of Inquiry gives the individual or group the right to take part in proceedings as directed by the Commissioner and to make submissions to the Inquiry.

It is the present intention that the Inquiry's public hearings will start on Monday June 14<sup>th</sup>, 2004 at 10:00 a.m. and will be held at the Government Conference Centre in Ottawa.

More details will soon be available on our Web site: [www.ararcommission.ca](http://www.ararcommission.ca)

Established under Part I of the *Inquiries Act*, the Arar Inquiry was set up on the recommendation of the Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness to investigate and report on the actions of Canadian officials in relation to Maher Arar. The Commission is also mandated to recommend an arm's length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security.

-30-

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Commission of Inquiry into the  
Actions of Canadian Officials  
in Relation to Maher Arar



Commission d'enquête sur les  
actions des responsables canadiens  
relativement à Maher Arar

## Media advisory

Reminder

**Ottawa, April 28, 2004** - The Arar Inquiry into the actions of Canadian officials in relation to Maher Arar will be holding public hearings for standing on Thursday, April 29 and Friday April 30 2004.

The hearings will take place in the Annex Room — Colonel By entrance - of the Government Conference Centre, 2 Rideau Street in Ottawa starting at 10 am.

During those two days, Mr. Justice Dennis R. O Connor will be hearing 23 requests for standing from individuals and groups.

The complete list of applicants can be found at: [www.ararcommission.ca](http://www.ararcommission.ca)

Established under Part I of the *Inquiries Act*, the Arar Inquiry was set up on the recommendation of the Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness to investigate and report on the actions of Canadian officials in relation to Maher Arar. The Commission is also mandated to recommend an arm's length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security.

-30-

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APPENDIX 3(B)  
**RULING ON STANDING AND FUNDING**

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## RULING ON STANDING AND FUNDING

### I. INTRODUCTION

I have been appointed by Order in Council P.C. 2004-48 to conduct both a factual inquiry and a policy review. In the first part of my mandate, I am to investigate and report on the actions of Canadian officials in relation to Maher Arar, including the following:

- (i) the detention of Mr. Arar in the United States;
- (ii) the deportation of Mr. Arar to Syria via Jordan;
- (iii) the imprisonment and treatment of Mr. Arar in Syria;
- (iv) the return of Mr. Arar to Canada; and
- (v) any other circumstance directly related to Mr. Arar that I consider relevant to fulfilling my mandate.

The first part of this inquiry is the “Factual Inquiry”.

The second part of my mandate is to conduct a policy review, and to make any recommendations that I consider advisable on an independent, arm’s length review mechanism for the activities of the RCMP with respect to national security based on:

- (i) an examination of models, both domestic and international, for that review mechanism; and

- (ii) an assessment of how the review mechanism would interact with existing review mechanisms.

This latter aspect of my mandate is referred to as the “Policy Review”.

The following paragraphs in the Terms of Reference are relevant to this ruling:

- (e) the Commissioner be authorized to adopt any procedures and methods that he may consider expedient for the proper conduct of the Inquiry, and to sit at any times and in any places in Canada that he may decide;
- (f) the Commissioner be authorized to grant to any person who satisfies him that he or she has a substantial and direct interest in the subject-matter of the factual inquiry an opportunity during that inquiry to give evidence and to examine or cross-examine witnesses personally or by counsel on evidence relevant to the person’s interest;
- (g) the Commissioner be authorized to conduct consultations in relation to the policy review as he sees fit; and
- (h) the Commissioner be authorized to recommend funding, in accordance with approved guidelines respecting rates of remuneration and reimbursement and the assessment of accounts, to a party who has been granted standing at the factual inquiry, to the extent of the party’s interest, where in the Commissioner’s view the party would not otherwise be able to participate in that inquiry.

## A. FACTUAL INQUIRY

I will conduct the Factual Inquiry by way of evidentiary hearings at which witnesses will give evidence under oath or affirmation, and will be examined and cross-examined. I will receive closing submissions at the end of the Factual Inquiry.

The draft Rules of Practice and Procedure which have been developed for the Factual Inquiry have been published on the Commission web site at [www.ararcommission.ca](http://www.ararcommission.ca). These have been modelled on the rules used in other public inquiries. I thought that it would be useful to publish these Rules before the hearings on standing. If any person or group participating in the Inquiry wishes to make submissions on the Rules, they should do so in writing by May 20, 2004. Any changes will be published on the Commission web site. Persons or groups participating in the Inquiry should visit our web site regularly for information on practical details and scheduling.

## B. POLICY REVIEW

The Policy Review will not proceed by way of formal evidentiary hearings. Instead, in order to make its work accessible and to provide an opportunity for public participation on a broad range of policy issues, the Policy Review will proceed in a number of phases. The Policy Review will proceed concurrently with the Factual Inquiry.

I have appointed a five member Advisory Panel for the Policy Review part of the Inquiry. The members of the panel are Monique Bégin, Alphonse Breau, Kent Roach, Martin Rudner and Reginald Whitaker. The Panel's task is to help me to discharge my mandate in making recommendations on an independent arm's length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security, including how such a review mechanism would interact with existing review mechanisms. I am confident that the Panel's expertise in the fields of intelligence, national security and government policy will be of great assistance to me in addressing this part of my mandate.

I have arranged for a Research Paper to be prepared which will, among other things, examine domestic and international review models, and identify the key issues which should be considered with respect to any recommendations regarding a review mechanism. The Research Paper will be published on the Commission web site, together with a description of what I see as the more important issues that need to be addressed in formulating my recommendations.

After the Research Paper has been published I will invite persons or groups with an interest in the subject matter of the Policy Review to make submissions in writing to the Commission about matters relevant to the Policy Review. The Commission will set and publish a deadline by which all public submissions must be received. The public submissions will be available for public review.

I also intend to hold a number of public meetings relating to the Policy Review. I will preside over those meetings, and members of the Advisory Panel may also participate.

## II. RULING ON STANDING AND FUNDING

The Commission published a Notice of Hearing which invited persons interested in the Factual Inquiry to apply for standing. I received 24 applications for standing, some of them involving multiple individuals or organizations. The applications were heard in Ottawa on April 29 and 30, 2004. Some were heard by way of teleconference.

Before I address each of the applications, I think it is useful to summarize the general principles that have guided my decisions on standing and funding.

## A. GUIDING PRINCIPLES: STANDING

I am committed to ensuring that the Inquiry is both fair and thorough, and that in the course of the Inquiry I obtain and consider all relevant information relating to the issues identified in the Terms of Reference.

I agree with the submissions of those applicants who urge that the Inquiry look into not only what happened, but also the causes. I intend to examine the “why it happened” from an individual, organizational and systemic perspective. I also agree with the submissions that the scope of my mandate should be interpreted broadly, and that the actions in question must be viewed in context.

At the same time, I must bear in mind the importance of completing this Inquiry as expeditiously as is reasonably possible. In the past, public inquiries have suffered and lost the confidence of the public because of undue delay. I will do what I can to avoid repetition and I will avoid the examination of matters not relevant or helpful in making findings called for by the mandate.

Another principle which will guide the conduct of this Inquiry is that of transparency and openness. Because of the nature of this Inquiry, this principle presents a special challenge. Some of the evidence will no doubt have to be heard *in camera* in order to avoid injury to international relations, national defence or national security. However, to the greatest extent possible, I will strive to ensure that the work of the Inquiry is accessible to the public and that this Inquiry is as open as possible. I have set out a process in the draft Rules designed to assist me with decisions about what evidence is to be heard *in camera* and to provide for the involvement of those participating in the Inquiry in formulating the principles upon which those decisions will be made.

I will rely upon Commission counsel to assist me throughout the Inquiry. They are to ensure the orderly conduct of the Inquiry and they have standing throughout. Commission counsel have the primary responsibility for representing the public interest, including the responsibility to ensure that all interests that bear upon the public interest are brought to my attention. Commission counsel do not represent any particular interest or point of view, and their role is not adversarial or partisan.

I have decided to create three separate categories through which persons or groups may participate in the Factual Inquiry:

- (i) Party Standing - those with a substantial and direct interest in all or part of the subject matter of the Factual Inquiry;
- (ii) Intervenor Standing - those who do not have a substantial and direct interest but have a demonstrated concern in the issues raised in the

mandate and a perspective and/or expertise that I consider will be of assistance to me in carrying out my mandate; and

(iii) Witnesses - They may be represented by counsel when testifying.

The primary difference between a grant of party standing and one of intervenor standing is that those with party standing will be involved directly in the development of the evidence - the examination of witnesses. Those with intervenor standing will have significant opportunities to participate but not the right to examine witnesses. I set out in more detail below the criteria upon which I have made my decisions, and the nature of the opportunities to participate that I am granting.

I have not granted some applicants all of the rights to participate that they sought. If, as the evidence is called, circumstances change affecting individuals' or organizations' interests, they may apply for an increased opportunity to participate.

### 1. Party Standing: Substantial and Direct Interest

The test for the right to examine witnesses under the Terms of Reference is that a person have "a substantial and direct interest in the subject-matter of the factual inquiry". The "substantial and direct interest" test is not unique to this Inquiry. Section 5(1) of the *Ontario Public Inquiries Act*, R.S.O. 1990, c. P.41 uses the same test, and the test under the *Ontario Coroners Act*, R.S.O. 1990, c. C.37 is also similar. In the past both federal and provincial public inquiries have applied the "substantial and direct interest" test in determining whether applicants should be granted standing.

It is neither possible nor desirable to set out a comprehensive list of the types of interests that will come within this test for public inquiries. In each case, a commissioner conducting a public inquiry will have to consider a number of factors including his or her mandate, the nature of that aspect of the public inquiry for which standing is sought, the type of interest asserted by the applicant, and the connection of the particular applicant to the Inquiry's mandate.

In some instances, applicants asserting a substantial and direct interest have essentially been obliged to prove that their "legal interests" would be "affected" by the outcome of the inquiry or inquest. (Ruling of Commissioner Grange of the Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children, cited and affirmed by *Gosselin v. Ontario (Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children)*, [1984] O.J. No. 1302 (Div. Ct.) at paras. 7 and 16-17). That, it seems to me, may be an overly restrictive view of the issue.

Clearly individuals or groups whose interests may be adversely affected by the report of an Inquiry as set out in section 13 of the *Inquiries Act*, R.S.C. 1985, c. I-11, have a substantial and direct interest. However, a “substantial and direct interest” embodies more than a section 13 interest (see for example, *Re Royal Commission on Conduct of Waste Management Inc. et al.* (1977), 80 D.L.R. (3d) 76 (Div. Ct.)).

If the subject matter of the inquiry may seriously affect the interest of a party that too would be a basis for finding a substantial and direct interest (*Re Ontario (Royal Commission on the Northern Environment)*, [1983] O.J. No. 994 (Div. Ct.)). For example, if the findings of the Inquiry will affect the legal rights or the property interests of an individual or organization, they would have a substantial and direct interest in those aspects of the Inquiry that implicate those rights and interests. Further where as, here, an individual like Mr. Arar is integrally involved in the events underlying the mandate of the Factual Inquiry, and indeed is specifically named in the Terms of Reference, he will have a substantial and direct interest.

At the same time, merely being a witness does not itself constitute a substantial and direct interest. Nor does having a genuine concern about the issues raised in the subject matter of the Inquiry, or having an expertise in those issues, necessarily amount to a substantial and direct interest in the subject matter of the Inquiry.

In this regard I agree with the reasoning of Campbell J. in *Range Representative on Administrative Segregation Kingston Penitentiary v. Ontario (Regional Coroner)*, [1989] O.J. No. 1003, 38 Admin. L.R. 141 (Div. Ct.) at p. 13 (O.J.):

Mere concern about the issues to be canvassed at the inquest, however deep and genuine, is not enough to constitute direct and substantial interest. Neither is expertise in the subject matter of the inquest or the particular issues of fact that will arise. It is not enough that an individual has a useful perspective that might assist the coroner.

This comment is particularly applicable when the aspect of the Inquiry for which standing is sought is investigative and not preventative. For that reason, one must view some of the jurisprudence dealing with standing in coroner’s inquests bearing in mind the difference between standing in an aspect of a hearing that is purely investigative from that in which the investigative, recommendatory and preventative roles are considered jointly.

As I said above, it is not possible to set out a definitive list of the factors that will control the determination of when an interest is sufficiently linked to

the mandate to be considered “substantial and direct.” There will necessarily be a degree of judgment involved. That judgment should have regard to the subject matter of the Inquiry, the potential importance of the findings or recommendations to the individual or organizations including whether their rights, privileges or legal interests may be affected, and the strength of the factual connection between the individual or group and the subject matter involved.

## 2. Intervenor Standing

Paragraph (e) of my mandate authorizes me to adopt any procedures and methods which I consider expedient for the proper conduct of the Inquiry. I have decided to exercise my discretion to afford intervenor standing to a number of applicants which I find do not have a substantial and direct interest in the subject matter of the Factual Inquiry, but do have a genuine concern about issues raised by the mandate and who have a particular perspective and/or expertise which I have determined will be of assistance to me in this Inquiry.

I am satisfied that I should interpret my mandate broadly and should manage this inquiry process in such a way as to obtain the maximum amount of assistance without unduly expanding on the time and expense necessary to achieve my mandate.

I am satisfied that affording certain applicants rights of participation that fall short of party standing but which allow them to participate in the Factual Inquiry in a significant way will enable me to better fulfill my mandate. I call this participation “Intervenor Standing”.

Moreover, I am not, at this stage at least, satisfied that it is necessary to provide the opportunity to examine witnesses to those applicants to whom I have granted intervenor standing. I say so for three reasons:

- (i) As I have stated above, the role of Commission counsel is to represent the public interest, and I am confident that Commission counsel will fully explore all matters related to my mandate.
- (ii) Mr. Arar will be ably represented by two senior counsel, and two junior counsel. None of these applicants is opposed in interest to Mr. Arar. Indeed, it is fair to say that they would approach the development of the factual record with most, if not all of the same objectives. Many of them have supported Mr. Arar in a variety of ways, from meeting with government officials during his detention, writing opinion pieces and letters to the editor in his support, to calling for this public inquiry. Insofar as the development of evidence is concerned I am satisfied that Mr. Arar and his counsel will fully and adequately

address the issues raised by the applicants who have not been granted the opportunity to examine witnesses.

- (iii) It will be open to any of these applicants to approach Commission counsel or Mr. Arar's counsel regarding issues to be canvassed, witnesses to be called, or areas of evidence to be explored. I expect that Commission counsel or Mr. Arar's counsel will pursue all reasonable suggestions.

Finally, I note that it is in everyone's interest to have this Inquiry conducted thoroughly, but also as expeditiously as possible. This Inquiry raises matters of important public concern. On the basis of what is now known, I am satisfied that the participation of parties with standing who have a direct and substantial interest will enable me to canvass all of the evidence necessary to allow me to make the factual findings called for in my mandate. To add more counsel in the evidence taking process could unduly protract the proceedings, and add unnecessary delay and expense. In making this comment I do not intend in any way to criticize the organizations to which I grant intervenor standing. However, my experience tells me that additional counsel generally result in additional delay and expense.

Those applicants which have been accorded intervenor standing will be entitled to participate in the Inquiry in the following ways. They will have:

- a) The opportunity to make submissions as to the Rules of Practice and Procedure. These submissions should be made to the Commission in writing by May 20, 2004;
- b) The opportunity to make written submissions on the principles which should be applied in making decisions whether information and evidence should be heard *in camera* or in public. Further details on this process will be made available shortly;
- c) The opportunity to make written opening submissions, one week prior to the commencement of the hearings. I would find it most valuable if the parties with standing and the intervenors outline the major principles they submit should guide the Inquiry process, and the specific factual issues raised by my mandate which they submit should be examined;
- d) Copies of exhibits entered into evidence at the public hearings; and
- e) The opportunity to make closing submissions, with a particular focus on the interests, perspectives and expertise as set out in these reasons which have led me to grant intervenor standing.

Importantly, those with intervenor standing will have the opportunity to fully participate in the recommendation and preventative aspect of the mandate - the Policy Review. For many of those granted intervenor standing this will be the main focus of their participation. I will be issuing further directions about the process for the Policy Review in due course.

It has become evident to me that certain applicants have a similar interest or perspective and have no apparent conflict of interest. I am satisfied that the relevant interest or perspective will be fully and fairly represented by a single grant of intervenor standing to the applicants as a group. In order to avoid repetition and unnecessary delay, I have therefore grouped certain applicants into coalitions as discussed below. I did the same in the Walkerton Inquiry, and was satisfied that the participants in the coalitions worked well together. I greatly benefited from their cooperation. As I stated then:

In my view the formation of flexible coalitions achieves a fair balance between the desire to have important interests and perspectives represented and the need to have an inquiry that is manageable. I am asking that the counsel and principals of applicants who have been joined in a coalition make all efforts to work in the coalition. Cooperation and reasonableness are essential . . . In my view, the alternative of separate standing for everyone is simply not acceptable.

(Ruling on Standing and Funding, *Report of The Walkerton Inquiry, Part One* (Ontario: Queen's Printer for Ontario, 2002) at Appendix E(ii), p. 67.)

I also recognize that circumstances may develop that result in a coalition becoming unsuitable and I am satisfied that there should be flexibility, allowing members to request separate intervenor standing should such a situation arise.

### 3. Witnesses

Witnesses in the Factual Inquiry who are not represented by counsel for parties with standing are entitled to have their own counsel present while they testify. The witness may be represented by counsel for the purposes of his or her testimony, and counsel may make any objections which they believe to be appropriate.

## B. GUIDING PRINCIPLES: FUNDING

The Terms of Reference provide that I may make recommendations for funding for a party who has been granted standing at the Factual Inquiry, to the extent of the party's interest where the party could not otherwise participate. I have

made recommendations for funding for those granted party standing who are unable to pay for counsel.

I am of the view that funding for some of those granted intervenor standing is important in order that I receive the type of assistance that will be very helpful to me in fulfilling my mandate with respect to the Factual Inquiry. Accordingly, I am making recommendations for funding for some of those who have been granted intervenor standing.

In making my decisions with respect to funding for the intervenors, I have considered the following:

- whether the intervenor has an established record of concern and a demonstrated commitment to the interest it seeks to represent;
- whether the intervenor has special experience or expertise with respect to the issues;
- whether the intervenor can reasonably be included in a coalition with others with similar interests; and
- whether the perspective or interest of the intervenor will be otherwise represented.

Finally I note that if witnesses called to give evidence request counsel and are unable to fund counsel, I may make recommendations for funding.

The Government will set out guidelines respecting funding, including the payment of counsel fees and disbursements, for those participating in the Factual Inquiry. My comments in this ruling on the government's guidelines are based on the current draft which has yet to be approved.

### **III. APPLICATIONS FOR STANDING AND FUNDING: DISPOSITION**

I address the applications for standing and funding below.

#### **A. DIRECT FACTUAL CONNECTION**

##### **1. Mr. Maher Arar**

This Commission of Inquiry is the "Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar". Mr. Arar seeks standing in all aspects of the Factual Inquiry as they relate directly to his detention, his deportation, his imprisonment and treatment in Syria, as well as any other actions of Canadian officials as they affect him. His counsel have stated that they will put before me all relevant evidence to assist me as I evaluate the conduct of officials towards Mr. Arar, and I welcome that assistance. Mr. Arar's counsel indi-

cated that they will pursue a broad range of issues including: (1) whether the Canadian government “contracts out” torture, or acquiesces in such a practice; (2) the extent to which racial profiling of Muslims occurs; (3) the use of confessions obtained under torture by Canadian intelligence services; and (4) the balance between national security and civil liberties.

On the issue of funding, Mr. Arar seeks funding for two senior counsel and two junior counsel. Mr. Arar has also requested that funds be made available for small offices in both Toronto and Ottawa so that the voluminous documentation can be appropriately managed. One of Mr. Arar’s counsel specifically stated that she recognized the trust involved in the use of public funds, and that his counsel would endeavour to minimize overlap. At this time, she stated that the only time she contemplated overlap is when Mr. Arar and his spouse and others who are part of his direct family network are being interviewed or called as witnesses.

**Disposition:**

I am satisfied that Mr. Arar has a substantial and direct interest in the Factual Inquiry. In accordance with the Terms of Reference I grant Mr. Arar party standing for the purpose of examining and cross-examining witnesses and otherwise participating in the Factual Inquiry.

The Government guidelines for funding for counsel contemplate that I may make recommendations that go beyond the guidelines “in exceptional circumstances”. I am satisfied that Mr. Arar’s involvement in the Factual Inquiry constitutes an “exceptional circumstance”. He is integrally involved in all aspects of the evidence. It is essential that he, with the assistance of his counsel, be able to fully and thoroughly participate in developing the evidence and in making submissions about the appropriate findings.

For those reasons, I recommend that Mr. Arar be granted funding for two senior and two junior counsel. Mr. Arar’s senior counsel have undertaken to minimize overlap, and have said that other than days on which Mr. Arar and his direct family network will be called, they will not both be required to attend.

I am recommending that Mr. Arar’s senior counsel each be allowed 50 hours for preparation prior to the first day of public hearings and that each junior counsel be allowed 25 hours during the same period. Otherwise, counsel fees, preparation time, disbursements and travel and other expenses are to be paid in accordance with the Government guidelines. I will make a recommendation with respect to the amount of fees allowed for closing submissions later in the process.

Mr. Arar's counsel seek funding for a small office in Toronto and in Ottawa. I note that the Government guidelines for reimbursing counsel do not contemplate this kind of expense. The public hearings for the Inquiry will be held at the Conference Centre in Ottawa. The Inquiry will attempt to arrange for an office or offices for counsel to interview witnesses and to use on the day of hearings. Hopefully this arrangement will be of assistance to Mr. Arar's counsel.

In making the above recommendations I have had regard to the types of funding granted to parties with standing in other public inquiries. I have also taken into consideration the central role that Mr. Arar and his counsel will play in the Factual Inquiry. I am satisfied that the recommendations that I have made for Mr. Arar are at least as favourable and probably more favourable than the recommendations made in other instances.

## 2. Attorney General of Canada

The Attorney General of Canada has applied for standing in the Factual Inquiry. The Minister of Justice is *ex officio* Attorney General of Canada. Under the federal *Department of Justice Act* he is responsible for, among other things, ensuring that the administration of public affairs is in accordance with law, and for the superintendence of all matters connected with the administration of justice in Canada not within the jurisdiction of the governments of the provinces. He is also responsible for advising the heads of departments of government on all matters of law connected with such departments, and for the regulation and conduct of all litigation for or against the Crown or any department.

Under the proposed Rules of Practice and Procedure of this Inquiry, the Attorney General of Canada has the responsibility of indicating to me which documents or portions thereof, or which aspects of proposed evidence, are subject to a claim of National Security Confidentiality. The Crown servants with knowledge of relevant facts and events may be entitled to be represented by the Attorney General of Canada. The Attorney General of Canada acts as the Crown's legal advisor with respect to positions to be advanced before this Inquiry, and also with respect to the government's response to my report.

### Disposition:

The Attorney General of Canada has a substantial and direct interest in the Factual Inquiry. I grant the Attorney General of Canada party standing in the Factual Inquiry.

### 3. The Ontario Provincial Police

The Ontario Provincial Police (OPP) assert a substantial and direct interest in the subject matter of the Factual Inquiry with respect to Joint Task Force operations as described below. Members of the OPP belong to joint police task forces operating with the RCMP which were involved in matters related to the mandate of the Factual Inquiry. These task forces, known as Integrated National Security Enforcement Teams (INSET Teams), are charged with the investigation of offences arising out of conduct constituting a threat to the security of Canada. As members of these teams, OPP officers have information about actions and communications that took place among Canadian officials in relation to the mandate of the Inquiry.

The OPP has identified its substantial and direct interest in the Factual Inquiry as a result of:

- (a) its interests as the employer of OPP officers involved in national security investigative teams in which Mr. Arar's name arose;
- (b) its participation in joint investigative task forces mandated to investigate matters of national security; and
- (c) its knowledge of and involvement in the sharing of investigative information among police forces, including joint task forces, at both domestic and international levels.

Counsel indicated that the OPP seek standing limited to those matters directly engaging these interests. They are not seeking funding.

#### Disposition:

I am satisfied that the Ontario Provincial Police have a substantial and direct interest in the matters set out above. I grant party standing to the OPP in the Factual Inquiry limited to those matters directly engaging those interests.

### 4. Mr. Ahmad Abou El Maati

Mr. El Maati is a Canadian citizen born in Kuwait. He knows Mr. Arar. In his affidavit, he states that from April 2001 onwards he had been the subject of surveillance and harassment by CSIS, the OPP and the RCMP. He states that CSIS indicated that they were going to stop the sponsorship of his Syrian wife, and he flew to Syria. He states that he was immediately detained, tortured and mistreated between November 2001 and February 2002 when he was transported to Egypt. In Egypt he states he was directly imprisoned and mistreated until his release in January 2004. He states that during his detention and torture by the

Syrians, he was questioned with respect to both Mr. Arar and Mr. Abdullah Almalki. He states that his substantial and direct interest in this Inquiry is in the actions and conduct of Canadian officials whom he believes had a hand in his illegal detention and torture by Syria and Egypt. He submits that his detention and torture is linked to Mr. Arar and Mr. Almalki.

In particular, he states that during his detention and torture in both Syria and Egypt, his torturers made reference to facts and documents from Canada which he believes were provided by Canadian officials. He also seeks funding.

**Disposition:**

At this point I am not satisfied that Mr. El Maati has a substantial and direct interest in the Factual Inquiry that would entitle him to party standing.

It is important to keep in mind that the Factual Inquiry is directed at the actions of Canadian officials in relation to Maher Arar, no one else. Indeed, in his submission for standing Mr. El Maati's counsel suggested that if his client had been in Canada when this Inquiry was called, the Terms of Reference would have included Mr. El Maati as well as Mr. Arar. Whether that is the case or not, the Terms of Reference do not include Mr. El Maati, and I must approach my mandate as it is, not as it might have been.

The mandate for the Factual Inquiry directs me to investigate and report on the actions of Canadian officials in relation to Mr. Arar. Subparagraphs a(i) to (iv) each refer to Mr. Arar. Subparagraph a(v) directs me to consider any other circumstances directly related to Mr. Arar that I consider relevant to fulfilling my mandate. Clearly the mandate is focussed on the events involving Mr. Arar and no one else.

There is a likelihood that Mr. El Maati will be called as a witness. If so, he will have an opportunity to relate what happened to him. However, being a witness does not in itself constitute a substantial or direct interest in the Inquiry. If he testifies, Mr. El Maati will be entitled to have counsel to represent him with respect to his testimony.

There is also a possibility that some evidence relating to Mr. Arar may involve Mr. El Maati including, for example, evidence of alleged associations with Mr. Arar. However, the reference to a person in evidence at a public inquiry does not in itself constitute a substantial or direct interest. More is required.

That said, I am satisfied that if evidence relating to Mr. Arar should refer to Mr. El Maati, he should be entitled to have counsel represent him with respect to that evidence if he chooses.

Further, it may be that as the investigation of the Commission proceeds and as the nature of the evidence to be called becomes clearer, Mr. El Maati's inter-

est will be greater than is currently envisioned. However, at the present time, I am satisfied that his interest falls short of being substantial and direct. In this connection I would point out that section 13 of the *Inquiries Act*, R.S.C. 1985, c. I-11, precludes any finding of misconduct (which includes a finding adversely affecting an individual's reputation) unless that individual has been given reasonable notice and allowed full opportunity to be heard in person or by counsel. The Attorney General of Canada opposed Mr. El Maati's application for standing taking the position that he does not have a substantial and direct interest in the Factual Inquiry. I have no doubt that in opposing the application counsel for the Attorney General was well aware of section 13.

It may be that Mr. El Maati's participation in the evidentiary portion of the hearings will warrant the opportunity to be involved in other aspects of the Inquiry including making closing submissions. That is not yet clear and I will defer my ruling with respect to future participation.

Where Mr. El Maati is represented by counsel I recommend that the Government pay for one counsel, and fees and disbursements should be paid in accordance with the guidelines.

## 5. Mr. Youssef Almalki

Mr. Youssef Almalki has applied for standing. He states that his brother, Mr. Abdullah Almalki, was detained and tortured in Syria for almost two years. He seeks standing on the ground that "Mr. Abdullah Almalki's case and Mr. Arar's case may be strongly intertwined"; and because it is unclear when his brother will return to Canada. I understand Mr. Youssef Almalki to effectively be applying for standing on his brother's behalf.

### Disposition:

Mr. Abdullah Almalki is in the same position as Mr. El Maati except perhaps that he may not be available to give evidence should the Inquiry wish to call him as a witness. My disposition with respect to Mr. El Maati applies equally to Mr. Abdullah Almalki, and I need not repeat those reasons here.

Commission counsel are presently in the investigative stage of the Inquiry. Should the situation with respect to Mr. Abdullah Almalki change, he or his counsel will be notified and his application for standing will be considered further at that time.

Mr. Abdullah Almalki is entitled to be represented by counsel if he testifies. If evidence relating to Mr. Arar should refer to Mr. Abdullah Almalki, he should be entitled to have counsel represent him with respect to that evidence if he chooses.

I recommend funding for Mr. Abdullah Almalki for one counsel whose fees and disbursements shall be paid in accordance with the Government guidelines for those matters referred to above.

## **6. Mr. Muayyed Nureddin**

Mr. Nureddin is a Canadian citizen of Iraqi origin. He says he was detained and tortured in Syria. Mr. Nureddin submits that he has a substantial and direct interest in the subject matter of the Factual Inquiry for two principal reasons. He states that he experienced difficulties similar to those experienced by Maher Arar, and he believes Canadian officials played a role in his detention and torture in Syria. He submits this Inquiry is mandated to determine the extent to which racial profiling and systemic racism played a role in what happened to Maher Arar. He submits that a further investigation of what happened to him would assist this Commission in putting into context what happened to Mr. Arar, and would particularly assist me in determining the extent to which racial profiling and systemic racism played a role. He also seeks funding.

### **Disposition:**

I am not prepared to make a grant of standing for Mr. Nureddin at this point in time. It is not clear that Mr. Nureddin will be called as a witness. If he is, he will be entitled to have counsel for that purpose.

Moreover, it is not anticipated at this point that the evidence relating to Mr. Arar will involve Mr. Nureddin.

Commission counsel are presently in the investigative stage of the Inquiry. Should the situation with respect to Mr. Nureddin change, his counsel will be notified and his application for standing will be considered further at that time.

## **B. INTERVENOR STANDING**

### **1. Introduction**

There are sixteen organizations which have applied for standing which I am satisfied do not have a substantial and direct interest in the Factual Inquiry but which should be granted intervenor standing. I will address each of these applicants individually below. However, for the sake of avoiding repetition, I will start out by making some general comments.

All of these applicants are sympathetic to Mr. Arar. Many were involved in the efforts to have Mr. Arar returned to Canada and in the public campaign to have the Government call this Inquiry. Each of these applicants have a genuine

concern in some of the issues raised in the Factual Inquiry. These applicants bring a variety of perspectives to these issues.

Some represent different points of view of the Arab community. Others approach the Inquiry from Islamic or Muslim perspectives. Still others have a primary focus directed at human rights and civil liberties, while others, some international, are concerned about international relations and the prevention of torture.

These applicants also have different experiences and expertise as it relates to their particular perspective.

I am not persuaded at this time that any of these organizations have the type of connection to the matters raised in the Factual Inquiry that meets the “substantial and direct interest” test. It must be remembered that the Factual Inquiry aspect of my mandate for which they seek standing is an investigative, fact-finding process. The recommendation and preventative part of my mandate is found in the Policy Review.

As I said above, the mandate for the Factual Inquiry directs me to investigate and report on the actions of Canadian officials in relation to Mr. Arar. Subparagraphs a(i) to (iv) each refer to Mr. Arar. Subparagraph a(v) directs me to consider any other circumstances directly related to Mr. Arar that I consider relevant to fulfilling my mandate. Clearly the mandate is focussed on the events involving Mr. Arar and no one else.

I have concluded that the interests asserted by the applicants to whom I grant intervenor standing do not meet, at least at this point, the legal test of having a “substantial and direct interest” in the Factual Inquiry. For example, while the Arab and Muslim/Islamic organizations assert an interest based on the premise that what happened to Mr. Arar resulted from racial profiling, systemic discrimination and the way governments have treated their communities in the post 9/11 era, and while evidence about those matters may be helpful in putting what happened to Mr. Arar in context, I do not consider, at least at the present time, that this interest meets the “substantial and direct interest” test. However, as I have noted, I am committed to ensuring that the Factual Inquiry is thorough and that it examines the causes of what happened to Mr. Arar from an individual, organizational and systemic perspective. The applicants to whom I grant intervenor standing have established their particular areas of expertise and experience, and their genuine concern about these issues, and I believe they can make a valuable contribution to this Inquiry.

I have described the attributes of intervenor standing above. Unless otherwise indicated each organization or coalition shall have those opportunities.

For purposes of simplifying the process and for purposes of making the best use of Government funding, I have grouped some applicants into groups or coalitions. I am flexible with respect to coalitions. If any organization seeks to join or separate from a coalition they are free to do so. However, my recommendations with respect to funding are premised, as I set out below, on certain coalitions being formed. Let me then turn to each applicant.

## **2. Arab and Muslim/Islamic Groups**

### **(a) Canadian Islamic Congress**

The Canadian Islamic Congress (CIC) is a non-profit national Muslim organization. The CIC has been in existence for just under a decade. The CIC lobbied the Federal Government for a full inquiry into the Maher Arar matter.

The CIC is concerned with what they submit is racial profiling of members of the Muslim community by national and local law enforcement agencies, including the RCMP and CSIS. They state that while Commission counsel has the primary responsibility for representing the public interest at the Factual Inquiry, they feel that the Inquiry would benefit from a Muslim perspective. The CIC proposes to call expert evidence regarding the present experience of the Muslim community with respect to law enforcement, particularly the RCMP.

Counsel indicated that members of the Muslim community feel threatened, fearful and angry at “Islamophobia”. The CIC would use their expertise to link “Islamophobia” with racial profiling as it is used by the police, the RCMP and CSIS; the impact of racial profiling on the Muslim community; and their expertise in social therapy. They allege that there is a lack of cultural and religious sensitivity on the part of law enforcement officers including the RCMP. Their counsel confirmed that the interest which has led them to seek standing is racial profiling and the stereotyping of Arab and Muslim people.

### **(b) The National Council on Canada-Arab Relations**

The National Council on Canada-Arab Relations (NCCAR) is a national organization that was founded in 1985. The mission of the NCCAR is “to build bridges of understanding and cooperation between Canada and the Arab world”. Their objectives include to promote and assist programs that increase Canadian awareness and knowledge of the Arab world; to expand links between Canadian and Arab institutions; to achieve a fair and balanced coverage of social, political and economic events in the Arab world; and a greater recognition of the contributions of Arab-Canadians to Canada. The NCCAR has been supportive

of Mr. Arar, and urged the Arab League to intervene with respect to Mr. Arar's treatment.

The NCCAR submit that the treatment of Mr. Arar, a Canadian citizen of Arab descent, is of substantial and direct concern as it impacts directly on Arab-Canadians. The conduct also has significant implications regarding the security of Arab-Canadians in Canada and elsewhere, and on Canada's relations with Arab countries. The NCCAR approaches these issues "from the perspective of an organization whose mandate since its inception has been to study and promote international Canadian-Arab relations".

The NCCAR identifies its expertise in international relations; governmental and legal constructs, and the sharing of information between governments. They have a wide knowledge of the workings of a variety of Arab governments. Although they are concerned with racial profiling, their counsel acknowledged this is not their area of expertise.

**(c) The Muslim Community Council of Ottawa-Gatineau**

The Muslim Community Council of Ottawa-Gatineau (MCCO-G) is an umbrella organization of several Muslim organizations within the National Capital Region and across Canada. It is a non-profit organization whose mission is to encourage Canadian Muslim organizations in the Ottawa-Gatineau region to work together harmoniously to establish and support Islamic institutions, principles and practices that help build happy families in a safe and secure community, and to work with other organizations across Canada to address common issues affecting Muslims. The MCCO-G is comprised of a total of 29 organizations engaged in a range of religious, social, educational and cultural activities.

The MCCO-G seeks standing to the extent of its interest on issues involving race relations, cross-cultural sensitivities, and the interaction of police and other officials with racial and cultural minorities. The MCCO-G has been supportive of Mr. Arar and his family throughout. They identified Mr. Arar and his family as active participants in the Ottawa Muslim community, and cite proximity to and familiarity with Maher Arar and his friends, and the impact of his arrest as having a powerful and negative impact on Muslims in the Ottawa-Gatineau region. They state that other members of the Canadian Muslim communities have experienced various degrees of negative episodes and experiences with intelligence and law enforcement agencies in the wake of the September 11, 2001 tragedy, which they perceive as discrimination on the basis of religion.

**(d) Canadian Council on American-Islamic Relations**

The Canadian Council on American-Islamic Relations (CAIR-CAN) is an Ottawa-based national organization that represents Canadian Muslims through community education, media engagement, anti-discrimination resolution and public advocacy. They represent three national Canadian Muslim organizations, and 112 local Canadian Muslim organizations. CAIR-CAN has expertise in the legal and policy issues arising from the Arar case, including the context of issues that affect Canadian Muslims in the post-9/11 security environment. I note that they identified the MCCO-G as one of their participating organizations.

CAIR-CAN has been distributing a pocket guide for Canadian Muslims entitled "*Know Your Rights*", advising Muslims what to do if CSIS or the RCMP tries to interrogate them about terrorism. This is reflective of what their counsel referred to as a "community under siege" since 9/11, and their particular concern and expertise in racial profiling.

CAIR-CAN was very active in the campaign to secure Mr. Arar's release and attended meetings with senior officials from the Canadian and American governments. Their 2003-2004 Annual Review contains a statement from Mr. Arar that CAIR-CAN was the first organization to support his wife, Dr. Monia Mazigh, in her efforts to obtain his freedom.

CAIR-CAN is jointly applying for standing with the Canadian Arab Federation and I rule on this joint standing application below.

**(e) The Canadian Arab Federation**

The Canadian Arab Federation (CAF) was founded in 1967 as a national, not-for-profit, umbrella organization. The CAF's mandate is to articulate, defend and otherwise pursue the interests of Canadians of Arab origin through maintaining relationships with all three levels of government, liaising with the media, and forging partnerships with other equity-seeking organizations. They indicate that their substantial and direct interest lies in the fact that the CAF is uniquely positioned to represent the interests of Canadian Arabs. This includes the existence of racial and religious profiling of Arabs in Canada by state agents; the effectiveness of oversight and accountability mechanisms for law enforcement and intelligence agencies; the civil and human rights implications of public legislation; human rights and international principles; the nature and details of Canada-U.S. national security relations; and the status, protocol and legal implications of information sharing with foreign security and law enforcement agencies.

Counsel for the CAF submitted that they are deeply concerned with the human rights abuses suffered by Arab Canadians as a result of the new national security agenda. Mr. Arar suffered as he did because he was an Arab Canadian, and Arab Canadians identify deeply with Maher Arar. Counsel identified six main areas of interest to the CAF: (1) racial profiling; (2) security stereotyping; (3) flawed intelligence gathering in minority communities; (4) information sharing practices and protocols; (5) discrimination and marginalization; and (6) human rights abuses. Counsel stated that an overriding concern is the proper balance between national security and the protection of civil liberties.

**(f) The Muslim Canadian Congress**

The Muslim Canadian Congress (MCC) is an unincorporated non-profit association created in March, 2002 with the objective of providing a voice to Muslim Canadians who are not represented by existing organizations. They state that the primary objective of the MCC is to identify, articulate, defend and otherwise pursue the interests of the Canadian Muslim community, as well as out-reach and education within the non-Muslim Canadian community. The MCC is seeking to intervene on issues raised with respect to the discrimination on the basis of religion concerning Muslims. They also raise the issue of racial profiling of Muslims in Canada, and the recruitment and use of Muslims as informers by intelligence agencies.

The MCC is seeking the right to file written closing submission at the Factual Inquiry, and to be involved in the Policy Review. They agreed to be part of a coalition to share a single grant of standing.

**Disposition:**

Three of these organizations - CAIR-CAN, the CAF and the MCC - have agreed to be involved in a coalition. That coalition shall be granted intervenor standing. Each of these organizations is concerned with issues of racial profiling, systemic discrimination and the impact on the Arab and/or Muslim communities of post 9/11 government actions. It is premature to determine to what extent these issues will be relevant to the Factual Inquiry. However, it may be that this coalition can play a role helpful to Commission counsel in developing evidence and identifying issues in these areas. I do not foreclose the possibility that at some point this coalition could be permitted to participate in the examination of witnesses in these areas.

The other three organizations – CIC, the NCCAR, and the MCCO-G – have not sought to be joined in a coalition. These organizations are each granted intervenor standing.

I accept the reasons why they may choose not to join a coalition. Different groups represent different constituencies and different perspectives. For example, the NCCAR is concerned about issues of racial profiling, but it is also concerned about international relations and the sharing of information between states.

Although I grant each a separate grant of intervenor standing, I would urge them to consider if their interests in relation to the Factual Inquiry can be accommodated through a single representation. If so, that would have to have the effect of streamlining the process. If not, I understand.

As to funding, I recommend that the Government provide funding for two counsel for the six Arab and Muslim/Islamic organizations for the Factual Inquiry. As I said, I recognize that some have different constituencies and different perspectives. However, I am satisfied that funding for two counsel is sufficient to provide adequate representation for the different interests.

Although I will not at this point recommend to whom the funding will be directed, I consider the coalition referred to above as a prime candidate to receive funding. I would ask that the six organizations discuss the matter and present a plan. If they are unable to reach agreement by May 17, 2004, I will make a ruling.

As to the amount of funding I recommend that each counsel be permitted a maximum of forty hours in order to make submissions with respect to the Rules, the *in camera* hearings, the opening submissions and other matters prior to closing submissions. I will make a recommendation with respect to the amount of time permitted for closing submissions later in the Inquiry.

### 3. Civil Liberties and Canadian Democracy/Sovereignty

#### (a) British Columbia Civil Liberties Association

The British Columbia Civil Liberties Association (BCCLA) is a society incorporated in 1963 pursuant to the *Society Act*, R.S.B.C. 1996, c. 433. The objectives of the BCCLA include the promotion, defence, sustainment and extension of civil liberties and human rights. The BCCLA has a long history and involvement with national security and intelligence, anti-terrorism legislation and police accountability. In 1978 and 1979, the BCCLA made submissions to the McDonald Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, and have continued to participate in subsequent reviews of CSIS.

The BCCLA submits that its long standing concern, involvement and influence in national security, intelligence and policing issues in Canada and its ac-

knowledgeable expertise in these areas “means it has a direct and substantial interest in the rights of not only one citizen such as Maher Arar, but all or any citizen whose rights or freedoms are similarly at risk”. It identifies a unique interest in ensuring that Canadian legislation, institutions, policies and practices are designed to protect those civil liberties, and asserts a substantial and direct interest as information resulting from this Inquiry will be relevant to the work that the BCCLA does in assisting individuals with complaints about the RCMP and other security and intelligence agencies.

Counsel identified the BCCLA’s substantial and direct interest as: (1) the BCCLA represents the civil liberties of all Canadians; (2) an interest in the outcome, to ensure it never happens again; and (3) their role in policy-making and the eliciting of relevant facts. Counsel identified a particular interest and expertise, as demonstrated through the BCCLA’s participation in the APEC Inquiry and court interventions, on principles relevant to *in camera* hearings and the conditions thereto.

**(b) The Minority Advocacy and Rights Council**

The Minority Advocacy and Rights Council (MARC) is a non-profit corporation formed in 1991 for the purpose of monitoring, assisting, sponsoring and undertaking selected litigation concerning human rights legislation and the *Canadian Charter of Rights and Freedoms* in the promotion and protection of minority rights. MARC’s mandate is to address issues related to race, national and ethnic origin, colour and religion in the area of human rights and social justice and to work towards the elimination of racial discrimination and systemic inequality.

MARC submits that this Inquiry raises issues of freedom of conscience, religion and association (*Charter* section 2), the mobility rights of citizens (*Charter* section 6), the right to life, liberty and security of the person (*Charter* section 7), and equality rights (*Charter* section 15). MARC submits that these issues are raised in the context of section 27 of the *Charter*, which recognizes the multicultural heritage of Canadians. They submit that the Inquiry must “consider the more precarious position of minorities in enjoying these legal and constitutional rights particularly where, as here, the fact that Mr. Arar’s membership in a minority group was a factor in the events”.

Counsel submits that MARC will assist the Inquiry in obtaining facts, and they also have a particular interest in oversight and policing issues.

**(c) Canadian Labour Congress**

The Canadian Labour Congress (CLC) is affiliated with approximately 60 public and private trade union organizations representing approximately 2.6 million

members. The CLC identifies three major issues that they say arise from or may explain the actions of Canadian officials in relation to Mr. Arar, which they identify as their substantial and direct interest. The first issue is human rights and racial profiling. Secondly, they state that they represent workers who are or may be directly affected by the actions of Canadian officials. For example, members of their affiliate trade unions are employed in the transportation sectors and have job duties which require them to regularly travel outside the country.

The CLC's counsel submitted that the Terms of Reference require me to examine not only what happened, but why. This will require an examination of the policy context in which the actions of Canadian officials are placed. On this point, counsel submitted that some of their affiliated members are members of PSAC who are called upon to implement government policies relating, for example, to customs and immigration.

The third aspect identified by the CLC is that of sovereignty. They state that the case of Mr. Arar "illuminates the serious erosion of Canadian sovereignty that has become an increasingly common feature of Canada-U.S. relations", and are particularly critical of any form of two-tiered citizenship in which Canadian citizens of colour or those born in poorer countries are accorded a lesser status, as they say appears to have happened with Mr. Arar.

**(d) The Law Union of Ontario**

The Law Union of Ontario (Law Union) is an Ontario-based, unincorporated association created in 1974. The Law Union defines its mandate as a commitment to the defeat of oppression on the basis of class, ethnic origin, sex including sexual orientation, age, colour and religion. The Law Union cite a long history of involvement in law reform, and in particular on policing issues including strengthening of public complaints procedure, ensuring effective civilian oversight, combatting the use of excessive force and raising awareness about racial and cultural sensitivity. The Law Union have been involved in a number of national security cases at all levels of court in Ontario, the federal courts and the Security Intelligence Review Committee. The Law Union submits that they would make a special contribution with respect to the use of informers, the apparent lack of understanding of cultural issues by the RCMP and INSET teams, the transmission of intelligence information to agencies of countries that engage in torture and detention without trial, and the credibility or reliability of information obtained or provided by the RCMP and CSIS.

**(e) International Civil Liberties Monitoring Group**

The International Civil Liberties Monitoring Group (ICLMG) is a pan-Canadian coalition of civil society organizations that was established in the aftermath of the September 11, 2001 terrorist attack in the United States. The ICLMG coalition brings together over 30 groups, including a number of the other applicants such as Amnesty International, the CAF, the CLC, and the Council of Canadians. The mandate of the ICLMG is to defend civil liberties and human rights as set out in the Canadian *Charter of Rights of Freedoms*, federal and provincial laws and international human rights instruments. The ICLMG is also involved in the dissemination of information relating to human rights in the context of counter-terrorism and concern with Canada's anti-terrorism legislation and security policies.

The ICLMG has actively been involved in the campaign for Mr. Arar's release, and supported the calling of this Inquiry.

The ICLMG has indicated they are willing to cooperate in a coalition.

**(f) Council of Canadians and the Polaris Institute**

The Council of Canadians is a not-for-profit organization founded in 1985. The central interest of the Council of Canadians is the erosion of Canadian sovereignty and the democratic process. The primary objectives of the Council are safeguarding social programs, promoting economic justice, renewing democracy, asserting Canadian sovereignty, preserving the environment and advancing alternatives to present trade policies.

The Polaris Institute is a research-advocacy institute founded in 1997. The key focus for the Institute has been the impact of Canada-U.S. relations on sovereignty and democratic policy-making in variety of areas, including the potential for government priorities in the economic and security sphere to negatively impact Canadian sovereignty and the rights of Canadians.

The Applicants submit that their purpose in seeking standing is to "ensure that the policy and institutional origins of the apparent collaboration that took place between Canadian and U.S. officials be thoroughly examined". They state that in this regard, it is crucial to examine all relevant aspects of Canada-U.S. relations that may have "come into play in creating the policy and institutional context within which the actions of Canadian officials in relation to Mr. Arar were formulated and carried out". Their counsel submits that this Inquiry should examine the extent to which Mr. Arar's fate is symptomatic of a decline in Canadian sovereignty and increased economic integration with the U.S. The Applicants refer to the integration of economic, national security and other policies, which

they submit has a corrosive impact on Canadian sovereignty and democracy. It is in this area that they identify their substantial and direct interests and their particular expertise.

**Disposition:**

Each of these organizations is granted intervenor standing to pursue the interests identified in their applications. At this point none have indicated a willingness to form a coalition.

As to funding, it is important that the civil liberties perspective be fully and forcefully represented at the Inquiry. Accordingly, I recommend funding for two counsel for this group of applicants.

I ask the applicants in this group to have discussions and if possible to present a plan to the Inquiry by May 17, 2004 for how the funding should be allocated. Failing receipt of such a plan, I will issue a ruling.

Let me make a few comments that might be of assistance. At this point, I am not persuaded that the interests raised by the Council of Canadians, the Polaris Institute and the CLC, other than those relating to civil liberties, are sufficiently germane to the mandate of the Factual Inquiry to warrant funding. I consider the BCCLA as a prime candidate to receive a grant of funding. I was very impressed with their presentation and their history of protecting civil liberties in a national security context.

I recommend that the funding for counsel be to a maximum of forty hours for each counsel, plus disbursements, for services prior to closing submissions. I will address closing submissions later in the process.

#### **4. International Human Rights**

**(a) The Redress Trust, the Association for the Prevention of Torture and the World Organization Against Torture**

Three organizations have applied jointly for standing.

The Redress Trust (REDRESS) is an international non-governmental organization with a mandate to assist torture survivors to seek justice and reparations. It is a United Kingdom based organization, and has accumulated a wide expertise on the rights of victims of torture within the United Kingdom and internationally. It has recently completed a comparative study on a reparation for torture in 31 countries worldwide.

The Association for the Prevention of Torture (APT) is a non-governmental organization based in Switzerland which works worldwide to prevent torture and ill-treatment by actively supporting the national implementation of interna-

tional norms and standards that prohibit torture, contributing to the promotion of control mechanisms; and developing information and training activities for authorities in contact with detainees. It has participated in the adoption of international and regional standards by various organizations and has organized training in conjunction with various police forces on police codes of conduct and human rights issues. The APT suggests that it will bring to the Commission its experience concerning the elaboration and adoption of international legal obligations at the level of national governments and regional organizations of states, particularly in regard to standards for national police forces.

The World Organization Against Torture (WOAT) was founded in 1985 and is based in Geneva. It is the world's largest coalition of non-governmental organizations fighting against arbitrary detention, torture, and other forms of violence. Its global network comprises two hundred and sixty-six local, national and regional organizations which share the common goal of eradicating such practices and enabling the respect of human rights for all. WOAT frequently intervenes with various governmental authorities and international mechanisms on behalf of those in danger of being returned to countries where they are at risk of being tortured. Support for victims also takes a more general form, through the submission of reports to various United Nations mechanisms. WOAT brings to the Commission a wealth of experience gained worldwide about the practical implementation of international instruments at the national level.

The Coalition has applied for special standing in the Factual Inquiry. They have identified four areas which they would like to participate. First, they have sought the right to make an opening submission on the rules of international law and practice governing the obligations of government officials, including officials of the government of Canada, to protect citizens, residents and other persons under their government's protection from torture at home or abroad, and the implications of the Arar case within the international community of persons concerned with the prevention of torture. This opening submission would be for the purpose of assisting the Inquiry to frame the issues for the Factual Inquiry and subsequent Policy Review. They also seek the ability to apply for leave to examine specific witnesses on the forcible removal of persons to countries where there is a foreseeable risk of torture. The Coalition seeks leave to make submissions on the scope of the Inquiry's mandate or other procedural matters "that may affect the perception, within the international community, of this Inquiry's ability to achieve the mandate established by its terms of reference". They wish to participate in oral consultations in the Policy Review. Finally, they

seek the ability to make closing submissions on matters that arise in the course of the Inquiry.

The Applicant organizations are all members of the Coalition of International Non-Governmental Organizations Against Torture (CINAT), an international body composed of seven international non-governmental organizations committed to ending and preventing torture, to bring torturers to account, providing rehabilitation and obtaining justice and reparations for survivors of torture. I note that Amnesty International, another applicant applying separately, is a member of CINAT.

The Coalition states that they have direct and substantial interest in the subject matter of this Inquiry, more particularly located in their work on the application of international human rights instruments, the prevention of torture, the promotion of the rights of torture survivors, and the practice and jurisprudence of national and international mechanisms for the protection of human rights. The Coalition submits that the Inquiry raise the potential conflict between national security concerns and international human rights.

Counsel indicated that the Coalition members are pleased to share their expertise if Commission counsel or Mr. Arar should request.

Mr. Kevin Woodall, who acts for this group, has indicated that counsel will serve on a *pro bono* basis, and seek funding only for disbursements. Counsel are acting in the highest tradition of the profession, and I thank them for their commitment to pro bono representation.

**(b) Amnesty International**

Amnesty International Canadian Section (English Branch) (Amnesty International) has applied for standing. Amnesty International was extensively involved in Mr. Arar's case commencing two weeks after his detention in the United States. They worked closely with Mr. Arar and his family and other concerned organizations.

Amnesty International does not seek standing to present evidence or examine or cross-examine witnesses but rather, to observe the proceedings and make submissions on occasion, particularly at the close of the Factual Inquiry. Amnesty International has stated that the essential question the Inquiry must address is whether the knowledge, action or inaction of Canadian officials in any way put Mr. Arar at risk of the serious human rights violations he has experienced. They have also set out a number of specific questions which they submit this Inquiry should address. Amnesty International does not seek funding.

**(c) The International Coalition Against Torture**

The web site indicates that the goal of the International Coalition Against Torture (InCAT) is to take all necessary and lawful steps to abolish sovereign immunity for all acts of torture, so that the path leading to justice for all victims of torture will be open. It is a non-governmental organization aimed at providing legal aid for victims of torture, and pursuing justice in the courts by holding perpetrators and violating states responsible for their actions.

InCAT identified as their direct interest that one of their founding members has been tortured, and is still involved in litigation with respect to that torture. Counsel indicated they have no objection to being grouped together in a coalition.

**(d) The Center for Constitutional Rights**

The Center for Constitutional Rights (CCR) was established in 1966. It is a New York based non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. They are one of the leading organizations in the U.S. providing avenues of redress for torture victims.

Since the September 11<sup>th</sup> attacks, CCR has spear-headed litigation before U.S. and international tribunals to protect fundamental rights to due process for both U.S. citizens and non-citizens, who are impacted by what they state, are the United States administration's counter-terrorism measures. The CCR represents Maher Arar in legal proceedings against United States officials involving his detention in the United States and his removal to interrogation and treatment in Syria. The CCR filed a complaint on Mr. Arar's behalf with the Federal Court in January, 2004.

The CCR has identified these main areas of its expertise: (1) a history of U.S. policies regarding torture, refoulement and rendition, including covert and overt policies regarding extraordinary rendition; (2) the legal framework within which Mr. Arar's detention and removal took place, including the function and jurisdiction of various executive, judicial and law enforcement branches and agencies; and (3) the legal framework in the U.S. relating to the implementation of the UN Convention Against Torture, including the role of diplomatic assurances. The CCR has agreed to provide assistance to Commission counsel on these issues, if requested.

**Disposition:**

Each of these organizations other than the CCR is granted intervenor standing. The CCR acts for Mr. Arar in a civil action in the United States. Given that relationship it seems to me that the CCR's interest in the Factual Inquiry can most appropriately be addressed through Mr. Arar's grant of standing.

As to funding, counsel for the coalition of REDRESS, APT and the WOAT indicated that counsel would provide legal services on a *pro bono* basis. He requested, however, that I recommend payment of disbursements. I am in agreement with that request and so recommend.

Consistent with its established policy, Amnesty International does not request any Government funding.

I do not consider it necessary to make any further recommendations for funding with respect to this group. I note that InCAT has no objection to joining with one of the other organizations in this group.

**5. Individuals****(a) Ken Rubin**

Mr. Rubin is a public interest researcher who seeks standing as an individual citizen. He states that since May, 2003 he has spent considerable time doing access to information and privacy research work for Mr. Arar and Dr. Monia Mazigh. He also notes that he has been an advocate of open government for over 30 years and has been involved in a significant number of cases and hearings in many jurisdictions, and has written extensively on disclosure and privacy protection. He submits that the areas of his contribution would be to monitor and intervene on the need for as much disclosure of the facts as possible, to provide input on government records connected with the Arar case, and to outline issues regarding access to information and privacy requests. He is requesting funding as a senior researcher.

**Disposition:**

Mr. Rubin's primary interest relates to the basis on which this Inquiry will determine what evidence should be heard *in camera*. He is granted limited intervenor standing for the purpose of making submissions on this issue. I am not persuaded that he should be granted standing to pursue the other issues raised in his application. I make no recommendation as to funding.

(b) Emmanuel Didier

Dr. Didier appeared before me requesting to appear either as an independent expert, or as an expert appointed by the Commission under Section 11(1) of the *Inquiries Act*, R.S.C. 1985, c. I-11. His experience is in both public and private international law and administrative law. This proceeding deals with standing and not with experts, and so I make no ruling on this application at this time.

#### IV. CONCLUSION

I express my thanks to all of the individuals, groups and organizations who applied for standing and participated in the hearings.

May 4, 2004



Justice Dennis R. O'Connor  
Commissioner

#### APPENDIX 3(C)

### SUPPLEMENTARY RULING RE: FUNDING

I have received a number of submissions with respect to my ruling which was released on May 11, 2004. All of the submissions are directed to the issue of funding. I address each of those submissions below.

#### **MAHER ARAR**

In my ruling I recommended that Mr. Arar be granted funding for two senior and two junior counsel. Those counsel have undertaken to minimize overlap. I recommended that senior counsel be allowed 50 hours of preparation prior to the public hearings (now scheduled to begin on June 21) and that junior counsel be allowed 25 hours during the same period.

Mr. Arar's counsel have written requesting that those numbers be increased to 200 and 150 hours respectively. In their letter counsel point out that the Commission counsel's decision to call Mr. Arar, his family members and other

Arar witnesses towards the beginning of the public hearings will result in an enormous amount of work for them before the hearings begin. If those witnesses were to be called later in the Inquiry, the funding guidelines which permit 10 hours of preparation for each day of hearings would help significantly in covering the expense of preparing those witnesses for the hearings. At the time of Mr. Arar's original request for funding, the need for additional funding for preparation time before the start of the hearings was not as apparent as it is now.

There is merit to this request for extra funding. To date Mr. Arar's counsel have been very cooperative in assisting with the preparation for this Inquiry. They indicate that they will continue to provide assistance so that the Inquiry can proceed expeditiously. I am pleased that we are able to start the public hearings as early as June 21<sup>st</sup> and it appears that we will be able to continue those hearings through the month of July. There is a significant advantage to everyone concerned in proceeding with this Inquiry as expeditiously as possible. The cooperation of those involved in the Inquiry is important in achieving this goal.

I am prepared to increase the funding I previously recommended for Mr. Arar's counsel for preparation before the first day of hearings by 100 hours for each of the four counsel. An increase of 100 hours for each lawyer is less than requested, however, given that there are four lawyers and that those lawyers will attempt to minimize overlap, it seems to me that an increase of 100 hours is reasonable. Accordingly, I recommend that senior counsel be permitted 150 hours each and junior counsel 125 hours each. In all other respects my recommendation with respect to funding for Mr. Arar's counsel remains unchanged.

#### **CIVIL LIBERTIES AND CANADIAN DEMOCRACY/ SOVEREIGNTY GROUP**

In my ruling I granted intervenor standing to the six organizations which I grouped under the above-noted heading. I recommended funding for two counsel for the group. I recommended that each counsel receive funding for 40 hours for services prior to closing submissions and stated that I would address the amount of funding for closing submissions at a later point in time. I asked that the group present a plan setting out how that funding should be allocated.

This group has written to me making a number of requests. First, the group requests that I expand my funding recommendation to include payment of fees and disbursements for one full-time legal counsel for the duration of the Factual Inquiry. This counsel would be funded to attend the hearings at which evidence is called, but would not participate directly in the examination of witnesses. It

is suggested that having a counsel in full-time attendance at the hearings would better enable these intervenors to assist Commission Counsel and other counsel when questioning witnesses and would also enable these intervenors to be better informed when making final submissions.

I am not prepared to make the recommendation requested. The transcripts of the hearings will be available on the Commission's website in a timely manner - we expect on the evening of the day during which evidence is heard. Counsel for these parties will have an opportunity of reviewing those transcripts and Commission Counsel will be available to discuss suggestions about areas in the evidence that need to be pursued. I will ensure that no problem arises because counsel for this intervenor group are not present at the hearings when a particular area of evidence is first introduced. I am confident that the intervenors' suggestions to Commission Counsel will be fairly addressed.

Moreover, in approaching the issue of funding I have tried to ensure that Mr. Arar's counsel are sufficiently funded so that they can fully and effectively participate in the hearings. Mr. Arar will be represented by two very experienced senior counsel and I will have the benefit of their participation. Similarly, the government will be represented by a very experienced senior counsel who is supported by a substantial team of lawyers. There will be no shortage of top-flight legal talent participating in the calling of the evidence.

I am satisfied that Commission Counsel and the other counsel who are entitled to examine witnesses will be able to fully and fairly develop all of the evidence necessary for me to make the findings called for in the Factual Inquiry part of my mandate. I do not think that the benefit gained from the presence of an additional counsel throughout the hearings warrants the expense to the public purse that would be involved.

I note that the intervenors in this group would like to reserve the right to make individual or group submissions on various aspects of the Factual Inquiry. I agree with that request.

Finally, this intervenor group has requested that the 80 hours of preparation time be allocated equally among three groups: (1) the BC Civil Liberties Association, (2) the International Civil Liberties Monitoring Group, the Minority Advocacy and Rights Council and the Law Union of Ontario, and (3) the Council of Canadians/Polaris Institute.

I am in agreement with that request and so recommend.

#### **ARAB AND MUSLIM/ISLAMIC GROUP**

In my ruling I recommended that the government provide funding for two counsel for the six Arab and Muslim/Islamic organizations which were granted

standing. I asked that the six organizations discuss the issue of the allocation of the funding and, if possible, present a plan.

The Canadian Council on American-Islamic Relations (CAIR-CAN) and the Canadian Arab Federation (CAR) have agreed to share one grant of funding. I appreciate their cooperation. On the basis of their written and oral submissions I am satisfied that this is a reasonable approach and I so recommend

There remain four other organizations in this group which have been granted intervenor standing. They are: the Muslim Community Council of Ottawa-Gatineau, the Canadian Islamic Congress, the National Council on Canada-Arab Relations and the Muslim Canadian Congress. These organizations have been unable to agree upon a plan for shared representation and funding. Each wishes to be represented separately. While I fully accept the point that each of these organizations represent different constituencies and perspectives, none of them has pointed out any conflicting positions on the issues for which they would be granted funding; the Rules of Procedure; the principles governing In-Camera Hearings; and the issues that need to be canvassed in the Factual Inquiry. I would have thought that while some of these organizations may have a different emphasis or perspective on some issues, a cooperative approach to this Inquiry would nonetheless be possible and desirable.

That said, I have granted each organization intervenor standing and am anxious to have their participation. In order to move the matter ahead, I am prepared to recommend one extra grant of funding of 40 hours for this group of four organizations. It continues to be my view that this funding will be better used if a sharing agreement is reached and I urge these organizations to reach an agreement. Failing agreement, I will recommend that the two grants be divided equally – 20 hours each. I look forward to a response by June 7<sup>th</sup>. The recommendation for an additional grant of funding at this stage should not be taken as necessarily leading to an additional grant for closing submissions. I will consider funding for closing submissions in due course.

May 26, 2004



Justice Dennis R. O'Connor  
Commissioner

APPENDIX 3(D)

SUPPLEMENTARY RULING ON STANDING

Three of the witnesses whose evidence will be heard during the upcoming *in camera* hearings of the Inquiry have applied for standing. There has also been an application for standing by the Ottawa Police Service.

I have granted all of these applications.

In particular, I have granted standing to three members of the A-O Canada project who I am satisfied have a substantial and direct interest in certain A-O Canada-related matters that will be dealt with at the Inquiry. The names of those members are not to be disclosed at the present time. Standing is limited to those matters that directly engage their interests.

I have also granted standing to the Ottawa Police Service, limited to those matters that directly engage its interest.

October 25, 2004

A handwritten signature in black ink, appearing to read "D. O'Connor", with a stylized flourish at the end.

Justice Dennis R. O'Connor  
Commissioner

APPENDIX 3(E)

EXCERPT OF TRANSCRIPT OF JUNE 29, 2005  
 PUBLIC HEARING (RE: STANDING OF ABDULLAH  
 ALMALKI AND AHMAD EL MAATI), PP. 7749-7755

## APPEARANCES:

Mr. Paul Copeland

*Counsel to Abdullah Almalki*

Ms. Barbara Jackman

*Counsel to Ahmad El Maati*

Ms. Barbara A. McIsaac, Q.C.

*Attorney General of Canada*

Mr. COPELAND: Thank you Mr. Commissioner. As I am sure you are aware, although some in the room may not be aware, I am counsel for Abdullah Almalki.

As, again you are aware, he was initially refused standing when an application was brought by Mr. Edelson. So far as I am aware, Mr. Almalki was not notified of the evidence that was being heard at this inquiry that affected his reputation. He became aware of that evidence and, as you are aware, in my absence last week, Ms. Jackman brought an application for standing on my part on behalf of Mr. Almalki.

And so far as I understand your ruling — and I apologize, but I only returned to Toronto late Saturday night — we have been granted standing so far for the testimony of Mr. Cabana.

THE COMMISSIONER: Right.

Mr. COPELAND: My client is very concerned about what the RCMP and CSIS have done to his reputation. He is very concerned about how the actions of the RCMP and CSIS led to his detention and severe interrogation in Syria. He is very concerned about how the evidence at this inquiry will impact on his reputation.

I am greatly hampered in representing him by the non-participation to date and by the lack of detailed knowledge that I have about evidence that has gone in at this inquiry. I also will have, I think, some great problems knowing what areas I can examine on — much like Ms. Edwardh — as to what is permissible and what is going to get barred by national security, and I have the additional

difficulty that at this point I am not quite sure what areas I am allowed to ask questions about generally, what issues will be raised.

So I just wanted to alert you to that. I may have questions of this officer that get into the national security issues, and I expect that I will be shut down when that happens. But I just wanted to make you aware of the concerns that I have.

THE COMMISSIONER: Just to clarify, Mr. Copeland, I was aware of the application that Ms. Jackman brought on behalf of her client and on your behalf for Mr. Almalki. What I indicated through Mr. Cavalluzzo is I would rule, and I now rule, is that you do have standing for purposes of dealing with evidence that relates to your client and for purposes of addressing evidence that may adversely affect your client's reputation.

As I understand it, the evidence that will be led through this witness will mention your client from time to time. I am not sure of the exact details. But in any event, it will.

So your standing and your participation will be with respect to that issue.

As a general guideline I would say to you that your cross-examination of the witness should be limited to the interest which gives rise to your standing.

So it is not a grant of standing, if you will, generally for all of the issues in the inquiry; it is a focused grant of standing. I will accompany the grant of standing with a recommendation of funding with respect to the grant.

Mr. COPELAND: Thank you.

THE COMMISSIONER: Thank you.

Ms. JACKMAN: I echo what Mr. Copeland said.

THE COMMISSIONER: Thanks, Ms. Jackman, and I make then the same order that I did with respect to you and to your client in exactly the same terms.

Just to indicate for the record, your client's name.

Ms. JACKMAN: I am appearing for Ahmad El Maati.

Ms. McISAAC: Mr. Commissioner, we were completely unaware of either of these applications and had no foreknowledge that this application was going to be made this morning, or any opportunity to make representations.

THE COMMISSIONER: Actually, it is consistent with the ruling that I made back in my initial ruling denying standing to these two when they applied at the outset.

I apologize for that, Ms. McIsaac. Would you like an opportunity to oppose these applications?

Ms. McISAAC: I would like an opportunity to think about them, sir, because I am not sure what the implications are.

THE COMMISSIONER: I have made a tentative ruling.

Ms. McIsaac, do you oppose these two counsel asking questions of this witness with respect to evidence that affects their clients and their clients' reputation?

Ms. McISAAC: May I reserve my comments on that until I have had an opportunity to think about it, sir?

THE COMMISSIONER: It is just that that will be coming up fairly soon.

Ms. McISAAC: Yes. I will certainly advise you prior to that happening. I have to seek instructions as well.

THE COMMISSIONER: I might just indicate for the record that I had, at the beginning when I made rulings on standing earlier, made what I considered to be a rather normal direction in a public inquiry of this sort: that the type of standing that I have now granted to these two counsel would be available.

Ms. Edwardh?

Ms. EDWARDH: Could I take a position with respect to the application?

I want to make two observations, Mr. Commissioner.

When all the applications for standing came forward, no one was given an opportunity to comment on other applicants. It was a matter for your discretion, as a matter of fairness to the persons. I certainly remind you of that process, because I think that no one other than you should determine the propriety of the grant of standing.

THE COMMISSIONER: Thank you.

We will simply wait until we hear from Ms. McIsaac.

In that sense, I guess the ruling that I made this morning will be provisional or held in abeyance until we hear from you, Ms. McIsaac.

Ms. McISAAC: Thank you, sir.

THE COMMISSIONER: Are we ready to begin?

Mr. CAVALLUZZO: Just on that point, Commissioner, I want to remind counsel that there have been several grants of standing with counsel here today without notice to other parties. These matters are within your discretion.

THE COMMISSIONER: Absolutely.

Mr. CAVALLUZZO: I reiterate Ms. Edwardh's point.

THE COMMISSIONER: I agree. I am looking at at least three counsel in the back row who we didn't go through the formality of giving notice, and I don't recall Mr. Arar being given notice and an opportunity to object. That certainly has not been the process.

That said, Ms. McIsaac makes the request, and I think if she wishes to consider it, she may do so.

Mr. CAVALLUZZO: Thank you, Commissioner.

### APPENDIX 3(F)

## SUPPLEMENTARY RULING RE: FUNDING

I have received a request for additional financial support from the eighteen organizations with intervenor status. In an earlier ruling I recommended funding for the intervenors to assist with their participation in the evidentiary portion of the factual Inquiry. In that ruling I indicated that I would address the amount of funding for their closing submissions at a later point in time. I also recommended that the funding be based on the intervenors' participating in specific groups.

In March, 2005, the Coalition of the Canadian Council on American-Islamic Relations and the Canadian Arab Federation entered into a Contribution

Agreement with the Commission whereby the Minister agreed to provide funding for parties meaning “an Applicant with a substantial and direct interest in the subject-matter of the factual inquiry . . . to contribute towards the reasonable expenditures , , .” It was also agreed that payments under the Agreement “be directed to and issued in the name of the legal counsel retained by the Applicant.” In early 2005, the eighteen intervenors formed a single group, titled “Committee of Organizations with Intervenor Status at the Inquiry” in order to pool their resources and to launch fund raising activities to hire a coordinator. The Coalition of the Canadian Council on American-Islamic Relations and the Canadian Arab Federation are members of this Committee.

As a result of support from some generous organizations in the labour movement, they were able to fund almost five months participation, taking them from February through to mid-June of 2005. Since February, the intervenors have participated in the Inquiry, in effect as a single coordinated voice. I commend them for this approach. From the Inquiry’s standpoint, this approach has enabled the intervenors to participate in an efficient and in an effective manner. Coordinating intervenor participation, to the extent possible, makes sense.

In the request for additional funding, the Coalition of the Canadian Council on American-Islamic Relations and the Canadian Arab Federation indicate that they exhausted their available resources, including funding received from this Inquiry. They request that I recommend funding in the amount of \$21,000 to cover their expenses, which amount includes the salary of a coordinator for the Committee of Organizations with Intervenor Status at the Inquiry, for the period from the middle of June until September 30, 2005.

In my view, this is a reasonable request and I will recommend to the government the funding of the additional \$21,000. The contribution of the intervenors to date has been useful and their continued participation would be of assistance to the Inquiry. Submissions are scheduled for September, and while some intervenors may choose to make submissions separately, and I look forward to the participation of the intervenors in making submissions at that time.

August 17, 2005



Justice Dennis R. O'Connor  
Commissioner

APPENDIX 3(G)

## PARTIES AND INTERVENORS IN FACTUAL INQUIRY

<u>INDIVIDUAL OR GROUP</u>	<u>STANDING</u>
Maher Arar	<i>Party Standing</i>
Attorney General of Canada	<i>Party Standing</i>
Ontario Provincial Police	<i>Party Standing</i>
Ottawa Police Service	<i>Party Standing</i>
Ahmad Abou El Maati	<i>Limited Party Standing</i>
Abdullah Almalki	<i>Limited Party Standing</i>
Canadian Council on American-Islamic Relations	<i>Intervenor Standing</i>
Canadian Arab Federation	<i>Intervenor Standing</i>
Muslim Canadian Congress	<i>Intervenor Standing</i>
Canadian Islamic Congress	<i>Intervenor Standing</i>
National Council on Canada-Arab Relations	<i>Intervenor Standing</i>
Muslim Community Council of Ottawa-Gatineau	<i>Intervenor Standing</i>
British Columbia Civil Liberties Association	<i>Intervenor Standing</i>
Minority Advocacy and Rights Council	<i>Intervenor Standing</i>
Canadian Labour Congress	<i>Intervenor Standing</i>
Law Union of Ontario	<i>Intervenor Standing</i>
International Civil Liberties Monitoring Group	<i>Intervenor Standing</i>
Council of Canadians and the Polaris Institute	<i>Intervenor Standing</i>
Redress Trust, Association for the Prevention of Torture and World Organization Against Torture	<i>Intervenor Standing</i>
Amnesty International	<i>Intervenor Standing</i>
International Coalition Against Torture	<i>Intervenor Standing</i>

APPENDIX 4

## WITNESSES AT THE PUBLIC HEARINGS

<u>NAME</u>	<u>TITLE</u>
Rachad Antonius	<i>Professor, Department of Sociology, Université de Québec à Montréal</i>
Reem Bahdi	<i>Professor, Faculty of Law, University of Windsor</i>
Peter Burns	<i>Dean Emeritus, Faculty of Law, University of British Columbia</i>
Michel Cabana	<i>Former Officer in Charge, Project A-O Canada, RCMP</i>
Marlene Catterall	<i>Member of Parliament</i>
Nancy Collins	<i>Case Management Officer, Consular Affairs Bureau, DFAIT</i>
Maurice Copithorne	<i>Professor Emeritus, Faculty of Law, University of British Columbia</i>
Pierre De Bané	<i>Senator</i>
Lawrence Dickenson	<i>Former Assistant Secretary to the Cabinet, PCO</i>
Hon. Wayne Easter	<i>Former Solicitor General</i>
Michael Edelson	<i>Former Counsel to Maher Arar</i>
Ward Elcock	<i>Former CSIS Director</i>
Rick Flewelling	<i>Member, Criminal Intelligence Directorate (CID), RCMP</i>
Craig Forcese	<i>Professor, Faculty of Law, University of Ottawa</i>
Robert Fry	<i>Former Senior Policy Advisor to Minister of Foreign Affairs</i>
Maureen Girvan	<i>Manager of Consular Services, Canadian Consulate General, New York</i>
Jim Gould	<i>Former Deputy Director, Foreign Intelligence Division (ISI), DFAIT</i>
Hon. Bill Graham	<i>Former Minister of Foreign Affairs</i>
Julia Hall	<i>Counsel and Researcher, Human Rights Watch</i>
Henry Hogger	<i>Former U.K. Ambassador to Syria</i>
Jack Hooper	<i>Former Deputy Director, CSIS</i>
Sheema Khan	<i>Chair, Canadian Council on American Islamic Relations (CAIR-CAN)</i>
Dan Killam	<i>Director General of National Security, RCMP</i>

NAME	TITLE
Ron Lauzon	<i>Officer in Charge, National Security and Intelligence Branch, RCMP</i>
Flynt L. Leverett	<i>Former Senior Analyst, CIA</i>
Dan Livermore	<i>Director General, Security and Intelligence (ISD), DFAIT</i>
Roberta Lloyd	<i>Federal Public Servant, The Global Health Research Initiative</i>
James Lockyer	<i>Former Counsel to Maher Arar</i>
Garry Loeppky	<i>Deputy Commissioner, Operations, RCMP</i>
Kathryn McCallion	<i>ADM, Corporate Services, DFAIT</i>
Alexa McDonough	<i>Member of Parliament</i>
Hon. John Manley	<i>Former Deputy Prime Minister</i>
Léo Martel	<i>Canadian Consul in Damascus, DFAIT</i>
Richard Ofshe	<i>Professor, Department of Sociology, University of California, Berkeley</i>
Gar Pardy	<i>Former Director General, Consular Affairs Bureau, DFAIT</i>
Myra Pasty-Lupul	<i>Case Management Officer, Consular Affairs Bureau, DFAIT</i>
Dr. Donald Payne	<i>Psychiatrist, Toronto, and Member, International Council for Torture Victims</i>
Franco Pillarella	<i>Former Canadian Ambassador to Syria, DFAIT</i>
Richard Roy	<i>RCMP Liaison Officer at DFAIT</i>
Konrad Sigurdson	<i>Director General, Consular Affairs Bureau, DFAIT</i>
Gregg Williams	<i>Former RCMP employee at Immigration and Passport Branch</i>
Stephen Yale-Loehr	<i>Adjunct Professor, Faculty of Law, Cornell University</i>

APPENDIX 5  
SECTION 13 NOTICES

APPENDIX 5(A)

SAMPLE SECTION 13 NOTICE

Commission of Inquiry into the  
Actions of Canadian Officials  
in Relation to Maher Arar



Commission d'enquête sur les  
actions des responsables canadiens  
relativement à Maher Arar

Name  
Address

Dear [Name of Counsel]:

**RE: Section 13 Notice:  
[Name of Recipient of Notice]**

We have now met with your client in respect of his anticipated evidence. In this regard, we are appreciative of his cooperation in assisting us in the preparation of evidence to be presented before the Commissioner. As you know, our goal is to ensure that the Commissioner has all the relevant evidence before him so that the Inquiry's mandate may be fulfilled.

In the interests of fairness, it is our practice to notify each witness of areas where the Commissioner might find that the witness may have engaged in conduct for which there could possibly be critical comment. Such notices are not allegations that the conduct referred to did in fact occur nor are they charges in the sense that if proved the witness will be found to have engaged in misconduct. Even if proved, the Commissioner may find that such actions or inactions were the result of mitigating or extenuating circumstances and were therefore understandable in the circumstances. As you can see, it is out of an abundance of caution that we issue these notices to individuals and government agencies.

Further, in drafting the notice I have attempted to be as specific as possible. Thus, rather than setting out two or three general statements, I have chosen to be much more focused. It strikes me that this is a much fairer approach from [Name of Recipient of Notice] perspective.

In this light, we direct your attention to the following matters in respect of [Name of Recipient of Notice] for which there may be negative findings:

[List of matters]

PO Box / CP 507, Station B / Succursale B  
Ottawa, Canada K1P 5P6

613 996-4741 Fax / télécopieur 613 992-2366

[www.ararcommission.ca](http://www.ararcommission.ca) / [www.commissionarar.ca](http://www.commissionarar.ca)

- 2 -

Once again, we reiterate the purpose for which this notice is given. It is to bring to your attention the possible action or inaction of [Name of Recipient of Notice] which could possibly attract critical comment from the Commissioner. I stress that neither Commission Counsel nor the Commissioner have reached any conclusions that the matters referred to in this notice occurred or, if they did, warrant critical comment. It should be noted that this notice may be amended, varied or changed at any time prior to or subsequent to the testimony of [Name of Recipient of Notice]. Needless to say, [Name of Recipient of Notice] will be given full opportunity to deal with any alterations to the notice.

If you have any questions or comments, please contact me.

Yours truly,

A handwritten signature in cursive script, appearing to read "Paul Cavalluzzo".

Paul Cavalluzzo  
Lead Commission Counsel

APPENDIX 5(B)

RULING — MOTIONS TO QUASH CERTAIN  
S. 13 NOTICES

On August 9 and 10, 2005, I heard a number of motions brought by recipients of Section 13 Notices seeking to quash the notices. I heard the motions *in camera* because the parties indicated that they would need to refer to information covered by the government's NSC claims in arguing the motions.

I dismissed all of the motions with written reasons. I have asked Commission Counsel to meet with counsel for the parties involved to discuss providing enhanced details, if possible, of some of the paragraphs in some of the notices.

I have asked the parties to the motions and the Government to include in their closing submissions, if they wish, submissions about whether my ruling, subject to National Security Confidentiality claims, should be made public. I invite any other parties to make submissions in writing about publication of my ruling by September 30, 2005.

August 17, 2005



Justice Dennis R. O'Connor  
Commissioner

APPENDIX 5(C)

RULING — MOTIONS TO QUASH CERTAIN  
S. 13 NOTICES

A number of motions were brought by individuals who have been issued notices pursuant to s. 13 of the *Inquiries Act*. These motions were heard *in camera* on August 9 and 10, 2005.



A argues that the finding contemplated by paragraph 4 goes beyond the mandate of this Inquiry [in that it is] ██████████ ██████████ not related to “the actions of Canadian Officials in relation to Maher Arar”.

██████████  
 ██████████  
 ██████████  
 ██████████  
 ██████████

The determination of whether the evidence should be viewed in this manner depends on an analysis of a number of pieces of evidence. It would be premature, at this stage of the Inquiry, for me to determine whether ██████████ [it] is something that I will, in the end, consider relevant to answering the questions raised by my mandate. The evidence is not yet complete and final submissions have not been heard. In fairness to A, though, the possibility exists that I will make a finding relating to ██████████ [this paragraph]. A should have notice of that possibility.

As far as determining at this stage whether such a finding would be *ultra vires* my mandate, the comments of Cory J. in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 [hereinafter *Krever*] are apposite. At para. 56, he states that “[e]ven if the content of the notice appears to amount to a finding that would exceed the jurisdiction of the commissioner, that does not mean that the final, publicized findings will do so. It must be assumed, unless the final report demonstrates otherwise, that commissioners will not exceed their jurisdiction.”

In response to questioning ██████████ ██████████, counsel for A suggested that I would not have sufficient evidence before me to properly answer the question ██████████

██████████ [of whether A’s conduct had a certain effect]. My response is that I will only make findings in my final report that I can safely make on the basis of the evidence before me.

Accordingly, I do not accept the argument that paragraph 4 should be struck as being *ultra vires*.

██████████  
 ██████████  
 ██████████

[REDACTED]

Below I indicate that I have asked Commission Counsel to meet with counsel for the s. 13 recipients with a view to providing enhanced details, if possible, about some of the s. 13 paragraphs. I suggest that paragraph 4 [REDACTED] be included in those discussions.

## 2. Paragraphs 1 to 3 of the s. 13

A's next argument relates to the content of paragraphs 1 to 3 of the s. 13 notice. [REDACTED]

[REDACTED]

For purposes of this argument, paragraphs 2 and 3 are similar and need not be repeated.

A argues that paragraphs 1, 2 and 3 are void because they set out a legal standard of conduct and thereby run afoul of the prohibition against making findings of misconduct that would appear in the eyes of the public to be determinations of legal liability. In support, counsel for A relies on *Re Nelles and Grange* (1984), 46 O.R. (2d) 210, *Starr v. Houlden*, [1990] 1 S.C.R. 1366, and their mention in para. 43 of *Krever*. I do not accept this argument.

The language in paragraphs 1 to 3 is not couched in the language of criminal culpability or civil liability. In addressing an argument of this nature in the *Krever* case, Justice Cory stated, at para. 62:

“... there are many different types of normative standards, including moral, scientific and professional-ethical. To state that a person “failed” to do something that should have been done does not necessarily mean that the person breached a criminal or civil standard of conduct. The same is true of the word “responsible”. Unless there is something more to indicate that the recipient of the notices is legally responsible, there is no reason why this should be presumed.” [Emphasis in original]

In the following paragraph, he adds the following:

“There are phrases which, if used, might indicate a legal standard had been applied, such as finding that someone “breached a duty of care”, engaged in a “conspiracy”, or was guilty of “criminal negligence”. None of these words have been used by the Commissioner. The potential findings as set out in the notices may imply civil liability, but the Commissioner has stated he will not make a finding of legal liability, and I am sure he will not. In my view, no error was made by the Commissioner in sending out these notices.” [Emphasis in original]

In my view, this language is applicable to the case at hand. Paragraphs 1, 2 and 3 allege [REDACTED]

That language does not necessarily mean that [REDACTED] [he or she] breached either a criminal or civil legal standard. Moreover, the notice in this case does not use the type of wording described by Justice Cory, which could, in normal legal proceedings, be used to describe the basis of civil liability or criminal culpability. Finally, I point out that I will be careful, in preparing my report, not to make any findings of legal liability.

### **Bias/Timing**

A argues that Commission Counsel demonstrated bias or created an apprehension of bias in the manner that [REDACTED]

[REDACTED] Linked to this argument is a suggestion that Commission Counsel knew everything that eventually was included in the s. 13 notice, prior to that examination, and that he failed to issue the notice until after the examination had taken place. As I understand the argument, the combination of the bias shown in the examination and the late delivery of the notice should lead me to quash the s. 13 notice in its entirety.

Importantly, counsel for A emphasized that in making these submissions [REDACTED] was not suggesting that Commission Counsel acted in bad faith.

I will deal with the bias point first. In making this argument, it is suggested that the tone of the examination was prosecutorial and aggressive.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Clearly, Commission Counsel’s examination of A in this area was firm, much firmer than with the other two, but with good reason.

[REDACTED]



Commission Counsel, who will make the findings of fact with respect to A. Although it is often said that Commission Counsel is the Commissioner's alter ego in a public inquiry, that description is apt in relation to the conduct of the inquiry, but not to the function of making findings in the Commissioner's report. Fact finding is exclusively within the Commissioner's province.

The bias argument would only succeed if it could be shown that the conduct of Commission Counsel (perhaps linked in this case to the late delivery of the s. 13 notice) operated so as to raise a reasonable apprehension that I would not, in my report, be able to judge A's actions on the evidence fairly and impartially.

In the leading case on reasonable apprehension of bias in relation to a Commissioner, *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, Brigadier-General Beno was served with a s. 13 notice. During Beno's testimony, the Chairman interjected, pointing out that the witness had just contradicted evidence he had previously given in response to a question that the Chairman had put to him. The Chairman said that Beno would not "gain much by fiddling around". One week later, in an informal discussion with another senior officer who expressed the view that the Chairman had been unfair and aggressive in his treatment of Mr. Beno, the Chairman expressed the opinion that "Beno had not given straight answers and that perhaps Beno had been trying to deceive."

The Federal Court of Appeal overturned the decision of the trial judge, who had granted prohibition (prohibiting the Chairman from making findings adverse to Mr. Beno). After referring to the decision of Cory J. in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 644-645, the Court stated (at para. 27):

"Applying that test, we cannot but disagree with the findings of the Judge of first instance. A commissioner should be disqualified for bias only if the challenger establishes a reasonable apprehension that the commissioner would reach a conclusion on a basis other than the evidence. In this case, a flexible approach of the reasonable apprehension of bias test requires that the reviewing court take into consideration the fact that the commissioners were acting as investigators in the context of a long, arduous and complex inquiry. The Judge failed to appreciate this context in applying the test".

██████████ [Counsel], on behalf of A, did not extend ██████ bias argument to suggest that there was an apprehension that I would be biased in dealing with A in my report.

Next, I turn to the question of the timing of the s. 13 notice. ██████

██████████. The s. 13 notice was served ██████ [after A's testimony]. ██████ A argues that the matters raised in the notice were known to the Commission before ██████ testified on both occasions, and that ██████ should have been given the s. 13 notice prior to testifying. As a result, ██████ the failure to give notice in a timely manner operated unfairly ██████. ██████ submits that, while the content ██████ may not have been different, the tone might have been. ██████ suggests that it is possible that cross-examinations of other witnesses might have differed.

In the *Krever* case, Justice Cory dealt with the timing of s. 13 notices. In that case, the notices were given virtually at the conclusion of the evidence. In declining to strike the notices, Justice Cory pointed out that there is no statutory requirement that a Commissioner give notice as soon as he or she foresees the possibility of an allegation of misconduct. He went on to say, at para. 69:

“Although the notices should be given as soon as it is feasible, it is unreasonable to insist that the notice of misconduct must always be given early. There will be some inquiries, such as this one, where the Commissioner cannot know what the findings may be until the end or very late in the process. So long as adequate time is given to the recipients of the notices to allow them to call evidence and make submissions they deem necessary, the late delivery of notices will not constitute unfair procedure.”

He continues as follows:

“Further, the appellants were given an adequate opportunity to respond to the notices and to adduce additional evidence if they deemed it necessary. The notices were delivered on December 21, 1995 and the parties were initially given until January 10, 1996 to decide whether and how they would respond. This period was then extended following a request from the parties. The time permitted for the response was adequate; it cannot be said that the timing of the delivery of the notices amounted to a violation of procedural fairness”.

This has been a difficult and complicated Inquiry. The decision whether and when to give a s. 13 notice is a matter of judgment. ██████ [Counsel]

does not allege that there was bad faith in not issuing the notices before [REDACTED] [A's testimony].

Accepting, for the sake of argument, that the timing of the s. 13 notice could present some difficulty for A, the remedy is not to quash the s. 13 notice. Rather, the remedy is to provide A with an opportunity to respond to the matters raised in the notice if [REDACTED] considers that necessary.

It is important to bear in mind that the type of prejudice, flowing from the timing of a notice, that needs to be addressed is prejudice with respect to findings that may be made in my report. In this context, prejudice does not include critical commentary in the media following testimony at a public inquiry. As I said above, A has not, to date, suggested that if [REDACTED] had received notice before testifying that any [REDACTED] answers would have been different, nor [REDACTED] pointed to evidence of others that [REDACTED] would have been cross-examined differently.

[REDACTED]

A will, of course, have the opportunity to make full closing submissions to address the matters raised in the s. 13 notice. I have also indicated to A's counsel that, if the Commission's current schedule does not allow sufficient time [REDACTED] to take any of the steps referred to above [REDACTED] I can be spoken to in order to make the necessary adjustment.

I, therefore, decline to quash the s. 13 notice issued to A.

## MOTIONS OF B, C AND D

The Commission delivered s. 13 notices to each of the above, containing four paragraphs with virtually identical language. They each seek to quash the notices on a number of grounds.

### 1. Timing

The Commission delivered notices to each, [REDACTED] after they had testified [REDACTED] B and C seek to quash the notices on the basis of delay in issuing the notices. D does not challenge [REDACTED] on this basis.

B and C argue that questions put during their examinations and questions put to other witnesses during their examinations by Commission Counsel prior to the issuance of the s. 13 notices showed that ██████ B and C, were individuals about whom a “charge” was being made long before the issuance of the s. 13 notice. The delay, they contend, denied them the full opportunity to be heard. Moreover, given the amount of evidence heard by the Inquiry, it would be unreasonable to expect witnesses to be recalled and re-examined on the issues in s. 13 notices.

I do not accept these arguments. As I said above, the decision whether to issue s. 13 notices and when to do so is a matter of judgment. The Commission issued notices to these individuals after all of the ██████ [their employer’s] evidence had been heard *in camera* and could be evaluated.

As I said above, the remedy for late delivery of a notice is not to quash but to provide an opportunity to fairly respond. While I do not accept that the delivery of the notices to these two individuals was “late”, it is important to note that shortly after the notices were delivered, Commission Counsel wrote indicating that those individuals could have witnesses recalled for further cross-examination and could call evidence if they wished. To date, they have done nothing in response.

In their arguments, counsel for B and C did not point to any specific pieces of evidence which show that ██████ were prejudiced by not receiving the s. 13 notices earlier. It is worth noting that prior to receiving the s. 13 notices, B and C were represented by government counsel, who were fully informed of all the evidentiary issues relating to them.

Be that as it may, the offer to rectify any possible prejudice has now been outstanding for several months and has not been accepted.

Finally, I note that counsel for B and C complained about the amount of time necessary to review transcripts in order to prepare for final submissions. It is worth noting that the issues arising from the s. 13 notices issued to B and C are comparatively discrete in the context of the overall body of evidence. Further, government counsel, who are thoroughly familiar with all the evidence, have assisted the current counsel by directing them to the relevant portions of the evidence. Finally, in response to requests from these counsel and others, I have deferred the date to receive closing written submissions to September 19, 2005.

I decline the request to quash these s. 13 notices on the basis of timing.

## 2. Specificity/Lack of Standards

B, C and D moved to quash some paragraphs in the s. 13 notices on the basis that they lacked sufficient details to put them on notice of what may be found to be misconduct, and on the basis that the standards against which their actions may be viewed are not adequately set out.

In my view, it is premature to seek to quash the notices on either of these bases at this stage of the Inquiry. For one, the evidentiary portion of the Inquiry is not yet complete and closing submissions have not been received. I must be careful not to foreclose reasonable arguments that may be made by parties with standing in closing submissions. The quashing of a s. 13 notice in advance of hearing closing submissions, in effect, narrows the manner in which I may report on the matters referred to in the notice.

Second, it must be remembered that this is not a criminal or civil trial in which specific allegations are made and are then sought to be established. Section 13 notices do not contain charges or allegations, rather they provide notice of potential findings. The purpose of the notice is to provide procedural fairness – a chance to respond to the matters raised in the notice. The question of whether a particular notice provided a party with sufficient information (factual detail, or possibly a standard) to enable the party to fairly respond can best be assessed after a Commissioner has made findings in a report. The findings that may be made pursuant to a notice may vary. In the normal course, and absent reasonable grounds to believe that a Commissioner will exceed his or her jurisdiction, the question of whether the s. 13 recipient was able to fairly respond to a specific finding should await the report.

In this regard, the reasoning of Justice Cory in *Krever* is apt. In that case, Cory J. addressed challenges to the wording of s. 13 notices on the basis that the notices could lead impermissibly to findings of civil or criminal liability.

At para. 58, Justice Cory began by pointing out that the challenges were to notices, not to the contents of the report or specific findings. At para. 59, he further pointed out that the question is whether the Commissioner exceeded his jurisdiction in the notices delivered to the parties. He concluded that he had not. He went on at para. 60 to say:

“If the Commissioner’s report had made findings worded in the same manner as the notice, then further consideration might have been warranted. However, the appellants launched this application before the Commissioner’s findings had been released. Therefore, it is impossible to say what findings he will make or how they will be framed. Quite simply, the appellants have launched their challenge prematurely. As a general rule, a challenge such as this should not be brought before the

publication of the report, unless there are reasonable grounds to believe the Commissioner is likely to exceed his or her jurisdiction.”

It seems to me that the same general principles with respect to the prematurity of a challenge apply equally in the case of the types of challenges I am considering here.

In my view, even if valid, the challenges to the s. 13 notices do not establish an excess of jurisdiction at this stage of the Inquiry. Rather, the question of whether the notices provide sufficient notice of findings that may ultimately be made in my report can better be addressed after the findings are made.

All of that said, I agree with Justice Cory’s comment in *Krever* that the more detail that can be provided to the recipient of a notice, the better. Greater detail helps focus the issues and potentially saves time and expense. The countervailing interest, however, is not to narrow the notices unduly so as to limit the Commissioner’s discretion in making findings and comments on facts relevant to the mandate. That, too, would be premature at this stage.

It is important to note that, prior to these motions, as a result of requests for more detail, Commission Counsel have provided further detail for a number of the paragraphs in the notices. Further, I have now asked Commission Counsel to meet with counsel for each of the recipients of s. 13 notices with a view to discussing the provision of enhanced details wherever possible, including the details of the basis upon which conduct may be found wanting. In this regard, I am encouraged by the approach of government counsel, who act on behalf of four institutions and two individuals who have received s. 13 notices containing several dozen paragraphs in all. Government counsel quite reasonably took the position that even if there is a lack of detail or a lack of standards, these are not matters that go to my jurisdiction to conduct the Inquiry and should not result in the notices being quashed. Instead, he pointed to four paragraphs and suggested there may be a few others where the government would be assisted in making submissions by further details. I am sure that the discussions that will take place between Commission Counsel and government counsel will be of assistance in this regard.

Moreover, there may be an opportunity for further discussions about the notices after closing oral arguments and before the s. 13 recipients are required to file their submissions.

Finally, I wish to make a few comments about the submission that the paragraphs in the s. 13 notices need to be based on articulated or published standards or guidelines. I disagree.



### PUBLICATION OF THIS RULING

As indicated, this motion was heard *in camera*. This was because the parties indicated in advance that their arguments depended on referring to information covered by the government's national security confidentiality (NSC) claims. As it turned out in argument, except for the submissions relating to [REDACTED] [one matter] there was little reference to NSC information.

For the time being I am releasing this ruling only to the moving parties and to the government. I invite those parties and the government to include in their closing submissions their arguments, if any, why this ruling, subject to redactions for NSC claims, should not be made public.

At this time I am releasing a short public ruling indicating that I have heard motions *in camera* from certain s. 13 recipients seeking to quash the s. 13 notices and that I have dismissed those motions. I will also invite parties not involved in these *in camera* motions to make submissions on the issue of whether this ruling, redacted for NSC claims, should be made public. Depending on what submissions are received, I will provide opportunities to respond. Finally, I will issue a ruling in due course dealing with the publication of this ruling.

August 17, 2005



Justice Dennis R. O'Connor  
Commissioner

APPENDIX 6  
EVIDENCE AND CONFIDENTIALITY

APPENDIX 6(A)  
INITIAL DOCUMENT REQUEST LETTER

Commission of Inquiry into the  
Actions of Canadian Officials  
in Relation to Maher Arar



Commission d'enquête sur les  
actions des responsables canadiens  
relativement à Maher Arar

March 30, 2004

Ms Barbara McIsaac, QC  
McCarthy Tétrault LLP  
The Chambers  
Suite 1400, 40 Elgin Street  
Ottawa, ON  
K1P 5K6

**Re: Attorney General of Canada – Document Request #1**

Dear Ms McIsaac:

Please find enclosed Document Request #1 directed to the Attorney General of Canada. We have set out the documents that we require the government and its agents, servants, contractors, agencies, boards, commissions and Crown corporations to produce. As discussed, the document request is directed to the Attorney General of Canada rather than being separately directed to each of the departments, agents, servants, contractors, agencies, boards, commissions and Crown corporations which may have possession, custody or control of relevant documents. We have agreed to this suggestion as it will expedite the request and production process. We understand that in making this suggestion, the Attorney General represents that for the purposes of this document request, he has the same powers of possession, custody and control as any of the other departments of government, agents, servants, contractors, agencies, boards, commissions and Crown corporations referred to in the document request.

In addition, please note the following:

1. The government may provide copies of all documents, and may provide electronic copies of all documents, although the Commission may require originals to be produced upon request.

PO Box / CP 507, Station B / Succursale B  
Ottawa, Canada K1P 5P6

613 996-4741 Fax / télécopieur 613 992-2366

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- 2 -

2. Further to our letter of March 24, 2004, we expect that all issues respecting claims of privilege and confidentiality are to be deferred until Commission Counsel indicate to you that they propose to use the documents in any manner other than for the purposes of internal review by persons retained by the Commission who have obtained security clearances.

3. The document request is a continuing request. The obligation to produce thus extends to documents which are created after the date of the document request.

4. Commission counsel may make supplementary document requests.

5. The Commissioner will require, prior to the time he delivers his report, that the Attorney General of Canada complete a certificate of production of documents. The Commissioner will require that the Attorney General certify that he directed the government and its agents, servants, contractors, agencies, boards, commissions and Crown corporations to conduct a diligent search for the documents in any way related to Maher Arar as listed in the document request(s); that he established a system to ensure that the document request(s) were acted upon appropriately; and that he is fully satisfied that all documents requested by the Commission in the document request(s) have been produced to the Commission.

6. We request that documents be provided to the Commission as they become available, rather than waiting until all document searches have been completed. This is important to eliminate any delays in starting the Inquiry process.

Thank you for your cooperation in this matter. Please do not hesitate to contact me should you have any questions or comments.



Paul Cavalluzzo  
Senior Commission Counsel

COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN  
OFFICIALS IN RELATION TO MAHER ARAR

**A.G. (Canada) Document Request No. 1**

**TO:** The Attorney General of Canada

**DATE:** March 30, 2004

**A. DEFINITIONS**

**“document”** refers to any written or electronic record, including faxes, telex, e-mail as well as any audiotape or electronic capture of oral information in the possession, custody or control of the Government of Canada or any of its agents, servants, contractors, agencies, boards, commissions and Crown corporations, anywhere in the world, including material in off-site storage or which has been archived, in relation to the matters set out below.

**“Government”** means the Government of Canada, including its agents, servants or contractors, agencies, boards or commissions, including all Crown corporations, unless otherwise specified.

**B. TIME FRAME**

In this request, unless otherwise specified, production is requested for all documents created or collected in the period from September 11, 2001 to February 5, 2004, unless the Government has knowledge of documents specific to Mr. Arar which were created prior to September 11, 2001.

**C. DOCUMENT REQUEST**

1. All documents in any way related to Maher Arar and the actions of Canadian officials in relation to Maher Arar, including:
  - (i) the detention of Mr. Arar in the United States,
  - (ii) the deportation of Mr. Arar to Syria via Jordan,
  - (iii) the imprisonment and treatment of Mr. Arar in Syria,
  - (iv) the return of Mr. Arar to Canada, and
  - (v) any other circumstance directly related to Mr. Arar,

which are within the possession, custody or control of the Government, including, without limitation, the following Departments and agencies:

- (a) The Department of Foreign Affairs and International Trade,

- (b) The Department of National Defence;
- (c) The Department of the Solicitor General;
- (d) The Department of Justice;
- (e) The Privy Council Office;
- (f) The Prime Minister's Office.
- (g) Citizenship and Immigration Canada;
- (h) The Royal Canadian Mounted Police;
- (i) The Financial Transactions and Reports Analysis Centre of Canada;
- (j) The Canadian Security Intelligence Service;
- (k) The Canada Revenue Agency; and
- (l) The Communications Security Establishment.

#### **D. DESTRUCTION/LOSS OF CONTROL**

If the Government has knowledge of any documents relevant to this document request which (a) were in its possession, custody or control but are no longer, or (b) have been destroyed, the Government is to identify the documents and explain the circumstances leading to loss of possession, custody or control or the destruction.

Dated at Ottawa this 30<sup>th</sup> day of March 2004.



Justice Dennis R. O'Connor  
Commissioner

APPENDIX 6(B)  
**SAMPLE UNDERTAKINGS REGARDING  
 CONFIDENTIALITY**

Commission of Inquiry into the  
 Actions of Canadian Officials  
 in Relation to Maher Arar



Commission d'enquête sur les  
 actions des responsables canadiens  
 relativement à Maher Arar

**UNDERTAKING OF PARTIES AND INTERVENORS  
 TO THE COMMISSION OF INQUIRY INTO THE  
 ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR**

I undertake to the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar that any document or information which is disclosed to me in connection with the Commission's proceedings will not be used by me for any purpose other than those proceedings and for no other purpose. I further undertake that I will not disclose any such documentation or information to anyone.

I understand that this undertaking will have no force or effect with respect to any document or information which becomes part of the public record of the Commission, or to the extent that the Commissioner may release me from the undertaking with respect to any document or information. For greater certainty, a document is part of the public record once the document is made an exhibit at the Inquiry.

With respect to those documents or information which remain subject to this undertaking at the end of the Inquiry, I further understand that such documents or information will be collected from me by my counsel who disclosed them to me.

\_\_\_\_\_  
 Signature

\_\_\_\_\_  
 Witness

\_\_\_\_\_  
 Date

\_\_\_\_\_  
 Date

Commission of Inquiry into the  
Actions of Canadian Officials  
in Relation to Maher Arar



Commission d'enquête sur les  
actions des responsables canadiens  
relativement à Maher Arar

UNDERTAKING OF COUNSEL  
TO THE COMMISSION OF INQUIRY INTO THE  
ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR

I undertake to the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar that any and all documents or information which are disclosed to me in connection with the Commission's proceedings will not be used by me for any purpose other than those proceedings and for no other purpose. I further undertake that I will not disclose any such information or documents to anyone for whom I do not act, and to anyone for whom I act only upon the individual in question giving the written undertaking annexed hereto. In the event I act for a coalition, I will disclose such documents and information to anyone who is a member of that coalition only upon the individual in question giving the written undertaking annexed hereto.

I understand that this undertaking has no force or effect once any such document or information has become part of the public record of the Commission, or to the extent that the Commissioner may release me from the undertaking with respect to any document or information. For greater certainty, a document is part of the public record once the document is made an exhibit at the Inquiry.

With respect to those documents or information which remain subject to this undertaking at the end of the Inquiry, I undertake to either destroy those documents or information, and provide a certificate of destruction to the Commission, or to return those documents to the Commission for destruction. I further undertake to collect for destruction such documents or information from anyone to whom I have disclosed any documents or information which were produced to me in connection with the Commission's proceedings.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

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Ottawa, Canada K1P 5P6  
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## APPENDIX 6(C)

## CERTIFICATE OF PRODUCTION OF DOCUMENTS

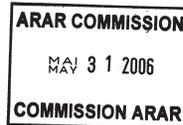


Department of Justice  
Canada

284 Wellington Street  
Level AA  
Ottawa, Ontario  
K1A 0H8

Ministère de la Justice  
Canada

Telephone: (613) 948-9800  
Facsimile: (613) 948-9802



Our File Number: 2-365619

May 31, 2006

**BY HAND**

Mr. Paul Cavalluzzo  
Lead Commission Counsel  
Commission of Inquiry into the Actions of  
Canadian Officials in Relation to Maher Arar  
1720 - 66 Slater Street  
Ottawa ON K1P 5K6

Dear Mr. Cavalluzzo:

**Re: Certificate of Production of Documents**

Please find enclosed the Government of Canada's Certificate of Production of Documents. The Certificate has been signed on behalf of the Attorney General of Canada by Mr. William Pentney, Senior Assistant Deputy Minister, Policy Sector, Department of Justice. Mr. Pentney is the senior official responsible for the Government's legal representation before the Commission of Inquiry, and he has been involved in its proceedings from their inception.

We trust that the foregoing is satisfactory.

Yours truly,

Simon Fothergill  
Senior Counsel  
Civil Litigation Section

Encl.

Canada

**COMMISSION OF INQUIRY INTO THE  
ACTIONS OF CANADIAN OFFICIALS  
IN RELATION TO MAHER ARAR**

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**CERTIFICATE OF PRODUCTION OF DOCUMENTS**

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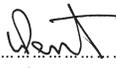
I, William Pentney, Senior Assistant Deputy Minister, Policy Sector, Department of Justice (Canada), of the City of Ottawa, in the Province of Ontario, representative of the Attorney General of Canada, have made the necessary enquiries of others to inform myself in order to make this Certification and, to the full extent of my knowledge, information and belief, based on those enquiries, do **CERTIFY THAT**:

1. The Attorney General of Canada received document requests from the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the "Commission").
2. In accordance with the document request and correspondence from the Commission dated March 30, 2004, the search for documents was restricted to documents created in the period from September 11, 2001 to February 5, 2004, unless the Government of Canada had knowledge of documents specific to Mr. Arar which were created prior to September 11, 2001 and unless otherwise specifically directed by the Commission. Throughout the hearings of the Commission further document requests were made.

- 2 -

3. The Attorney General of Canada directed the government and its agents, servants, contractors, agencies and departments to conduct a diligent search of the paper-based and electronically-maintained documents in the possession, custody or control of the Government of Canada in response to the Commission's document requests and any subsequent communication with the Commission which requested all documents relevant to the subject-matter of the Inquiry. The vast majority of these documents originated with the Royal Canadian Mounted Police, the Department of Foreign Affairs and International Trade, the Canadian Security Intelligence Service, the Canadian Border Services Agency (formerly the Canada Customs and Revenue Agency), the Department of Public Safety and Emergency Preparedness (formerly the Department of the Solicitor General), and the Privy Council Office.
4. The Attorney General of Canada established a system to ensure that the document requests were acted upon appropriately and I am fully satisfied that all the documents requested by the Commission, as referenced in paragraph 3 above, have been produced to the Commission.
5. If the Attorney General of Canada or counsel for the Government learn, before the public release of the Commissioner's interim report(s) that this Certification was based on incorrect information, the Commission shall be contacted forthwith with the correct information.

Date: May 25, 2006

  
.....  
Signature

APPENDIX 6(D)  
**RULING ON CONFIDENTIALITY**

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## RULING ON CONFIDENTIALITY

### I. INTRODUCTION

I have been appointed by Order in Council P.C. 2004-48 (the Terms of Reference) to investigate and report on the actions of Canadian officials in relation to Mr. Maher Arar and to make recommendations on an independent arm's length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security.

The final Rules of the Inquiry have now been finalized and copies circulated to parties and intervenors. The Rules have been posted on the Commission website.

I have received submissions with respect to national security confidentiality from many of the parties and intervenors. These submissions have proven to be very helpful and they have assisted me in designing what I think will be the most effective process for addressing national security confidentiality in a way that is thorough, fair and consistent, as well as expeditious.

This ruling concerns matters relating to the public disclosure of information that is subject to a claim of national security confidentiality (NSC); that is, a claim that disclosure of the information would be injurious to international relations, national defence or national security. The ruling deals with the motion by counsel for Mr. Arar that information over which the Attorney General of Canada has claimed NSC, but which is in the public domain, be disclosed. The ruling also deals with questions of interpretation arising from sections (k)(i) and (k)(iii) of the Inquiry Terms of Reference and from the *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38 and Schedule. Finally, the ruling outlines how the Inquiry process will proceed with respect to the information and evidence that is subject to an NSC claim.

### LEGAL BACKGROUND

My mandate, as provided for in the Terms of Reference, is as follows:

- (a) to investigate and report on the actions of Canadian officials in relation to Maher Arar, including with regard to:
  - (i) the detention of Mr. Arar in the United States,
  - (ii) the deportation of Mr. Arar to Syria via Jordan,
  - (iii) the imprisonment and treatment of Mr. Arar in Syria,
  - (iv) the return of Mr. Arar to Canada, and

- (v) any other circumstances directly related to Mr. Arar that the Commissioner considers relevant to fulfilling this mandate.

The Terms of Reference also contain provisions with respect to information which, if disclosed, would be injurious to international relations, national defence or national security. In particular, I am directed as follows:

....

- (k) ... in conducting the inquiry, to take all steps necessary to prevent disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security and, where applicable, to conduct the proceedings in accordance with the following procedures, namely,
  - (i) on the request of the Attorney General of Canada, the Commissioner shall receive information *in camera* and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information would be injurious to international relations, national defence or national security,
  - (ii) in order to maximize disclosure to the public of relevant information, the Commissioner may release a part or a summary of the information received *in camera* and shall provide the Attorney General of Canada with an opportunity to comment prior to its release, and
  - (iii) if the Commissioner is of the opinion that the release of a part or a summary of the information received *in camera* would provide insufficient disclosure to the public, he may advise the Attorney General of Canada, which advice shall constitute notice under section 38.01 of the *Canada Evidence Act*.

....

- (m) nothing in this Order shall be construed as limiting the application of the provisions of the *Canada Evidence Act*.

The provisions of the *Canada Evidence Act* which are relevant to issues addressed in this ruling are appended as Appendix "A".

## II. THE MOTION FOR DISCLOSURE

Counsel for Mr. Arar filed a motion, dated May 30, 2004, for disclosure of records in the possession of the government that contain or relate to information that is

already in the public domain. The motion is supported by a number of the intervenors. Counsel for the Attorney General responded to the motion in writing; those submissions were supported by the Ontario Provincial Police. Oral submissions by counsel for Mr. Arar and the Attorney General were heard at a hearing on July 5, 2004. Mr. Ronald Atkey, *amicus curiae* for matters of national security confidentiality, also made submissions at the hearing.

#### A. THE NATURE OF THE MOTION

Counsel for Mr. Arar sought orders that the government disclose all records that contain information that is in the public domain or that becomes public during the Inquiry or that is subsumed or made obvious by information in the public domain, and records that contain information emanating from Mr. Arar or his counsel or that were disclosed to Mr. Arar by officials in the United States and Syria. This motion included requests for any information disclosed:

- to and by Mr. Arar during questioning in the U.S. and Syria;
- to and by Mr. Arar’s counsel, Mr. Michael Edelson and Mr. James Lockyer;
- to and by Ms. Monia Mazigh during questioning in Tunisia;
- as a result of the release of files to Ms. Juliet O’Neill of the Ottawa Citizen;
- by Canadian government officials in Hansard, in appearances before parliamentary committees, to the media, and under the *Access to Information Act* and *Privacy Act*;
- by U.S. government officials to the media;
- by Syrian government officials to the media; and
- by unnamed media sources.

Counsel for Mr. Arar submitted a detailed compendium of public information relating to Mr. Arar, collected from official sources and from media reports. Counsel sought disclosure of specific documents that she was able to identify, including an unedited version of the U.S. order removing Mr. Arar to Syria and the decision of the regional director, both dated October 7, 2004, copies of Mr. Arar’s statements to U.S. and Syrian authorities, contents of a “JSTF file” that was reportedly the basis for Ms. Juliet O’Neill’s article of November 8, 2003 in the Ottawa Citizen, contents of a “Syrian file” on Mr. Arar that was reportedly given to the Canadian government, contents of a “Tunisian file” that was allegedly shown to Ms. Mazigh during questioning in Tunisia, and a copy of Mr. Edelson’s statement to Superintendent Garvie during the investigation into Mr. Arar’s case by the RCMP Complaints Commissioner.

Counsel also sought disclosure of information concerning certain events or matters relating to Mr. Arar, such as investigations into suspected terrorist activities in Canada and the U.S. in the period preceding Mr. Arar's detention, information-sharing between Canada and the U.S., communications between police and Mr. Edelson, the government practice of extraordinary rendition, and alleged "leaks" about Mr. Arar before and after his return to Canada.

## **B. THE SUBMISSIONS OF THE PARTIES**

### **1. Mr. Arar**

The essence of Mr. Arar's motion is the submission that no valid NSC claim can be made over information that is in the public domain. Thus, all relevant government documents that contain information that is in the public domain should be publicly disclosed. Counsel for Mr. Arar offered two arguments to support this submission. The first was that, in the context of a public inquiry, information that is in the public domain simply cannot be privileged. Therefore, section (k) of the Inquiry Terms of Reference does not apply to documents that contain such information. As such, I have the discretion to reject an NSC claim that relates to information in the public domain on the ground that the claim is an abuse of the government's authority to make NSC claims.

Alternatively, Mr. Arar's counsel argued that, if section (k) does apply to the Attorney General's claims of NSC, then the fact that information is already in the public domain means that the disclosure of documents containing such information would not be injurious to international relations, national defence or national security (the elements of NSC) since whatever injury would be caused by disclosure has already occurred.

### **2. The Attorney General**

Counsel for the Attorney General submitted that the motion by counsel for Mr. Arar was both improper and premature. The motion was improper because, in the context of an inquiry, a party receives information from the commission of inquiry, not from other parties to the inquiry. It is therefore beyond my jurisdiction to make an order, as sought by Mr. Arar, for the government to produce information either to Mr. Arar or to the public.

Counsel for the Attorney General submitted that the motion was premature because, in considering the government's NSC claims, it is necessary for me to hear the evidence that informs such claims with respect to specific documents and information. It would be inappropriate for me to rule on NSC claims in the abstract without having heard the underlying evidence that gives rise to the

claim. That underlying evidence will become known to me at the Inquiry's *in camera* hearings.

Counsel for the Attorney General also argued that information reported in the media might not be legitimately in the public domain. Media reports could be inaccurate. Where disclosure was unauthorized or otherwise illegitimate, media reports should not trigger the disclosure of the documents that verify or dispute that information.

On the other hand, counsel for the Attorney General characterized the fact that information was legitimately in the public domain as a strong factor in the determination of whether the information should be heard in public. Further, it was accepted that the objective of the Attorney General at the Inquiry is to maximize the public disclosure of relevant information.

Finally, counsel for the Attorney General dealt with a number of the specific documents referred to in the submissions of counsel for Mr. Arar. With respect to the U.S. deportation documents of October 7, 2004, counsel indicated that the government does not have an unredacted copy of those documents to produce. Counsel also indicated that the government has no information about information disclosed to Ms. Mazigh in Tunisia. With respect to Mr. Edelson's statement to Superintendent Garvie, that statement has been produced to the Commission and, like other documents over which the government has made no NSC claim, it can be disclosed. In the case of Ms. O'Neill's article of November 8, 2003, counsel submitted that the Inquiry should await the determination of matters of confidentiality in the ongoing proceedings before Ratushny J. of the Superior Court.

### C. THE SUBMISSIONS OF MR. ATKEY

Mr. Atkey submitted that, in his view, the motion was not premature and raised important issues concerning the disclosure of information that is relevant to the Inquiry. What might be premature would be an immediate decision on my part to grant the order without further review, at an *in camera* hearing, of the specific documents that relate to information that is in the public domain. In this regard, the motion record would be extremely helpful.

Mr. Atkey also submitted that the issue whether information is legitimately in the public domain appears to go to the core of the mandate of the Inquiry to determine whether the conduct of government officials was improper because, for example, unauthorized disclosures might have taken place in order to harm Mr. Arar's reputation.

#### D. RESOLUTION

The government's argument that the motion was improper because it seeks disclosure from the government rather than the Commission is technically correct but of no consequence. I will deal with the motion as if it sought disclosure from the Commission.

I agree with Mr. Atkey that the motion was not premature and that it has been a useful exercise. The motion has raised important issues concerning not only the disclosure of information that is already public but also the authority and process of this Commission generally, in relation to the disclosure of other relevant information. Nevertheless, I am not presently in a position to rule on the release of specific documents because I have not heard evidence about the circumstances surrounding the government's production or receipt of such documents. Further, I have not heard the evidence that the Attorney General may wish to call to support its NSC claims.

I have reviewed a summary of a number of documents, subject to an NSC claim, that appear to relate to information that is in the public domain. I did so in order to make a preliminary assessment of whether it would be possible for me, at this stage, to form an opinion whether disclosure of such documents would be injurious to any of the elements of NSC. In almost every case, I find it necessary to hear further evidence before making that decision. This is especially so in the case of documents received from foreign governments and in the case of documents relating to alleged "leaks" by Canadian government officials to the media.

Moreover, in the case of many of the NSC claims, I will be better able to evaluate the significance of the claim when it can be put in the context of the overall body of evidence over which NSC is claimed.

That said, I think that it is useful in this ruling to address several matters that were raised in argument.

First, counsel for the Attorney General, in her submissions, indicated that the government would make its best efforts to limit its NSC claims wherever possible. She also agreed that it would be inappropriate for the Attorney General to make NSC claims that were overinclusive, as a "first cut" for later negotiations with Commission counsel regarding the validity of such claims. I commend her for taking that approach. In my view that is the proper approach and counsel for the Attorney General should do everything she can to ensure that it is followed.

In her submissions, counsel for Mr. Arar submitted that I may reject an NSC claim by the Attorney General on the basis that it is improper because the

information is already in the public domain. In such a case she argues that I need not consider the test in section (k) of the Terms of Reference as to whether disclosure would be injurious to NSC. I do not accept that argument. No such authority is expressly granted to me in the Terms of Reference. More importantly, the language of section (k)(i) supports the contrary view. It states that, on the request of the Attorney General, I “shall” receive information in an *in camera* hearing if I am of the opinion that disclosure of the information would be injurious to any of the elements of NSC. It follows that, to reject an NSC claim, I must first decide that disclosure would not be injurious.

In her submissions, counsel for Mr. Arar made reference to a number of cases regarding claims of privilege over information that is already in the public domain, including the decision in *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3. In that case, the Supreme Court of Canada rejected a claim of cabinet privilege by the government, acting as the defendant in a civil lawsuit, over documents that had been previously disclosed to the plaintiffs. The reasoning in *Babcock* appears highly relevant to a determination under section (k)(i) with respect to information that the government has previously made public. However, the issue of whether section (k)(i) applies at all turns on the language of the Terms of Reference and I do not think that *Babcock* or the other case law helps to resolve that issue.

Counsel’s second argument is that the fact that information is in the public domain means that disclosure would not be injurious to international relations, national defence or national security. I agree that the fact that information contained in a document is in the public domain is an important factor in the assessment of whether disclosure of that document would itself be injurious to the elements of NSC. In other instances where privilege is sought, such as solicitor-client privilege and cabinet privilege, the fact of previous disclosure removes the privilege. That said, I do not think that the fact that information is in the public domain is necessarily conclusive of the issue under section (k)(i). Ultimately, the test is always whether disclosure would be injurious to an element of NSC; however, it is a matter of common sense that previous disclosure will tend to significantly weaken if not defeat the claim that further disclosure would be injurious.

Finally, it may be useful if I offer comments on some of the specific documents that were discussed during argument of the motion.

The Commission is not aware of the government having produced to the Inquiry documents originating in a “Tunisian file” on Mr. Arar and counsel for the Attorney General has indicated that the government has no information on such a file.

NSC claims over information about Mr. Arar that was provided to the Canadian government by U.S. or Syrian authorities generally implicate assurances provided by the Canadian government to those states with respect to information sharing. On reviewing a number of such documents, I find it necessary to hear further evidence before forming an opinion on NSC.

A copy of Mr. Edelson's statement to Superintendent Garvie was provided to counsel for Mr. Arar, in order to prepare for Mr. Edelson's testimony.

Commission counsel has requested that the Attorney General reconsider NSC claims with respect to a number of specific documents including certain documents that relate to police communications with Mr. Edelson and with family members of Mr. Arar. Commission counsel has also requested the Attorney General to reconsider NSC claims over certain documents that originate in Canada and that were allegedly shown to Mr. Arar during his detention in the U.S. I will consider whether to issue a ruling concerning those documents once the Attorney General has responded to these requests.

Finally, I agree with the submissions of counsel for the Attorney General that documents that relate to Ms. O'Neill's article of November 8, 2003 should not be disclosed until Ratushny J. has resolved matters of confidentiality presently before her, unless an application is brought before her by a party to the Inquiry.

### III. SECTION (k)(i) OF THE TERMS OF REFERENCE

On June 24, 2004, the Commission sent two questions to counsel for Mr. Arar and the Attorney General. The questions are attached as Appendix "B".

The questions were sent in order to invite further submissions on specific issues that arose in the context of my consideration of matters of confidentiality and the overall Inquiry process. They did not reflect any determination by me.

The first question raised the issue of the procedural steps that follow a decision by me under section (k)(i) that the disclosure of information that is subject to an NSC claim would not be injurious to any of the elements of NSC. In the event of my reaching such a decision, the question was framed to suggest that such information could be released to the public after a period of 10 days following the Attorney General's receipt of my decision, unless the Attorney General notified the Commission within that period that he would apply to Federal Court for an order to prohibit release under s. 38 of the *Canada Evidence Act*. The Attorney General objected to this interpretation of section (k)(i) on the basis that it was contrary to the *Canada Evidence Act*.

## A. THE SUBMISSIONS OF THE PARTIES

### 1. The Attorney General

Counsel for the Attorney General submitted that, despite a decision by me under section (k)(i) of the Terms of Reference that disclosure of information would not be injurious to international relations, national defence or national security, such information remains “potentially injurious information” and “sensitive information” under s. 38 of the *Canada Evidence Act*. The provisions of s. 38 apply generally to the process of the Inquiry and are not modified by the Inquiry Terms of Reference. Indeed, section (m) of the Terms of Reference expressly states that those Terms must not be construed so as to limit the application of the provisions of the *Canada Evidence Act*.

Therefore, the Commission may not disclose information that is subject to an NSC claim, even after I have decided that disclosure would not be injurious to any of the elements of NSC, unless the Attorney General authorizes its release under s. 38.03 or s. 38.031 of the *Canada Evidence Act* or unless a Federal Court judge authorizes disclosure under s. 38.06(1) or (2). If the Commission wishes to disclose such information without authorization by the Attorney General, and if the Attorney General does not bring an application in the Federal Court, the Commission may apply to Federal Court, under s. 38.04(2)(c), for a judicial order authorizing disclosure. The Commission may do so after a period of 10 days following the Attorney General’s receipt of my decision that disclosure would not be injurious to any of the elements of NSC.

The Commission is listed as a designated entity under the Schedule to the *Canada Evidence Act*. The purpose of this designation, according to counsel for the Attorney General, was to enable the government to produce potentially injurious and sensitive information to the Commission without triggering the application of s. 38.01(1) to (4) and the resulting procedural regime. However, the designation of the Commission in the Schedule does not allow the Commission to publicly release information, the disclosure of which I have decided would not be injurious, absent authorization by the Attorney General or a Federal Court judge. This is supported by the inclusion of the words “except where the hearing is in public” in the designation of the Commission in the Schedule.

Further, counsel for the Attorney General submits that s. 38.02(1.1) does not authorize the Commissioner to publicly release information, the disclosure of which I have decided would not be injurious to any of the elements of NSC, absent authorization by the Attorney General or a Federal Court judge. This section reads as follows:

“(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.”

This section requires the entity not to disclose potentially injurious or sensitive information that is contained in a decision until after a period of 10 days following the Attorney General’s receipt of notice of the decision. Counsel for the Attorney General pointed out that this section is silent with respect to what happens after notice is given to the Attorney General. As such, the section does not expressly oblige the Attorney General to respond in any way to a decision by a designated entity. For this reason, and in light of section (m) of the Terms of Reference, s. 38.02(1.1) does not authorize the Commission to publicly release information, disclosure of which I have decided would not be injurious to any of the elements of NSC, absent authorization by the Attorney General or a Federal Court judge.

Finally, I note that the Attorney General’s submissions were consistent with a supplementary request by the government, received by the Commission on June 22, 2004, to amend Rule 50(b), Rule 55, and Rule 56 of the Inquiry Rules of Procedure and Practice.

## 2. Mr. Arar

Counsel for Mr. Arar submitted that the Commission may disclose information once I have decided that disclosure would not be injurious to any of the elements of NSC, unless the Attorney General takes positive steps to prevent such disclosure. Section 38.01 of the *Canada Evidence Act* does not apply to the Commission because the Schedule lists the Commission as a designated entity “for the purposes of the inquiry”. In the listing in the Schedule, the inclusion of the words “except where the hearing is in public” is intended to require me to form my opinion whether disclosure would be injurious at an *in camera* hearing, not to prevent the public disclosure of information once I have decided that its disclosure would not be injurious.

Further, it is not logical for the Inquiry to go through the time-consuming and expensive activity of reaching a decision on an NSC claim by the Attorney General, as contemplated by section (k)(i) of the Terms of Reference, if that decision did not take precedence over the Attorney General’s initial NSC claim. Where the government objects to disclosure by the Commission, following a

decision by me, the option that is available to the Attorney General is to issue a certificate under s. 38.13 that prohibits disclosure. This interpretation is consistent with the *Canada Evidence Act* and has the benefit of maximizing and facilitating disclosure in the context of a public inquiry.

## B. RESOLUTION

The issue is whether under the provisions of s. 38 of the *Canada Evidence Act* I am prohibited from disclosing information, the disclosure of which I have decided would not be injurious to international relations, national defence or national security, once 10 days have elapsed from the date on which notice of my decision was given to the Attorney General, in circumstances where the Attorney General has neither agreed to the disclosure nor applied to the Federal Court to prohibit disclosure. If I am prohibited from disclosing such information, the only recourse open to me would be to bring an application to the Federal Court to authorize the disclosure.

The provisions of s. 38 of the *Canada Evidence Act* were enacted in December, 2001 as part of Bill C-36, the government's anti-terrorism legislation. I was not referred to any cases in which the question of the interpretation of the subsections in issue here have been considered by a court.

Unfortunately, the provisions of s. 38 do not provide a clear answer to the question. It is difficult to fit decisions made by listed entities referred to in s. 38.02(1.1) into the statutory scheme that applies when notice is given to the Attorney General under s. 38.01. It is clear, however, that whatever interpretation of s. 38 is adopted, the Attorney General must be given notice of a decision by a listed entity that would result in disclosure of such information, and, in my view, the Attorney General has the means to challenge such a decision either in the Federal Court or by issuing a certificate under s. 38.13.

The Commission raised this issue relating to section (k)(i) in the hope of resolving a potential procedural problem at an early stage in order to avoid delay later in the process. However, I have concluded that it does not make sense for me to opine on this issue at this stage. As I have said, the answer is far from clear. Moreover, the issue may never actually arise in the context of the Inquiry. The Attorney General may not disagree with my disclosure decisions or, if he does, he may bring an application to have the decisions reviewed in the Federal Court. It would only be in the situation where the Attorney General remains silent for 10 days after receiving notice of my decision that I would have to confront the issue at hand. It is my hope that this situation will not arise.

Let me add a few observations. Whatever interpretation one adopts, it seems to me that it would be unusual to require the entities listed in the

Schedule to the *Canada Evidence Act* to bring applications to a Federal Court judge for disclosure of the information contained in their decisions. This would be particularly unusual given that many of the listed entities are Federal Court judges. I am not aware of any procedural regime requiring one judge to bring an application before another. A more common approach, of course, is that where a person, such as the Attorney General wishes to challenge a decision, then that person is required to bring an application to seek judicial review. In any event, I leave the resolution of this issue for another day and, preferably, for another listed entity or a court.

Finally, I address the submission of Mr. Arar's counsel as to the options available to the Attorney General if he objects to disclosure within the 10 day period. Depending on the resolution of the issue discussed above, the Attorney General may have the option of doing nothing. Counsel for Mr. Arar submitted that the only option that is available to the Attorney General at this stage is to issue a certificate under s. 38.13. The other possibility is that the Attorney General could apply to the Federal Court pursuant to s. 38.04(1) for an order prohibiting the disclosure of information about which I have made a decision under section (k)(i).

I am satisfied that both of these options are available to the Attorney General. If, on receiving notice of a decision referred to in s. 38.02(1.1) it is necessary for there to be a s. 38.01 notice to the Attorney General in order for the Attorney General to bring an application under s. 38.04(1), I am satisfied that it is open to those involved in the Inquiry proceedings on behalf of the government to give notice to the Attorney General under s. 38.01(1) to (4) that sensitive or potentially injurious information could be disclosed.

In particular, s. 38.01(2) requires any "participant" in a proceeding "who believes that sensitive information or potentially injurious information is about to be disclosed" to raise the matters with the person presiding at the proceeding and to notify the Attorney General. Section 38.01(3) and (4) authorize an "official" to notify the Attorney General or to raise the matter with the person presiding at the proceeding in similar circumstances. In the context of this Inquiry, if a matter of this nature is raised with me then I, as the person presiding, must "ensure that the information is not disclosed other than in accordance with this Act". Finally, s. 38.04(1) authorizes the Attorney General to apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under s. 38.01. In light of these provisions, I do not think that the Attorney General's options to respond to a decision under section (k)(i) are limited to the issuance of a certificate under s. 38.13.

#### IV. SECTION (k)(iii) OF THE TERMS OF REFERENCE

The Inquiry Terms of Reference contemplate that I will make two types of decisions with respect to information, the disclosure which the Attorney General claims would be injurious to international relations, national defence or national security. Under section (k)(i) I am directed to hear information *in camera* on the request of the Attorney General if I am of the opinion that disclosure of that information would be injurious to any of the elements of NSC. The second type of decision I am required to make relates to the public interest. The combined effect of sections (k)(ii) and (k)(iii) of the Terms of Reference is that if, after hearing information *in camera*, I am of the opinion that the summary of that information that is acceptable to the Attorney General provides inadequate disclosure to the public, then I may so advise the Attorney General and this advice constitutes notice under s. 38.01 of the *Canada Evidence Act*. Thus, if I am of the opinion that partial or non-disclosure of relevant information – the disclosure of which, I have previously concluded, would be injurious to any of the elements of NSC – is inadequate, then I may so advise the Attorney General. That notice triggers the process found in s. 38.01 and after of the *Canada Evidence Act*.

To the extent that counsel for Mr. Arar or the Attorney General made submissions on the operation of section (k)(iii), those submissions related to matters of disclosure that are dealt with in part V of this ruling. Here, I will briefly indicate my interpretation of section (k)(iii).

Although what constitutes “inadequate disclosure to the public” is not defined in the Terms of Reference, I am of the view that the process set out in the Terms of Reference contemplates that I should, at this stage, apply the same test that a reviewing judge would apply under s. 38.06(2) of the *Canada Evidence Act*. That section reads as follows:

“(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.”

The result of deeming my advice that there is inadequate disclosure to the public to be notice under s. 38.01 would, if the matter runs its course, lead to a determination by a Federal Court judge under s. 38.06(2) of the *Canada Evidence Act*. If the opinion I reach under section (k)(iii) of the Terms of Reference is to be reviewed on the basis of the test in s. 38.06(2) then it is logical that my opinion should be based upon the same test. The reviewing court should have the benefit of my views on the same public interest balancing test that it will be called upon to apply.

In summary, the Terms of Reference call for two decisions: would release of the information be injurious to international relations, national defence or national security and, if so, would it nonetheless be in the public interest to release such information. The Terms of Reference make clear that the second decision can only be made after the evidence in issue has been heard *in camera*.

If I decide, under section (k)(iii), that the release of a part or a summary of the information received *in camera* would provide insufficient disclosure to the public, then I am required to advise the Attorney General, and such advice constitutes notice under s. 38.01 of the *Canada Evidence Act*. Once notice is given, pursuant to section (k)(iii), the Commission is required not to disclose the information to which my decision relates without authorization or agreement by the Attorney General or an order by a Federal Court judge.

## V. DISCLOSURE PROVISIONS OF THE *CANADA EVIDENCE ACT*

The questions posed by the Commission to counsel for Mr. Arar and the Attorney General implied that the Commission is subject to the non-disclosure provisions found in s. 38.02(1)(a) to (d) of the *Canada Evidence Act*. Those provisions prohibit, not only the disclosure of information about which notice has been given under s. 38.01 [subsection (a)], but also the fact that notice has been given to the Attorney General [subsection (b)], the fact that an application or appeal is underway in the Federal Court [subsection (c)], and the fact that an agreement has been reached with the Attorney General to disclose certain information [subsection (d)]. An issue that arises in this Inquiry, therefore, is whether subsections (b), (c) and (d) apply to decisions under sections (k)(i) and (k)(iii) of the Terms of Reference.

## A. THE SUBMISSIONS OF THE PARTIES

### 1. The Attorney General

The Attorney General submitted that the language of s. 38.02(1) makes clear that the Commission is bound by all of the subsections in s. 38.02(1).

### 2. Mr. Arar

Counsel for Mr. Arar submitted that s. 38.02(1)(b), (c) and (d) are unconstitutional. In effect, these provisions place an arbitrary publication ban on the process by which NSC claims are resolved at the Inquiry. The view that the provisions are unconstitutional is supported, in particular, by the open court principle as applied by the Supreme Court of Canada in *Re Vancouver Sun* (2004), SCC 43. Counsel indicated that she did not have sufficient opportunity to prepare a detailed challenge to the constitutionality of the *Canada Evidence Act* in this respect but indicated that she was prepared to do so if necessary.

## B. RESOLUTION

The provisions of s. 38.02(1)(b), (c) and (d) are clear and in my view apply to my decisions if a notice has been given under s. 38.01(1) to (4). A decision under section (k)(iii) is deemed to constitute notice under s. 38.01 of the *Canada Evidence Act*. Subsections 38.02(1)(b), (c) and (d) expressly prohibit the Commission from disclosing the fact that notice has been given to the Attorney General, the fact that an application has been made or the fact that an agreement has been reached, unless the Attorney General or a Federal Court judge authorizes disclosure.

On their face, the breadth of these provisions clearly detracts from the transparency of the Inquiry. Indeed, the provisions do not appear to sit well with the whole idea of a public inquiry. That said, I have not heard sufficient argument on the constitutionality of s. 38.02(1)(b), (c) and (d) to decide the issue. Further, I do not propose to request submissions at this stage. While it is open to Mr. Arar to initiate a constitutional challenge to these provisions, I do not propose to launch such a challenge at present.

The reason that I am not pursuing the issue now is because this is only a potential problem and one that may never need to be resolved in the context of the Inquiry. I have asked Commission counsel to request the Attorney General to agree to a blanket waiver of s. 38.02(1)(b), (c) and (d) with respect to this Inquiry. Failing an agreement, should a situation arise that in my view warrants disclosure of facts that would contravene s. 38.02(1)(b), (c) or (d), I will instruct

my counsel to apply to Federal Court under s. 38.02(2)(b) to permit such disclosure.

## VI. THE PROCESS

The final question that the Commission put to counsel for Mr. Arar and the Attorney General, before the hearing of July 5, 2003, asked whether it would be best for all matters concerning the disclosure of information, about which the Attorney General claims NSC, to be dealt with after all the relevant evidence has been received *in camera*. Following the *in camera* hearing, it was suggested, I would be in a position to issue an omnibus ruling dealing with my decisions under sections (k)(i) and (k)(iii). Further, it was asked whether, as a practical matter, all of the information relating to NSC claims should be dealt with in a single sequence of *in camera* hearings rather than by switching back and forth between *in camera* and public hearings.

Speaking generally, counsel for the Attorney General did not object to this way of proceeding with respect to NSC claims. On the other hand, counsel for Mr. Arar raised the concern that holding a single sequence of *in camera* hearings would prevent the public from knowing about the Attorney General's objections to the public disclosure of particular evidence. For this reason, counsel for Mr. Arar favoured a process in which the introduction of the evidence would switch back and forth between *in camera* and public hearings.

The concern raised by Mr. Arar's counsel is legitimate and one that I think should be kept in mind. However, I think that there is considerable benefit to holding an *in camera* hearing that would receive, in sequence, much of the NSC evidence. Moreover, as I point out below, there are ways of addressing, to some extent at least, the concern of Mr. Arar's counsel. The government has claimed NSC for a substantial portion, although not all, of the RCMP and CSIS factual evidence. There are five significant advantages to hearing this evidence *in camera* before I decide what portion may be made public, either by way of testimony in a public hearing or by way of releasing a part or a summary of some of the information heard *in camera*.

First, I will be in a better position to evaluate the Attorney General's NSC claim as well as the public interest in disclosure after I have heard all of the *in camera* evidence. At that point, I will be better able to appreciate the significance of different pieces of evidence in the overall context of what happened. Probably, I will also be better able to evaluate the extent of the injury, if any, to the elements of NSC from the release of evidence to the public when I am in a position to understand where a particular piece of evidence fits into the chronology of events and how that evidence relates to other evidence.

Second, the two decisions that I am called upon to make – NSC and the balancing of the public interest – are not unconnected. In making a decision with respect to the public interest, the degree of the alleged injury to the elements of NSC will undoubtedly be relevant. It seems to me sensible in most instances to address those two decisions at the same time. Notably, as a matter of general principle, the submissions which I received from many parties and intervenors did just that; they addressed the issue of injury to the elements of NSC and the issue of the public interest in disclosure interchangeably.

Third, I consider it very important to hear all of the factual evidence of the RCMP and CSIS in one sequence, uninterrupted by shifting back and forth between *in camera* and public hearings. The opportunity to hear all of the evidence in its normal sequence will make it easier for me to understand and evaluate the events relating to Mr. Arar.

Fourth, I am satisfied that hearing all of the RCMP and CSIS factual evidence *in camera* is the most efficient way to deal with what could become a very complex process. After the evidence has been heard *in camera* I will rule on both NSC and the balancing of the public interest. I recognize that, subject to challenges in court, it may become necessary to hear some of the evidence again in the public hearings. However, it may be possible in some instances to simply introduce the transcript of evidence heard *in camera* and to provide the opportunity for cross-examination in the public hearings. Even though there will be some duplication of evidence heard *in camera*, I am satisfied that on balance the process that I am adopting will enable us to proceed as expeditiously as possible.

In addition, the process will result in one main ruling on what information, for which NSC is claimed, can be heard in public. Court challenges are one of the main causes for delays in public inquiries. Although I am obviously not encouraging court challenges, I am aware of the possibility. I expect that the process that I describe in this ruling will reduce the potential for multiple court challenges on these issues. It is in everyone's interest that the Inquiry be completed as quickly as possible and, if there is to be a court challenge to any of the rulings I make with respect to *in camera* hearings, it is preferable that there be only one such challenge.

Finally, everyone including the Attorney General has submitted that I should make public as much evidence as is permitted under the Terms of Reference. It seems to me that I will be best able to fulfill that objective by way of a process that enables me to make decisions after hearing all of the factual *in camera* evidence and to put that evidence in its proper context. I also think that this

process will lead to more sensible and manageable disclosure for the parties and intervenors.

All of that said, I am not foreclosing the possibility that I may release rulings with respect to some of the Attorney General's NSC claims before all of the evidence has been heard *in camera*. Neither this ruling nor the question that was put to counsel for Mr. Arar and the Attorney General should be interpreted as foreclosing that possibility. In particular, I may choose to make such a ruling if I come to the conclusion that I have heard sufficient information to decide, under section (k)(i), that disclosure of particular information would not be injurious to any of the elements of NSC.

As discussed, counsel for Mr. Arar expressed the concern that holding a single sequence of private hearings will limit the ability of the public to know when the government was objecting to disclosure of information. No doubt this is true. However, this concern is mitigated by a number of factors. First, pursuant to Rule 54, prior to an *in camera* hearing, Commission counsel will advise the parties and intervenors of the information and evidence that will be introduced at the hearing. The parties and intervenors are invited to raise with Commission counsel areas for questioning. In the process that I have described above, I contemplate that Commission counsel will periodically make available to parties and intervenors a brief summary of the evidence that will be heard *in camera* before the evidence is heard. It may become obvious from the advice of counsel, or the summaries of evidence, what evidence the Attorney General claims is subject to NSC.

Also, I will produce a summary of the evidence that is heard *in camera* which will provide the public with an indication of the evidence over which the Attorney General claimed NSC. If circumstances permit, I may produce a summary of evidence heard *in camera* before all of the *in camera* hearings have been completed. Finally, I can make additional rulings with respect to NSC claims, if the need arises, in the course of the *in camera* hearings.

I am satisfied that the process described above is consistent with the Terms of Reference and with the Rules of Practice and Procedure and, at this stage, I think that is the best way to proceed. However, because of the special problems related to NSC claims, this Inquiry presents more than its fair share of procedural difficulties. We at the Commission are doing our best to design and draft a process that is thorough, fair and as expeditious as possible. It may be that as other issues arise further adjustments to the process and to the schedule will need to be made. I appreciate the cooperation and assistance that we have been receiving from the parties and intervenors to date and look forward to that continuing as we proceed.

I have not included the DFAIT evidence in the process described above. The Attorney General does not claim NSC over DFAIT evidence to the same extent as the RCMP and CSIS factual evidence. I am advised by Commission counsel that we should be able to proceed with a sufficient amount of the DFAIT evidence in the public hearing in a way that will make it understandable and useful to the parties, the intervenors and the public.

We will hear those portions of the DFAIT evidence for which the Attorney General claims NSC during the *in camera* hearings that address the RCMP and CSIS factual evidence. In my omnibus ruling with respect to the matters of confidentiality, I will include my rulings concerning the DFAIT evidence heard *in camera*.

There may be NSC claims with respect to other government departments and agencies. I will address the appropriate process for addressing those claims if and when they arise.

After completing the *in camera* hearings, I will prepare an omnibus ruling addressing the two issues: NSC and the balancing of the public interest. In doing so, I will have regard to the submissions received from the parties and intervenors on the principles that apply to the question of national security confidentiality, the submissions made on July 5 on the motion by counsel for Mr. Arar, and the submissions of counsel for the Attorney General and Mr. Atkey with respect to specific *in camera* evidence. This ruling will address all of the evidence heard *in camera* and it will include the rulings that are contemplated by Rules 50 and 56.

I anticipate that the omnibus ruling will include:

- a) a brief description of the relevant evidence for which no NSC claim is made. That evidence will be introduced in a public hearing.
- b) subject to a challenge by the Attorney General, a summary of evidence for which the Attorney General claims NSC but which I consider is not injurious to any of the elements of NSC. That evidence will either be introduced at a public hearing or filed as a transcript of the *in camera* evidence. The parties will then have an opportunity at the public hearing to cross-examine on the evidence so disclosed.
- c) subject to a challenge by the Attorney General, a summary of evidence which I consider is subject to NSC but which I am nonetheless of the opinion should be made public in the public interest. That evidence will be dealt with in the same manner as the evidence referred to in paragraph b) above.

- d) subject to Rule 55, a summary of evidence heard *in camera* which I conclude should not be made public as contemplated by section (k)(ii) of the Terms of Reference.

July 19, 2004

A handwritten signature in black ink, appearing to read "D. O'Connor", with a stylized flourish at the end.

Justice Dennis R. O'Connor  
Commissioner

## Appendix A

### Relevant provisions of the Canada Evidence Act, R.S.C. 1985, c. C-5

The following provisions of s. 38 of the *Canada Evidence Act* are relevant to this ruling:

**38.** The following definitions apply in this section and in sections 38.01 to 38.15.

....

“participant” means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information.

“potentially injurious information” means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.

....

“sensitive information” means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

**38.01** (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in

connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

....

(6) This section does not apply when

....

(c) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or

(d) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

....

(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.

**38.02** (1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding

(a) information about which notice is given under any of subsections 38.01(1) to (4);

(b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);

(c) the fact that an application is made to the Federal Court under section 38.04 or that an appeal or review of an order made under any of

subsections 38.06(1) to (3) in connection with the application is instituted; or

(d) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).

(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

(a) the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or

(b) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

**38.03** (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

....

(3) The Attorney General of Canada shall, within 10 days after the day on which he or she first receives a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under section 38.01 about that information of his or her decision with respect to disclosure of the information.

2001, c. 41, s. 43.

**38.031** (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts

referred to in paragraphs 38.02(1)(b) to (d) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under paragraph 38.04(2)(c), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

(2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under paragraph 38.04(2)(c) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).

2001, c. 41, ss. 43, 141.

**38.04** (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).

(2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section 38.031, authorizes the disclosure of only part of the information or disclosure subject to any conditions,

- (a) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;
- (b) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and
- (c) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

(3) A person who applies to the Federal Court under paragraph (2)(b) or (c) shall provide notice of the application to the Attorney General of Canada.

(4) An application under this section is confidential. Subject to section 38.12, the Chief Administrator of the Courts Administration Service may take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

(5) As soon as the Federal Court is seized of an application under this section, the judge

(a) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;

(b) shall decide whether it is necessary to hold any hearing of the matter;

(c) if he or she decides that a hearing should be held, shall

(i) determine who should be given notice of the hearing,

(ii) order the Attorney General of Canada to notify those persons, and

(iii) determine the content and form of the notice; and

(d) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

(6) After the Federal Court is seized of an application made under paragraph (2)(c) or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,

(a) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and

(b) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.

(7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated

in relation to that information, to the extent of the authorization or the withdrawal.

....

**38.06** (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.

(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.

....

**38.07** The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.

**38.08** If the judge determines that a party to the proceeding whose interests are adversely affected by an order made under any of subsections 38.06(1) to (3) was not given the opportunity to make representations under paragraph 38.04(5)(d), the judge shall refer the order to the Federal Court of Appeal for review.

....

**38.13** (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order

or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

....

The Schedule to the *Canada Evidence Act*, as amended by Order in Council P.C. 2004-73, provides:

#### DESIGNATED ENTITIES

....

19. The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, for the purposes of that inquiry, except where the hearing is in public.

## Appendix B

### Questions of interpretation and process

With a view to eliciting further submissions about the public disclosure of information at the Inquiry, the Commission sent the following questions to the parties for their consideration:

1. Does section (k) entail the following two stage process?

a. Decision under section (k)(i):

The Commissioner is authorized to decide, under s. (k)(i), whether the public disclosure of information relevant to the Inquiry would be injurious to international relations, national defence or national security (National Security Confidentiality – NSC). This decision will follow a claim by the Attorney General or any other person that relevant information is subject to NSC.

If the Commissioner decides that disclosure would not be injurious to NSC, the Commission may disclose the information after a period of 10 days following receipt of the Commissioner's decision by the Attorney General unless the Attorney General has notified the Commission within that period that he intends to apply to the Federal Court for a determination under s. 38.04(1) of the *Canada Evidence Act*.

b. Decision under section (k)(iii):

Following his decision under s. (k)(i) that disclosure would be injurious to NSC, the Commissioner is authorized to decide, under s. (k)(iii), whether the release of a part or a summary of the information, after the information has been received *in camera*, would provide insufficient disclosure to the public.

If the Commissioner decides that such partial disclosure would provide insufficient disclosure, he may advise the Attorney General, which advice shall constitute notice under s. 38.01 of the *Canada Evidence Act*. The Commissioner may also apply to the Federal Court for an order under s. 38.06 with respect to disclosure of the information.

Under s. 38.02(1) and (2) of the *Canada Evidence Act*, the Commission may not disclose the information, the fact of the Commissioner's decision under s. (k)(iii), the fact that an application has been made to the Federal Court, or the fact that an agreement regarding disclosure has

been entered into with the Attorney General, unless the Attorney General authorizes such disclosure in writing or by agreement, or a judge authorizes such disclosure in a final order under s. 38.06.

Thus, absent authorization or agreement by the Attorney General, or a final order by a Federal Court judge, the Commission may not disclose information that the Commissioner has decided should be disclosed, in the public interest, under section (k)(iii).

2. Would it be best for all matters concerning the disclosure of information, with respect to which the Attorney General claims NSC, to be dealt with after all of the information has been received *in camera*, following which the Commissioner will issue a ruling or rulings dealing with his decisions under s. (k)(i) and s. (k)(iii)? As a practical matter, would it be best to hear all of the information, with respect to which the Attorney General claims NSC, by holding one sequence of *in camera* hearings rather than by switching back and forth between *in camera* and public hearings?

#### APPENDIX 6(E)

## RULING ON A MOTION TO DETERMINE WHETHER TO MAKE CERTAIN RCMP DOCUMENTS PUBLIC

This is a motion to determine whether certain redacted documents relating to the RCMP evidence, now being heard *in camera*, be released to the public.

The government produced to the Inquiry a large number of documents from the RCMP. The documents, considered to be relevant, have been entered as exhibits in the *in camera* hearings. The government claimed NSC with respect to all or portions of many of the documents. The relevant documents, with those portions over which the government claims NSC redacted, were produced to Mr. Arar's counsel. Mr. Arar's counsel requests that the redacted documents be released to the public.

Counsel for certain parties who have testified *in camera* object to the release at this time. They argue that the release of these documents should await either the public disclosure of a summary of the RCMP evidence heard *in camera* or a decision by me about what other portions of these documents may be publicly disclosed, or both. In that way, they submit, the documents will make more sense and the public will be able to put the documents in their proper

context. The government does not object to the release of the documents at this time, but submits that it would be a more orderly process if the documents were released later in conjunction with a summary of the *viva voce* evidence relating to them. These documents, possibly with fewer redactions, will be released eventually. The essential issue is one of timing.

I heard this motion *in camera* in order to give the parties objecting to release an opportunity to raise specific concerns about unfairness to their interests by the release of the documents at this time and in their redacted form. I am not satisfied that there will be any unfair prejudice to the parties by their release at this time. Nor do I accept that the public will be misled because they cannot put the documents in their proper context. The public is fully able to understand that there may be other evidence relating to the matters referred to in the unredacted documents.

Clearly, some of the documents, without accompanying *viva voce* evidence, may provide little, if any, useful information to the public. However, others will. There is already a considerable amount of information in the public domain about Mr. Arar and the events relating to him. That information should assist in understanding where some of the documents fit into the overall picture. In any event, the documents, albeit in unredacted form, have now been entered as exhibits in evidence. This is a public inquiry and to the extent possible evidence should be made public in a timely manner. In my view, absent a demonstration of unfair prejudice to a party or of a likelihood that the public will be misled or confused by disclosure of the documents in their redacted form, they should be released.

One of the parties argued that it is the unredacted documents that are the exhibits, not the documents in redacted form. Thus, it is argued the redacted documents should not be released on the basis that they have not been entered into evidence. Be that as it may, the unredacted portions of the documents which are the subject of this motion are part of the exhibits now in evidence. Given the absence of legitimate concerns about prejudice or confusion, I am exercising my discretion under Rule 26 of the Rules of Procedure and Practice to direct release of the redacted versions of the documents now in evidence. I note that not uncommonly documents are released under the Access to Information and Privacy process in redacted form without accompanying *viva voce* evidence.

In the course of submissions, I was referred to a ruling by Justice Linden in the Ipperwash Inquiry. I agree with his conclusion in which he declined to disclose publicly certain documents, however, that case is distinguishable. Unlike this case, the Commission Counsel had not screened the documents in issue and they did not form part of the evidentiary base of the Inquiry.

I wish to make a number of points about the documents. First, it is Mr. Arar's counsel who seeks their release. Counsel has seen the documents and are obviously not concerned about any potential unfairness to Mr. Arar or his family.

Second, the documents are redacted on the basis of the government's NSC claims. The Commission has received into evidence the documents in their entirety. At this point, I have not ruled on the government's redactions. It may be that in future, more of the information contained in some of these documents will be disclosed publicly.

Next, I caution readers not to attach undue importance to the information in these documents. The Inquiry has heard and will hear more evidence about the documents and the events referred to in them. In due course I will provide a public description, to the extent I am able, of that evidence.

Finally, as I look ahead in this Inquiry, I am concerned about the amount of time that would be involved in screening for NSC claims all of the documents received into evidence at the *in camera* hearings. I expect that there will be over 2000 documents and many are lengthy. The process for reviewing a document, sometimes word by word, and hearing submissions and ruling upon the NSC claims, can be very protracted. Some documents are far more significant than others. It is essential that I thoroughly examine all of the relevant evidence and that I provide a public report that is as thorough as the NSC constraints permit. It is also important that the Inquiry be completed as expeditiously as possible. With that in mind, I will be asking the parties for submissions about the process that I should follow in addressing the government's NSC claims over documents so as to provide a public report that is as thorough as possible and at the same time is delivered in a timely manner.

Accordingly, I direct that a set of the documents will be made available to the public at the Inquiry's office.

November 23, 2004



Justice Dennis R. O'Connor  
Commissioner

APPENDIX 6(F)  
 RULING ON NATIONAL SECURITY  
 CONFIDENTIALITY

## I. INTRODUCTION

1. I have been appointed by Order in Council P.C. 2004-48 (the Terms of Reference) to investigate and report on the actions of Canadian officials in relation to Mr. Maher Arar including the following:
  - the detention of Mr. Arar in the United States,
  - the deportation of Mr. Arar to Syria via Jordan,
  - the imprisonment and treatment of Mr. Arar in Syria,
  - the return of Mr. Arar to Canada, and
  - any other circumstances directly related to Mr. Arar that the Commissioner considers relevant to fulfilling this mandate.
  
2. This ruling relates to the first summary of information that has been received *in camera* that should, in my opinion, be released to the public. This summary, which I will sometimes refer to as the “final” summary, is attached as Appendix A. This is also the first opportunity for me to address issues of National Security Confidentiality (NSC) by reference to particular information over which the government claims NSC and which, in my opinion, should be made public.

## BACKGROUND: LAW AND PROCESS

### The Terms of Reference

3. In the Order in Council, I have been directed to take all steps necessary to prevent the public disclosure of information that would, in my opinion, be injurious to international relations, national defence or national security (NSC). The Order in Council directs me:

....

- (k) ... to take all steps necessary to prevent disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security and, where applicable, to conduct the proceedings in accordance with the following procedures, namely,

(i) on the request of the Attorney General of Canada, the Commissioner shall receive information *in camera* and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information would be injurious to international relations, national defence or national security,

(ii) in order to maximize disclosure to the public of relevant information, the Commissioner may release a part or a summary of the information received *in camera* and shall provide the Attorney General of Canada with an opportunity to comment prior to its release, and

(iii) if the Commissioner is of the opinion that the release of a part or a summary of the information received *in camera* would provide insufficient disclosure to the public, he may advise the Attorney General of Canada, which advice shall constitute notice under section 38.01 of the *Canada Evidence Act*.

The relevant provisions of the *Canada Evidence Act* were appended to my ruling of July 29, 2004.

### The NSC process to date

4. Rules 43 to 56 of the Inquiry Rules of Procedure and Practice set out the process of the Inquiry as it relates to NSC claims. Rules 55 and 56 deal with the release of a part or a summary of the information that has been received at the *in camera* hearings. I elaborate on relevant aspects of that process in the body of this ruling.
5. In the early stages of the Inquiry, I appointed Mr. Ron Atkey as an *amicus curiae* to test the government's NSC claims. Mr. Atkey has expertise in matters of national security. From 1984 until 1989, he served as the first Chairman of the Security Intelligence Review Committee (SIRC), a body established to oversee the activities of the Canadian Security Intelligence Service (CSIS). Mr. Atkey, assisted by Mr. Gordon Cameron, has participated in the NSC proceedings leading up to this ruling and I will refer to their role in the course of the ruling.
6. In May 2004, the parties and intervenors had the opportunity to make written submissions about the case law and principles that should apply to my determinations of NSC. I thank them for those submissions. They were helpful to me in making this ruling.

7. In my ruling of July 29, 2004, I decided to receive all of the information over which the government claims NSC in one sequence, *in camera*, rather than by switching back and forth between public and *in camera* hearings. I also indicated that I would make an omnibus ruling after the *in camera* hearings are complete, setting out all of the information that, in my opinion, can be disclosed to the public under either section (k)(i) or section (k)(iii) of the Terms of Reference. That continues to be my intention.
8. In my ruling of July 29, I did not foreclose the possibility that I might release rulings with respect to some of the government's NSC claims before all of the evidence has been heard *in camera*. In particular, I indicated that I might choose to make such a ruling if I reached the conclusion that I had heard sufficient information to decide, under section (k)(i), that disclosure of particular information would not be injurious to any of the elements of NSC.
9. The first round of the *in camera* hearings, dealing with evidence relating to CSIS, is now complete. I am satisfied that I can, at this point, rule on the government's NSC claims over some of the information received at those hearings. My ruling is based upon both sections (k)(i) and (k)(iii) of the Terms of Reference and my reasons are set out below. I have attached as Appendix A a summary of the information that, in my view, should be disclosed publicly at this stage of the Inquiry. Additional *in camera* hearings, dealing with evidence relating to the Royal Canadian Mounted Police (RCMP), are underway.

### **The preparation of the summary**

10. I will describe the steps leading to the preparation of the summary in some detail in order to shed light on the difficulties that we have encountered in preparing and releasing a summary. Throughout, Commission staff have attempted to reasonably accommodate the positions of the government so as to avoid litigation and the ensuing delay at this stage of the Inquiry, while at the same time trying to provide disclosure of some information in accordance with the Terms of Reference. The fact that information heard *in camera* is not disclosed in Appendix A does not necessarily mean that it will not be disclosed at a later date.
11. Following the *in camera* hearings of evidence relating to CSIS, Commission staff prepared a draft summary that was provided to government counsel and to Mr. Atkey. Both government counsel and Mr. Atkey had the opportunity to comment, and Commission counsel convened a meeting to

- identify areas of dispute. Government counsel objected that the summary contained information that was subject to an NSC claim, and that some portions of the summary did not fairly present the evidence. Government counsel also commented that the summary should not be as specific as was proposed by the Commission, and provided an alternative draft summary that was more general. A copy of the government's proposed summary is attached as Appendix B.
12. In response to the comments of government counsel and Mr. Atkey, the Commission prepared a revised draft summary. Further discussions ensued and, although the areas in dispute were narrowed, there remained several significant areas about which there continued to be disagreement. Commission counsel prepared another revised draft representing its position and the government highlighted on that draft the areas to which it objected. That draft with the highlighted areas of objections is attached as Appendix C.
  13. This draft summary formed the basis of a hearing before me on October 29, 2004. At the hearing, the government was given the opportunity to call evidence to support its NSC claims and to make submissions as to the contents of the summary. Unfortunately, for personal reasons, Mr. Atkey was unable to attend the hearing. However, he was involved in the process leading up to the hearing. Prior to the hearing, Mr. Atkey indicated that he agreed that the first summary prepared by the Commission (which formed the basis for the draft summary, in Appendix C, that was considered at the October 29<sup>th</sup> hearing) could be disclosed to the public in accordance with the Terms of Reference.
  14. Following the hearing, Mr. Atkey appointed Mr. Gordon Cameron to assist him in his role as *amicus curiae*. Mr. Cameron has extensive experience with matters of national security. He has been an outside counsel for SIRC for the past ten years. At my request, Mr. Atkey and Mr. Cameron reviewed the material leading to the preparation of the summary. They also reviewed the evidence upon which the government relied for its NSC claims, as well as the oral and written submissions of the government made at the October 29<sup>th</sup> hearing. Mr. Atkey has not changed his view that the draft summary in Appendix C may be disclosed to the public.
  15. This ruling follows the hearing of October 29. As I outline below, I have removed some of the information contained in the draft summary, Appendix C, on which the hearing was based. The final summary, Appendix A, contains information that, in my view, should be disclosed at this stage of the Inquiry.

16. The final summary, with this ruling, will be provided to the government, ten days before any release to the public or Mr. Arar, so that the government has an opportunity to respond in accordance with the Terms of Reference and s.38 of the *Canada Evidence Act*. Subsequently, the Commission will provide a copy of the summary to counsel for Mr. Arar to allow an opportunity for comment on its fairness and balance from Mr. Arar's perspective. After any objections of Mr. Arar's counsel have been considered and addressed the summary will, if appropriate, be released publicly.
17. Because this is the first summary produced by the Commission, the preparation and release of the summary has been extenuated. In future, I anticipate that the process should be simplified without interfering with the government's or the *amicus curiae's* opportunity to participate in accordance with the Inquiry Rules of Procedure and Practice.
18. I want to repeat that the fact that information received at the *in camera* hearings has not been disclosed in the final summary does not foreclose disclosure of such information in a future summary or other public release. Some information was excluded from the final summary for reasons other than NSC, including in some instances the need for fair and balanced disclosure. I anticipate releasing that information at a future date. Moreover, in furtherance of timely disclosure, Commission staff excluded some information from the draft summary in order to minimize NSC disputes. Finally, I have excluded some information from the final summary because I considered it better to defer my ruling on that information until later in the Inquiry. For these reasons, the fact that information received at the *in camera* hearings has been excluded from the final summary should not be construed as a ruling by me that release of the information would be injurious to any of the elements of NSC.

## II. THE GOVERNMENT'S NSC CLAIMS

### A. THE SUBMISSIONS OF THE GOVERNMENT

19. The draft summary in Appendix C formed the basis for the hearing before me on October 29. The government's objections to disclosure of information in that summary are based on two types of NSC claims. The first, which is highlighted in yellow in Appendix C, flows from the concern that disclosure would reveal information about CSIS investigations. In its written submissions of October 27, the government indicated that the disclosure of this information would:

identify or tend to identify Service interests in individuals, groups or issues, including the existence or absence of past or present files or investigations, the intensity of investigations, or the degree or lack of success of investigations.

20. The government emphasized the mosaic effect of the disclosure of any information about CSIS investigations. By this, the government meant that the release of apparently innocuous small pieces of information could assist and inform the often sophisticated individuals, who are involved in the activities being investigated, of what CSIS is doing and what CSIS knew or did not know. The government pointed to the fact that the consideration of whether the disclosure of information might be injurious must be a forward-looking exercise and that one cannot know today what might come to light in the future, nor can one know what harm the release of even small pieces of information might have on future investigations. For this reason, CSIS routinely refuses to publicly disclose information about past or ongoing investigations, or information acquired about individuals. Indeed, CSIS does not confirm or deny any such matters. The government submitted that, even when that information is in the public domain, there could be injury if CSIS confirms its accuracy.
21. The information in Appendix C that the government submits falls within this first broad NSC claim – injury to investigative interests – can conveniently be divided into three sub-categories.
  - a) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (The draft summary does not disclose the details or the nature of such information).
  - b) [REDACTED]  
[REDACTED]  
[REDACTED]
  - c) [REDACTED]  
[REDACTED] Paragraphs 41 and 42 of Appendix C are the primary source of this information.
22. The second type of government NSC claim, highlighted in red in Appendix C, falls generally within the heading of information sharing, primarily with foreign agencies. In particular, the government indicated that the disclosure of this information would:

reveal information received in confidence from foreign agencies or governments and/or compromise the relationship that CSIS or other Canadian government departments and agencies have with foreign governments and their departments and agencies.

23. At the hearing on October 29, government counsel elaborated on the government's submissions in relation to this NSC claim, and referred to the earlier evidence of Messrs. Hooper, ██████████. Those CSIS witnesses testified to the damage that would be done to CSIS' relationships with foreign agencies if CSIS' information sharing arrangements with foreign agencies were revealed, or if information received from foreign agencies was publicly disclosed in violation of caveats to protect the information.
24. The government's evidence stressed the importance of protecting relationships with other agencies in order to ensure the exchange of information. In this age of global terror, the sharing of information among police forces and security and intelligence agencies is critical. Information sharing relationships are based on trust and confidence that the information shared, and often the relationship itself, will not be disclosed. Breaches of these understandings undermine relationships and can interfere with Canadian agencies' access to information that is vital to protecting our national security interests.

## **B. THE ARAR CASE: A HIGHLY UNUSUAL SITUATION**

25. The circumstances in which the government's NSC claims must be considered are highly unusual, perhaps unique.
26. The highly unusual nature of this situation results from two factors: first, a significant amount of information over which the government claims NSC is already in the public domain; second, the decisions about the government's NSC claims are being made in the course of a public inquiry.

### **1. Information in the public domain**

27. Normally, NSC issues are determined in circumstances where there has been little if any public disclosure of the information over which NSC is claimed. Thus, the potential for injury to the elements of NSC arises because the information, if disclosed, will inform the public and particularly those whose activities are suspect of the information at issue. That, however, is not this

case. There has been extensive media coverage about Mr. Arar and the events surrounding his detention in the United States, deportation to Syria via Jordan, imprisonment in Syria, and return to Canada. Further, there is information in the public domain with respect to the national security investigation that is connected to Mr. Arar.

28. Shortly after Mr. Arar was detained in New York, on September 26, 2002, the media became aware of his circumstances and there were periodic media reports about what was happening to him, including the fact that he had been sent to Syria, where he was imprisoned. The media coverage increased alongside the efforts, spearheaded by Mr. Arar's wife, Ms. Monia Mazigh, to have him released from imprisonment in Syria. After Mr. Arar's return to Canada in October 2003, Mr. Arar made public statements describing his detention and his imprisonment in Syria. The Arar story was front-page news across the country. Controversy grew about the role of Canadian officials in the Arar matter. Mr. Arar literally became a household name. The level of public interest and the uncertainty about what happened led the government to establish this public inquiry in February 2004.
29. The information already made public about Mr. Arar and what happened to him, and about investigations connected to him, has originated from a number of different sources.
  - a) From time to time, government officials have made public statements that were reported in the media or in official sources about Mr. Arar and his circumstances. Some media reports also attributed statements to unidentified government officials.
  - b) In response to requests under the *Access to Information Act*, the government has released documents, or parts of documents, that contain information about Mr. Arar ("ATIP release").
  - c) Through this Inquiry, additional information has been released to the public with the concurrence of the government. Most importantly, the report of the Security Intelligence Review Committee (the "SIRC report", which reviewed CSIS' role in relation to Mr. Arar) and the report of Chief Superintendent Brian S. Garvie (the "Garvie report", which reviewed, in the context of the RCMP public complaints process, the RCMP's actions in relation to Mr. Arar) have been entered as exhibits at this Inquiry, and publicly released in redacted form. The unredacted portions of those reports reveal information over which the government does not assert an NSC claim.

- d) There have been many other documents entered as exhibits at the Inquiry, some at the public hearings and others at the *in camera* hearings. Those entered at the public hearings are now in the public domain. The unredacted portions of documents entered at the *in camera* hearings, i.e. the portions over which the government does not assert an NSC claim, have been made available to Mr. Arar and his counsel and will be publicly released at some point. For practical purposes, the information in unredacted portions of these documents should be considered to be in the public domain.
- e) On November 4, 2003, Mr. Arar made his first public statement outlining the circumstances of his detention in New York, his transfer to Syria, and the mistreatment to which he says he was subjected in Syria. Shortly after, an article appeared in the Ottawa Citizen reporting on statements that Mr. Arar allegedly made during his imprisonment in Syria. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED] I do not rely on any of the information in the Ottawa Citizen article in the reasoning contained in this ruling.

30. To illustrate, the information that is already in the public domain, often damaging to Mr. Arar, includes the following:

- Mr. Arar was connected to an RCMP national security investigation that involved individuals also of interest to U.S. authorities. Members of the RCMP took steps to continue the investigation after Mr. Arar's return to Canada in October 2003.
- Shortly after Mr. Arar was deported from the United States, the RCMP reportedly told U.S. authorities that the RCMP had no information concerning any threat associated with Mr. Arar. RCMP Deputy Commissioner Loepky later stated that Mr. Arar was "subject of a national security investigation in Canada" and that he "remains a subject of great interest". Other RCMP officials have stated that Mr. Arar was a "person of interest".
- The Solicitor General reportedly disclosed that Canada shared information about Mr. Arar with U.S. authorities, and the Foreign Affairs Minister reportedly disclosed that both CSIS and the RCMP did so.

- Canadian officials received confirmation from American officials that Mr. Arar was deported to Syria and that he might have been sent to Jordan. DFAIT learned that Mr. Arar was transferred from the U.S. to Jordan by private plane. DFAIT at one point reported that, on arrival in Jordan, Mr. Arar was detained for questioning by Jordanian authorities instead of being transferred to Syria and that Jordan handed Mr. Arar over to Syria only on October 21.
  - In November 2002, an unidentified party provided DFAIT with a verbal briefing of the results of the Syrian investigation of Mr. Arar to that point. A copy of a written report of this information, in Arabic, was translated and forwarded to CSIS.
  - In January 2003, the Department of Foreign Affairs and International Trade (DFAIT) informed CSIS that the Syrians believed that Mr. Arar was involved with the Muslim Brotherhood, as well as other Syrian allegations. DFAIT also informed CSIS that, when Syrian officials were asked about Mr. Arar's future, they responded that Mr. Arar would likely be detained for a lengthy period and prosecuted.
  - After Mr. Arar's return to Canada, Syria's Ambassador to Canada reportedly stated: "we didn't find complete ■■■ concrete evidence of his link."
31. I have appended, in Appendix D, a lengthier summary of some of the information about Mr. Arar that is in the public domain. I have laid out the information in some detail because I anticipate that the nature of prior public disclosure will be relevant, not only to the present summary, but also to future summaries. It is important to emphasize that the fact that information has been reproduced, both below and in Appendix D, should not be taken to mean that I have found that any of the conclusions that are drawn about Mr. Arar are warranted.

## 2. THE CONTEXT OF A PUBLIC INQUIRY

32. The second unusual factor about the case of Mr. Arar is that the government's NSC claims are being raised in the context of a public inquiry. No doubt it was partly because of information about Arar that had become public, and the level of controversy that surrounded what happened to Mr. Arar, that the government sought to investigate what had happened. Significantly, the government chose to pursue a public inquiry, rather than a private investigation, into these events.

33. The relevant part of my mandate, contained in section (k) of the Terms of Reference, is set out above. Section (k) directs me to conduct a two-stage process. First, under section (k)(i), I am to decide whether the disclosure of information would be injurious to any of the elements of NSC: international relations, national defence or national security. The second step is set out in section (k)(iii): if I decide that the disclosure of certain information would be injurious to the elements of NSC, then I must consider whether the disclosure of a part or a summary of the information would provide insufficient disclosure to the public. If I conclude that disclosure would be insufficient, then I may so advise the Attorney General and that advice shall constitute notice under s. 38.01 of the *Canada Evidence Act*.
34. For the sake of efficiency, I address both steps – NSC and the public interest in disclosure – in this ruling. The draft summary, Appendix C, was prepared taking into consideration both section (k)(i) and section (k)(iii). Thus, the summary was intended to include information, the disclosure of which would not be injurious to the elements of NSC; as well as information, the disclosure of which would be injurious, but which should be disclosed publicly under section (k)(iii). This ruling therefore addresses both stages of the process under section (k) of the Terms of Reference.
35. Section (k)(i) of the Terms of Reference requires me, at the first stage, to consider whether the disclosure of information would be injurious to any of the elements of NSC. I am satisfied that the fact that this is a public inquiry is not relevant to a decision under section (k)(i). Under that section, I am to hear *in camera* all information that, in my opinion, would be injurious to the elements of NSC. The factors that affect that determination are the same whether the decision is made in the context of a public inquiry or in some other proceeding.
36. The second stage of the process takes place under section (k)(iii). Here, I am satisfied that the fact that the decision is made in the context of a public inquiry is relevant.
37. In itself, the calling of a public inquiry is a significant event in a parliamentary democracy. Public inquiries are often called in the wake of a tragedy or a scandal. When the public's confidence in public officials or institutions has been shaken, the public's demand to know all of the details about what has occurred is often the catalyst for the calling of a public inquiry. Because a public inquiry is established to be independent of the government, it has the advantage of bringing to light, in an impartial and independent way, those facts that are necessary to assess the situation that triggered public concern. One of the great advantages of a public inquiry

is that it can expose all of the facts, many of which might not be revealed in normal public discourse.

38. As important as the Commissioner's report, at the end of an inquiry, is the process of public exposure of the facts that allows the public to make its own evaluation over time. I agree with Justice Samuel Grange, who conducted two public inquiries, when he said in "How should lawyers and the legal profession adapt?" (1999) 12 *Dalhousie Law Journal* 151 at 154-55:

I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries; they are public inquiries... I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along.

39. I recognize that this Inquiry is different from others in that it is concerned with many matters that, for reasons of NSC, cannot be publicly disclosed. Even so, I think it important that I bear in mind, under section (k)(iii), the fundamental point that the government established a public inquiry, rather than a private investigation, in the case of Mr. Arar.
40. Moreover, the government specifically directed me to opine on what constitutes sufficient public disclosure. In forming that opinion, it is important to consider the public nature of the Inquiry and the importance of providing as much information as possible to the public. Consistent with this approach, section (k)(ii) of the Terms of Reference, speaks of maximizing disclosure. It reads:

In order to maximize disclosure to the public of relevant information, the Commissioner may release a part or a summary of the information received *in camera* and shall provide the Attorney General of Canada with an opportunity to comment prior to its release [REDACTED] [emphasis added].

41. Thus, I am satisfied that I should consider as one of the factors in the balancing exercise, under section (k)(iii), the fact that the sufficiency of public disclosure is being determined in the context of a public inquiry.
42. That said, the interest in public disclosure must be balanced against the fact that disclosures of information, pursuant to section (k)(iii), are disclosures that I have determined would be injurious, at least to some extent, to an element of NSC. Otherwise disclosure could take place under section (k)(i).

43. Clearly, some injuries to the elements of NSC are more serious than others. For example, there should very rarely, if ever, be a disclosure of information that would reveal, even indirectly, the identity of a human source. Similarly, I would only rarely, if ever, consider disclosing information that would harm relationships with foreign law enforcement or security and intelligence agencies. Those relationships are essential to effectively protecting our national security. However, other NSC-related interests may be less compelling. Moreover, I must bear in mind that, where the information at issue is already in the public domain, most, if not all, of the injurious effect of disclosure may have already occurred.
44. Further, I must consider, under section (k)(iii), the need for fairness so as to ensure, as best I can, that the disclosure or non-disclosure of information – for reasons of NSC – is not unfair to those individuals who may be affected. In my consideration of the present summary, I speak here of fairness to Mr. Arar in light of detrimental information about him that is already in the public domain, and nothing more.
45. I recognize that, in addition to considering the public interest in disclosure and the need for fairness to individuals about whom there is damaging information already in the public domain, there may be other factors that come into play in the decision-making process under section (k)(iii). However, for purposes of determining what may be disclosed in the present summary, I need to consider only those two.

## C. THE TWO-STAGE PROCESS

### 1. Section (k)(i)

46. I want to address three aspects of the decision-making process under section (k)(i). First, the onus is on the government to establish its NSC claims. By this I mean that the government cannot merely assert a claim for NSC. Rather, the government must establish an NSC claim by introducing evidence to support the claim.
47. In *Canada (Attorney General) v. Ribic* [2003] F.C.J. No. 1964 (F.C.A.), the Court stated at para. 18-21:

Where the judge is satisfied that the information is relevant, the next step pursuant to section 38.06 [*Canada Evidence Act*] is to determine whether the disclosure of the information would be injurious to international relations, national defence or national security. This second step will also involve, from that perspective, an exam-

ination or inspection of the information at issue. The judge must consider the submissions of the parties and their supporting evidence. He must be satisfied that executive opinions as to potential injury have a factual basis which has been established by evidence: *Home Secretary v. Rehman*, [2001] H.L.J. No. 47, [2001] 3 WLR 877 at 895 (HL(E))....

....

An authorization to disclose will issue if the judge is satisfied that no injury would result from public disclosure. The burden of convincing the judge of the existence of such probable injury is on the party opposing disclosure on that basis.

48. The requirement that the government lead evidence to support an NSC claim has an additional dimension. The evidence must be sufficiently particular to support the claim of injury flowing from disclosure of the piece of information that is in question. In *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)* [1996] F.C.J. No. 30 (F.C.T.D.), Rothstein J. concluded that this requirement for sufficient particularity was not met. He stated at para. 34 that “[t]he determination the Court must make requires some explanation of the linkage between disclosure of specific information and harm to Canadian interests” and that what he was dealing with was largely an “exaggeration of the harm to Canadian interests from disclosure which [REDACTED] subsections 37(1) and 38(1) of the *Canada Evidence Act* were enacted to curtail.”
49. All of that said, I recognize that some of the government’s NSC claims will be obvious and that the need to call evidence may be dispensed with. In other cases, evidence previously called by the government will be sufficient to support its NSC claim. However, the underlying requirement is that the government supports its NSC claims with evidence.
50. Further, for the government to succeed on a claim of NSC, it must show that disclosure “would be injurious” to one of the elements of NSC. That is a different and more stringent test than that found in some statutory provisions, such as section 38.01 of the *Canada Evidence Act* and section 15 of the *Access to Information Act*.
51. The *Canada Evidence Act*, s. 38.01, requires persons to notify the government of Canada about the anticipated disclosure in court proceedings of what they believe to be “potentially injurious information”, which is defined as “information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security” [emphasis added].

52. The *Access to Information Act*, s. 15(1), permits the head of a government institution to refuse to disclose information contained in government records requested under the Act if such disclosure “could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities...” [emphasis added].
53. Counsel for Mr. Arar submitted that the use of the phrase “would be injurious” in the Terms of Reference connotes a higher threshold for establishing that information should be held *in camera* at this Inquiry than in the case of the statutory provisions reproduced above. I agree. On the face of the Terms of Reference, the use of the less speculative term “would” in the Terms of Reference does connote a higher threshold. This interpretation is supported by an examination of the structure of the *Canada Evidence Act*.
54. In the case of the *Canada Evidence Act*, the initial determination that disclosure could injure triggers a duty to notify the Attorney General of Canada. The Attorney General then has the opportunity, pursuant to s. 38.04(1), to apply to the Federal Court for an order to prevent disclosure of the information. At that stage, pursuant to s. 38.06, the judge of the Federal Court may authorize disclosure unless the judge concludes that disclosure “would be injurious to international relations or national defence or national security” [emphasis added]. Thus, the judge has the discretion to permit disclosure unless a higher threshold is satisfied in support of non-disclosure. The language that is used at the s. 38.06 stage is similar to the language in the Terms of Reference.
55. It is consistent with the basic purpose of this public inquiry – to address public concern about the conduct of Canadian officials – that the threshold for concluding that information will be heard *in camera* should be higher than the threshold that is applied in deciding, in the first instance, whether a piece of information should be disclosed under the *Access to Information Act* or in court proceedings in general. The purpose of this Inquiry, and the connection of that purpose to a discrete set of events, makes it appropriate to be cautious about applying an overly speculative approach to the determination that information should be received *in camera*. The threshold of injury test in a section (k)(i) determination requires a probability that disclosure would be injurious, rather than a mere possibility of injury.
56. Finally, I want to comment on what deference, if any, should be paid to the government’s NSC claims. The wording of the mandate is important. For convenience, I repeat the relevant language of section (k):

- (k) ... to take all steps necessary to prevent disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security and, where applicable, to conduct the proceedings in accordance with the following procedures, namely,
- (i) on the request of the Attorney General of Canada, the Commissioner shall receive information in camera and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information would be injurious to international relations, national defence or national security, .... [emphasis added]
57. The mandate directs that I form an opinion with respect to the government's NSC claims. Given that the integrity of a public inquiry depends, to a large extent, on its independence from government, it makes sense that that should be the case. As I said above, a decision that the disclosure of information would be injurious to NSC must be based on evidence. Thus, the mere assertion of an NSC claim is not by itself sufficient to find that an NSC claim is established.
58. I will consider the evidence called by the government to support its NSC claims very carefully and I will attach weight to the expertise of those who give that evidence. As is frequently said in the case law regarding NSC claims, it is the executive – in this case CSIS – which is the expert in the field of NSC; the judiciary is not. I accept that the government and its witnesses have access to special information and expertise, and they have a protective role with respect to public security and safety. See for example *Canada (Attorney General) v. Ribic, supra*, at para. 18-21.
59. Further, I accept that the injury required to shield information from disclosure under section (k)(i) need not be great and that I should bear in mind the mosaic effect that Addy, J. described in his oft-quoted passage in *Henrie v. Canada (Security Intelligence Review Committee)* (1988), 53 D.L.R. (4<sup>th</sup>) 568, aff'd (1992) 88 D.L.R. (4<sup>th</sup>) 575 (F.C.T.D.), at page 578-9:

It is of some importance to realize that an 'informed reader', that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has be-

fore him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security....

60. All of that said, I need to be vigilant about the possibility that the government could attempt to use the opportunity to claim NSC in order to delay or avoid the release of embarrassing information, the disclosure of which would not be injurious to any of the elements of NSC.
61. In *Goguen v. Gibson* [1984] F.C.J. No. 13 (F.C.A.), Marceau J. made comments which were adopted by Rothstein J. in *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)*, *supra*, and which I think are apt to the situation that I must address [adopted in *K.F. Evans* at para. 33]:

While a confidence of the Queen's Privy Council, with the precisions given in the Act, is readily identifiable, a possible danger to international relations or national security is not so easily capable of being recognized and, as a result, may be feared and evoked somewhat too quickly, albeit in perfect good faith. That is clearly apparent in the field of international relations, but is also true, although to a somewhat lesser degree, in that of national security, and if the possibility of improper use has always been present in the former system, it will, of course, be even more present in the new one where the objection is available not only to ministers but to any person claiming interest.

The new rule as I view it, is aimed at thwarting those possible exaggerations, over-statements or abuses by giving the Court the authority to examine the information and to declare that the public interest invoked as the basis for objecting to disclosure, although related to international relations or national security, is, in any given instance, outweighed in importance by the public interest in requiring disclosure for the due administration of justice.

## 2. Section (k)(iii)

62. I also want to deal with the question of the onus under section (k)(iii). As mentioned, when I embark upon the analysis of particular information under section (k)(iii), I will have accepted that disclosure of the information would, to some extent at least, be injurious to NSC. Because of that, I am satisfied that I should approach the determination under section (k)(iii) on the basis that the factors which weigh in favour of disclosure must outweigh the injurious effect to the elements of NSC.
63. I note that there will in many cases be no party, other than Commission counsel and the *amicus curiae*, to assert the public interest in disclosure. This is because the *in camera* hearings at which these decisions will be



67. In my view, the disclosure of information in this sub-category would not be injurious to any of the elements of NSC.

68. Information that falls within this sub-category is found throughout the draft summary in Appendix C. [REDACTED]

- [REDACTED]
  - [REDACTED]
- [REDACTED] (Note that the words [REDACTED] were added at the request of the government, in place of the word “about” in the Commission’s draft.)

Other examples are found in paragraphs 25 and 29 of the draft summary in Appendix C.

69. I begin by noting that the disclosure in the form that I propose provides very little, and only very general, information. Moreover, this information is already in the public domain. Publicly available information directly discloses that CSIS acquired information about Mr. Arar during the critical time period shortly after Mr. Arar was imprisoned in Syria. The redacted SIRC report, which was vetted by CSIS in order to protect national security concerns, disclosed that, in November 2002, an unidentified party provided Ambassador Pillarella with a verbal briefing of the results of the Syrian investigation of Mr. Arar to that point. A copy of the written report of this information, in Arabic, was translated and forwarded to CSIS in November 2002. Further, in a report dated January 8, 2003, DFAIT informed CSIS that the Syrians believed that Mr. Arar was involved in the Muslim Brotherhood, along with other allegations. The public record clearly shows that CSIS acquired information about Mr. Arar shortly after his imprisonment in Syria.

70. Moreover, the public record is replete with references to the RCMP’s national security investigation relating to Mr. Arar. Publicly available information discloses that the RCMP was looking at Mr. Arar from the start of 2002; that the RCMP communicated with U.S. authorities during Mr. Arar’s detention in New York from September 26 to October 8, 2002; that as of June 2003, when Mr. Arar was still in prison in Syria, Mr. Arar was the subject of a national security investigation in Canada and a person “of great interest” to the RCMP; and that in October 2003 Mr. Arar continued to be a person of interest and arrangements were made to conduct surveillance of

him after he returned to Canada. In addition, the public record makes clear that, in order to protect Canada's security, CSIS works very closely with the RCMP and other Canadian agencies. CSIS has the primary mandate to protect Canadians' national security interests. It would be surprising indeed if CSIS did not acquire information about Mr. Arar from the RCMP.

71. Further, it is publicly known that SIRC conducted a review of CSIS' involvement with Mr. Arar and that CSIS is participating in this Inquiry. Both of those facts make clear that CSIS was involved with Mr. Arar and, given CSIS' role as a security intelligence agency, it can safely be concluded that the public knows that CSIS acquired information about Mr. Arar.
72. Moreover, the government did not call any evidence to support the submission that, given the information that is currently in the public domain about CSIS' involvement in the Arar matter, [REDACTED]

[REDACTED] I am satisfied that, if the disclosure of that type of information would in fact injure CSIS' investigative interests, such injury has long since occurred. Members of the public, particularly Mr. Arar and anyone who knows him, would by now have concluded that CSIS collected or received some information about Mr. Arar. I cannot conceive that there is the slightest doubt in their minds about that.

73. Let me then turn to information in the [REDACTED]

[REDACTED] Examples are found in paragraphs 13, 14 and 18 of the draft summary in Appendix C. [REDACTED]

at the Inquiry, Mr. [REDACTED] – a CSIS witness called by the government – accepted that the fact that CSIS has a database in which it stores information is not a secret. Indeed, that fact was disclosed in public testimony at this Inquiry. [REDACTED]

74. Insofar as the specifics in paragraphs 13, 14 and 18 are concerned, I am satisfied that the public record is such that no one, let alone Mr. Arar and anyone who knows him, would be surprised by the disclosure of the fact

that in the fall of 2002, after Mr. Arar was detained and deported to Syria,

[REDACTED]

75. Finally, in this sub-category the government objects to those parts of the summary that [REDACTED]

[REDACTED] Examples of the government's objections in this regard are found in paragraphs 15, 21, 22 and 30 of the draft summary in Appendix C.

76. Again, I do not accept that the disclosure of this type of information in the circumstances of the Arar case [REDACTED]

[REDACTED]

77. [REDACTED]

[REDACTED]

78. I am therefore satisfied that there would be no injurious effect to the elements of NSC, [REDACTED]

[REDACTED]

79. Further, pursuant to section (k)(iii), I am satisfied that the public interest in disclosure of this information, in the context of this Inquiry, overwhelms any possible damage to the elements of NSC. The same reasons that lead

- me to conclude that such disclosure would not be injurious to the elements of NSC also lead me to say that, if there were injury, it would be minimal.
80. On the other side, arguing in favour of public disclosure, is the fact that this is a public inquiry. I am asked to report on the actions of Canadian officials in relation to Mr. Arar. CSIS played a significant role in the events relating to Mr. Arar. In my confidential report to the government, I will be addressing the role of CSIS at length. However, the government has also requested that I make a public report. If I am unable to comment on the fact that [REDACTED] even without providing details, [REDACTED]
81. The second sub-category of information under the [REDACTED] relates to information in the summary that would [REDACTED]
82. Out of caution, I will defer my decision on this sub-category of information until later in the Inquiry. This should not be taken as an indication that I consider that information in this sub-category may cause injury to the elements of NSC. Rather, I think I may be assisted in forming an opinion on this issue when I am addressing the potential disclosure of information about the RCMP's investigation of Mr. Arar.
83. The third sub-category relates to [REDACTED] This information is found in paragraphs 41 and 42 of the draft summary in Appendix C. I will also defer my decision with respect to [REDACTED] I will consider the release of that information later in the Inquiry.
84. [REDACTED]

[REDACTED]

85. [REDACTED]

86. However, Mr. Arar's case is far from the usual one. There are a number of reasons why, in my view, the above information should be disclosed in this case.

87. First, there is currently in the public domain a large amount of information concerning the assessment of Mr. Arar's status as a threat to national security. This information has come from a number of official sources including, importantly, the RCMP which conducted a national security investigation in relation to Mr. Arar. In my view, the amount of information about Mr. Arar's status currently in the public domain [REDACTED]

[REDACTED]

[REDACTED] Given the substantial amount of public information about Mr. Arar's status, and given that the fact that the [REDACTED]

[REDACTED] I fail to see how disclosure of that assessment could in any way compromise future investigations.

88. Moreover, in this Inquiry, the government has taken the position that disclosure of the RCMP's assessments of Mr. Arar's status would not be injurious to the elements of NSC. At this point, the RCMP is the agency with the primary investigative role with respect to Mr. Arar. By way of example, when the government redacted the Garvie Report for possible NSC claims, it did not redact the RCMP's assessment of Mr. Arar that he was a person of interest or a person of great interest, or the information that Mr. Arar was the subject of a national security investigation. Moreover, the government

has not claimed NSC with respect to the disclosure of several of the important details that make Mr. Arar a person of interest to the RCMP.

89. In addition, I note that the information that I propose to disclose in this regard is largely benign.

This disclosure would add nothing to information now publicly available.

90. Finally, I heard evidence about the potential injury that may result from the release of this type of information. In his testimony at the Inquiry, Mr. [REDACTED], who is the individual whose personal opinion is expressed in the information I propose to disclose, was asked if release of the information [REDACTED] as of the day of Mr. [REDACTED] testimony, would be injurious. After replying that the issue was debatable and that he thought Mr. Arar had already been informed of this information, Mr. [REDACTED] agreed that disclosure of the information would not be injurious. I accept Mr. [REDACTED] forthright assessment. He was an impressive witness. He was completely familiar with the case of Mr. Arar and, no doubt, fully aware of much of the information that is now in the public domain. Throughout his evidence, I was struck by his even-handedness, his fairness and his knowledge about matters relating to national security.
91. Two other witnesses gave evidence with respect to the release of the information about Mr. Arar's current status. Mr. Jack Hooper, the deputy director of CSIS, testified that, in his view, there would be injury from the release of this information. He relied upon two factors. First, he was concerned that the disclosure be accurate and comprehensive. I believe that the disclosure I propose is accurate and comprehensive. Second, Mr. Hooper was concerned about setting a precedent and offered a type of floodgates argument. As I have said, the Arar situation is highly unusual. I do not accept that the disclosure of this information would create a precedent that would present a problem for CSIS in other circumstances. Finally, Mr. Hooper, when giving his opinion, did not address the fact that considerable evidence about Mr. Arar's status has already been publicly disclosed.

92. Mr. ██████ testified that he considered that ██████ would be injurious. Like Mr. Hooper, Mr. ██████ also did not address this issue in the context of the information that is now in the public domain.
93. Where the evidence of the three witnesses differed, I prefer the evidence of Mr. ██████. In summary, I am of the opinion that ██████ as set about above, would not be injurious to any of the elements of NSC.
94. There is also a compelling reason why this information should be released, if necessary, under section (k)(iii) of the Terms of Reference. That reason has to do with fairness to Mr. Arar. It is in the public interest that persons whose interests may be affected by a public inquiry be treated fairly. The confidential nature of much of the evidence that will be heard in this Inquiry presents unique challenges to the principle of fairness. Section (k)(iii) of the Terms of Reference directs me to consider whether the release of some information heard *in camera* would provide insufficient disclosure to the public. I am satisfied that one of the factors relevant to the sufficiency of disclosure is fairness to individuals; in this instance, Mr. Arar.
95. With respect to the present summary, the relevant issue is that of fairness to Mr. Arar in light of information about him that is already in the public domain. Both before and during the Inquiry, there has been a great deal of information released about Mr. Arar's status in relation to national security. Take for example the statements of an unnamed "senior Canadian intelligence source" as reported in the Ottawa Citizen on January 30, 2004: "This guy ██████ is not a virgin. There is more than meets the eye here.... If the Americans were ever to declassify the stuff, there would be some hair standing on end."
96. Moreover, much of the information about Mr. Arar's status was released with the government's concurrence. For example, the RCMP's assessment of Mr. Arar, and the information that there was an RCMP national security investigation linked to Mr. Arar, was revealed in portions of the Garvie Report that were left unredacted by the government. Likewise, portions of the SIRC report, left unredacted by the government, revealed that Syrian Military Intelligence Service (SyMI) officials informed Canadians MPs that a Syrian investigation of Mr. Arar was completed and that Mr. Arar would soon stand trial on charges of belonging to Al Qaeda. The information in those unredacted portions of the Garvie report and the SIRC report were publicly released after the reports were filed as exhibits at the Inquiry, and,





Appendix C, was prepared so as to minimize NSC-related disputes. As a result, Commission staff left out a good deal of information that I might ultimately determine should be disclosed.

108. Even with that approach, this process has been extremely protracted. In this ruling I have set out the basis for my conclusions in some detail. I have done so in part because this is the first ruling of this sort and because I hope that, by doing so, the approach I take in this ruling will facilitate the process in future.

109. I have prepared the final summary, Appendix A, with a view to capturing the reasons set out in this ruling. Without in any way accepting the validity of the government's submissions as to accuracy and fairness, I have incorporated some of the government's proposed changes where I concluded that they did not alter the meaning of the summarized evidence.

110. It is also my intention to release this ruling to the public. I propose to release the ruling, after providing the government with a copy that contains square brackets to indicate the small amount of information in the ruling that I would not publicly release, and after giving the government an opportunity to make submissions about those portions of the ruling that could raise NSC concerns.

December 3, 2004



Justice Dennis R. O'Connor  
Commissioner

## Appendix A

### Summary of Information Received at *In Camera* Hearings

**[Note:** In the attached Ruling, the Commissioner authorized public release of this final summary following an *in camera* National Security Confidentiality (NSC) hearing of October 29, 2004.

After reviewing this summary, the government asserted claims of NSC over certain sections of the text. These sections have been blacked out in this Appendix.]

This summary relates to information received at hearings from September 13 to 29, 2004. The summary was prepared by Commission staff and it is subject to revision and addition by the Commission.

There are a number of points that should be made clear about the purpose and content of the summary. First, the summary is not a comprehensive ruling by the Commissioner as to the portions of the evidence that can be publicly released. Rather, the summary has been prepared in order to inform the public, in general terms, about the Inquiry's *in camera* hearings. It is anticipated that a more detailed description of the evidence will be publicly released when the Commissioner makes his ruling(s) on National Security Confidentiality (NSC), either during or after the *in camera* hearings. The Commissioner will also rule, in future, on the government's NSC claims over information that is contained in the SIRC Report, the Garvie Report and other documents, as he considers appropriate. Additional information received at the Inquiry's hearings to date may also be released in future summaries.

Next, the summary does not reflect findings or factual conclusions on the part of the Commissioner. Additional information received at future hearings may differ from information that is summarized here. Any information in this summary that reflects negatively on any individual or organization should be treated as inconclusive until the end of the Inquiry.

Finally, the summary in many instances does not fully reflect the probing of witnesses, by Commission counsel, particularly where relevant information in the testimony is being disclosed at the present time. Information has been excluded or synthesized in the summary in order to present a logical account of evidence that is deemed to be both relevant and significant. The summary also excludes information that is subject to a valid NSC claim and where, in the Commissioner's opinion, the public interest in non-disclosure is not outweighed by the public interest in disclosure. Further, some information has been excluded for reasons of fairness, including consideration of the inability of

individuals to cross-examine witnesses whose testimony affects those individuals, the need to account for conflicts in the evidence, and the need not to mislead the public. In particular, to avoid unfairness, information has been excluded where it involves speculation or where it may be contradicted by other evidence. The unusual nature of publishing information by summary has led the Commission to exercise caution in avoiding undue emphasis on evidence that may yet be called into question.

1. The Inquiry received information in contextual presentations by a CSIS officer and an RCMP officer. The presentations summarized ongoing CSIS and RCMP investigations relating to national security. The purpose of the presentations was to provide contextual or background information for the events involving Mr. Arar and to indicate why information that concerns ongoing investigations should be kept confidential for reasons of National Security Confidentiality. Information in the presentations was not presented for the purpose of establishing the culpability of individuals subject to those investigations, but rather for the purpose of providing a background against which the actions of Canadian officials involving Mr. Arar could be reviewed.
2. Following these contextual presentations, the Inquiry heard evidence from nine CSIS officers. Their testimony is summarized below. Any significant divergence of testimony, deemed significant, is reflected in the summary.
3. Prior to Mr. Arar's detention and deportation, [REDACTED]
4. Within one month of September 11, 2001, CSIS transferred to the RCMP primary responsibility for national security investigations on a number of targets that were believed to warrant criminal investigation and possible charges. [REDACTED]  
[REDACTED] An RCMP-coordinated investigation project was created. The project was called Project O Canada and its operation in Ottawa was called Project A-O Canada.
5. This transfer of investigations allowed CSIS to focus its resources on security threats that were less clear and to search for new threats. It was a very extensive transfer of investigations by CSIS to the RCMP. The transfer of investigations was not made simply because of resource limits. CSIS believed that there was a good possibility that the RCMP would be able to lay criminal charges against the individuals whose files had been transferred. Even with its resource allocation before the budget cutbacks of the 1990s, CSIS would have made the same decision to transfer the investigations. As yet,

there have been no prosecutions of any of the individuals in question. However, criminal investigations continue as does the prospect of criminal charges under the new anti-terrorism legislation that was introduced in Bill C-36.

6. Following the transfer of investigations to the RCMP, CSIS took a less aggressive role in the investigation of the targets in question. However, CSIS continued to monitor and collect information on the targets. Following the transfer of investigations, CSIS continued to pass on to the RCMP information collected by CSIS, [REDACTED]
7. Information provided by CSIS in disclosure letters to the RCMP was normally subject to caveats that it be used only for the pursuit of investigative leads and that it not be used to obtain search warrants or authorizations for intercepts, or to support prosecutions.
8. CSIS exercises tight control over the dissemination of its information. After September 11, 2001, CSIS staff warned the RCMP that, when dealing with foreign security intelligence agencies, the RCMP should protect the integrity of CSIS' information. They did so to ensure that CSIS' information, contained in RCMP databases, was being appropriately protected.
9. Following the transfer of investigations to the RCMP, the RCMP provided CSIS with reports on its ongoing investigations. These reports summarized the RCMP's ongoing investigations. Some of the information provided by the RCMP, through Project A-O Canada, [REDACTED]
10. CSIS officers maintained an ongoing relationship with members of Project A-O Canada. Since the creation of Project A-O Canada, CSIS officers had two dozen, or more, meetings with members of Project A-O Canada. A CSIS officer testified that CSIS was kept up to date about the RCMP's relevant ongoing investigations.
11. [REDACTED]  
[REDACTED]  
[REDACTED] The information was accompanied by written caveats that the information was loaned in confidence, and that it not be used as evidence or reclassified or disseminated, without the consent of CSIS.
12. Mr. Arar was detained at JFK Airport in New York on September 26, 2002. In a report dated September 26, 2002, the RCMP informed CSIS that Mr. Arar would be denied entry into the U.S. [REDACTED]  
[REDACTED] a CSIS witness testified that [REDACTED] the report was in fact

- received and read by CSIS on October 3. [REDACTED]  
[REDACTED]
13. In a report dated September 27, 2002, the RCMP informed CSIS that Mr. Arar was being detained and interrogated in New York. [REDACTED]  
[REDACTED]  
[REDACTED] a CSIS witness testified that [REDACTED]  
[REDACTED] report was in fact received and read by CSIS on October 3. [REDACTED]
  14. CSIS first learned of Mr. Arar's detention from DFAIT on October 2, at which time DFAIT asked CSIS what it knew about Mr. Arar. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
  15. After receiving DFAIT's request in relation to Mr. Arar, a CSIS officer advised other CSIS staff that Mr. Arar had been arrested in the U.S., that DFAIT had advised that the arrest did not appear to relate to an immigration matter, and that DFAIT had advised that "it could be much bigger".
  16. Also on October 2, CSIS headquarters in Ottawa requested its Washington office to contact U.S. authorities to seek clarification about the circumstances and reason for Mr. Arar's detention in the U.S. The CSIS office in Washington, which had three staff at the time, handled hundreds of information requests per month. This request was treated as a routine request by CSIS since Mr. Arar already had consular assistance and [REDACTED]  
[REDACTED]  
Also, the request was not made a priority because CSIS expected that, if Mr. Arar was deported from the U.S., he would be deported to Canada. Finally, CSIS was aware that other Canadian agencies were involved.
  17. On October 7, the RCMP provided CSIS with a report that stated that "Project A-O Canada submitted a request through channels [to U.S. authorities] to allow investigators access to Maher Arar to conduct an interview". The report also stated that Mr. Arar "was detained by U.S. [REDACTED]  
[REDACTED] upon trying to enter the U.S. on the 27<sup>th</sup> of September". [REDACTED]  
[REDACTED]
  18. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

19. CSIS learned of Mr. Arar's deportation to Syria on October 9, from two sources, one at DFAIT and the other at Project A-O Canada. DFAIT had obtained this information from the RCMP.

20. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] a CSIS request for information from U.S. authorities about Mr. Arar's [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

21. [REDACTED]  
[REDACTED] a CSIS request for information from U.S. authorities about Mr. Arar's [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

22. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

23. On October 14 or 15, CSIS was informed by DFAIT that Mr. Arar may be in Syria. On October 22, CSIS received confirmation from DFAIT that Mr. Arar was in Syria. Subsequently, CSIS was informed by DFAIT that Mr. Arar had advised its officials that he had been in Jordan briefly, was taken to the Syrian border, and was given to Syrian authorities.

24. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
25. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
26. [REDACTED]
- [REDACTED]
27. After Mr. Arar's deportation, CSIS continued to receive information about Mr. Arar. On October 24, CSIS received information from DFAIT about Mr. Arar from sources in Syria. A DFAIT report was generated which included information about statements allegedly made by Mr. Arar while in detention in Syria. On November 6, CSIS received an Arabic copy of a statement, obtained by DFAIT from a Syrian official. The statement was allegedly made by Mr. Arar while in detention in Syria.
28. For national security reasons, CSIS may have to enter into relationships with a foreign agency of a country that has a poor human rights record. In such cases, CSIS exercises caution by closely scrutinizing the content of information provided to, or obtained from, the foreign agency and by instituting checks and balances to ensure that none of the security intelligence information exchanged with the foreign agency is used in the commission of human rights violations.
29. Generally speaking, CSIS only discloses information to a foreign agency of a country in which there are human rights concerns after considering various issues. These issues include the potential use to which the foreign agency may put the information, especially if it concerns Canadians, and the degree of the threat that an affected individual poses to national security.

- Further, CSIS considers the ability and willingness of the foreign agency to respect caveats and protect the information from public disclosure.
30. CSIS was concerned that, if Mr. Arar was tortured or mistreated in Syria, this would make it difficult for Canada to deport other individuals to Syria.
  31. By mid-January, 2003, Canadian officials became aware that Mr. Arar could be imprisoned in Syria for a very long time and that he could be sentenced to death. A CSIS witness agreed with the statement that the Canadian government should do everything possible to secure Mr. Arar's release from Syria.
  32. In May, 2003, the CSIS liaison officer at DFAIT advised CSIS that the DFAIT Security and Intelligence Bureau was considering sending an officer to Syria to interview Mr. Arar. The Bureau asked CSIS whether CSIS had any questions for Mr. Arar. A CSIS witness testified that, to his knowledge, no questions were sent. Government counsel advised, at the hearing, that the contemplated interview with Mr. Arar did not take place.
  33. In May and June, 2003, CSIS objected to a DFAIT proposal to send a joint ministerial letter – from both the Solicitor General and the Minister of Foreign Affairs and International Trade – to the Syrian government requesting Mr. Arar's release. In particular, CSIS objected to the proposed statement that “the Government of Canada has no evidence that Mr. Arar was involved in terrorist activity nor is there any impediment to his return to Canada”. CSIS supported alternative language as follows: “Mr. Arar is currently the subject of a National Security Investigation in Canada. Although there is not sufficient evidence at this time to warrant Criminal Code charges, he remains a subject of interest. There is no Canadian government impediment to Mr. Arar's return to Canada.” A letter, with modified language, was eventually sent by the Prime Minister on July 11, 2003. That letter stated: “I can assure you that there is no Canadian government impediment to [Mr. Arar's] return”.
  34. [REDACTED]

35. [REDACTED]
36. As mentioned above, [REDACTED] disclosure of which would be injurious to international relations, national defence or national security.  
[REDACTED]
37. [REDACTED]
38. [REDACTED]
39. [REDACTED]
40. With respect to the Commissioner's mandate to make recommendations in Part 2 of the Inquiry, several CSIS witnesses testified that the CSIS review mechanism – consisting of the Security and Intelligence Review Committee (SIRC) and the Inspector General – are very effective. The prospect of review occupies a high position in the mindset of CSIS staff. This is very effective in keeping CSIS within the bounds of appropriate behaviour and its mandate.
41. In response to a question about caveats, a CSIS witness testified that, when applying caveats, he did not tend to think of the prospect of review by SIRC. Nevertheless, he testified that CSIS staff are very conscious of the policies that surround the use of caveated information and that there could be a review if an error occurs.
42. Another CSIS witness testified that, although the CSIS review bodies are seen as time and resource-intensive by frontline staff, from an organizational point of view the review bodies increase internal accountability. The same witness also testified that, following the implementation of the new anti-terrorism legislation post 9/11, there is now more overlap than ever before between CSIS' work and the RCMP's work in relation to national

security, which is a requirement to preclude things ‘falling between the cracks’.

## Appendix B

### The government’s proposed summary of information received *in camera*

[**Note:** The government proposed this summary, as an alternative to the draft summary produced by the Commission, in advance of the *in camera* NSC hearing of October 29, 2004.]

#### Summary – CSIS Witness Testimony

The Commission received information in contextual presentations by Mr. Jack Hooper, the A/Deputy Director Operations, CSIS and an RCMP officer. The presentations summarized ongoing CSIS and RCMP investigations relating to national security. The purpose of the presentations was to provide contextual or background information for the events involving Mr. Maher Arar, and to indicate why information relating to concerns pertaining to ongoing investigations should be kept confidential for reasons of national security confidentiality and to ensure that those investigations are not compromised. Information in the two presentations was not presented for the purpose of establishing the culpability of individuals subject to those investigations, but rather for the purpose of providing a background against which the actions of Canadian officials involving Mr. Arar should be reviewed.

Following these contextual presentations, the Commission heard evidence from nine CSIS employees over nine days of *in camera* testimony.

To prepare for this testimony, the Commission reviewed both the corporate and non-corporate (transitory) records of CSIS – in short, all of the records CSIS identified that could relate to the work of the Commission. Additional equipment and software had to be purchased by the Service and substantial human resources were involved in conducting the searches required by the Commission.

Following a review of CSIS documentation and a series of pre-interviews with Service employees, nine CSIS employees testified *in camera* before the Commission. They were questioned extensively and in detail about the Service’s counter-terrorism mandate and investigations, the Service’s investigations in the area of Sunni Islamic extremism and, more particularly, on any information relating to Mr. Arar and the work of this Commission.

CSIS witnesses included: senior management (including Mr. Jack Hooper who had testified in the open hearings in June, 2004), analysts, supervisors and managers from CSIS Headquarters Counter Terrorism Branch, CSIS Ottawa Region office investigators and supervisors and CSIS Liaison Officers posted abroad during the relevant period.

During the course of the *in camera* hearings the Commission looked into the following questions raised by the SIRC:

- Was Mr. Arar a CSIS target or individual of interest to the Service before his detention in the United States in September 2002?
- What was the nature and extent of the information that CSIS possessed on Mr. Arar before his detention in the United States?
- What information did CSIS provide to domestic agencies (including the RCMP) and/or foreign agencies (including American, Jordanian and Syrian intelligence agencies) *before* Mr. Arar's detention in the United States?
- Was any information regarding Mr. Arar provided to CSIS, before his detention in September 2002, by other Government of Canada departments or agencies? Which ones?  
By foreign governments? Which ones?
- When and how did CSIS become aware that Mr. Arar had been detained in the United States?
- When and how did CSIS become aware that Mr. Arar was being deported to Syria?
- What information did CSIS receive from and/or provide to domestic and/or foreign agencies between the time Mr. Arar was detained in the United States and the time he arrived in Syria?
- What information did CSIS obtain regarding the detention and interrogation of Mr. Arar in Syria, and from whom did CSIS receive this information?
- Did any CSIS employee or human source travel to Syria during the time Mr. Arar was detained, and did any person associated with the Service have contact with Syrian officials and/or Mr. Arar during this time?
- What operational information did CSIS obtain stemming from Mr. Arar's interrogation in Syria, and did CSIS share any of this information with domestic and/or foreign agencies?
- When and how did CSIS become aware that Mr. Arar was to be returned to Canada?
- What information did CSIS receive from and/or provide to domestic and/or foreign agencies regarding the circumstances under which Mr. Arar would be returned to Canada?

- Regarding the distinction between the duties, powers, functions and responsibilities of CSIS and those of the RCMP, how is this distinction defined and applied by CSIS?
- What are the standards and policies that are in place to determine whether an individual should be a target or subject of an investigation by CSIS?
- INSET is an example of a new program that involves close collaboration between CSIS and the RCMP. Would it be accurate to conclude that the division of responsibilities between the RCMP and CSIS are more blurred today, than intended in 1984 and practices until recent years?

During the June 21-23 public hearings, counsel for Mr. Arar – Mr. Lorne Waldman – posed a number of questions the answers to which were opposed by Government Counsel on the grounds of national security. During the *in camera* hearings, the Commission received information in respect of these questions:

- Have there been times when restrictions have been placed on relationships with foreign agencies because of human rights violations?
- Do you know if CSIS agents went to Syria?
- Does CSIS have an arrangement with Syria?
- The US Department of State website lists the states that engage in torture. Do we have arrangements with any of the states listed on the US Department of State website?
- Has CSIS given information regarding an individual to regimes that engage in torture?
- Can you ascertain whether we shared information with Syria?
- Can you ascertain whether we shared it [information] on any individual?
- Did CSIS provide information on Mr. Nureddin to Syria?
- With respect to joint operations, would this also involve observing another agency interview a suspect? Did this happen to Mr. Arar?
- What are INSET teams? What training do they receive? What additional information can you provide?
- Do you think the deportation of Mr. Arar was appropriate?

The Commission also heard detailed evidence from several of the CSIS witnesses in support of the Attorney General of Canada's request that information be received *in camera* and *ex parte* and not be disclosed publicly on the basis that disclosure of such information would be injurious to national security.

With respect to the Commissioner's mandate to make recommendations in Part 2 of the Commission, several CSIS witnesses were asked by the Commissioner to comment on their personal views of the CSIS review

mechanism, consisting of the Security Intelligence Review Committee and the Inspector General. Witnesses testified that they viewed the review mechanisms as effective. The prospect of review occupies a high position in the mind set of CSIS staff and is effective in keeping CSIS within the bounds of its statutory mandate. The Commission did not receive any evidence relating to the effectiveness of existing RCMP review mechanisms or possible alternative review mechanisms.

## Appendix C

### Draft summary of information received *in camera* [not for public release]

**[Note:** The Commission produced this draft summary in order to provide a record for the *in camera* NSC hearing of October 29, 2004. It was not intended for public release. A revised version of this draft summary, authorized for public release by the Commissioner, is attached as Appendix A.]

## Appendix D

### Summary of information that is in the public domain

The following is a collection of some of the information about Mr. Arar, often damaging to his reputation, that is already in the public domain. I have grouped the information into different categories and identified the sources of the information in each case.

#### Investigations relating to Mr. Arar

##### Official release

- The genesis of Project O Canada and Project A-O Canada (RCMP investigations) was fundamentally linked to the events that occurred post-September 11, 2001. Project O Canada began on September 27, 2001. It was made up of a task force called the Toronto Counter Terrorism Task Force, whose mandate was to investigate an alleged Al Qaeda cell (Exhibit P-19, Garvie report p.55).
- Mr. Arar was connected to an ongoing RCMP investigation that involved individuals also of interest to U.S. authorities (Exhibit P-19, Garvie report p.30).

- On October 7, 2003, A-O Canada investigators decided to request Mr. Arar's arrival location and time in Canada so that their investigation of Mr. Arar could be continued, including placing Mr. Arar under surveillance when he returned to Canada (Exhibit P-19, Garvie report, p.23).

#### Media reports based on statements of named government officials

- Headline: "Maher Arar still under RCMP suspicion, solicitor general hints: Easter won't divulge force's role in case" (Ottawa Citizen, October 8, 2003). Story: "... Mr. Easter and Deputy RCMP Commissioner Garry Loeppky threw a cloud of suspicion over Mr. Arar yesterday while testifying at a Commons committee.... Mr. Easter would not say if the RCMP provided information to the U.S., saying it could compromise the integrity of a continuing investigation and violate Mr. Arar's privacy.... Mr. Easter's statement indicates the RCMP are continuing an investigation of Mr. Arar, under way since at least January 2002 when Mounties visited the computer engineer's Ottawa home."
- Headline: "Mounties eyed Arar since start of 2002: Syrian-Canadian had contact with 'persons of interest,' document says" (National Post, October 18, 2003). Story: "The federal government has acknowledged for the first time that the RCMP had Maher Arar under investigation since January, 2002, because of concerns about his associates. A government document says the Mounties were investigating Mr. Arar from the 'early days of this case' based on contacts the Syrian-Canadian allegedly had with "persons in Ottawa who were of interest to them.... The documents say U.S. law enforcement gave the Mounties 'clear evidence' of Mr. Arar's "involvement in al-Qaeda"" [citing documents obtained under ATIP].
- Headline: "Chief admits Ottawa police took part in Arar probe" (Ottawa Citizen, March 10, 2004). Story: "... After his return home, it was revealed that the RCMP had had Mr. Arar under surveillance and had passed on information about him to U.S. officials."

#### Media reports based on statements of unnamed sources

- Headline: "Arar case began amid fear of attack on Ottawa" (Globe & Mail, January 16, 2004). Story: "Canadian counterterrorism agents were investigating the possibility of an al-Qaeda plot to blow up targets in Ottawa when they began a probe that would lead to the detentions of Maher Arar and several other Canadian Muslims half a world away.... information obtained by the Globe and Mail points to a series of events that started just before the September 11, 2001, attacks in the United States. In late August, 2001,

U.S. border guards discovered a single sheet of paper – a schematic map of Ottawa marking government buildings and nuclear research facilities – in an 18-wheeler driven by a man named Ahmad Abou El-Maati... Friends say he [Mr. Muayyed Nureddin] was put under scrutiny by CSIS before his capture.”

- Headline: “Fears of terror cell fade as two are freed” (Globe & Mail, March 20, 2004). Story: “Fears that Ontario might have harboured a terrorist cell, once thought to have included Maher Arar, seem to have disintegrated, now that two acquaintances are to return to Canada as free men.... Abdullah Almalki was quietly released from a Syrian jail... Ahmad Abou El-Maati was freed early this year... Mr. El-Maati... had been under close scrutiny in Canada, suspected of links to terrorism.... All three men were subjects of a counterterrorism investigation in Ontario in the aftermath of the September 11, 2001 attacks. Properties were searched, but no charges were ever laid.”

## Information sharing with foreign governments

### Official release

- On October 2, 2002, a briefing note stated that an identified party had indicated that “they” would interview Mr. Arar and then refuse his entry into the United States, and that an unidentified party had requested a list of questions from A-O Canada for “their” interview (Exhibit P-19, Garvie report p.17).
- U.S. authorities inquired as to the RCMP’s level of interest in filing criminal charges against Mr. Arar and the RCMP’s ability to refuse him entry into Canada (Exhibit P-19, Garvie report p.30).
- According to Mr. Stephen Harper, Leader of the Opposition: “The foreign affairs minister said for two months that the United States had offered no justification or information for the deportation of Maher Arar. Yet we now know that the RCMP knew of Arar’s activities. They questioned him nearly a year ago and they were notified weeks ago by the FBI of its information” (Hansard, Oral question period, November 18, 2002).
- Syrian authorities provided the Department of Foreign Affairs and International Trade (DFAIT) with confirmation that Mr. Arar was being held and interrogated by Syrian authorities and that there was a reference to Mr. Arar having “apparently already admitted that he has connections with terrorist organizations” and that the Syrians intended to continue to interrogate him (Exhibit P-19, Garvie report, p.32).

- In response to a possible question “Did Syria provide transcripts of its interrogation of ARAR to CSIS”, the Solicitor General was briefed to answer as follows (ATIP release):
  - I simply will not comment on the operational activities of CSIS.
  - The terrorist threat confronting Canada is international in scope and unrelenting. We are clearly not immune from the threat of terrorism.
  - To protect Canada and Canadians, CSIS is working very closely with the RCMP and other Canadian agencies.
  - CSIS is actively engaged with its international counter-terrorism partners and exchanges intelligence on terrorist threats to Canada and Canadians.
  - The activities of CSIS are closely reviewed by both the Security and Intelligence Review Committee, SIRC, as well as by the Office of the Inspector General of CSIS.

The briefing was prompted by a CTV news report as follows:

- A CTV news report of 24 October 2003, alleges that the Syrian government provided transcripts of its interrogation of Maher ARAR to CSIS.
- CTV reported that senior government officials have advised that the Syrian information indicates that ARAR, during his interrogation, provided information which implicated several other Canadians detained in Syria as well as in Canada under security certificates.
- CTV reported that this information pertained to Abdullah al Malki, Arwad al Bushi, Ahmed Abu al Maati and Mohamed Harket, and that it tends to indicate that there are Al Qaeda sleeper cells in Canada.
- In response to a possible question, the Solicitor General was briefed as follows (ATIP release):

Question:

What about the recent media reports, stating that CSIS has received transcripts of Mr. Arar’s “debriefing” by Syrian officials?

Answer:

In order for CSIS to fulfill its mandate, CSIS actively exchanges information with foreign agencies, under defined arrangements. These types of information exchanges, as well as the arrangements that govern them, are available to the Committee at all times and are reviewed by SIRC on an ongoing

basis. I am not prepared to comment further, except to re-state that SIRC has full access to all CSIS files.

- On October 10, 2002, American officials confirmed that Mr. Arar was deported to Syria, and further information was provided that Mr. Arar might have subsequently been sent to Jordan (ATIP release).
- Syrian and Jordanian authorities confirmed that Mr. Arar was not in their countries (ATIP release).
- DFAIT learned that Mr. Arar was transferred from the U.S. to Jordan by private plane (ATIP release).
- DFAIT reported that, on arrival in Jordan, Mr. Arar was detained for questioning by Jordanian authorities instead of being transferred to Syria and that Jordan handed Mr. Arar over to Syria only on October 21 (ATIP release).
- DFAIT reported that Mr. Arar was detained by Jordanian authorities for over a week and that they may have questioned him over his alleged terrorist connections (ATIP release).

#### Media reports based on statements of named government officials

- Headline: “Deporting Arar was right thing to do: U.S.: Easter admits Canada gave information to U.S. about Ottawa man’s alleged terror links” (Ottawa Citizen, November 20, 2003). Story: “... In the past, Mr. Easter has ducked questions about the role Canada played in providing information on Mr. Arar, but yesterday, he said the information on Mr. Arar came ‘from a number of agencies globally,’ including Canada. ‘I think I can say that our discussions indicate that this information didn’t just come from Canada alone,’ Mr. Easter said.”
- Headline: “RCMP passed along Arar’s name, U.S. says” (Globe & Mail, November 8, 2003). Story: “... ‘Arar first came to our attention from information from the Canadian government,’ a U.S. official who has been closely involved in the case said.... it was of sufficient interest to the Federal Bureau of Investigation and U.S. immigration officials for them to place the Canadian man’s name on a computerized watch list known as Viper.”
- Headline: “CSIS, RCMP alerted U.S. about Arar, Powell says” (Globe & Mail, December 20, 2003). Story: “Both the RCMP and CSIS fingered Maher Arar to U.S. anti-terrorist agencies, Foreign Minister Bill Graham says he was told by U.S. Secretary of State Colin Powell.... ‘Both [CSIS and the RCMP] provided information to the U.S.,’ Mr. Graham said.”

## Conclusions drawn by Canadian authorities about Mr. Arar

### Official release

- On October 18, 2002, the RCMP stated that it had no information concerning any threat associated with/by Mr. Arar (Exhibit P-19, Garvie report, p.30).
- In November, 2002, the RCMP declined to provide Mr. Michael Edelson, counsel for Mr. Arar, with a letter stating that Mr. Arar was not wanted in Canada for any offence, that there was not a warrant for his arrest, and that he was not a suspect with respect to any terrorist crime (Exhibit P-19, Garvie report p.33).
- On June 26, 2003, Deputy Commissioner Loepky informed another government official that Mr. Arar was “currently subject of a national security investigation in Canada” and that he “remains a subject of great interest” (Exhibit P-19, Garvie report p.41).
- In response to a possible question about Mr. Arar’s links to terrorism and “clear evidence”, provided by the U.S. to the RCMP, of Mr. Arar’s involvement in Al Qaeda, the Solicitor General was briefed to say: “For national security reasons, we do not comment on ongoing investigations nor how they are conducted” (ATIP release).
- On October 10, 2003, RCMP Chief Superintendant Killam determined, concerning the RCMP criminal investigation with respect to Mr. Arar, that Mr. Arar was “a person of interest” and that arrangements were made to conduct surveillance on Mr. Arar upon his release and return to Canada (Exhibit P-19, Garvie report p.48). A request for surveillance resources was prepared by Project A-O Canada but not acted upon (p.70).
- Chief Superintendant Garvie concluded that the members of A-O Canada had legitimate reasons to initiate an investigation with respect to Mr. Arar and that Mr. Arar was a “person of interest,” and that direct and indirect links had been established with other individuals who were suspected of being members of, or associated with, Al Qaeda (Exhibit P-19, Garvie report p.67).

### Media reports based on statements of unnamed government officials

- Headline: “U.S. ready to cooperate in Arar probe: Wants assurances intelligence reports on case will remain secret” (Ottawa Citizen, January 30, 2004). Story: “... ‘This guy is not a virgin. There is more than meets the eye here,’ said a senior Canadian intelligence source, speaking on background. ‘If the

Americans were ever to declassify the stuff, there would be some hair standing on end.”

### Conclusions drawn by U.S. authorities about Mr. Arar

#### Official release

- U.S. authorities concluded that Mr. Arar was a member of Al Qaeda (ATIP release).
- Chief Superintendent Garvie concluded that Mr. Arar was, at the very least, a person of interest to U.S. authorities (Exhibit P-19, Garvie report p.67).

#### Media reports based on statements of named government officials

- Headline: “U.S. ready to cooperate in Arar probe: Wants assurances intelligence reports on case will remain secret” (Ottawa Citizen, January 30, 2004). Story: “... U.S. Justice Department spokesman Charles Miller said yesterday Mr. Ashcroft had ‘no position’ on Canada’s inquiry, but maintained the U.S. considers Mr. Arar a security threat. ‘We have information indicating that Mr. Arar is a member of al-Qaeda and, therefore, remains a threat to U.S. national security.... the information sought involves sensitive national security information that is classified and cannot be released publicly.’”

#### Media reports based on statements of unnamed government officials

- Headline: “Deporting Arar was right thing to do: U.S.: Easter admits Canada gave information to U.S. about Ottawa man’s alleged terror links” (Ottawa Citizen, November 20, 2003). Story: “... U.S. officials have been reportedly leaking details of the circumstances surrounding Mr. Arar’s deportation.... The Washington Post yesterday quoted an unnamed U.S. official who claimed that Mr. Arar had the names of ‘a large number of known al-Qaeda operatives, affiliates or associates’ in his wallets and pockets when he was detained after arriving in New York....”

### Conclusions drawn by Syrian authorities about Mr. Arar

#### Official release

- In November 2002, an unidentified party provided Ambassador Pillarella with a verbal briefing of the results of the Syrian investigation of Mr. Arar to that point. A copy of a written report of this information, in Arabic, was translated and forwarded to CSIS in November 2002. The report indicated

that, in 1993, Mr. Arar traveled to Afghanistan (Exhibit P-18, SIRC - report, p.18).

- In a report of January 8, 2003, DFAIT informed CSIS that the Syrians believed that Mr. Arar was involved with the Muslim Brotherhood (noting that this organization “has resorted to acts of political violence” and “has given rise to a number of more militant and violent organizations, including Hamas and Islamic Jihad”) and that Mr. Arar was part of a terrorist cell. DFAIT also informed CSIS that, when Syrian officials were asked about Mr. Arar’s future, they responded that Mr. Arar would likely be detained for a lengthy period and would be prosecuted (Exhibit P-18, SIRC report, p.22).
- Unredacted fragments of a DFAIT document state: “of Mr. Arar and question him as to his alleged affiliation with al-Qaida.”; “Mr. Arar could be connected to al-Qaida”; and “Mr. Arar had finished and it was their intention to have him stand trial on charges of belonging to al-Qaida and for having received military training in an al-Qaida camps in Afghanistan”; and “Mr. Arar was not wanted for any criminal activity in Canada and again emphasized the humanitarian and compassionate situation with respect to Mr. Arar” (ATIP release).
- The Canadian Ambassador and Canadian Members of Parliament Catterall and Assadourian met with SMFA (Syrian Ministry of Foreign Affairs) and SyMI (Syrian Military Intelligence Service) officials. The SyMI officials informed the MPs that their investigation of Mr. Arar was completed and that he would soon stand trial on charges of belonging to Al Qaeda and having received military training in Al Qaeda camps in Afghanistan (Exhibit P-18, SIRC report, p24, supplemented by ATIP release).
- DFAIT reported that Syrian authorities stated that Mr. Arar was a member of Al Qaeda, noting that this assertion was the same as that used by the Americans when Mr. Arar was ordered deported to Syria (ATIP release).

#### Media reports based on statements of named government officials

- Headline: “Syrians couldn’t link Arar to al-Qaeda” (Globe & Mail, October 9, 2003). Story: “Syria says it never had enough evidence to link Maher Arar to al-Qaeda.... ‘we didn’t find complete [or] concrete evidence of his link,’ Ahmad Arnous, Syria’s ambassador in Ottawa, said in an interview yesterday.... Mr. Arnous said U.S. authorities turned over to Syria an extensive dossier on Mr. Arar that, according to the Americans, showed involvement with the al-Qaeda terrorist group. This included information obtained during an interrogation of Mr. Arar that took place while he was detained in

Jordan.... Syria also provided Canadian officials with the information in the Arar dossier 'as a goodwill gesture,' Mr. Arnous said."

APPENDIX 6(G)

AMENDMENT TO RULING ON NATIONAL SECURITY  
CONFIDENTIALITY

Paragraph 14 of my Ruling of December 3, 2004 was based on information provided to me. As it turns out that information, through a misunderstanding, was not precisely accurate. An accurate statement of what occurred is set out below. This change has no effect on the conclusions that I reached in my Ruling. My Ruling should therefore be amended to substitute the following paragraph for paragraph 14.

*14. Following the hearing, Mr. Atkey appointed Mr. Gordon Cameron to assist him in his role as amicus curiae. Mr. Cameron has extensive experience with matters of national security. He has been an outside counsel for SIRC for the past ten years. At my request, Mr. Cameron reviewed the material leading to the preparation of the summary, something that Mr. Atkey had done earlier. Mr. Cameron also reviewed the evidence upon which the government relied for its NSC claims, as well as the oral and written submissions of the government made at the October 29th hearing. Having done so, Mr. Cameron consulted with Mr. Atkey and confirmed that Mr. Atkey remained of the view that the draft summary in Appendix C could be disclosed to the public, a view that Mr. Cameron shared. Mr. Cameron communicated this position to Commission Counsel, who advised me of it.*

January 19, 2005



Justice Dennis R. O'Connor  
Commissioner

APPENDIX 6(H)  
RULING ON SUMMARIES

The Terms of Reference for this Inquiry contemplate that I may, from time to time, prepare summaries of those portions of the *in camera* evidence that, in my opinion, can be disclosed publicly in accordance with the process set out in the Terms of Reference. With that in mind, I developed Rules of Procedure and Practice that provided for the preparation of periodic summaries of the *in camera* evidence. The purpose of periodic summaries was twofold: to keep the public informed, to the extent possible, of the evidence being heard *in camera*; and to provide the parties with as much information as possible about the *in camera* evidence before the public hearings took place.

In accordance with the contemplated process, I prepared a summary of a relatively small portion of the CSIS *in camera* evidence that, I considered, could be disclosed to the public in accordance with the Terms of Reference. Without belabouring the point, the discussions with the government about the contents of that summary and what parts of it could be disclosed publicly were extremely time-consuming. In the end, no agreement was reached and the government filed an application in the Federal Court challenging the disclosure of some parts of the summary.

In light of that experience, it became obvious to me that, from a practical standpoint, the summary process is unworkable. Were that process to be continued, discussions with the government about the contents of summaries and what parts may be disclosed publicly would be both complex and time-consuming. Further, based on the experience with the first summary, the government and I appear to have differing views with respect to disclosure of at least some of the information over which the government claims national security confidentiality. The summary process, if continued, could lead to a series of potentially lengthy court applications, with ensuing delays of the work of the Commission and a substantial increase in the cost of the Inquiry.

As a result, I have decided to implement a new procedure for the Inquiry. The Rules of Practice and Procedure will be amended so that I may prepare summaries of the evidence heard *in camera*, but I will no longer be committed to do so. At the present time I do not intend to prepare any further summaries.

Before making this decision I sought submissions from the parties and intervenors about discontinuing the summary process. It is fair to say that while Mr. Arar and the intervenors think it unfortunate that the summary process must

be abandoned, they also accept that, in the circumstances, the new procedure that I set out below is the best way to proceed. The government accepts that I have the authority to establish the procedures I think best for the Inquiry.

Given that the new procedure will not involve the preparation of summaries, I have agreed not to seek disclosure of the CSIS summary at the present time on the understanding that the issues raised in the government's challenge to the disclosure of that summary can be litigated later, if necessary. The government has accordingly withdrawn its court application.

Before turning to the new procedure, I want to make it clear that the adoption of this new procedure does not constitute a change of view on my part with respect to the information in the CSIS summary. I maintain the view that that information should be disclosed to the public.<sup>1</sup>

The new procedure is designed to develop a more efficient, expeditious and workable process for the Inquiry. It provides an approach in which disagreements about what should be disclosed publicly, if they arise, can be addressed at one time and in the context of a report containing findings of fact, rather than on the basis of a series of summaries of the evidence heard *in camera*.

The new procedure will be as follows:

1. Rule 55 of the Rules of Procedure and Practice, which currently provides that "the Commissioner shall prepare a summary" of evidence heard *in camera*, shall be amended to provide that "the Commissioner may prepare a summary" of that evidence.
2. The Commission will complete the *in camera* hearings and then commence the public hearings in May. A schedule of the evidence to be called during the public hearings will be published shortly. A schedule for closing submissions will be prepared.
3. After hearing submissions, I will submit a report to the government with those findings of fact and conclusions in respect of the actions of Canadian officials in relation to Mr. Arar that I am able to make on the basis of the *in camera* and public evidence heard to that point.
4. The question remains how I will communicate to the government my opinion as to what portions of my report should be made public in accordance

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<sup>1</sup> However, I recognize that in response to a new concern raised by the government after my ruling on the CSIS summary was released, I agreed to hear further evidence and submissions from the government with respect to one specific area in the summary. I will hear that evidence and those submissions before forming any view as to whether that information should be disclosed to the public.

with the Terms of Reference. Currently, I am inclined to prepare a second “public” report containing those findings of fact and conclusions from the report referred to in the preceding paragraph that, in my opinion, can be disclosed to the public. However, as the Inquiry proceeds, it may be that some other way of approaching the issue of public disclosure of my report will appear more desirable.

5. For the time being, I leave open the possibility that further evidence may be called after the disclosure referred to in the previous paragraph has occurred. It is possible, but by no means certain, that upon reviewing the public report, the parties, and in particular Mr. Arar, may seek to have the Commission call further evidence. At this stage, I do not foreclose that possibility.
6. I will convene an *in camera* hearing prior to submitting my report. At that time, the Attorney General will be given an opportunity to lead evidence and make submissions with respect to the government’s claims of national security confidentiality.
7. If the government disagrees for reasons of national security confidentiality with the disclosure to the public of parts of my report that I consider should be disclosed, such disagreements may be addressed pursuant to the Terms of Reference.

There will be a procedural hearing on May 3<sup>rd</sup>, 2005 to deal with three other issues that have arisen in the course of considering this new procedure. The three issues relate to Mr. Arar’s testimony, the process by which the government’s national security confidentiality claims will be addressed in the public hearings, and the role of the *amicus curiae*. A notice calling that hearing is attached to this ruling.

April 7, 2005



Justice Dennis R. O'Connor  
Commissioner

APPENDIX 6(I)

## RULING ON PROCESS AND PROCEDURAL ISSUES

I held a public hearing on May 3, 2005 to address a number of process and procedural issues. The Notice of Hearing raised four issues. One other issue was raised by the intervenors during the course of the hearing. This is my ruling on four of the issues.

**1. MR. ARAR'S TESTIMONY**

The Notice of Hearing asked for submissions on what parts, if any, of Mr. Arar's potential testimony are essential to fulfilling my mandate, when his testimony should be heard and, importantly, how to minimize any potential unfairness to Mr. Arar arising from the fact that he does not have access to many documents and much of the *in camera* evidence relating to matters about which he would testify.

My mandate requires me to investigate and report on the actions of Canadian officials in relation to Mr. Arar, including with regard to:

- the detention of Mr. Arar in the United States;
- the deportation of Mr. Arar to Syria via Jordan;
- the imprisonment and treatment of Mr. Arar in Syria;
- the return of Mr. Arar to Canada; and
- any other circumstance directly related to Mr. Arar that I consider relevant to fulfilling this mandate.

The mandate does not direct me to investigate Mr. Arar. There are no allegations of wrongdoing made against Mr. Arar. That said, Mr. Arar is obviously a central figure in the events that I am directed to investigate and, absent problems related to fairness to Mr. Arar, there would be no question that he should testify and testify fully about events within his knowledge and relevant to the mandate.

Mr. Arar, through his counsel, submits that he should not be compelled to testify at this time and that the decision on whether he should testify should be deferred until the release of the interim report that has been discussed in a previous ruling. I agree with this submission. For reasons of minimizing the potential for unfairness to Mr. Arar, I think it prudent to delay the decision about Mr. Arar testifying until that time. I emphasize that this is not a decision that

Mr. Arar will not testify nor that he will not be cross-examined at some point. This is a decision only to defer a ruling in that regard until a later point in time.

That said, I also wish to emphasize that Mr. Arar wants to testify. I have no doubt that this is a genuine wish. Indeed, were it not for the fairness concerns discussed here, Mr. Arar would insist on testifying as soon as possible. However, in the unusual circumstances of this Inquiry, I am satisfied that the fairness concerns inherent in the process justify his counsel's concerns.

The fairness concerns arise from two points. First, Mr. Arar has a strong reputational interest that may be affected by what happens at this Inquiry. Although Mr. Arar's actions are not the focus of the mandate, it would be naïve to suggest that his reputation is not, at least in the public's mind, an issue in this Inquiry. By that I mean, given the publicity that has surrounded the Inquiry, many in the public understandably question whether Mr. Arar is connected to terrorist activities or not. Rightly or wrongly, many in the public consider this to be one of the central issues for this Inquiry. Mr. Arar has a significant interest in this issue. I cannot ignore this reality in determining the issue of fairness as it relates to Mr. Arar.

Although Mr. Arar has not received a notice under section 13 of the *Inquiries Act*, there being no allegations of wrongdoing against him, I am satisfied that because of his reputational interest, he has a considerable stake in the way the proceedings are conducted and, likely, in the report as well. As a result, I am satisfied that I should consider the issue of fairness to Mr. Arar should he testify. He is in a different position than most other witnesses, who give evidence about their knowledge of events, but do not bring to the witness stand the significant reputational interests that are present in the case of Mr. Arar. That said, I am not suggesting that Mr. Arar has anything to hide or that he has done anything wrong.

The second factor that relates to fairness for Mr. Arar arises from the unusual nature of this Inquiry. Because of National Security Confidentiality (NSC) claims, it is not possible to provide Mr. Arar with access to many of the documents and much of the *in camera* evidence relating to matters about which he could testify. Should he testify now, he would be unable to comment on those documents and that evidence.

As a matter of course, witnesses at this Inquiry have been given disclosure of and access to documents and evidence of other witnesses relating to matters about which they will testify. In this Inquiry, most of the government witnesses have had, or will have, this type of disclosure and access prior to testifying. This is possible because they have the appropriate security clearances. Mr. Arar does not. It is fair that witnesses, particularly those with a personal interest at stake

in the outcome of a proceeding, be accorded as much access as possible to the information that may affect their interest before they testify. Further, if information is introduced into evidence after they testify that affects their interest they should be given an opportunity to respond to it.

Parties who have an interest in the outcome of legal proceedings generally are entitled to a broad range of discovery or disclosure about the matters in issue. Procedural fairness, in general terms at least, requires that parties (those who will be affected by the outcome) have access to information that may affect their interests so that they can adequately respond if necessary.

David J. Mullan, in his text *Administrative Law* (Irwin Law: Toronto, 2001) refers, at page 165, to the paradigmatic situation for the implication of procedural fairness as being that described by Le Dain J. in *Cardinal v. Director of Kent Institution* [1985] 2 S.C.R. 643. At paragraph 14, Le Dain J. states that “as a general common law principle, a duty of procedural fairness [lies] in every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.” In my view, Mr. Arar’s interests in this Inquiry come within this principle. Mr. Arar’s situation is quite unique because of the enormous publicity about his circumstances and the questions in the public mind about what involvement, if any, he has had with terrorist activities. His reputational interests could be seriously affected by testifying in public and possibly also by my report.

In terms of the content of the duty of procedural fairness, I am satisfied that Mr. Arar should be provided with as much disclosure of information relevant to his proposed testimony as possible. At that time, a decision can be made whether he should testify or not. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Justice L’Heureux-Dubé listed several factors to consider in determining the content of procedural fairness. These include the nature of the decision being made, the precise statutory context (the absence of an appeal or an inability to otherwise seek reconsideration), the significance of the decision to those affected, and the legitimate expectations of a certain procedure. L’Heureux-Dubé also suggests in *Baker* that one should accord a certain degree of respect to the procedural choices of the administrative decision-maker: *Baker, supra* at paragraphs. 23-28.

I recognize that this Inquiry is not a civil or criminal proceeding and that Mr. Arar is not directly the focus of the mandate. However, as I said above, the reality is that his reputational interest could be significantly affected, positively or otherwise, both by the evidence called at the public hearings and possibly by my report.

With that in mind, I accept Ms. Edwardh's submission that the decision whether to call Mr. Arar as a witness should be deferred until there has been made available to him the maximum amount of information relating to the matters about which he could testify. That situation will likely occur following the release of the interim report.

Delaying the decision about whether Mr. Arar should testify will not adversely affect the progress for this Inquiry, as I presently envision it. Mr. Arar's testimony, if and when I hear it, will have little to do with a large portion of my mandate. My mandate is to investigate and report on the actions of Canadian officials that relate to Mr. Arar. However, Mr. Arar has no direct knowledge about most of those actions. He was not involved and his testimony would add little, if anything, to my deliberations. Thus, deferring Mr. Arar's testimony as I discuss above should not adversely affect the progress of this Inquiry.

That said, there is one area about which Mr. Arar could provide information that, while not affecting Canadian officials, is nevertheless important for me to receive at this stage of the Inquiry. Here I refer to his treatment in Jordan and Syria. Ms. Edwardh submits, on behalf of Mr. Arar, and I agree, that were I to proceed even to the point of issuing an interim report without receiving information about Mr. Arar's treatment in Jordan and Syria directly from Mr. Arar, I would be leaving out important, even essential, background information. The reason this Inquiry was called was because of Mr. Arar's allegations of mistreatment. People are shocked and want to know if Canadian officials were in any way involved in what happened. Because Mr. Arar's allegations of mistreatment triggered this Inquiry, I think it is important that, at this stage, I receive information about Mr. Arar's treatment in Jordan and Syria and also about the effects of that treatment on him and his family.

No one, including the government, disagrees. The question then is how to receive that information. Importantly, in essence, the information that I am considering receiving at this stage does not involve allegations against Canadian officials. I realize that it may well be critical of Jordanian and Syrian officials. However, I invited Jordan and Syria to participate in this Inquiry and they declined. In these circumstances, I do not consider the fact that the information sought may reflect unfavourably on Jordanian and Syrian officials is a reason not to receive it.

During the hearing, two options for receiving this information were discussed. First, Ms. Edwardh proposed that I appoint an independent fact finder to investigate Mr. Arar's treatment and its effect on him and his family and to report his or her findings to me. By analogy, Ms. Edwardh pointed to the practice

of the United Nations Human Rights Commission using fact finders for collecting evidence of torture and other potential human rights violations.

The government, on the other hand, submitted that I need not appoint a fact finder because I am a fact finder and that I could do the same investigation as the fact finder, myself. Very fairly, the government took the position that so long as the information that Mr. Arar provides does not make allegations against Canadian officials, there would be no need for cross-examination. Indeed, the government accepted that the information may or may not be received under oath and that some of it might be heard in private because of the privacy interests of Mr. Arar and his family.

I would be amenable to adopting either model. From an evidentiary standpoint, the two proposals are similar. Both would provide a mechanism for me to receive the information without the legal requirements attendant on receiving evidence pursuant to the normal evidentiary model. Both avoid the potential procedural unfairness to Mr. Arar about which I spoke above. And both are able to protect the privacy interests of Mr. Arar and his family. In neither case would I receive information that constitutes an allegation against Canadian officials. Because of the lack of opportunity for officials who might be criticized to cross-examine Mr. Arar, it would be unfair to do so.

Mr. Arar prefers the fact finder approach and I am prepared to accede to that wish. As Ms. Edwardh fairly points out, the fact finder process will likely be more sensitive to the privacy and personal concerns of Mr. Arar and his family. One of the areas to be covered is a description of the effect of Mr. Arar's treatment in Jordan and Syria on his family relations and his health. As the government noted, Mr. Arar is a victim. Evidentiary processes are often customized to protect victims. The use of a victim impact statement in criminal sentencing proceedings is one example. The United Nations Human Rights process is another. The fact finder will likely be able to explore these very private areas in Mr. Arar's case in a more sensitive manner than would be the case if the various individuals necessary to tell this story appeared before me.

I wish to repeat that using a fact finder is not designed to shield Mr. Arar from a cross-examination that he would otherwise face. The information he provides will be limited solely to his treatment in Jordan and Syria and the impact on him. As I said, none of the parties wish to cross-examine him on these matters.

Thus, I will appoint a fact finder. The mandate of the fact finder will be to investigate and report to me on Mr. Arar's treatment during his detention in Jordan and Syria and the effect of that on him and his family. I will ask my counsel to consult with Mr. Arar's counsel about suggestions for a suitable

person to conduct the fact finding investigation. Given the nature of that mandate, I do not consider it necessary that the fact finder examine any documents over which the government claims NSC except, if the government agrees, the government's annual review of the legal, political and penal situation in Syria. The fact finder will have access to the public testimony about Mr. Arar's interactions with Canadian consular officials. The fact finder should interview Mr. Arar and others he or she considers necessary to fulfill the mandate. The fact finder may also wish to review publicly available information about detention and imprisonment conditions in Jordan and Syria and any other information that may be helpful to fulfilling the mandate.

The fact finder's report will be delivered to me and will be made available to the parties prior to its disclosure to the public. I will receive submissions from the parties and intervenors, if they deem necessary, about any portions of the report that should not form part of the record of this Inquiry or should not be disclosed publicly.

I think that the fact finder approach to this delicate issue is a creative solution. I thank all counsel for their submissions in regard to minimizing the unfairness to Mr. Arar inherent in the process of this unique public inquiry.

## **2. THE RCMP TESTIMONY**

Mr. Bayne, on behalf of members of Project A-O Canada, submits that this Inquiry should not hear evidence from members of Project A-O Canada in public. The government takes this submission one step further and submits that no RCMP evidence should be called in public. I will deal with their submissions in a separate ruling to be released shortly.

## **3. CONDUCT OF PUBLIC HEARINGS**

The issue is how the Inquiry should receive and address the government's objections to the introduction of evidence in the public hearings because of its NSC claims. The comments that follow relate to all of the public evidence other than the evidence of RCMP officers, should I rule that they be called. If necessary, in the ruling on RCMP testimony, I may address what limitations, if any, there would be on the matters about which RCMP officers will be required to testify.

As to the manner in which the government would raise its objections, there are two approaches put forward. The first, the government's preference, would have me rule in advance that questions not be asked in specified areas because of the government's NSC claims. Under the second, a more traditional approach, the government would raise its objections during the hearing when questions

were asked that it considered required an answer based on confidential information.

I prefer the second approach. Although the advance ruling approach may be intended to simplify the proceedings and to save time, I think it would probably have the opposite effect. It would be necessary first to agree upon the excluded areas and then to work out precise language that would cover all questions. The danger of casting the exclusionary net too broadly is significant. Moreover, experience in this Inquiry indicates that the government would take a broader view of what needs to be excluded because of NSC than I would. Finally, even if I did direct areas for exclusion, I can envision arguments from both sides about whether certain questions came within or fell outside the exclusionary direction. I do not think that the advance ruling approach will work very well.

As to the more traditional approach that requires an objecting party to raise an objection when a question is asked, I recognize that this could involve some exchanges where there are repeated objections. However, I expect that once it is clear that there will be objections to a certain line of questions, the line of questions may be dealt with by summarizing the line of questions rather than by asking each question individually. I will control the process so that the questions a party wishes to ask are recorded and, hopefully, so that there is not undue delay or waste of time.

The process will be as follows. When there is an objection to a question on NSC grounds, the question will be noted but not answered. I do not propose to rule on the validity of the government's objections to questions on the basis of NSC during the public hearings. To do so would likely raise all of the problems that led me to conclude that the summary process was unworkable. Instead, in my report, I will summarize at least in general terms the questions that were objected to.

Furthermore, if the questions have already been answered *in camera*, Commission counsel or I will indicate that this is the case. In some instances, it may be necessary to review the transcripts to be certain. If questions have not been asked *in camera*, and if the questions are relevant, Commission counsel will ask those questions at future *in camera* hearings. Thus, when the government objects to answering questions because of NSC concerns, assuming the questions are relevant, an assurance will be given that the questions either have been or will be asked *in camera*. I will include in my report the information received when the questions were answered *in camera*.

Having said all of the above, I encourage all counsel to approach this issue cooperatively. If Mr. Arar's counsel has questions to which they know the

government will object, it will not be necessary to ask all of those questions. Rather, after discussions with Commission counsel, they could indicate on the record the nature of the questions and their wish to ensure those questions are asked *in camera*. Similarly, I would ask government counsel to not raise objections that are overly broad and to ensure that there is made available to the public as much information as possible during the public hearings. The fact that objections will result in answers not being given publicly should be an impetus to use the objection procedure only when necessary. It should never be used solely to shield potentially embarrassing evidence.

All told, I am satisfied that the above procedure will satisfy the obligation in the Terms of Reference to prevent disclosure of information that in my opinion would be injurious to international relations, national defence or national security.

#### 4. THE ROLE OF *AMICUS CURIAE*

The Notice of Hearing for May 3<sup>rd</sup>, 2005 invited submissions on the role of the *amicus curiae*. Mr. Atkey, the *amicus*, and Mr. Gordon Cameron, who assists him, both attended the hearing. Mr. Atkey filed written submissions and made oral submissions. I want to thank Mr. Atkey and Mr. Cameron for the work they have done to date and for their thoughtful submissions.

On page 7 of their written submissions, Mr. Atkey and Mr. Cameron set out their views on the role of the *amicus* for the balance of the Inquiry. They make seven points. They are as follows:

1. *Amicus curiae* will continue to familiarize itself with the transcripts of oral testimony and exhibits filed in *in camera* proceedings held during the months of September 2004 – April 2005 and will attend public hearings in May and June, 2005 so as to be in a position to test government claims to national security confidentiality and to participate in *in camera* proceedings that occur as a result.
2. *Amicus curiae* will prepare a written brief on August 19, 2005 containing submissions on the legal basis for national security confidentiality claims in practice and as set forth in the jurisprudence, and will also comment generally on the evidence adduced from witnesses representing CSIS, the RCMP, DFAIT and other Canadian agencies in relation to Maher Arar. However, *amicus curiae* in its written brief and oral submissions to follow will not make reference to specific pieces of evidence until it is determined later in the proceedings which evidence Commission counsel will be relying upon in his response to

various submissions-in-chief, suggesting alternative findings or conclusions that are available to the Commissioner.

3. Until such time as the Commissioner makes findings of fact and conclusion in his interim report, all *amicus curiae* submissions related to evidence for which national security confidentiality is claimed should be received *in camera*.
4. *Amicus curiae* shall have an opportunity to file a written reply brief by August 26, 2005 commenting on various submissions-in-chief as may relate to issues of national security confidentiality.
5. In submitting any interim report to the government with findings of fact and conclusions, the Commissioner will consider the submissions of *amicus curiae* in expressing his opinion as to which parts of the interim report shall be disclosed to the public.
6. If there is a disagreement in relation to what parts of the interim report may be disclosed to the public, an NSC hearing will be conducted in accordance with Order in Council P-C 2004-48 with full standing given to the *amicus curiae*.
7. Upon public disclosure of the interim report, if there are further witnesses to testify, *amicus curiae* will continue to participate in the proceedings and reserves the right to make submissions to the Commissioner respecting claims to national security confidentiality.

I agree with their submissions and would for clarity add the following comments.

I note that in paragraph 1 the *amicus* indicates that he will attend public hearings (for simplicity I will use the singular, however, in doing so I intend to refer to either Mr. Atkey or Mr. Cameron, or both). Currently it is expected that there will be some *in camera* hearings in late July and in early August. The *amicus* is welcome to attend those hearings as he sees fit having regard to his mandate.

A suggestion was made that the *amicus* not only deal with NSC issues, but that the *amicus* should also make submissions on the substance of the findings I will make in my report. The *amicus* has not suggested this role and I do not think it essential. Unlike many other types of proceedings, I have had the benefit of Commission counsel, whose task has been to present all the evidence and to assist me as Commissioner in getting to the bottom of what occurred. That said, I would welcome any assistance or submissions the *amicus* sees fit to give in this regard, but I stop short of directing that the *amicus* must do so. It occurs to me, however, that if the *amicus*, as a result of his involvement, feels that

there are useful submissions that he can make on some aspects of my mandate, he should feel free to do so. I would welcome such submissions.

Finally, as has been the practice throughout, all submissions received from the *amicus* will be disclosed to the government, and the government will be given an opportunity to reply.

## 5. TESTIMONY OF MESSRS. EL MAATI, ALMALKI AND NUREDDIN

This issue was not raised in the Notice of Hearing. In their written and oral submissions, the intervenors submitted that if I were to appoint a fact finder, as suggested by Mr. Arar's counsel, I should direct the fact finder to bring evidence from the above-named individuals, each of whom was detained in Syria in or about the same time as Mr. Arar. (They referred to the fact finder as a Rapporteur.)

The submissions of the intervenors suggest that the evidence of these three individuals could be of assistance to me in two ways. First, as all three were imprisoned in Syria, and all have alleged being tortured there, they would be able to provide evidence that will assist in understanding Mr. Arar's experience in Syria. Their evidence of mistreatment and torture would be helpful in evaluating Mr. Arar's evidence in this regard. Second, the intervenors suggest that the circumstances under which these individuals ended up in Syrian detention raise troubling questions about whether Canadian officials were complicit in their detention. The evidence of what happened to them could possibly show a pattern of misconduct by Canadian officials. If so, that pattern could shed light on what happened to Mr. Arar and could also help me in the Policy Review part of my mandate.

I will deal with Mr. Ahmad El Maati first. Through his counsel, he has indicated that he will not cooperate with this Inquiry. Mr. El Maati alleges that he was tortured in Syria. I do not intend, nor have I been asked, to compel anyone who alleges torture to give evidence or otherwise become involved in this Inquiry. Thus, I will not direct the fact finder to include Mr. El Maati in his investigation.

Mr. Abdullah Almalki is represented by counsel who has indicated to Commission counsel that his client would be prepared to cooperate with a fact finder, but I am told that he does not wish to give evidence, in the traditional manner, at this Inquiry.

As I said above, the intervenors seek to elicit information from these witnesses about two subjects: mistreatment in Syria and complicity of Canadian officials in their removal to Syria. In my view only the first subject - mistreatment in Syria - would be appropriate for investigation by a fact finder. I say this for

the same reasons that I directed that, in regard to Mr. Arar, the fact finder should not look into any allegations of misconduct against Canadian officials. Information of that nature would have to be introduced through evidence at the Inquiry and be subject to cross-examination. It would be unfair to receive information for evidentiary purposes, alleging wrongdoing without giving those who are subject to the allegation an opportunity to directly challenge the evidence by way of cross-examination.

I do not know if what Mr. Almalki has to say about his detention in Syria will be helpful to me in assessing what happened to Mr. Arar. In any event, I do not see that there is prejudice to any Canadian official or institution if I direct the fact finder to interview Mr. Almalki and to report on matters relating to his treatment in Syria. The prejudice, if any, would be to Syrian officials. As I said above, Syrian officials were invited to participate in this Inquiry, but declined the invitation.

Further, I do not think that obtaining this information by way of the fact finder unduly expands my mandate. The fact finder process should not delay the progress of the Inquiry. Finally, when the fact finder report is received, it will be provided to the parties and, if necessary, submissions can be made about the use, if any, to be made of it.

Mr. Muayyed Nureddin was also detained in Syria and he alleges torture. For the same reasons that apply to Mr. Almalki, I will direct the fact finder to interview Mr. Nureddin and to report to me on his treatment. His lawyer also takes the position that he should not testify at the Inquiry.

I note that the reasons that Messrs. Almalki and Nureddin do not want to testify arise from concerns (similar to those that I discussed in relation to Mr. Arar) about lack of disclosure of information relating to those matters about which they could testify. The result is that I will direct the fact finder to interview Mr. Almalki and Mr. Nureddin about their treatment in Syria. I think that information is sufficiently related to the terms of my mandate to warrant gathering the information in this fashion, reserving a decision on its use until after the receipt of the fact finder report.

It is worth noting that the Commission has heard some *in camera* evidence about the circumstances of these three individuals that may be useful to my mandate. Because of NSC claims, I cannot disclose that evidence at this time. I will be hearing submissions *in camera* about what use, if any, I may make of the evidence relating to individuals other than Mr. Arar who were detained in Syria. In making these comments, however, I am not suggesting that I have conducted a full investigation into the cases of Messrs. El Maati, Almalki and

Nureddin. To do so would be beyond my mandate and would add considerable time to the issuance of any report.

Finally, I have heard the submissions of the intervenors that complicity evidence would assist me in the Policy Review. If there were such evidence it would reveal the type of problem that a review process would need to address. However, it is important to bear in mind that a new review process, if one is to be recommended, would have jurisdiction to address the types of problems that may occur in security intelligence activities generally. It would not be designed in response to a single problem or set of problems that may emerge for one or a few investigations. Clearly one of the types of problems that could be reviewed would be abuses of human rights that could take place in a variety of ways, including interactions with foreign governments. During the Policy Review, we have conducted research about the types of problems that may occur in security-related activities and the types of review mechanisms that are best suited to deal with them. I will consider this information in formulating my recommendations.

May 9, 2005



Justice Dennis R. O'Connor  
Commissioner

## APPENDIX 6(J)

# RULING ON RCMP TESTIMONY

### A) OVERVIEW

It is accepted that the RCMP, and particularly Project A-O Canada, played a central role in the events giving rise to my mandate. The Inquiry has received virtually all of the relevant RCMP evidence *in camera*. Because of national security confidentiality (NSC) claims, some of the evidence cannot be disclosed in the public hearings.

Mr. Bayne, counsel on behalf of some members of Project A-O Canada, and the government argue that because the evidence of RCMP officers that can be given in public will not be complete, individual officers and the RCMP itself

could be unfairly prejudiced. The public, it is said, will only hear “half truths” and parts of the story, thus giving an incomplete and inaccurate picture of what occurred. RCMP witnesses will not be able to answer some questions because their answers would involve referring to information over which the government claims NSC. Moreover, Mr. Bayne and the government argue that RCMP witnesses will not be able to provide the proper context for all the RCMP evidence because of NSC claims. They also submit that if the RCMP evidence is called in public there is a concern that the public will be misled and draw unfair conclusions about the role of RCMP officers and the RCMP because they will not have heard the full story or seen the complete picture. The public should await my report and whatever disclosure of that report eventually takes place.

Mr. Bayne and the government therefore ask me to make what would in effect be a blanket ruling at this stage that no RCMP witness be called in the public portion of this Inquiry. They contend that I should make this blanket ruling without even attempting the public process to determine what problems may in fact arise.

I asked Mr. Bayne for specific examples of the problems he envisions. He said that he was unable to comment publicly. I convened an *in camera* hearing on Thursday, May 5, 2005 and have now heard those submissions. Because of the government’s NSC claims, I can only comment in a general way on those submissions in this ruling.

I do not accept the submission that the Commission should not call any RCMP witnesses in the public hearings of this Inquiry. The government chose to call a public inquiry, not a private investigation. Implicit in the Terms of Reference is a direction that I maximize the disclosure of information to the public, not just in my report, but during the course of the hearings. The reason for that direction is consistent with what are now broadly accepted as two of the main purposes of public inquiries: to hear the evidence relating to the events in public so that the public can be informed directly about those events, and to provide those who are affected by the events an opportunity to participate in the inquiry process.

It has often been said that this is not a normal public inquiry, where it is possible to hear virtually all of the evidence in public. On the contrary, because of the NSC claims, only part of the evidence can be heard in public, only part of the story can be told. That is the reality. However, that reality does not mean that I should readily abandon the concept of public hearings for all or even part of the evidence that is not subject to NSC claims. I think it behooves me as Commissioner in a public inquiry to take reasonable steps to attempt to maximize, during the hearing stage of the Inquiry, the disclosure of information to

the public. In addition, I should try to maximize, to the extent possible, the participation of the parties in the hearing process, particularly Mr. Arar.

That said, I readily accept that the public hearing process should be conducted in a way that avoids unfairness to individuals or institutions and also avoids misleading the public about what in fact occurred. What I do not accept, at this point, is that RCMP evidence cannot be called in such a way as to avoid both of these unacceptable results.

Although some of the RCMP evidence cannot be disclosed publicly, much can and already has been. Commission counsel has prepared a timeline of events concerning RCMP witnesses and containing information over which the government does not claim NSC. This timeline is based entirely on information that is now in the public domain, which includes information in documents released by this Inquiry, information in reports of the Security Intelligence Review Committee and the Commission for Public Complaints against the RCMP and public statements by government officials. In this ruling, I refer in summary form to some of the types of information from that timeline that would form part of the examination of RCMP witnesses.

## **B) ADVANTAGES OF PUBLIC RCMP TESTIMONY**

In my view, there are four advantages to having the RCMP evidence that can be heard publicly introduced in the public hearings of this Inquiry.

First, the information that is not subject to an NSC claim would provide an interesting and informative description about the way the RCMP at the relevant times was coping with national security investigations in the aftermath of 9/11. In particular, that evidence would provide a description about the way one investigation, Project A-O Canada, was conducted. There would be evidence about the creation of Project A-O Canada, its composition, the reporting structure under which it operated, its relationship with other sections of the RCMP and the way, in general terms at least, that it carried out a national security investigation. For example, the evidence, as I envision it, would describe how the RCMP worked in an integrated fashion with other domestic agencies, including CSIS, the Ontario Provincial Police, and the Ottawa Police Service. It would also describe how Project A-O Canada worked cooperatively with American agencies – a cooperative approach that is an important reality in the post 9/11 national security landscape. The evidence would describe, in general terms at least, the type of information that was provided to the American agencies, the importance of information sharing among agencies, and the policies of the RCMP that applied to those activities. There would also be evidence about what role the RCMP played in the Canadian efforts to have Mr. Arar returned from Syria.

While clearly some of the steps that were taken in the Project A-O Canada investigation cannot be disclosed publicly, and many of the details or specifics of the investigation also cannot be disclosed, a good deal already has been. I believe that some of this information should be introduced into the public record of this Inquiry.

Thus, I am satisfied that the information that can be introduced in the public hearings would provide a useful and informative story for the public. Further, it would synthesize information already in the public domain in a more coherent and understandable fashion than is now the case. That in itself is a worthwhile exercise.

I do not accept the argument that because the description will not be complete it will necessarily be misleading. The public need not be misled into believing that they are hearing the entire story. I will make it clear at the outset that there are constraints on what evidence may be called, and I will repeat that explanation periodically as the Inquiry proceeds. I am confident that with clear instructions from me the public will be able to fully appreciate that there are areas of information, even some important ones, that can only be canvassed *in camera*.

The second advantage of calling RCMP evidence in public is to give the parties, particularly Mr. Arar, an opportunity to ask questions about this information. It is worth remembering that Mr. Arar was granted standing for a reason. Clearly, he has an interest in this Inquiry. He has been excluded from all of the *in camera* evidence. Although Mr. Arar's counsel have had an opportunity to suggest questions to Commission counsel to be asked *in camera*, the value of this opportunity is somewhat diluted because Mr. Arar's counsel have not heard any evidence before proposing questions. In my view, the opportunity to hear the evidence, as I envision it, and to pose questions directly, adds significant value to Mr. Arar's participation as a party in this Inquiry. Maximizing the participation of parties is a legitimate objective when considering what evidence should be called in the public hearings. Indeed, giving the opportunity to Mr. Arar and other parties to question the RCMP witnesses directly, from these parties' unique perspectives, maximizes the chance of a fuller picture emerging from this Inquiry.

The third advantage of calling RCMP evidence publicly relates to the Policy Review. The government joined the Factual Inquiry and the Policy Review in one mandate and appointed a single commissioner for both. The public has been invited to participate in the policy review process. The information that I envision being led through RCMP evidence will be helpful to those making submissions for the Policy Review. The descriptive type of information to which I

referred above will provide a useful examination of a national security investigation and its place within the RCMP organization. This description will benefit those in the public who are participating in the policy review process.

As an aside, I note that I have been asked by some intervenors to defer receiving public submissions in the policy review process until after publication of my findings in the Factual Inquiry. To date, I have not accepted this suggestion. I am of the view that the decision whether a new review mechanism is required, and, if so, what form it should take, should not be greatly influenced by what may or may not have gone wrong in a single investigation. More relevant to the Policy Review, in my view, is the type of evidence that I envision can be led from RCMP witnesses describing the RCMP organization for national security activities, the Project A-O Canada investigation, and its relationship with other agencies, even if that description may have to be given in general terms in some areas. Thus, I think that the public RCMP evidence will be of assistance to the Policy Review part of my mandate.

The final advantage of calling RCMP evidence in public has to do with the credibility of this Inquiry. The RCMP played a central role in the events that gave rise to the Inquiry. If possible, this being a public inquiry, the public should hear evidence about the RCMP's involvement. It has been suggested that the public can wait for the publication of my report to be informed about the RCMP investigation activities, to the extent that this information can be made public at that time. The difficulty with this suggestion is that it ignores the fact that public inquiries are intended to be conducted in public and there is an advantage in doing so. This advantage was discussed by Justice Cory in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paragraphs 60-63.

I recently read portions of the United States report on the events of 9/11 (the 9/11 Commission Report). I was impressed by the open way in which the Americans were able to conduct that Inquiry and the forthcoming way in which they made public so much of the information leading up to those tragic events, particularly when the information was critical of or embarrassing to individuals or agencies. As I read the report, it struck me that the openness of the 9/11 Commission's work fostered public confidence in the report. Indeed, in the long term it will foster public confidence in the institutions it investigated.

The reason I refer to the 9/11 Commission Report is to make the point that I believe that the public credibility of this Inquiry, and the government who called it, will be enhanced if we work together to make public as much information as possible during the public hearings.

## B) UNFAIR PREJUDICE

I now turn to Mr. Bayne's and the government's arguments that calling RCMP evidence – any RCMP evidence – publicly will unfairly prejudice members of Project A-O Canada and the RCMP itself.

Mr. Bayne argues that, if the senior officer of Project A-O Canada is compelled to testify publicly, procedural fairness requires that he have an opportunity to tell the full story. In effect, Mr. Bayne is saying that, because NSC claims prevent the senior officer from telling the full story in public, procedural fairness requires that he not testify at all. I cannot accept this submission for the reasons that follow.

First, I agree with Mr. Bayne that the officer in charge of Project A-O Canada has, like Mr. Arar, a reputational interest in the outcome of this Inquiry which requires that I reach my final conclusions through an “open and fair procedure ... with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker”: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 22. To my mind, however, all RCMP officers affected by the Inquiry have had ample opportunity to be heard and present their views, including the senior officer from Project A-O Canada. The RCMP and its officers have, through their counsel, been privy to nearly every step of this Inquiry, both *in camera* and in public. They have had full disclosure, and there have been many days of hearings during which RCMP officers presented their views. In this sense, the procedural rights of the RCMP and its officers have been protected, and will continue to be protected. Should there be critical comment in my report, the RCMP and individual officers will have had an opportunity to be heard and to have been represented by counsel.

Mr. Bayne argues, though, that procedural fairness requires that his client be allowed to tell the full story, not just to me, but to the public at large. I am not satisfied that the content of procedural fairness can be stretched so far, especially when the ironic result of this argument would be that the public would hear nothing at all from the witness. It must also be remembered that *Baker, supra* at paragraph 22, stands for the proposition that the content of procedural fairness is “eminently variable” and its content should be “decided in the specific context of each case.” The unusual nature of this Inquiry, in particular the NSC concerns, calls for a degree of flexibility.

I have emphasized time and again the importance of the public aspect of this Inquiry. I readily accept that the public hearing process should be conducted in a way that avoids unfairness to individuals or institutions, and avoids

misleading the public about what in fact occurred. I think it is important to understand the process that I propose for calling RCMP evidence in public, as I think that process should address the concerns of unfair prejudice expressed by Mr. Bayne and government counsel.

To start, I will give a clear direction to the public and to the media that they should not draw conclusions adverse to any witness or to the RCMP from the evidence heard during the public hearings. I will point out that they have not heard the *in camera* evidence and, as a result, they should refrain from drawing conclusions at this point. I will also say that there may be *in camera* evidence that would provide an explanation or context for certain actions, making it unfair to form a judgement on the public evidence alone.

I will also indicate that my report will be based on all of the evidence, *in camera* and in public, and that the public should refrain from prematurely drawing conclusions critical to individuals and to the RCMP when they have not had the opportunity to hear all of the evidence. I will repeat this direction as I consider necessary throughout the RCMP evidence.

This direction is relatively straightforward and one that I think the public and the media are capable of understanding. Routinely, juries are asked to suspend judgement when they have heard only part of a case. My observation is that they are able to do so. In legal proceedings, not all of the evidence can be introduced at one time. It is not unusual to hear discussions in the media about cases that are in progress that emphasize that the other side of the story has yet to be heard – the full story has not yet emerged. I am confident that the public will understand my directions to keep an open mind and not to draw premature conclusions.

Next, I expect Commission counsel to lead the publicly available evidence in what I would describe as a primarily descriptive manner. Commission counsel will try to avoid questions to which the answers would require a witness to refer to information over which the government claims NSC. This will mean that in some areas Commission counsel will not be able to ask questions challenging the witness or suggesting something was not done in a proper fashion. In making this comment, I am not suggesting one way or the other whether there are such areas. I am simply indicating that Commission counsel's examination will be primarily directed at eliciting information. It will not be, to use Mr. Bayne's words, based on innuendo, insinuation, critical suggestions or other types of questions which the witness is unable to answer and that could reflect badly on the witness because of NSC claims. Thus, I do not foresee a problem of unfair prejudice to witnesses or the RCMP arising during the examination by Commission counsel.

The problem, if any, could arise in cross-examination. I am not suggesting that it will. Because of the limits on what can be publicly disclosed, it will not be possible for Mr. Arar's counsel to fully cross-examine the RCMP witnesses as they would in a normal case. The witnesses will not be able to answer some questions if those questions are directed towards the propriety of certain actions or the reasons why certain decisions were taken. If the answers to those questions require reference to information over which the government claims NSC, it would be unfair to require witnesses to answer the questions if they are unable to give a complete answer or in some cases the context within which an action or a decision was taken.

In general terms, these are the restrictions that must be placed on cross-examination. This, however, does not mean that there should be no cross-examination. There may be cross-examination for the purpose of clarifying evidence that has already been given. Moreover, there may be some areas in which a cross-examination, probing the reasons why actions were taken and challenging the basis for doing or not doing certain things, can be answered without reference to information over which the government claims NSC. It is difficult for me at this stage to foresee all of the possibilities.

I asked Mr. Bayne to give me examples of the types of issues that he considered would cause problems for examination in the public hearings. He gave me several. I do not think it useful to go into detail with regard to each of those examples. However, I will mention two to illustrate the point I am making.

The first relates to the reason why the Americans made the decision to deport Mr. Arar to Syria. This is obviously an important issue for me in this Inquiry. The difficulty is that the answer, if there is sufficient evidence to give one, will depend to a large extent on evidence heard *in camera*. It would not be productive and would be potentially unfair to a witness to explore this issue in public. Thus, suggestions, insinuations or innuendos, again using Mr. Bayne's words, that one particular action or set of actions of the RCMP caused the United States to deport Mr. Arar would not be useful and could contribute to the type of problem Mr. Bayne raises.

Similarly, questions about the strength of the RCMP's investigations and the reasonableness of the bases for taking certain steps could lead to the same type of difficulty.

That said, I am reluctant to block out in advance areas of cross-examination that are off-limits. I think that the general directions that I have given in this ruling will suffice for the present time. During the course of the hearing, if problematic questions are asked, I will direct that they need not be answered and will explain why. It seems to me, at this stage at least, that objections can be dealt

with on a question by question basis rather than in the abstract. As the hearing progresses, it may be possible to summarize lines of questions that cannot be answered.

It is worth noting that the Commission is currently scheduled to hear the evidence of a number of witnesses from the Department of Foreign Affairs. Some of the evidence will be heard in public and some has been or will be heard *in camera* because of NSC claims. To this point in time at least, there has been no objection to hearing this evidence in public, although the public will hear only some of the evidence. No one so far has raised issues of prejudice or misleading the public. What is contemplated is that, if concerns about prejudice or misleading arise from a particular question or line of questioning, objections will be made. I will direct that the questions not be answered and be set aside to be dealt with, as discussed in my ruling dated May 9, 2005. I am satisfied that the same process that I envision for the Foreign Affairs evidence should be followed for the RCMP evidence.

In summary, it is my view that it is premature to abandon the efforts to call any RCMP evidence in the public hearings. The mandate to maximize public disclosure requires more. I am optimistic that if all counsel approach this matter in a spirit of cooperation with a view to maximizing public disclosure, this Inquiry should be able to hear some evidence from the RCMP without creating unfair prejudice or misleading the public.

#### **D) THE RCMP WITNESSES**

This brings me to the question of who should testify. Commission counsel has proposed calling two witnesses: the senior officer of Project A-O Canada and Deputy Commissioner Garry Loepky. There is good sense in this proposal.

In terms of the senior officer from Project A-O Canada, the public will benefit from hearing from someone directly involved in Project A-O Canada. That witness will have direct knowledge of many of the events that will form part of the public evidence. I agree with the government's submission that it makes little sense to call a third party who would inform himself or herself about those events in order to give evidence. I am confident that, if the introduction of the evidence is managed as I have set out above, the senior officer from Project A-O Canada can give evidence without being judged unfairly by the public or in the media. I reject the suggestion that the officers should not be called because there is a danger that parties or intervenors in this Inquiry or others may, outside the hearing room, attempt to unfairly "spin" the evidence. This is mere speculation and I do not think that I should comment further on that prospect at this point.

As for Deputy Commissioner Loepky, I also think it makes sense to call someone from RCMP headquarters who could speak with authority about the RCMP organization for dealing with national security investigations, the background for Project A-O Canada and the way in which that project was managed from the perspective of headquarters.

In conclusion, I am directing that the officer in charge of Project A-O Canada and Deputy Commissioner Garry Loepky be called as witnesses in the public hearings for this Inquiry.



Justice Dennis R. O'Connor  
Commissioner

May 12, 2005

#### APPENDIX 6(K)

### RULING ON PARLIAMENTARY PRIVILEGE

Counsel for Mr. Arar seeks to introduce into evidence extracts of *Hansard* containing answers given during Question Period in the House of Commons by Ministers of the government who will be called to testify at the Inquiry. They also seek to introduce minutes of parliamentary committee proceedings at which one or more of the Ministers participated.

For the purposes of this Ruling, it is not necessary to distinguish between the extracts in *Hansard* and the minutes of the committee meetings. Hereafter, for simplicity, I will refer to the information sought to be introduced into evidence as statements made in Parliament.

The House of Commons (the “House”) opposes the introduction of this material on the basis of parliamentary privilege protecting freedom of speech in Parliament. In written submissions, the Office of the Law Clerk and Parliamentary Counsel describes the privilege as follows:

“Over the centuries this privilege has come to be accepted to mean that what is said in the House of Commons or its Committees cannot be referred to or used outside of the House of Commons in any way that may require Members to reflect upon, comment upon or justify anything that they have said in the House of Commons or

its proceedings. As well, the words said in proceedings cannot be used as evidence that may itself be subject to submissions, debate, measuring or interpretation.”

The House argues that I should not admit evidence of statements made in Parliament if the result would be that this Inquiry would question or assess the accuracy of those statements and thereby impugn the credibility of the speaker. The rationale underlying this privilege is that Members must be able to speak freely in Parliament without concern that what they say may be used against them in legal or other proceedings outside Parliament to attack their credibility.

In response, Mr. Arar’s counsel raises two arguments. First, he argues that parliamentary privilege protecting freedom of speech in Parliament is limited to providing immunity from criminal prosecution or civil liability. The scope of the privilege does not extend, as the House contends, to protecting statements made in Parliament from impeachment in proceedings outside Parliament. In the alternative, he submits that the purpose for which he seeks to introduce the parliamentary statements is to show the history of what was said and not to impeach or question the accuracy of those statements or to challenge the credibility of the Ministers who made the statements.

For the reasons that follow, I am not prepared to admit the evidence of the parliamentary proceedings at this stage of the Inquiry. At the outset, I want to emphasize that excluding this evidence will not impair the ability of this Inquiry to investigate the matters referred to in the mandate. The matters covered by the parliamentary statements in issue will be fully canvassed in the evidence of the Ministers who made the statements, and in the evidence of government officials who were involved in the relevant activities. There is a significant amount of evidence dealing with these matters. I am satisfied that I will be able to properly assess the credibility of the Ministers and the officials involved without the need to refer to what was said in Parliament or its committees.

Let me now turn to the reasons for excluding the statements. I do not accept the argument that the parliamentary privilege protecting free speech is limited to immunity from criminal or civil action. In my view, the privilege extends as well to protect parliamentary speech from attack in legal or other proceedings that are separate from those conducted in Parliament.

In this regard, I agree with the decision of Tremblay-Lamer J. in *Gagliano v. House of Commons*, [2005] F.C. 576 at paragraphs 66-97. I accept, for sake of argument, that the parliamentary free speech privilege, with the scope I have referred to above, has not been authoritatively established in Canada. I am satisfied, however, that the doctrine of necessity requires that statements made in Parliament must be immune from challenge in other tribunals. It is necessary that

Members of Parliament be free to express themselves in parliamentary debate without concern that some other tribunal – in this case a public inquiry – will at a later date assess or call into question the accuracy or credibility of statements they made in Parliament. Parliament has its own procedures and powers for addressing challenges to parliamentary statements. In this regard, it is the master of its own house. In my view, the need to ensure that Members are able to express positions and ideas in Parliament free from outside interference is so closely and directly connected to the proper functioning of Parliament that it is necessary to extend the parliamentary privilege in the manner I have described.

As for the second point made by Mr. Arar's counsel, I have difficulty understanding what evidentiary value the statements sought to be introduced would have other than to show that those statements were inaccurate. There will be a significant body of evidence dealing with the same matters as those referred to in the parliamentary statements. It has not been suggested that the parliamentary statements sought to be introduced contain facts that could only be established through the introduction of those statements. If the statements are consistent with the other evidence, there would be no need to admit them into evidence. The difficulty arises because of the risk that the statements will be contradicted by or inconsistent with other evidence introduced in the Inquiry.

I recognize that Mr. Arar's counsel has indicated that he will not seek to challenge the statements by way of cross-examination. In this way, he seeks to distinguish this situation from that in *Gagliano, supra*. However, impeachment of statements can result from more than cross-examination. The introduction of conflicting evidence would inevitably lead to questioning or assessing the credibility of parliamentary statements, particularly if they had been entered into evidence in the same proceeding. Submissions based on conflicting evidence, and indeed findings in my report, that are inconsistent with the parliamentary statements would be ways in which those statements could be impeached or questioned by this Inquiry. In my view, the scope of the privilege protecting free speech in Parliament includes challenges to parliamentary statements by means other than cross-examination.

Mr. Arar's counsel points out that, at this stage, we do not know if there will be evidence that conflicts with the parliamentary statements. I agree. However, I think it is prudent to conduct this Inquiry so as to avoid the unacceptable outcome of breaching the privilege should such evidence be introduced. The way to do this, in my view, is to not admit the statements at this time. There is no need to do so. As I pointed out, Mr. Arar's counsel does not intend to cross-examine on these statements for credibility, but only for clarity, if necessary. When all of the evidence has been called, counsel for Mr. Arar may apply, if he

chooses, to have the parliamentary statements admitted. I would be inclined to admit them if there was no evidence conflicting with those statements, and if it can be shown that there is some utility to doing so.

Given my conclusion on the scope of the parliamentary privilege, I do not find it necessary to address the House of Commons alternative argument that a Member of Parliament is not at liberty to give evidence of statements made in the House absent permission being granted by the House.



Justice Dennis R. O'Connor  
Commissioner

May 30, 2005

#### APPENDIX 6(L)

### DIRECTIONS RE: CLOSING SUBMISSIONS

The schedule to make closing submissions is revised as set out below. Those making submissions are divided into two groups: those who wish to make oral submissions and those making written submissions only.

#### ORAL SUBMISSIONS

1. Any party making oral submissions in public shall file written submissions with the Commission by 5 pm on Saturday, September 10<sup>th</sup>. Those submissions shall be served on other parties making oral submissions by the same time and upon parties making written submissions only by 5 pm on September 12<sup>th</sup>.
2. The government shall file its *in camera* submissions with the Commission by 5 pm on Saturday, September 10<sup>th</sup>.
3. Public oral submissions will be heard on September 12<sup>th</sup> and 13<sup>th</sup> as follows:
  - September 12: 10 am to 1 pm – Arar  
2 pm to 5 pm – Government
  - September 13: 10 am to 1 pm – Government  
2 pm to 4 pm – Intervenors  
4 pm to 5 pm – Ottawa Police, OPP

4. *In camera* oral submissions:
- September 14: 10 am to 1 pm – Government  
2 pm to 5 pm – Government
- September 15: 10 am to 1 pm – Overflow

#### WRITTEN SUBMISSIONS ONLY

1. This direction assumes that the parties not mentioned above will make only written submissions and that each submissions may in part refer to NSC material. Those submissions shall be filed with the Commission and served on the Government and parties with NSC clearances by 5 pm on September 19<sup>th</sup>.
2. Parties making written submissions only shall indicate, as fully as possible, what parts of those submissions may in their view be made public. The Government shall review and redact those submissions for purposes of making NSC claims. The Government shall provide the redacted submissions to the Commission on or before October 3<sup>rd</sup>.
3. The Commission will forward the submissions redacted for NSC claims to parties who do not have NSC clearances by October 5<sup>th</sup>.
4. All parties may file written responses to the submissions of others on or before October 14<sup>th</sup>.



August 10, 2005

Justice Dennis R. O'Connor  
Commissioner

#### APPENDIX 6(M)

### RULING ON MOTION TO FILE CHRONOLOGIES

On August 31, 2005, Counsel, on behalf of Messrs. Abdullah Almalki, Ahmad El Maati and Muayyed Nureddin brought a motion to file chronologies of events relating to their detentions in Syria. Counsel asked that those chronologies be made part of the public record of this Inquiry.

Importantly, in making this request Counsel does not seek to have the chronologies entered as proof of the truth of the facts set out therein nor did they ask that these documents be used to establish “complicity or pattern”. Thus the chronologies would not be factual evidence. Rather, Counsel seek to have the chronologies entered for three purposes: as background or contextual information, as information that would be relevant to the reputational interest of the three individuals, and as information that might assist me in making recommendations to the government, either with respect to the specific cases of the three individuals or with respect to a review mechanism for the RCMP’s national security activities generally.

In an earlier ruling, I appointed Mr. Stephen Toope as a Fact Finder. I asked Mr. Toope to interview Messrs. Almalki, El Maati and Nureddin as part of a fact finding exercise in respect of Mr. Arar’s treatment in Syria. Clearly, it would be helpful to Mr. Toope to have the chronologies and I have forwarded them to him.

The question remains whether the chronologies should form part of the record of this Inquiry. I think that they should. They were referred to during the motion and, at a minimum, they will be used by Mr. Toope. Not uncommonly, I have marked as exhibits documents for reference purposes only and not because they were intended to prove the truth of their contents.

Accordingly, I direct the three chronologies with the accompanying documents be marked as the next three public exhibits. I reiterate, however, that they are not entered as proof of the facts set out in the chronologies. I leave to my report what, if any, use beyond Mr. Toope’s fact finding process, will be made of these chronologies. However, it will be open to parties and intervenors, if they choose, to refer to the chronologies in their submissions.

October 25, 2005



Justice Dennis R. O'Connor  
Commissioner

APPENDIX 6(N)RULING ON MOTION TO FURTHER REDACT  
WRITTEN SUBMISSIONS OF CERTAIN INDIVIDUALS

On August 10, 2005, I issued a Directive setting out the schedule for closing submissions, providing parties and interveners the opportunity of making oral or written submissions. I also set out the procedure that would be followed for NSC claims by the Government and the manner in which written submissions would be then distributed to parties and interveners for the purpose of written reply submissions.

The closing written submission procedure was further modified as outlined in Commission Counsel's letter to concerned parties dated September 30, 2005.

The Commission has now received the written closing submissions of certain individuals who participated in this Inquiry and the OPP. The submissions have been redacted, in some cases substantially, because of the process that has been adopted in this Inquiry. A good deal of evidence was heard *in camera* and may not be referred to in public submissions.

The parties making submissions, who had access to the *in camera* evidence, have made submissions based on both *in camera* evidence and public evidence. I have the benefit of their full submissions and will consider all of their submissions in preparing my report.

The submissions have been redacted to remove information over which the Government claims National Security Confidentiality, evidence heard *in camera*, and information or submissions which the parties making them consider to be unfair because there can only be partial disclosure to the public.

Mr. Arar's counsel also had an opportunity to review and comment on the independent party submissions and seek further redactions on the basis of concerns for fairness to Mr. Arar. Mr. Arar's counsel quite properly point out that certain submissions, because of the redactions, invite speculation about the content of *in camera* evidence in a manner that is unfair to Mr. Arar because he has not had access to the evidence and, therefore, cannot respond.

This Inquiry has been conducted with public and *in camera* hearings. It is inevitable that those, like Mr. Arar, who only have had access to the public record will be placed at some disadvantage. Mr. Arar does not have access to *in camera* evidence and will not be able to adequately respond to any argument that is based on a party's assessment or interpretation of that evidence. However,

I do have access to all of the evidence and I will base my report on the entirety of that evidence.

It is important to keep in mind that the submissions or statements to which Mr. Arar's counsel object are in essence submissions and nothing more. They should not be treated as statements of fact. They are not evidence. A reader must not assume that the submissions made by those parties will necessarily be accepted. The *in camera* evidence may not support the submissions at all. By definition, a submission exposes an advocate's view of the case and nothing more.

There is no perfect solution to the difficulty encountered by Mr. Arar's counsel in not being able to respond to some of the submissions. However, given that these are only submissions, and that the fundamental mandate of this public inquiry is to review and report on the conduct of Canadian Officials, I think that, on balance, the submitting parties should be allowed to assert their positions publicly. The fact that Mr. Arar's counsel cannot fully respond is an unfortunate result of the process in this Inquiry. In the end, I am satisfied that I will be able to address all of the arguments in my report.

Mr. Arar's counsel also argue that in a few instances assertions are made in the submissions that are unsupported on the public record and which give rise to inferences that could harm Mr. Arar's reputational interests. I note, however, that the instances that could be harmful to Mr. Arar's reputation are only indirect, at best. Moreover, there is now a substantial body of evidence on the public record that has gone a great distance to addressing Mr. Arar's reputational concerns. Further, I repeat that the assertions objected to are also contained in submissions, not evidence. I caution readers, again, that they should not assume that the *in camera* evidence referred to in the submissions necessarily supports the submissions being made. In my report I will fairly address the evidence as it relates to Mr. Arar. In these circumstances, I do not think that the passages objected to by Mr. Arar's counsel that may cause Mr. Arar any reputational damage need be further redacted.

In the result, I am directing that the submissions be released without the redactions sought by Mr. Arar's counsel. Reply submissions, if any, shall be filed by 3:00 pm on Wednesday, November 2, 2005.

October 25, 2005



Justice Dennis R. O'Connor  
Commissioner

APPENDIX 7REPORT OF PROFESSOR STEPHEN J. TOOPE,  
FACT FINDER, OCTOBER 14, 2005

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## MANDATE OF THE FACT FINDER

On 27 July 2005, Mr. Justice Dennis O'Connor, Commissioner of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, issued terms of reference appointing me as Fact Finder for the Commission. My mandate was set out in precise terms:

*Pursuant to the Commission's "Ruling on Process and Procedural Issues" of May 12, 2005, I hereby appoint Prof. Stephen J. Toope as a fact finder for the Commission, with the following terms of reference:*

*To investigate and report to the Commission on Mr. Maber Arar's treatment during his detention in Jordan and Syria and its effects upon him and his family.*

My role is not to reach factual conclusions on the role of Canadian officials in the saga of Maher Arar. Rather, I am to determine with as much specificity as possible what happened to Mr. Arar in Jordan and Syria and to assess the effects of those events and experiences upon Mr. Arar and his family. Given the short time that Mr. Arar spent in Jordan, and his very limited interactions with Jordanian security officials, I determined at the outset of my inquiries that the Jordanian leg of his difficult travels would not be material to an assessment of his experiences or their effects. In the course of my investigations it became clear that to assess effects it was also necessary to consider what happened to Mr. Arar upon his return to Canada, and in the months and years following his return. These events and experiences are the direct consequence of what happened in Syria, and so fall within my terms of reference. In other words, it is not possible to consider "effects" without considering the interplay of the raw events in Syria with the reactions to Mr. Arar upon his return and the experience of the Commission of Inquiry itself.

## PROCESS

### Review of Written Materials

I began my investigations by reviewing publicly available reports detailing the human rights situation in Syria. In considering the materials on Syria, I focussed upon admittedly rather sketchy descriptions of detention facilities and reports of interrogation techniques employed by the Syrian security services. I paid particular attention to any references to the Far Falestin detention centre, where Mr. Arar had reportedly been held for most of his time in Syria. The reports consulted, which were authored by both governmental and non-governmental entities, are listed in *Appendix A* to this report.

I also requested and received from Dr. Donald Payne, Board Member of the Canadian Centre for Victims of Torture and expert witness before the Arar Inquiry, case reports of four patients he had worked with in the early-to-mid-1990s, who claimed to have been tortured while in Syrian detention. I determined that these reports might help to establish patterns that persisted over a period of time. These case notes were, of course, private, but there was no nominate information in the reports; nor were any personal details provided that might allow for the identification of the patients.

I then reviewed all of the relevant public testimony before the Arar Commission that related to Mr. Arar's conditions of detention and his experiences in interrogation. In particular, I focussed upon the expert testimony of Professor Peter Burns, Former Chair of the United Nations Committee Against Torture; Dr. Donald Payne, who testified on the physical and psychological effects of torture; and Prof. Richard Ofshe, an expert on the classification of true and false confessions.

## Interviews

With this background information in mind, I then interviewed Mr. Abdullah Almalki, Mr. Ahmad Abou El Maati and Mr. Muayyed Nureddin, each of whom described in vivid detail their experiences in Syrian detention facilities, and in particular in Far Falestin. The testimony of these men was not taken under oath, but my purpose was to compare their descriptions with the information that I had gleaned from the case reports of Dr. Payne and the publicly available reports concerning the conditions of detention at Far Falestin and the interrogation "techniques" of the Syrian security forces. I would later have to assess the credibility of this testimony, and then relate it to what I would be told by Mr. Arar himself. In gathering the information from Messrs. Almalki, El Maati and Nureddin, I was careful to allow them to tell their stories in an unfiltered way, never posing leading questions. I wanted to let as much detail come forward as possible, detail that I would later use to compare with the testimony of Mr. Arar.

I also interviewed people who had worked closely with Mr. Arar since his return to Canada from Syria, and health professionals with whom Mr. Arar had consulted. In these interviews, I focussed primarily upon the effects of Mr. Arar's experiences on his physical and psychological health, on his social and familial relationships, and on his economic prospects. A complete list of interviews is found in *Appendix B*.

Finally, I interviewed Dr. Monia Mazigh, Mr. Arar's wife, and conducted two long in-person interviews with Mr. Arar, and one short telephone interview. In total, I spent almost 10 hours with Mr. Arar.

### *In Camera* Testimony and Unredacted Documents

The last step in my investigations was to review some in-camera testimony and a small selection of unredacted documents that were of direct relevance to my assessment of Mr. Arar's experiences in Syria. I chose the testimony and documents to examine after consulting with the Commissioner and with Commission counsel. I was not refused access to any material that I requested to see. This included the Canadian government's annual reviews of the legal, political and penal situation in Syria, notes taken by the Canadian consular officer, Mr. Leo Martel, after his consular visits with Mr. Arar (and some variations of these notes communicated to other Canadian government officials), and protected email communications amongst Canadian government officials during and after Mr. Arar's detention. It is important to state that there was nothing in the in-camera testimony or the unredacted documents that caused me to materially modify my assessment of the facts surrounding Mr. Arar's detention. I discovered no "secret" material that caused me to re-evaluate the information that had been provided in public sources.

### WHAT CONSTITUTES "TORTURE"?

Even while Mr. Arar was in detention in Syria, reports circulated that he was being subjected to torture. A report of the Syrian Human Rights Committee, an NGO based in London, provided certain details that Mr. Arar himself later contradicted and clarified. In his first public statement on the conditions of his detention, delivered on November 4, 2003, a month after his return to Canada, Mr. Arar described his treatment in the context of torture. He stated:

The next day I was taken upstairs again. The beating started that day and was very intense for a week, and then less intense for another week. That second and the third days were the worst. I could hear other prisoners being tortured, and screaming and screaming. Interrogations are carried out in different rooms.

One tactic they use is to question prisoners for two hours, and then put them in a waiting room, so they can hear the others screaming, and then bring them back to continue the interrogation.

The cable is a black electrical cable, about two inches thick. They hit me with it everywhere on my body. They mostly aimed for my palms, but sometimes missed and hit my wrists they were sore and red for three weeks. They also struck me on

my hips, and lower back. Interrogators constantly threatened me with the metal chair, tire and electric shocks.

The tire is used to restrain prisoners while they torture them with beating on the sole of their feet. I guess I was lucky, because they put me in the tire, but only as a threat. I was not beaten while in tire.

They used the cable on the second and third day, and after that mostly beat me with their hands, hitting me in the stomach and on the back of my neck, and slapping me on the face. Where they hit me with the cables, my skin turned blue for two or three weeks, but there was no bleeding. At the end of the day they told me tomorrow would be worse. So I could not sleep.

Then on the third day, the interrogation lasted about eighteen hours.

From the earliest descriptions of his ordeal, to the first public statement, and in all the subsequent representations of his counsel before the Commission, Mr. Arar has asserted that he was tortured. It is therefore necessary for me to enter the grim realms of defining what is meant by the term torture.

In assessing what constitutes torture, I am assisted by well-established international law standards and by clear testimony before the Commission. In the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 1984 [hereinafter *Convention Against Torture*], “torture” is defined in Article 1 as:

...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The *Convention Against Torture* is ratified by 140 states, including Canada (in 1985) and the Syrian Arab Republic (in 2004).<sup>1</sup> The definition of torture contained in the Convention is widely supported, and can serve as the appropriate basis for assessing whether or not Mr. Arar was indeed subjected to torture.

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<sup>1</sup> See the website of the UN High Commissioner for Human Rights: <http://www.ohchr.org/english/countries/ratification/9.htm>

The definition in the *Convention Against Torture* contains five elements: (1) the intentional (2) infliction of severe pain or suffering, (3) whether mental or physical, (4) for a range of purposes (5) when inflicted by, or at the instigation of, or with the consent or acquiescence of a public official or a person acting in an official capacity.

In his expert testimony before the Commission, Professor Peter Burns reviewed the experience of the Committee Against Torture, the treaty body set up to hear state reports and individual complaints under the *Convention Against Torture*. Professor Burns is a former Chair of the Committee. He emphasised that the Committee has paid much attention to the severity of the pain or suffering that is necessary to constitute torture and to the purposive requirement of the definition. When asked directly by counsel for Mr. Arar whether being “beaten repeatedly with an electrical cord during the course of interrogations that sometimes lasted as long as 18 hours” would meet the Committee’s requirements for severity, Professor Burns replied: “If that was established, in my view that would certainly be torture.” (Burns testimony, pp. 5920-5921)

The questioning of Prof. Burns then turned to the conditions of detention described by Mr. Arar. Mr. Arar’s lawyer described the cell in which Mr. Arar said that he was held for over 10 months, and was asked if these conditions of detention might in and of themselves constitute severe pain or suffering as understood by the Committee Against Torture. Prof. Burns answered:

Assuming that that was established, and assuming the medical evidence supported it, I would regard it as torture, again subject to the purposive aspect of the definition. (Burns testimony, p. 5922)

On the “purposive” requirement of the definition, Prof. Burns went on to explain that to constitute torture, it would not be enough that conditions of detention might be appalling or that Syrian officials were conducting interrogations and applying severe force. The infliction of severe pain or suffering would have to be for a purpose, such as the extraction of a confession, or another purpose referred to in Article 1 of the Convention.

In determining whether or not Mr. Arar was tortured, I looked for each of the elements contained in the definition of the *Convention Against Torture*. I was especially attentive to the issues of severity of pain and suffering, and purpose. The other three elements of the definition are more straightforward, with the possible exception of intention. Although intention is often considered a difficult problem in the imposition of criminal liability, it is less problematic in the definition of torture for two reasons. First, the types of force used in torture typ-

ically reveal intention. One does not apply electric shocks without intending to produce pain and suffering. Second, if one can discern a purpose in the application of force, the intention to harm is relatively easy to impute.

## FINDINGS OF FACT

### Assessing Credibility

In finding facts concerning Mr. Arar's experiences in Syria, I must conclude as to the credibility of his testimony, which was not taken under oath. Given the very nature of detention and interrogation, much of the detail concerning what happened to Mr. Arar in Jordan and Syria cannot be verified by eyewitness observers. None of the jailers or interrogators was available for me to interview. To assess credibility, I have obviously had to judge the person sitting before me and telling me his story. I have listened to Mr. Arar attentively and watched him closely. I have tried to compare his demeanour and his reactions to the scores of other torture victims and detainees I have interviewed on human rights monitoring missions in numerous countries, and in testimony before me at the United Nations Working Group on Enforced or Involuntary Disappearances where torture victims have also appeared. I have also undertaken a careful comparison of public sources about detention conditions and interrogation practices in Syria and the testimony before me. Finally, I have cross-referenced the detailed descriptions provided to me by the four men I interviewed who discussed their detention and treatment in Far Falestin. In undertaking that cross-referencing, I have also implicitly had to assess the credibility of the descriptions offered by Messrs. Almalki, El Maati and Nureddin. To do this, I have repeated the same practices used to judge the reliability of Mr. Arar.

I must emphasise that in assessing credibility, I am limiting myself to the parameters of my mandate: I am judging only whether or not the stories told to me concerning the conditions of detention in Syria and the practices of Syrian security services are believable and likely to be true. Within these parameters, I am confident in concluding that the descriptions offered by Messrs. Almalki, El Maati and Nureddin were convincing.

Mr. El Maati was held in Syrian detention from November 2001 to January 25, 2002, when he was transferred to Egyptian custody. During his first interrogation he was mocked and insulted. In what may seem surprising at first blush, insults were highlighted by Mr. El Maati as a particularly troubling feature of his first interrogation, even though he was also punched and kicked. This is a pattern repeated by all the men I interviewed who had been held in Far Falestin. Each described in vivid detail the dehumanizing effect of the "dirty"

or “nasty” words used by the interrogators. None of them even wanted to repeat these words. Mr. Almalki, who was detained from 3 May 2002 to 29 February 2004, explained the psychological effect most directly: he suggested that when the dirty words were used, he realized that he was going to be treated very badly. It was a shock delivered to his whole system.

The words also worked harm and created fear at a deep cultural level. The men I interviewed were all committed Muslims. They found the words deeply offensive from a religious perspective, especially when the words were used in relation to mothers, sisters or wives, and linked to threats. It must also be said that the use of “dirty” words seems to have confirmed cultural stereotypes. Two of the men I interviewed emphasized that the interrogators at Far Falestin were not traditional Sunni Moslems, but Alawites (a favoured group under the Baathist regime). There was a high level of distrust, even disgust that I sensed in their descriptions of the interrogators, rooted not only in suffering but in cultural incompatibility.

Mr. El Maati also offered a lengthy and highly specific description of the cell in which he was held. He remembered cell Number 5 with horror, describing it as a “hell hole”. The cell was downstairs from the interrogation rooms, in a basement. It was approximately “190 cms high by 180 cms long by 90 cms wide”. A small window in the door was blocked. There was a small hole in the ceiling covered by bars. Mr. El Maati found two blankets that smelled of urine. The cell was freezing cold, as it was winter and there was no heating.

This description of a cell at Far Falestin was mirrored almost exactly by Mr. Almalki. His cell was also downstairs from the interrogation rooms. It was small and dark, approximately 198 cms high by 185 cms long by 86 cms wide. Mr. Almalki was quite precise about the dimensions; he had decided to make a special effort to remember the conditions of the cell with care. For example, he remembered that the width was the length of his arm, plus the diameter of four fingers. He also described a hole in the ceiling some 25 by 15 cms, and mentioned that cats would sometimes urinate through the hole. The side and back walls were slick with condensation, and lice and cockroaches infested the cell. Large rats would sometimes squeeze under the cell door, presumably to look for food. On one very rare occasion when he was allowed to go outside for roughly 20 minutes, in July of 2002, Mr. Almalki took his blankets with him to air them. In the light he could see yellow and black growth on the blankets and “insulator” (two pieces of cloth stitched together to place under his blankets), that he had not seen in the dark cell. In winter the cell was freezing: “I used one of my underwears to put on my head just to warm my ears, I used socks on my hands...and all the clothes I have I was basically wearing.” In summer

it was stifling hot. Mr. Almalki told me that his interrogators referred to the cell as “the grave”.

Mr. Nureddin was detained from 11 December 2003 to 14 January 2004. He struck me as a simple man: his descriptions were unembellished and visceral. He described his fear at being shown in an interrogation room a few links of chain on a wall and an open chair frame which he immediately deduced were used for torture. Many details of his testimony correlated closely to descriptions offered by Messrs. Almalki and El Maati. For example, in one interrogation session two days after his arrest, Mr. Nureddin described how he was stripped to his underwear and had cold water poured over him while lying on his stomach under a fan. He was asked to raise his feet. He then saw a “black cable” which was used to beat him on the soles of his feet. This cable – which figures prominently in all the descriptions of beatings that I heard – was brought down on his feet some fifteen times. Then Mr. Nureddin was told to stand up. Cold water was poured on his feet to ease the searing pain, and he was ordered to run in one place before the procedure was repeated two more times.

Mr. Almalki described a similar pattern with even greater intensity. In his first interrogation session, on the night of his detention, Mr. Almalki was also partially stripped and told to lie on his stomach with his legs in the air. He was beaten with a black cable, in his case all over his body, but especially on the soles of his feet. Cold water was then poured on his feet and he was ordered to run in one place. He explained that this procedure actually restored feeling to the soles of the feet, and allowed the interrogators to begin the process again.

Mr. El Maati was also treated to a stripping down to his underwear, pouring of cold water over him, and intense beatings with what he described as a “black electric cable roughly an inch thick”.

In the case of all three men, it is important to specify that they were being beaten explicitly to gain information and a confession to involvement in a terrorist organization or plot. Mr. El Maati was asked about a map of a government complex in Ottawa that he knew had been discovered in the truck that he drove for a haulage company. He was specifically asked to “tell us the story of the map.” Mr. Nureddin was asked if he belonged to “Ansari Islam”. Mr. Almalki was asked “why everyone is looking for him” and was told to admit that he was “the right hand of Osama bin Laden.” At one point well into his detention, an interrogator told Mr. Almalki that he would be tortured for 3 days straight, that he would “not get out until you need to be hospitalized.” Or Mr. Almalki could confess to being a member of Al Qaeda and he might be released.

In each case, the men ultimately signed confessions or wrote out what they say they thought that interrogators wanted to read. Mr. El Maati said that after

three days of beatings he just could not resist any longer. Mr. Nureddin testified that he signed three documents that he had not read; he did so after hearing the screams of other torture victims, including women – which he found particularly upsetting. Mr. Almalki told me that after severe beatings he “was prepared to say more or less anything about myself”, but that it was “another thing to implicate someone else I did not know or did not know to have done anything”.

In his testimony before the Commission of Inquiry, Professor Richard Ofshe, a leading expert on the classification of true and false confessions from the University of California, Berkeley, emphasised that the use of physical force – he was questioned in the context of “torture” – is a “powerful motivator” for confessions (Ofshe testimony, pp. 5982-5983). He went on:

If the individual has already been convinced that the interrogator is immovable, then it makes no sense to resist the torture. The only thing in front of them is to minimize the torture. That is the only choice they've got. And they can do that by complying. ...And if you can succeed in cutting it [the torture] off by giving a false confession, that can start to look like a very attractive alternative... (Ofshe testimony, p. 5983)

This testimony is relevant because it helps to explain the psychological state of the men I interviewed who had been interrogated in Far Falestine. Each told me that at some point they concluded that they had to tell the interrogators whatever they wanted to hear. Prof. Ofshe explains why the truth or falsity of a statement may come to mean nothing to a detainee in the face of continuing physical violence.

Dr. Donald Payne explained the psychological effects of torture slightly differently, but the consequences he describes align with those suggested by Prof. Ofshe:

[T]orture has usually been...viewed as pain and suffering that is inflicted on somebody and people respond to reduce the pain, whereas seeing many individuals you come to realize it is really destroying the will, humanity, spirit of the individual so that they lose control of themselves and are willing to give up control of themselves to their torturers. (Payne testimony, p. 6052)

This description is consonant with the statements of the men I interviewed who often spoke of their “humiliation” or of attacks on their “dignity”. But, like Prof. Ofshe’s account, it helps to explain why one might “say anything” to stop

physical abuse: one may simply give up control, including control over the truth about oneself.

Of all the testimony I heard, Mr. Almalki's revealed the most intense pain and suffering. It is important to recount aspects of this testimony because it is the closest in certain descriptive elements to what I later heard from Mr. Arar. It is also important because Mr. Arar and Mr. Almalki overlapped in their respective periods of detention; the conditions they describe are closely interconnected.

When Mr. Almalki first arrived at Far Falestin, he was asked routine questions, and he was treated "decently". Indeed, he thought that he could still convince the Syrian authorities with whom he had to deal that his arrest was "a mistake." He was even told that he might be out in a "couple [of] hours." He was then blindfolded and taken to another room, where he was asked whether he knew certain people. He remained blindfolded for roughly two days. After being asked about one person who Mr. Almalki said that he did not know, suddenly he received a hard slap across the face. Mr. Almalki described how he felt "transferred...to another world":

I still remember that slap as if it's happening right now, and I got, just so vivid in my memory...because I felt just that he, in humiliation that they sacked my dignity, they crushed my, you know, my personality, just, it felt so bad when they slapped me...

Thus began an interrogation session that continued for between seven and eight hours. That was when he was asked to strip to his underwear and to lie on his stomach on the floor. The "whole point [was] to have my legs at 90 degrees". They started "hammering my soles. Basically it felt like lava just being poured over." In later session when he was not blindfolded, Mr. Almalki saw that the interrogators used a black cable that "looks something like a, the alternator belt in the car." He also saw black hoses "but they didn't use them too much because they said this is not as painful as the cables". Mr. Almalki specified that there were different styles of the cables used at different times, of "different thicknesses, different length, different ways of putting it together and taping it and twisting it on itself."

After enduring beatings on his soles for some time, Mr. Almalki felt he could bear no more, and he flipped over. The five or six interrogators were angry, so they began kicking Mr. Almalki, and beating him all over with the cable. They stood on his back to restrain him. After more lashes on Mr. Almalki's soles, the interrogators used the cooling method (cold water and running in place)

described previously. The interrogation only stopped when Mr. Almalki lost consciousness, and woke up with a doctor checking his blood pressure.

Mr. Almalki was then taken to the dark cell described above. He later learned that he was in cell number three; he was called “Number Three” for the entire period of his detention. On this first day the cell was a refuge:

I just felt that I don't want to go through the hell again so if they would just keep the door shut... Well, few minutes in there I just felt like crying, I just cried, I, I just didn't know what to do.

Over the course of a few months, the cell would take on an overwhelmingly negative power, and Mr. Almalki would almost hope to be taken for interrogations (which by this time were much less violent) to escape from the conditions of his solitary detention.

Mr. Almalki also described in detail the bathroom routine for prisoners in the basement cells. The two cockroach infested washrooms were made available to prisoners one-by-one three times a day. A bottle was in his cell for urination. At first Mr. Almalki was allowed exactly two minutes for each bathroom visit. This limit was enforced rigidly, and forcefully. Mr. Almalki complained that two minutes was not always enough for bodily functions, and that he would have to stop eating. One guard began to allow Mr. Almalki an extra minute in the bathroom. Even this was not much of a help when a prisoner had diarrhoea, which was common because of the bad food and water. In such circumstances, waiting to use the bathroom could be excruciating. On Fridays, he remembered that roughly ten minutes was allowed for pre-prayer ablutions.

Early the next morning, his second day at Far Falestin, and only about four hours after the previous interrogation had ended, Mr. Almalki was called up again. He was interrogated for approximately eighteen hours straight, but the focus was on intense questioning, not intense physical pressure.

On the third day, he was called in the morning and immediately told to take off most of his clothes. Mr. Almalki was forced into a car tire, his neck shoved against an inner rim, his back bent double and his knees against the other side of the inner rim. He was then beaten severely, especially on his head, his soles and his genitals. The motivation was clear:

...for every point they were asking me about...keep on beating me till I answer with something that they were satisfied; and then they would move on to another point and they would keep on beating me for that point till, you know, they get satisfied either that what I was saying was true or I get them what they wanted.

This treatment lasted for some three or four hours. In a surprisingly mundane twist, lunch was then brought in and Mr. Almalki was given some chicken and a piece of orange. He remembered that the orange was very hard to eat because “the inner skin of my mouth was almost gone because of the screaming so it was burning to eat anything acidic, I guess”.

Interrogation continued for roughly forty days, but without applications of force comparable to those of the first three days. Then around the fortieth day, Mr. Almalki was called in for an interrogation and asked for the first time about any connection he might have with Mr. Maher Arar. This was part of a wider ranging set of questions involving a number of Mr. Almalki’s friends and acquaintances, and about Mr. Almalki’s business dealings. This questioning involved a new interrogator, who Mr. Almalki later discovered, was a Mr. George Salloum, the “head of interrogation” at Far Falestin.

On July 17th 2002, Mr. Almalki was called up for another session of interrogation. He remembers that

...the tone of the treatment was different. They asked me to wear the blindfold immediately once I got up. Basically this blindfold was a, you know, you have the prison floor then stairs up to the interrogation floor, once you are at the gate, the door from the stairs to the interrogation floor, at the right-hand side there is a bucket of water which has these rubber pieces, blindfolds, they keep in the water I guess to keep them soft. ... But at same time for annoying the prisoners and humiliating them their water is the filthiest I have ever seen.

Blindfolded, Mr. Almalki was taken into an interrogation room and immediately slapped, punched and questioned aggressively for roughly an hour or two. He was accused of lying to the interrogators during his past sessions. He was then taken back to his cell, but remembers that he could hear almost constant screaming from other prisoners being interrogated. He stressed that this was a common denominator throughout his stay at Far Falestin: hearing screams. It reached a point where “I could distinguish if someone is being tortured by the tire, the chair, electricity; each one had a different type of screaming...”.

The next day, July 19th, Mr. Almalki was brought up for interrogation in the morning, but the approach was less aggressive. He was returned to his cell, then called back up at roughly 11 am, and “the humiliation started again...beating and calling names.” Mr. Almalki was forced to stand on one foot facing the wall. When he lost balance or tried to change legs, he would be beaten. Then the chief interrogator, Mr. George Salloum, arrived and asked Mr. Almalki why he

had lied. Mr. Almalki was then blindfolded and the beating recommenced, with repeated and powerful slaps across the face.

Then Mr. Almalki was forced onto his stomach, just as in the first three days' of interrogation, and the black cable was used to "hammer" the soles of his feet. He was once again accused of supporting Osama bin Laden and of training with Al Qaeda in Afghanistan. After more beatings, which lasted until after midnight, Mr. Almalki said that he told the interrogators whatever they wanted to hear.

On July 20th, Mr. Almalki was brought back to a different, high-ceilinged, interrogation room. More brutal questioning began. He was partially stripped and slapped. The room had a border at the bottom of the wall, a cement projection about 10 cms wide, which was probably part of the building's foundation. At the top of the wall there was a metal window with bars. Mr. Almalki was forced to face outward with his back against the wall, his hands above his head holding the bars on the window while standing on the cement projection at the bottom of the wall. He then had to let his feet slide from the ledge and hang, the window sill cutting into his wrists. When he slid down or fell, he would be beaten and told to suspend himself again. His hands and wrists were bleeding and the pain was intense. He was finally tied in this same manner to the bars, using strips of cloth, with his hands behind his head. The slapping continued, and Mr. Almalki was also hit with a belt and a black cable.

Mr. Almalki cannot remember how long he was kept in this position, as the pain blocked out his mental faculties. Finally, he was let down, but beatings continued all night. After this experience, Mr. Almalki gave in to the interrogators completely:

My policy after that was I wasn't willing to take any beating... I told them 'Whatever you want, I'll tell you what I know. If you want something else, I will sign a piece of paper, blank, and you fill it up with whatever you want or you can tell me what you want me to fill it up;' and I was really, I, I got to the point where I felt I cannot take any, you know, one more lash...

In fact, during the period in late July the interrogations continued to be harsh, though there were fewer intense beatings. Until August 24th. On that day another intensive session of beatings took place involving an unspecified number of interrogators. Mr. Almalki was again blindfolded.

In September and October, Mr. Almalki was questioned but without the application of physical force. Instead, he was threatened with new forms of punishment, including "the chair" which Mr. Almalki knew to be a brutal method

in which a victim's back was twisted over the empty frame of a metal chair, producing intense pain. Many of the questions began to revolve around his relationship with Maher Arar. From November 2002 to August 2003, Mr. Almalki remained in the same dark cell, and was questioned regularly, but not with the same use of physical force that he had previously experienced. He emphasises that he spent 483 days in that horrible cell. In August of 2003, Mr. Almalki was transferred to Sednaya military prison, where he experienced some further beatings, but not of quite the intensity of those in Far Falestin. Here, however, the beatings were not to gain information, merely to punish or intimidate. Nor were the living conditions quite so harsh, except for a period of ten days at the beginning of his detention in Sednaya that he spent in another subterranean cell. He was released from Syrian detention on March 1st, 2004.

Messrs. Arar and Almalki overlapped in Sednaya prison, where they were able to talk at some length. However, they apparently did not share all the details of their respective detention and interrogation experiences. They both told me that they were more preoccupied with daily survival and with discussing how to get out of detention. Since then, they have been in touch from time-to-time in Canada, but Mr. Arar says that they have not spoken for more than a total of five to six hours in person or on the telephone since their respective returns to this country. Mr. Arar states that when he saw the chronology of Mr. Almalki's detention that was published in the media, more than eighty per cent was new information to Mr. Arar. Mr. Arar and Mr. El Maati did not know each other well, but apparently have become mildly acquainted recently as a result of the Inquiry. They had not discussed the details of their detention and treatment in Syria before Mr. Arar's story became public. Mr. Nureddin and Mr. Arar did not know each other and to my knowledge have still not been in touch.

Although there are strong similarities in the descriptions of Syrian detention and interrogation techniques offered by Messrs. Almalki, Arar, El Maati, and Nureddin, I have been given no reason to suspect any collusion. Indeed, there are also some telling differences in what they described, differences that help me conclude that the similarities are based on authentic patterns and not on any collaboration to produce coherent stories.

The descriptions provided by Messrs. Almalki, El Maati, and Nureddin were also consistent with the descriptions of Far Falestin available in public sources, but were much more detailed. For example, the 2004 Country Report on Human Rights Practices for Syria, published by the United States Department of State, notes that former detainees "reported torture methods" including "beating, sometimes while the victim is suspended from the ceiling." The State Department reports that "torture was most likely to occur while detainees were being held at

one of the many detention centers run by the various security services throughout the country” (State Department 2004, p. 2). The State Department’s Report for 2002 contained essentially the same information (State Department 2002, p. 2). Amnesty International’s Report of 2002 states that in Syria “[t]orture and ill-treatment continued to be inflicted routinely on political prisoners, especially during incommunicado detention at the Palestine Branch [Far Falestin]...” (Amnesty International 2002, p. 2).

The practices described by Messrs. Almalki, Arar, El Maati, and Nureddin also found strong echoes in the case notes provided to me by Dr. Payne. Refugee claimants previously held in Syrian detention in the early 1990s also described tiny basement cells that were damp and dirty, hearing people screaming between their own interrogation sessions, being hit by cables, and being forced into a tire for beatings. The pattern of brutal beatings at the very beginning of detention followed by less “intense” interrogation was also reported by one of Dr. Payne’s patients.

The 2003 Annual Report of the Syrian Human Rights Committee provided more specific information. It referred to detainees in “Palestine Branch for Military Interrogation” who were “severely tortured and subject to immense physical and psychological abuse”. The report specifically mentioned Mr. Arar, who was said to have been subjected “to severe torture and intensive interrogation and charged with cooperating with Al-Qaeda” (Syrian Human Rights Committee 2003, pp. 3-4). In a letter to Mr. Arar’s wife, Dr. Monia Mazigh, dated July 29th, 2003, the Committee asserted that Mr. Arar was being subjected to extreme torture including “hitting with a baton and a fraying cable on the soles of his feet and on his body, the use of electricity and bending in an automobile tire for many hours.”

As will soon become apparent, the description of the Syrian Human Rights Committee was exaggerated. I take it to be a positive sign of his credibility that Mr. Arar was clear both in public and to me that his treatment was not as bad as suggested by the Committee. Mr. Arar knew what had been reported by the Committee before he made his first public statement detailing his treatment, yet his own description was more restrained. What is more, Mr. Arar also knew some of what Mr. Almalki had experienced but never sought to “out bid” Mr. Almalki in suffering. Indeed, Mr. Arar stated to me directly that he thought Mr. Almalki’s experience had been worse than his own. Throughout his testimony, Mr. Arar was remarkably measured. He was able to recall significant detail, but adjectives and adverbs were notably absent. He struggled to remember at times, and only rarely lost his composure. When he did, it was almost always

in reference to the suffering of someone else: Mr. Almalki, women that he heard being tortured, the idea of his children being left without him for a long time.

When I compare information available from public sources with the cross-referenced testimony of Messrs. Almalki, El Maati, and Nureddin, I conclude that the stories they tell are credible. I believe that they suffered severe physical and psychological trauma while in detention in Syria. Mr. Almalki was especially badly treated, and for an extended period. When I compare all of this information to the story told to me by Mr. Arar, I am convinced that his description of his treatment in Syria is accurate. It is now time to turn to that story.

### **Torture in Syria**

When Mr. Arar was taken across the border from Jordan to Syria on October 9th, 2002, he was already extremely worried and distraught. It is important to consider his state of mind even before he found himself in Far Falestin. He had been arrested in New York, and strip searched, which he found “humiliating.” He had been held in the Metropolitan Detention Centre in Manhattan for eleven days (September 27th to October 7th), being interrogated. He was denied access to a lawyer, and had little food or sleep. His request to pray during the interrogation sessions had also been denied. His interrogators had insulted him and used “bad words”, which he found deeply upsetting. At 3:00 a.m. one morning, he was awakened and told that the Director of the US Immigration and Naturalization Service had ordered that Mr. Arar be sent, not to Canada, as he says that he constantly requested, but to Syria. He told me that at this moment he began to cry and immediately said that he would be tortured. He felt “destroyed”.

Mr. Arar was then bundled into a van to New Jersey where he was loaded onto a private plane that began a long journey to Syria, via Washington, Portland Maine, Rome, and Amman. Throughout this trip of many, many hours, he was chained and shackled in the back of the plane. Only in the last couple of hours were the shackles removed; he was then invited to eat some dinner with his guards. He could not eat. He recalls that he had plenty of time to remember stories he had heard from his parents in the 1980s about abuse in Syrian prisons. He was terribly frightened, and assumed that he would face torture.

Mr. Arar arrived in Jordan in the middle of the night. While being transported to a detention centre, his Jordanian guards apparently hit him repeatedly on the back of the head. Mr. Arar was blindfolded. He had not slept since he left New York. He was brought into a room and his blindfold was taken off. He was asked some routine questions and then blindfolded again and taken to a cell. He could not sleep for fear. The next morning he was taken to a doctor

who asked if he had any chronic diseases or conditions. Then he was taken to an interrogation room and asked more routine questions before being told what he already knew: “You are clear you are going to Syria.”

That same day he was bundled into a car or van. Being blindfolded again, he was not sure exactly what was happening. He was told by one guard that he was going back to Montreal, and he was desperate to believe him. Instead, he was transferred twice into other vehicles. He was driven fast over bad roads; from time-to-time, he was struck by one of his guards.

At around 5:00 p.m. that same day, he was taken into a building and his blindfold removed. He saw pictures of Presidents Assad, father and son. Some of his luggage that had been given back to him in Jordan after the plane ride was searched and gifts for his family – chocolates and perfume – were stolen. Later, Mr. Arar learned that he was in the Far Falestin detention centre. He had arrived exhausted, hungry and terrified. He ventured to me that he was so frightened at that moment that if he could have figured out some way to kill himself he would have done it.

I must pause at this point to offer some impressions of Mr. Arar, gleaned from our extended conversations and from the way he tells his story. The impressions are relevant to my assessment of his credibility and, even more, to my later evaluation of the effects of his experiences upon Mr. Arar and his family. Mr. Arar strikes me as a person with what one might describe as moral courage. By that I mean that he is willing to take risks when he feels that he must to make a point or to vindicate a belief. However, he does not seem to be particularly physically courageous. He is not “tough”; the prospect of physical pain frightens him a lot. When frightened, he loses composure. On many occasions he told me that a particular circumstance had caused him to break into tears. This observation is not a criticism. Far from it. There are few people in our era in Canada who must ever test their own physical courage. I cannot imagine how I would react if threatened with the prospect of torture or if confronted with its reality. My point is only that when one considers Mr. Arar’s situation as he entered Far Falestin, it is relevant to note that his fear seems already to have been intense and his resources to cope with violence limited.

Later on the same day he arrived at Far Falestin, Mr. Arar was taken for questioning from around 8:00 p.m. to midnight. He was questioned by a man named “George”, who Mr. Arar later discovered was George Salloum, the head of interrogation at Far Falestin, who also interrogated Mr. Almalki, but in his case, only later in the period of detention. Two other interrogators were taking notes while George asked the questions, which were mostly about Mr. Arar’s family. George said he knew one of Mr. Arar’s brothers, but this later turned out

to be a lie. Mr. Arar said that he was already crying and “destroyed” during this interview. He had already decided to “say anything” necessary to avoid torture. It should be recalled that the other men I interviewed who had been in Far Falestin each made the same point, reflected as well in the extensive experience of Prof. Ofshe: telling interrogators what they seemed to want to hear was simply a way to avoid physical abuse. Alternatively, in Dr. Payne’s framework, saying what interrogators want to hear is simply a giving up of control, including control over the truth about oneself. There was in fact no physical violence during this interrogation, but there were ominous threats. If Mr. Arar was slow to answer, George said that he would use “the chair” which Mr. Arar did not understand, but assumed to be a form of torture.

After receiving some bread and potatoes to eat, Mr. Arar was taken downstairs to the basement. He was shown to the end of a hall and turned right and pushed through an open door. His reaction was one of shock, as he found himself in a tiny cell, roughly seven feet high by six feet long by 3 feet wide. The dimensions, though expressed in feet, rather than centimetres, correspond closely to the descriptions of Messrs. Almalki and El Maati. So do other details. Mr. Arar mentioned that the cell contained only two thin blankets and a “humidity isolator” as well as two bottles, “one for water and one for pee”. He also described an opening in the middle of the ceiling, roughly one foot by two feet. There was no light in the cell at all, except what filtered through from the opening in the ceiling. He recalled two or three times when cats peed through that opening. He later discovered rats in the building, seeing them in the bathroom. He found rats “scary” and began to stuff some Chinese-made shoes that he had been given in New York under the cell door to prevent rats from slithering in. The cell was damp and very cold in winter and stifling in summer. Mr. Arar was known to guards only by his cell number: Two.

Mr. Arar’s description of the bathroom routine also matches the detail offered by Mr. Almalki. Each prisoner was called to the bathroom three times a day, usually before the serving of meals. The guards would randomly start at different cells and would stand by the toilet. Each prisoner was given two or three minutes. One guard, with whom Arar had a slightly better relationship, would allow a little extra time in the bathroom. As other prisoners remembered, the bathroom routine was excruciating when one had diarrhoea. Mr. Arar was relatively lucky in that he had been able to bring in two tins that had been filled with Tunisian sweets. He used these tins when necessary and cleaned them in the bathroom. On Friday, fifteen minutes was allowed for washing before prayers.

On the day after he was brought to Far Falestin, October 9th, 2002, Mr. Arar was even more exhausted, as he could not sleep in the horrible cell. He was called up for interrogation. When George arrived, he immediately started hitting Mr. Arar. The chair on which Mr. Arar was sitting was taken away, so that he was now on the floor. Being put on the floor is a pattern repeated by the other men I interviewed. They interpreted it as a form of humiliation – lowering the status of the detainee in respect of the interrogators.

George brought with him into the room a black cable, which might have been a shredded electrical cable. It was about two feet long. It was probably made of rubber, but was not hollow. Mr. Arar says that as soon as he saw the cable he started to cry. George told Mr. Arar to open his right hand. George then raised the cable high and brought it down hard. Mr. Arar remembers the moment vividly. He says that he felt like a bad Syrian school boy. He stood up and started jumping, but was forced back down and the process was repeated with his left hand. Again Mr. Arar jumped up. No question had yet been asked. This technique seems to parallel the sudden slap used on Mr. Almalki, which snapped him into another world. Mr. Arar's reaction was the same. He really began to fear what was coming.

From then on, Mr. Arar was forced to stand near the door, and the questions began. The constant theme was "you are a liar." He was given breaks and put in another room where he could hear other people screaming. Sometimes he was blindfolded and left to stand in the hallway for an hour or more. The screaming continued. It is notable that the only time Mr. Arar completely broke down while I was interviewing him was when he described the screams of women being beaten and the cries of the babies that some of the women had with them in the detention centre. Mr. Arar was made "very fearful" hearing any screams. When he was brought back into the interrogation room, he would be beaten about the upper body and asked more questions. Mostly, he was asked about his relations with various people. On the second day in Far Falestin, the interrogation lasted for roughly ten hours.

Day three, October 11th, 2002, was the most "intensive" for Mr. Arar. He was questioned for sixteen to eighteen hours, with great physical and psychological abuse. The questions focussed in part on Mr. Almalki. Mr. Arar was beaten with the black cable on numerous occasions throughout the day, and threatened with electric shocks, "the chair" and "the tire". The pattern was for Mr. Arar to receive three or four lashes with the cable, then to be questioned, and then for the beating to begin again. After a while, he became so weak that he was disoriented. He remembers being asked if he had trained in Afghanistan. By this time, he was so afraid and in so much pain that he replied: "if you want

me to say so.” He was asked which border he crossed and whether he had seen Mr. Almalki in Afghanistan. Mr. Arar remembers urinating on himself twice during this questioning. He had to wear the same clothes for the next two and a half months. He was “humiliated.”

The questions continued to be focussed upon relationships with various people, his family, his bank accounts, and his salary. Mr. Arar remembers with some bemusement that the interrogators could not understand what he did for a living; the concept of “services” in the IT business did not ring true to them. Nor did his salary which they thought was impossibly high. He was beaten for all these “lies”.

After these beatings on day three, the interrogation became less intense physically. There was much less use of the cables, and more punching and hitting. On the sixteenth or seventeenth day in detention at Far Falestin, even this beating diminished. But the threats intensified, so that the psychological pressure was extreme. For example, in the second week of detention he was put in “the tire” but, unlike Mr. Almalki, was not beaten. But the threat was real. The “chair” was also invoked to scare him. At the end of each interrogation session an interrogator would say “tomorrow will be tough” or “tomorrow will be worse for you.” Mr. Arar found it almost impossible to sleep for more than two or three hours a night.

Mr. Arar describes a similar reaction to that of Mr. Almalki. Over time, as the beatings became less intense, it was the daily horror of living in the tiny, dark and damp cell all alone and with no reading material (except later, the Koran) that came to be the most disturbing aspect of the detention. Whereas at first the cell was a refuge from the infliction of physical pain, later it became a “torture” in its own right. Mr. Arar describes nights alone in his cell where he could not sleep on the cold concrete floor. He had to turn every fifteen minutes or so. He was constantly thinking of his family, and worried about their finances and their safety. He was “bombarded by memories”. He remained in this cell for ten months and ten days, and saw almost no sunlight except for when he was transferred for consular visits. His first visit to the courtyard of the prison did not take place until April 2003. Mr. Arar describes the cell as “a grave” and as a “slow death”. He remembers that by June or July of 2003, he had reached his limit. He had tried to keep in shape by doing push ups and pacing in his cell, but he was losing all hope, and he stopped his modest exercise regime.

On at least two occasions in his cell he completely lost control, and began to scream and to bang his head against the wall. He felt “dizzy and tired and breathless” and his heart started beating wildly. Each time, a guard came and let him wash his face. He was not punished, which surprised him. Over time,

Mr. Arar also found himself becoming, as he described it, “more selfish”. Whereas at first his thoughts were mostly about his family, after a few months in detention he cared only about his daily survival. This is a source of guilt even today.

One of his interrogators, “Khalid”, had not seen Mr. Arar for a few months. When he saw Mr. Arar in July 2003, Khalid said that Mr. Arar’s wife would divorce him if she saw him as he was now, thin, listless and crying. The consular visits with Mr. Leo Martel provided some small hope, and some connection to Mr. Arar’s family, but they were also immensely “frustrating”.

Mr. Arar remembered one particularly telling detail when I asked him about the walk up and down the stairs to the interrogation rooms. I simply asked whether he remembered seeing anything on the stairs. For some time, he could not recollect anything in particular, but then remembered the presence of a bucket with water on the stairs and what seemed like rubber shoes. It seems likely that this was the same bucket that Mr. Almalki remembered holding rubber blindfolds. Mr. Arar never took anything out of the bucket, unlike Mr. Almalki, but on one occasion when he was mistaken for another prisoner, Mr. Arar was asked to carry the bucket. That is why he remembered it on the stairs.

On August 20th, 2003, Mr. Arar was transferred to Sednaya Prison, where conditions were “like heaven” compared to those in Far Falestin. He was released from custody on October 5th, 2003 after signing a “confession” given to him in court by a Syrian prosecutor.

I conclude that the treatment of Mr. Arar in Far Falestin constituted torture as understood in international law. The interrogation techniques used on Mr. Arar, especially in the first three days but also sporadically in the first two weeks of his detention amounted to torture. The use of the black cable in particular, and the generalized beatings he endured, could only have been “intentional”. They were meant to inflict severe pain and suffering. The pain was clearly physical. But in addition, the techniques of humiliation and the creation of intense fear were forms of psychological torture. This is particularly true of the strategy of blindfolding Mr. Arar and making him wait for the next interrogation session in a corridor or room where he could hear the screams of other victims. The threats to use other forms of physical torture, such as the tire and the chair, also amounted to psychological torture. This was particularly the case for a man like Mr. Arar who so clearly feared physical violence. The infliction of pain and suffering was for a purpose considered relevant by international law: the extraction of a confession. As it happens, Mr. Arar did succumb to the pain and suffering he experienced, and he did “confess”. But even if he had not

done so, the purpose of the interrogation techniques would have been the same. For the purposes of determining if torture occurred, it does not matter whether or not the confession was “true”. Finally, there is no doubt that the perpetrators of the torture were Syrian public officials. Far Falestin is known to be run by Syrian military intelligence.

Mr. Arar also experienced a second form of torture, created by the appalling conditions of his detention. In his testimony, recall that Dr. Peter Burns suggested that the conditions of the cell in which Mr. Arar were held might constitute torture as understood by the Committee Against Torture:

Assuming that that was established, and assuming the medical evidence supported it, I would regard it as torture, again subject to the purposive aspect of the definition. (Burns testimony, p. 5922)

The conditions of the cell are established to my satisfaction. The descriptions offered by Mr. Arar are matched by those of Messers.. El Maati and Almalki. The parallels amongst their respective testimony are so close as to be entirely convincing. The idea of spending months in such conditions is horrifying. It was meant to be horrifying. The pain and suffering were terrible, especially at a psychological level. The purpose was to break down the victim so that he would confess. The conditions were created and managed by officials of the Syrian state.

As to the medical evidence, it fully supports both the physical and psychological torture during interrogation, and the torture of the cell conditions. Mr. Arar authorized me to speak with the two principal medical practitioners who have cared for him since shortly after his return to Canada, and he allowed them to share details of his medical history with me. Both expressed complete confidence in the authenticity of Mr. Arar’s story.

Dr. Doug Gruner is a family physician in Ottawa with experience in post-traumatic stress disorders. He also works as an emergency room doctor in two communities outside Ottawa. Practicing for roughly a decade, he has worked in Malawi and Tanzania and was with the International Committee of the Red Cross in East Timor in 2000. In the latter context he saw people who had been tortured, and who had experienced severe physical and emotional trauma. Mr. Arar first visited Dr. Gruner in October 2003 on the advice of Amnesty International and has scheduled regular appointments since then, though they have tailed off in recent months. Dr. Gruner is also the physician for another person in a position similar to that of Mr. Arar, but the doctor was assiduous in not confounding the cases. Dr. Gruner did not answer questions if he feared

that some of the information might derive not from Mr. Arar, but from the other person.

Dr. Gruner told me that the symptoms displayed by Mr. Arar, physically and psychologically, were completely consistent with the story Mr. Arar told of his confinement and torture. They were also consistent with similar stories told to Dr. Gruner by torture victims in East Timor. The details will be discussed later, in the section on the effects of Mr. Arar's experiences on him and on his family.

Dr. Marta Young holds a Ph.D. in clinical psychology and is a tenured professor at the University of Ottawa. She specializes in cross-cultural psychology and works on issues related to refugees, specifically those who have suffered from trauma and torture. Mr. Arar came to see her five days after his return from Syria on October 10th, 2003, again on the recommendation of Amnesty International. He continued with a cycle of approximately 12 visits.

Dr. Young found that Mr. Arar initially presented as a case completely consistent with recent trauma. He was in what she described as an "acute post-traumatic phase". She conducted certain standard tests for post-traumatic stress and depression, and discovered that on two occasions separated by over six months Mr. Arar scored as "severely" stressed and "moderately to severely" depressed. These assessments were confirmed by her clinical observations. Dr. Young stated that the details of the story told to her by Mr. Arar were entirely aligned with the public chronology of what he said had happened to him, and she emphasized that he began to tell her his story very soon after arriving back in Canada. She discerned "no sense of exaggeration or malingering". Indeed, her observations convinced her that Mr. Arar is "a straight, honest person". As she put it: "he is not making things up". The story is simply too congruent with her own experience and with the literature on torture victims for that to be at all likely.

In short, the medical reports are consistent with Mr. Arar's testimony which is confirmed by published reports of patterns of torture in Syria and with the testimony of the three other men I interviewed who had experienced detention and interrogation in Far Falestin. I find that Mr. Arar was tortured in Syria.

## EFFECTS OF TORTURE

### Physical Effects

Fortunately, the purely physical effects of the torture suffered by Mr. Arar have mostly proven to be short-lived. Dr. Gruner reports that when he first examined Mr. Arar there were few physical signs of torture. This is consistent with

Mr. Arar's story that the physical force applied against him took place in the earliest days of his detention. By the time Dr. Gruner saw Mr. Arar, the latter had been spared from torture as a part of interrogation for many months. What is more, Mr. Arar told me that during his detention in Sednaya Prison he had been able to "regain his physical shape." He had been able to eat better and to exercise.

However, Mr. Arar did have significant physical complaints initially upon his return to Canada and over the next three to four months. In particular he complained of hip pain, which was likely associated with sleeping in cramped and damp quarters on a hard floor for over ten months. Mr. Arar also complained of pain around his face, head, neck, shoulders, and lower back. As Dr. Gruner emphasised: "Pain is a difficult thing to pin down. There might not be a lot of objective findings, yet [it is] still there." In any event, the initial pain has now "resolved definitively" except that recently Mr. Arar has developed new pain at the top of his two shoulders which hurt with the lightest pressure. In addition, some of the psychological issues that I will describe shortly have real physical consequences. For example, teeth grinding caused by stress contributed to facial pain. Continuing bad dreams disrupt Mr. Arar's sleep to this day.

### **Psychological Effects**

Psychologically, Mr. Arar's experiences in Syria have been devastating, though it must also be said that some of his most difficult psychological challenges arise from his experiences since his return to Canada. Yet even these experiences can be connected to the Syrian events in that the detention and torture there has caused many of the events in Canada to take place, notably the Commission of Inquiry.

Mr. Arar told me that when he was flying home to Canada he was in a "fragile" state. He did not know who to trust. Dr. Young testified that this lack of trust is a classic symptom of post-traumatic stress when it is caused by human intervention, what she called "interpersonal trauma", rather than by a natural occurrence. Every person who has dealt closely with Mr. Arar since his return emphasised that he is still distrustful. Dr. Monia Mazigh, Mr. Arar's wife, said that it took him many months to trust anyone apart from her and a few close advisors that she told him he should trust because of their past work on his behalf.

The distrust is based on continuing fear. Mr. Arar cannot yet contemplate travel by air, even within Canada. He is afraid that the plane might be diverted to the United States, that he might be seized and that the ordeal could begin

again. He is afraid that he will not be able to resume any “normal” life. He is afraid that his story will not be believed.

This fear and distrust have actually been compounded by his experience of the Commission of Inquiry. He was particularly disturbed by certain “leaks” from sources allegedly inside the Canadian Government that cast him in a negative light. These events compounded his sense of injustice dating from his detention and torture in Syria. All his advisers that I interviewed emphasised that Mr. Arar was “devastated” by these leaks. Some described him as “hysterical”. He simply could not control his emotions, and it took many hours of constant conversation to calm him down each time new information surfaced in the press that he thought to be misleading and unfair.

Dr. Gruner described how Mr. Arar would tire easily. Whereas before the Syrian detention, Mr. Arar was described by his wife as an energetic, even driven, person now he found it hard to stay focussed on anything. He would feel overwhelmed if he had more than two meetings in a day. At other times, his lethargy would break into an unpredictable rage.

One of the most difficult psychological effects of the detention was that Mr. Arar kept sensing that bugs were crawling over his body, and particularly around his genitals. He thought that the bugs were real, but they turned out to be psychological creations. In Dr. Gruner’s experience, such thoughts are not unusual for people who have lived for a long time in completely unsanitary conditions of detention.

I have already mentioned that Dr. Young’s observations confirmed testing that showed that Mr. Arar was suffering from acute post-traumatic stress disorder and moderate to severe depression. In her dealings with Mr. Arar, she found him to be a person who likely was “highly functioning psychologically” before the trauma in Syria. She believed that he must have had a “good core sense of self” to emerge as he has. However, she noted that for some months he was “scattered”, with a relatively weak attention span, and difficulty staying on topic.

Dr. Mazigh stressed that the man she had married was very focused. He had strong “family values”, and an easygoing nature. Mr. Arar was religiously observant, which was important to Dr. Mazigh. He did not tend to argue and he could reach compromises. He was also “patient” and “flexible” with her as a woman who wanted to work outside the home. She described him as an optimistic person who believed that he could work hard and make a good life for his family. Dr. Mazigh believes that Mr. Arar always had a strong sense of duty towards his immediate family. In his religion and culture, as she put it, “a man should work and feed his children and wife”. But she sensed that this attitude was not about power, but about a man’s duty to protect his family. Mr. Arar was

apparently very caring to their daughter born in 1997 and was “a patient father”. When his son was born in 2002, he turned out to be colicky. Mr. Arar would take the baby for car rides to try to settle him. Of course, Mr. Arar was absent for much of the boy’s second year of life.

Dr. Mazigh met Mr. Arar at the airport in Montreal upon his return from Syria. She was shocked to discover a man who was submissive, without any light in his eyes. As she put it, he “looked like a dog” and he seemed “lost”. He was preoccupied with his safety and was completely distrustful. Over the next few days, as the family spent time together in Montreal, Mr. Arar began to tell his story. He was completely disjointed, with random memories and continuous crying. He could not eat or sleep for two or three days.

Dr. Mazigh reported that for many weeks Mr. Arar seemed “confused”. He would pace back and forth, as if still in his cell, as he talked to his wife. He was always tired. He told Dr. Mazigh that he just wanted “a normal life”, a phrase he repeated to me on several occasions. Normalcy meant no conflict. Mr. Arar told his wife: “I am not going to argue with you at all”. She thought that he hoped to be “an ideal person”.

Instead, over the next few months, Mr. Arar continued to have nightmares, especially about “George”. He was continually afraid and fragile. He was often suspicious and believed that he was being watched. [I do not imply necessarily that he was not being watched]. His memory has been far weaker than before his time in Syria. He felt so overwhelmed that he forgot to pay bills, and he often lost his keys. He still complains often of headaches and of the “stress” that he feels.

A particularly telling indication of the psychological trauma still facing Mr. Arar is that he has found it very hard to read the Koran since returning to Canada. He read the Koran every day in Far Falestin, as soon as the holy book was provided to him. He has been a devout and observant Muslim at least since his student days at McGill. Dr. Gruner emphasized how often Mr. Arar had spoken about this problem of not reading the Koran. Mr. Arar is not sure why he has faced this difficulty.

### **Family and Community Effects**

Mr. Arar told me that he feels guilty about how he now relates to his own family. He often feels emotionally distant and preoccupied with his own concerns. He is impatient with the children, and finds that he cannot spend time with them on their terms. He often takes phone calls when he is supposed to be with the children in the park, for example. His daughter gets angry when this

happens. Although both children seem to be functioning well, Mr. Arar thinks that they must feel his distance.

Dr. Mazigh certainly senses this distance. She also noted that Mr. Arar defers to her on almost all decisions. That aspect of their relationship has become “awkward”, to employ the word chosen by Dr. Mazigh. Mr. Arar seems to need his wife to be strong and in control, while he feels weak and disoriented. But at the same time, he is not comfortable with his position of dependence.

Although both spouses were circumspect on the question, I could sense that Mr. Arar’s focus on the Commission of Inquiry and upon his concerns over “security” issues generally have become a significant source of tension. Other close observers told me that Mr. Arar was “fixated” and “obsessed” with having his story told, with the proceedings of the Commission of Inquiry, and with the fate of other people in detention. Dr. Mazigh mentioned that when the Commission of Inquiry was not sitting, Mr. Arar was calmer than when it was in session. A friend of Mr. Arar’s told me that even on a family hike in the Gatineau Hills near Ottawa the only thing Mr. Arar could talk about was the Inquiry.

Since his return, Mr. Arar has had a difficult relationship with the Muslim community in Canada. Dr. Young noted that socially isolating behaviour is common for victims of torture. This may relate to feelings of distrust. Mr. Arar stopped going to the mosque that he had previously attended. He told me that he is disappointed with the reaction of many Muslims to him and his story. Whereas other Canadians sometimes come up to him on the street to share a sense of solidarity, most Muslims stay far away from him. Mr. Arar thought that this distancing was exacerbated after the press “leaks” mentioned previously. He feared that many Muslims “do not understand the principle of justice” and the need for its constant defence. Although many members of the Muslim community had helped Dr. Mazigh during the period of Mr. Arar’s detention in Syria, he had received little help since returning to Canada. Mr. Arar’s sense of isolation from the Muslim community was emphasized by other close observers that I interviewed

### **Economic Effects**

Although the psychological effects of Mr. Arar’s detention and torture in Syria have been serious, the economic effects have been close to catastrophic, at least from the perspective of a middle class engineer who has had to rely on social assistance to feed, clothe and house his family. Every person I interviewed who knows Mr. Arar well stressed that his inability to find a job since returning to Canada has had a devastating effect upon both his psychological state and his family finances.

Mr. Arar told me that his lack of employment was “destroying” him. Dr. Mazigh noted that it was a source of tension between her and her husband. She was encouraging him to look as widely as possible for any job, whereas he was still fixed upon finding a job in his field, computer engineering. Dr. Young believed that Mr. Arar’s employment status was one of the “most distressing” aspects of his current situation. Failing to find a job has also encouraged Mr. Arar’s sense of estrangement from the Muslim community: it is the most concrete example of a failure to help him when he needed help. Mr. Arar has sent out hundreds of email inquiries and letters, and has had few responses. When he has been able to speak directly with prospective employers, some of his advisors told me that he has been dealt with abruptly and coldly. In various contacts it has been made abundantly clear that he is not hireable because of his negative notoriety.

To put Mr. Arar’s inability to find a job in proper context, it is important to note that Mr. Arar seems to find much of his self-worth through his work. He is the most educated member of his family, the youngest child of a mother who pushed him to succeed in his studies. He is immensely proud of his engineering credentials, and has a strong self image as a successful and highly competent professional. He was pleased to be asked to travel for his work. As he described his past work experience and his commitment to various projects, a picture emerged of a man who might even be described as a workaholic. Mr. Arar took a job in Boston while leaving his wife behind in Canada with their first child while she completed her Ph.D. He did so because he was ambitious and thought that this was the best job on offer at the time, with the best prospects for the future. Mr. Arar cared deeply about his earning potential.

In the light of subsequent events, it is ironic that Mr. Arar seemed to harbour strongly positive feelings about American business culture. He told me, and this was confirmed by other observers, that he found American business people more professional, more competent and more committed than most Canadians he had dealt with. He seemed to believe that his future would lie in business contacts in the United States. He returned to Canada from the United States hoping to remain a consultant for his American employer. Boston was exciting professionally, but too expensive. He wanted to re-unite his family in the safe and relatively inexpensive environment of Ottawa where the family’s standard of living would be best protected.

That dream has collapsed utterly. The most recent information available to me is that Mr. Arar has finally been offered a small part time position as a computer advisor in his daughter’s school. This is small comfort for a man who prided himself on his growing earning capacity.

## CONCLUSION AND SUMMARY OF FINDINGS

I conclude that Mr. Maher Arar was subjected to torture in Syria. The effects of that experience, and of consequent events and experiences in Canada, have been profoundly negative for Mr. Arar and his family. Although there have been few lasting physical effects, Mr. Arar's psychological state was seriously damaged and he remains fragile. His relationships with members of his immediate family have been significantly impaired. Economically, the family has been devastated.

## Appendix A

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## Appendix B

### Interviews

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Doug Gruner  
Monia Mazigh  
Alex Neve  
Muayyed Nureddin  
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