

IN THE MATTER OF THE COMMISSION OF INQUIRY INTO 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

SUBMISSIONS ON BEHALF OF MAHER ARAR ON A MOTION REGARDING THE APPLICATION FOR DISCLOSURE OF CERTAIN DOCUMENTS IN THE POSSESSION OF THE GOVERNMENT OF CANADA

**PART I: STATEMENT OF FACTS**

**OVERVIEW**

1. The Applicant seeks the following orders:
  - (1) that the Government of Canada disclose to the Applicant and the public all records, in whole or in part, that contain information that is in the public domain;
  - (2) that the Government of Canada disclose to the Applicant and the public all records, in whole or in part, that contain information subsumed or made obvious by the information in the public domain, when considered in its entirety;
  - (3) that the Government of Canada disclose to the Applicant and the public, on an ongoing basis, records, in whole or in part, containing information that becomes public during this inquiry;
  - (4) that the Government of Canada disclose to the Applicant and the public all records, in whole or in part, containing information emanating from the Applicant or his counsel, including but not limited to statements made by the Applicant in the United States and Syria; and
  - (5) that the Government of Canada disclose to the Applicant and the public any and all records shown or provided to the Applicant during his interrogations in the United States and Syria.

## **SUMMARY OF THE RELEVANT FACTS**

2. On September 26, 2002, the Applicant, a Canadian citizen, was arrested at the JFK airport in New York. Despite his pleas to be sent to Canada, he was deported on October 8, 2002 to Syria via Jordan. In both Jordan and Syria he was subjected to mistreatment and torture. He spent almost a year detained in Syria before he was released into the custody of Canadian authorities. During his time in Syria he was subjected to physical and psychological torture.
3. His ordeal did not end upon his return to Canada. He arrived in Canada only to discover that the National Security Agencies—the RCMP, CSIS and/or the Canadian government had, during his captivity, opposed his return to Canada and had disclosed to the media information from their files on him. Some of the disclosed information originated from the false statements that he had been compelled to provide while being subjected to torture. According to information obtained from Mr. Arar's file by Juliett O'Neill of the Ottawa Citizen and published in the Citizen on November 8, 2003, the intentional disclosure of information concerning Mr. Arar by security officials prior to his return was prompted to defend the investigative work of the Joint Security Task Force (JSTF).
4. During the weeks and months following Mr. Arar's return, the public outcry about his treatment reached unprecedented levels. Virtually all of the major newspapers in Canada, including the Toronto Star, Globe and Mail, National Post and Ottawa Citizen called for a public inquiry into Mr. Arar's return.
5. As a result of the public indignation over Mr. Arar's treatment, the National Security Agencies continued to disclose information from Mr. Arar's file to the media in an effort to turn public opinion against Mr. Arar so as to prevent the calling of a public inquiry. Despite these disclosures, public concern was not allayed. The public and the media continued to press for answers to the many questions that have been raised by the treatment of Mr. Arar, questions about the

reliability of the intelligence gathering of our National Security Apparatus, questions about the viability of information sharing with the United States given that country's blatant disregard for its international human rights obligations, and questions about whether our government was complicit in Mr. Arar's deportation and torture.

6. Finally on January 28, 2004, the Government of Canada yielded to public pressure and ordered a public inquiry:
  - a. into 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;
  - e. and any other circumstance directly related to Mr. Arar that Justice O'Connor considers relevant to fulfilling this mandate.

7. It is in this context that the current motion is made. Mr. Arar submits that this inquiry has been called because the public has lost confidence in its National Security Agencies. Indeed, in a May 28, 2004 Commentary published in the *Globe and Mail* which dealt with Portland, Oregon lawyer Brandon Mayfield who was wrongly identified by the FBI as being a conspirator in the Madrid bombings, the following was noted:

When intelligence officials are 100-per-cent sure, they may still be dead wrong. Worse, they may be boasting of their certainty to provide a screen for human-rights abuses and their own mistakes. The last time we heard such confidence, a newspaper was reporting last December that unnamed Canadian and U.S. intelligence officials were "100 per cent sure" that Maher Arar, the Canadian citizen tortured in Syria last year, had trained in an al-Qaeda terrorist camp in Afghanistan. Nothing more was ever heard about it.<sup>1</sup>

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<sup>1</sup> "The Wrong Fingerprints", *Globe and Mail* (May 28, 2004), Volume I, p. 221. The Article noted: "The FBI had said it was "100 per cent sure" it had a fingerprint match. Turns out it had a poor digital copy of a partial print. Spanish police had raised questions about the match, but the FBI would have none of it. Then Spain found an Algerian whose fingerprints matched. Mr. Mayfield was set free. His case shows how an impressive-looking structure of accusation can be built on sand. Even fingerprints are not unassailable evidence. This is a reminder that, as democratic states seek a delicate balance between liberty and security, they need to preserve due process. When intelligence officials are 100-per-cent sure, they may still be dead wrong.

## POSITION OF THE GOVERNMENT OF CANADA REGARDING DISCLOSURE

8. Counsel acting on behalf of the Government of Canada has taken a position that is not reconcilable with the public's demand for a full and open accounting of the conduct of the National Security Services *vis a vis* Mr. Arar. Counsel for the government has argued that the vast majority of information and documents relevant to the inquiry should be suppressed under National Security Confidentiality.<sup>2</sup> Counsel for the government is seeking to suppress, among other information, information that has already been revealed to Mr. Arar or has already been publicly disclosed. This includes *inter alia*:
  - A. copies of the original US deportation document which was given to Mr. Arar but subsequently seized by the Syrian authorities, despite the fact that the document was disclosed to a large US media outlet, the CBS, and is now in the public domain;
  - B. copies of the statement that was voluntarily given by Mr. Arar's former counsel, Michael Edelson, to Superintendent Garvey during the investigation into Mr. Arar's case by the RCMP Complaints Commissioner despite the fact that this information emanates from Mr. Arar's former counsel;
  - C. copies of Mr. Arar's statement given to the U.S. authorities by Mr. Arar
  - D. copies of the statements given by Mr. Arar to Syrian authorities under torture which was obtained from Syria.
  
9. Mr. Arar submits that not only is this position untenable with the public's demand for a full accounting of the conduct of the National Security Agencies but it is also inconsistent with the previous decision of the Government to disclose much of the information that it is now seeking to suppress. The following information

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<sup>2</sup> See Submissions of the Government of Canada to Arar Commission on National Security Confidentiality

concerning Mr. Arar has been already been disclosed and is therefore no longer confidential information subject to National Security Confidentiality:

- A. information disclosed to and by Arar during questioning of Mr. Arar in the United States;
- B. information disclosed to and by Arar during Mr. Arar's questioning in Syria;
- C. information disclosed to and by Mr. Edelson, former solicitor for Mr. Arar;
- D. information disclosed to and by Ms. Mazigh during questioning in Tunisia;
- E. information disclosed as a result of the release of Mr. Arar's files to Juliet O'Neill, details of which were published in the Ottawa Citizen and many other newspapers on and subsequent to November 7, 2003;
- F. information disclosed to James Lockyer, former Solicitor to Mr. Arar;
- G. information disclosed by Canadian government officials that now form part of the public record and which are contained in the following sources:
  - (i) information disclosed in Hansard which contains statements by officials of the Canadian government;
  - (ii) information disclosed in appearances of officials before Commons and Senate Committees, including *inter alia* the Commons Committees on Foreign Affairs and Justice;
  - (iii) information disclosed by Canadian government officials to the media in Canada and the United States;
  - (iv) information disclosed under the *Access to Information Act* and *Privacy Act*;
- H. information disclosed by U.S. officials to the media;
- I. information disclosed in other media sources; and
- J. information disclosed by Syrian government officials to the media.

Particular details of the facts set out in 10 are as follows:

**A. INFORMATION DISCLOSED TO AND BY MR. ARAR DURING  
QUESTIONING OF MR. ARAR IN THE UNITED STATES**

10. During his detention in the U.S., Mr. Arar was questioned by U.S. authorities who possessed a file on him. As a result of this questioning, Mr. Arar was made aware of information contained in his file. It has been acknowledged by the former Solicitor General Wayne Easter that information was supplied by the Canadian authorities to the U.S. prior to Mr. Arar's detention.<sup>3</sup> In addition, Deputy Prime Minister Anne McLellan has recently noted that the transfer of information between Canada and the U.S. is 'seamless'<sup>4</sup>
11. Mr. Arar was confronted with the contents of his file and questioned extensively. This questioning revealed the following information in Mr. Arar's file:
- a. The authorities had information that he knew Abdullah Al Malki. They were aware that he had met with Abdullah in October of 2001 and also that Abdullah had witnessed the signing of his lease in 1997. They showed Mr. Arar surveillance photos taken of Mr. Al Malki, indicating that Mr. Al Malki had been under surveillance and a copy of the lease that had been witnessed by Mr. Al Malki.
  - b. The authorities were concerned about Mr. Arar's relationship with Mr. Ahmed El Maati.<sup>5</sup>

**B. QUESTIONING AND TORTURE IN SYRIA**

12. During his detention in Syria, Mr. Arar was questioned extensively. The questions asked and the concerns raised by his Syrian captors were similar to those raised in

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<sup>3</sup>Tim Harper, "Canada Gave U.S. Info on Arar-Easter", Toronto Star, (Nov 20, 2003), Volume I, p. 219 & "We have learned a little more about the Maher Arar Affair", CTV News, (November 19, 2003), Volume I, p. 217

<sup>4</sup>Globe and Mail (Thursday May 27, 2004).

<sup>5</sup> See Maher Arar Chronology and Statement to the Public, [www.maherarar.ca](http://www.maherarar.ca), (November 4, 2003).

the U.S. interrogations, including his relationship with Mr. Al Maalki and Mr. El Maati.<sup>6</sup> Mr. Arar was forced to answer these questions while being subjected to torture and threats of further torture.

### **False Coerced Statements In Syria**

13. In addition to repeated questioning, Mr. Arar was forced to sign an involuntary statement under torture in order to satisfy his interrogators. The first statement, which was signed in November 2002, was later transmitted to Canada by CSIS who visited Syria in late 2002.<sup>7</sup> In this statement, Mr. Arar falsely stated that he had been to a training camp in Afghanistan where he had received military training. A second coerced statement was signed on August 19, 2003. In that statement, Mr. Arar falsely stated that he went to the Khaldun training camp in Afghanistan in 1993.
14. From the interrogations in Syria, Mr. Arar learned again that one main area of concern was Mr. Arar's relationship with Mr. Al Malki and Mr. El Maati. The coerced statements given by Mr. Arar were used by Canadian officials in subsequent disclosures as a basis to justify assertions that Mr. Arar had been in Afghanistan and that he had received military training there, a theme that is repeated in the media articles cited below.

### **C. INFORMATION PROVIDED TO MICHAEL EDELSON MR. ARAR'S FORMER SOLICITOR**

15. Michael Edelson had two meetings with members of the JSTF in late December 2002 after CSIS returned from Syria.<sup>8</sup> In these meetings, the members of the JSTF and Department of Justice revealed to Mr. Edelson that CSIS had received Mr. Arar's statements. The conversation also revealed that they had accessed Mr.

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<sup>6</sup> *Ibid*

<sup>7</sup> James Lockyer former counsel to Maher Arar—see also Juliet O'Neill Article November 8, 2003

<sup>8</sup> Mr. Edelson has provided a statement in which he confirms these details.

Arar's Palm Pilot and notebook which had been seized briefly by Customs on a pretext in December, 2001. They also revealed some of their concerns about Mr. Arar. The concerns were as follows:

- Mr. Arar was in the US on September 11, 2001;
- They found the names of people of concern in Mr. Arar's palm pilot, and others have Maher's name in their phonebooks;<sup>9</sup>
- There are rumours that Mr. Arar has been in Afghanistan;
- They believe that when the family travelled to Tunisia, that they were running away; and
- They were concerned about Maher's relationship with Abdullah Al Malki.

16. This questioning revealed the following information as to what was in Mr. Arar's JSTF file:

- a. The JSTF believed that Mr. Arar was running away when he left for Tunisia in June 2002;
- b. The JSTF was concerned about Mr. Arar's relationship with Abdullah Al Malki and other individuals; and
- c. They believed that Mr. Arar had been to Afghanistan.

#### **D. INFORMATION OBTAINED AS A RESULT OF THE QUESTIONING OF MS. MAZIGH IN TUNISIA**

17. Ms. Mazigh was subjected to an interrogation in Tunisia. During the course of this interrogation, Ms. Mazigh noticed that the Tunisian authorities had a file that contained information on Mr. Arar. She was questioned about Mr. Arar's relationship with Abdullah Al Malki. This again revealed that this was a matter of serious concern to the Canadian authorities in their investigation of Mr. Arar. It also revealed that information about Mr. Arar had been shared with the Tunisian Security Services.<sup>10</sup>

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<sup>9</sup> Mr. Arar's Palm Pilot and Notebook were seized by Custom's on a pretext in December, 2001. When returned, Mr. Arar was able to confirm that officials of the Canadian Government had logged on to his notebook without his consent.

<sup>10</sup> Statement of Ms. Mazigh

**E. INFORMATION OBTAINED FROM O'NEILL ARTICLE AS AUTHENTICATED BY RCMP INFORMATION USED FOR SEARCH WARRANT**<sup>11</sup>

18. In an article first published on November 8, 2003, Juliet O'Neill of the Ottawa Citizen revealed that she had received access to the Arar file. She reproduced large portions of the file in her article. The article contains the following information:

- Mr. Arar was brought under suspicion as a result of the JSTF investigation of Abdullah Al Malki who was believed to be part of an Al Qaeda logistical support group;
- The disclosure of information concerning Mr. Arar by security officials prior to his return was prompted to defend the investigative work of the JSTF;
- Included in the disclosed documents was information that Mr. Arar told Syrian officials during the first few weeks of his incarceration. The information included fabricated details given by Mr. Arar under torture that would have only been known to his Syrian interrogators, such as the detail that he spent seven months of training at the Khaldun camp in Afghanistan in 1993;
- The document contains the allegation that Mr. Arar went to Pakistan at the behest of members of the Jamaat Tabligh;
- He was allegedly assigned to recruit followers for Jihad while studying at McGill in the early 1990's;
- The document states that Mr. Arar told U.S. interrogators that he had travelled to Pakistan with the Tabligh group;
- The document also states that he told U.S. interrogators that he met Mr. Almalki in 1994 or 1995. He had heard that Mr. Almalki worked for an aid organization in Afghanistan. He last saw Almalki in October 2001;
- The JSTF believed that when the family travelled to Tunisia, Mr. Arar had left Canada permanently;

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<sup>11</sup> Juliet O'Neill, "Canada's dossier on Maher Arar", Ottawa Citizen (November 8, 2003), Volume I, pp. 102-103.

- The existence of a suspected Ottawa based Al Qaeda cell is revealed in security information emanating from U.S., Syrian and Canadian investigations; and
- The RCMP and CSIS persistently opposed Mr. Arar's return to Canada and delayed his return as a result;

**Information From Affidavit Filed To Obtain Search Warrant To Search Juliet O'Neill's Office And Home**<sup>12</sup>

19. The information from the search warrant used to search the home and office of Juliet O'Neill confirms the authenticity of the documents used by Ms. O'Neill in her article. It also confirms the date of one of the documents as being December 13, 2002. This document contains information obtained from Syria concerning the coerced statements made by Mr. Arar there. The date is consistent with the information provided to Mr. Arar's counsel Michael Edelson and James Lockyer that CSIS had been to Syria in December, 2002 and had obtained his statements at that time. The information used for the search warrant confirms that the information in the O'Neill article comes from the Arar file.
20. In an article, Bruce Garvey, a journalist for the Ottawa Citizen stated the following about the affidavit sworn in support of the search warrant:

In his frequently blacked out affidavit, sworn before Mr. Sculthorpe, Cpl. Quirion declared that Ms. O'Neill's article contained information from a classified secret document that only a limited number of people knew about... One piece of paper, Cpl. Quirion swore, 'contains information on Maher Arar's apprehension by the U.S. immigration authorities along with other information.'<sup>13</sup>

**F. INFORMATION DISCLOSED TO JAMES LOCKYER WHO WAS RETAINED BY THE CANADIAN GOVERNMENT AS AN OBSERVER AND WHO WAS ALSO BRIEFLY MR. ARAR'S SOLICITOR.**

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<sup>12</sup> see redacted version of Affidavit used to obtain O'Neil Search Warrant that can be publicly accessed at [www.gowlings.ca](http://www.gowlings.ca).

<sup>13</sup> Bruce Garvey, "RCMP tailed Citizen writer, went through her garbage", Ottawa Citizen (March 23, 2004), Volume I, p. 181.

21. Mr. Lockyer advised that he was informed that CSIS agents visited Syria in late 2002.<sup>14</sup>

**G. INFORMATION DISCLOSED BY CANADIAN GOVERNMENT OFFICIALS THAT NOW FORM PART OF THE PUBLIC RECORD AND WHICH ARE CONTAINED IN HANSARD, IN THE PARLIAMENTARY COMMITTEES, IN MEDIA ARTICLES, AND IN THE DOCUMENTS OBTAINED UNDER THE ACCESS TO INFORMATION ACT AND PRIVACY ACT**

**Information Disclosed In Statements By Wayne Easter As Solicitor General And After He Left The Post**

22. Wayne Easter, former Solicitor General of Canada, made statements concerning Mr. Arar and the activities of the JSTF both while he was Solicitor General and after he left his post. It is submitted therefore that the information provided by Wayne Easter former Solicitor General of Canada in public statements confirms the following:
- a. Although Mr. Easter initially denied that the RCMP provided information, he later admitted that the RCMP did in fact provide information to the U.S. concerning Mr. Arar;<sup>15</sup>
  - b. Canada was not the only government that provided information to the U.S.;<sup>16</sup>
  - c. There are no rogue elements within the RCMP and that as a result any information that has been disclosed was disclosed with authorization;
  - d. There was no concern expressed over leaks of information concerning Mr. Arar by the security services after Mr. Arar returned despite a request for a condemnation of the leaks from Ms. McDonough. Indeed, the Solicitor General defended the conduct of the RCMP. Indeed, despite repeated requests to condemn the leaks, the Solicitor General did not do so but rather consistently defended the conduct of the RCMP and stated that they did not do anything improper;

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<sup>14</sup> Statement of James Lockyer

<sup>15</sup> Sheldon Alberts, "Easter admits Canada gave information to U.S." Ottawa Citizen (November 20, 2003), Volume I, p. 218.

<sup>16</sup> Ibid

- e. Mr. Easter raised the question of whether or not Mr. Arar was in fact a resident of Canada at the time of his arrest; and
- f. There is 'seamless' sharing of information between Canada and the U.S. This same position was reiterated by Deputy Prime Minister Anne McLellan in statements to the media.

### **Statements Made by Wayne Easter that are Reported in the Media**

- 23. In a July 31, 2003 article in the Ottawa Citizen, then Solicitor General Wayne Easter is quoted as saying that 'rogue' elements within the RCMP might have provided information to the U.S. which led to his arrest. The same article confirms that there is 'seamless' intelligence sharing in the war against terrorism.<sup>17</sup>
- 24. An October 7, 2003 Globe and Mail article indicates that "Mr. Easter has said that someone in the RCMP could have given U.S. officials incriminating information that caused them to place Mr. Arar's name on a border-point watch list. Senior RCMP officials may not have known about it, he said earlier this year."<sup>18</sup>
- 25. In a Graham Fraser article, published in the Toronto Star on October 10, 2003 the following is stated:

Solicitor-General Wayne Easter went further than he has done before in denying RCMP involvement in the decision to deport Arar to Syria. 'The facts are that the RCMP did not disclose to the American authorities on this issue,' Easter said. 'It was not part of the decision. It's that simple. Those are the facts,' he said. It is the first time that he has denied that the RCMP disclosed information to the U.S. authorities - a denial that is contradicted by other reports. In the past, he has said the RCMP was not involved in the decision to deport Arar.<sup>19</sup>

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<sup>17</sup> Robert Fife, "Groups question Mounties' role in deportation of Ottawa man", Ottawa Citizen, (July 31, 2003), Volume I, p. 33.

<sup>18</sup> Jeff Sallot, Tu Thanh Ha and Daniel LeBlanc, "Maher Arar Returns", Globe and Mail, (October, 7, 2003), Volume I, pp. 49-53.

<sup>19</sup> Graham Fraser, "MPs fight for Arar probe", Toronto Star (October 10, 2003), Volume I, pp. 64-65.

26. Wayne Easter in an October 24, 2003 CTV News interview stated- “I’ve been assured by the Commissioner of the RCMP that they were not involved in the decision taken by the American authorities. And I think this is the appropriate process to get to the bottom of this matter.”<sup>20</sup>

27. Robert Fife in a November 7, 2003 article noted the following comments made by Wayne Easter:

Mr. Easter told reporters yesterday he did not know how the Americans obtained the lease, but said it did not come from the RCMP, and might have been obtained by foreign intelligence agencies. ‘That particular document, there are multi-intelligence agencies involved in these matters,’ he said.<sup>21</sup>

28. In a November 20, 2003 Ottawa Citizen article, Mr. Easter is quoted as saying that:

The U.S. government has said it placed Mr. Arar on a terrorism watch list based on information provided by Canadian law enforcement officials. 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.<sup>22</sup>

29. In a December 22, 2003, Globe and Mail article the following was stated:

Former Solicitor-General Wayne Easter said in an interview yesterday that he still does not believe CSIS played a part in furnishing Washington with intelligence on Mr. Arar. . . ‘Mr. Powell is wrong,’ said Mr. Easter“ “Mr. Easter said the United States should have respected Mr. Arar’s Canadian passport by suggested that people

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<sup>20</sup> “The case of Maher Arar takes more twists and turns”, CTV, (October 23, 2003), Volume I, p. 75.

<sup>21</sup> Robert Fife, “Foreign spies may have stolen Arar document: Minister can’t explain how else U.S. obtained lease paper”, Ottawa Citizen (November 7, 2003), Volume I, p. 97.

<sup>22</sup> Sheldon Alberts, “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), Volume I, p. 117.

should ask more questions of Mr. Arar. ‘Nobody has raised the question: Was Mr. Arar a resident of Canada at the time? . . . How come some of these questions are not being raised?’ ‘A Canadian government source familiar with the case suggested Mr. Arar was not a ‘resident of Canada at the time‘ of his detention.’<sup>23</sup>

30. An Ottawa Citizen article dated November 22, 2003 stated the following:

Solicitor General Wayne Easter admitted this week Canadian authorities did pass on intelligence about Mr. Arar, but denied they had any role in the U.S. decision to deport him to Syria. The RCMP have had Mr. Arar under investigation since at least January 2002, which appeared to be focused on his links with Abdullah Almalki, an Ottawa resident now imprisoned in Syria. Security officials have told the Citizen they were investigating a suspected Ottawa-based al-Qaeda cell involved in alleged shipments of electronic and computer equipment to al-Qaeda terrorists in Pakistan and Afghanistan. The investigation also dealt with an alleged plot to bomb the U.S. Embassy in Ottawa, which was subsequently abandoned in favour of easier targets such as the Parliament Buildings.”<sup>24</sup>

### **Statements Made By Mr. Easter In The House Of Commons And At Parliamentary Committees**

31. In the October 7, 2003 Question Period, Mr. Easter stated in response to a question as to whether or not the RCMP passed on information that “[t]he RCMP operated within its mandate and within the laws of the country”<sup>25</sup>
32. In response to a question in the House of Commons by Alexa McDonough concerning leaks of information regarding Mr. Arar’s coerced statements and a

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<sup>23</sup> Steven Chase, “Graham rejects Arar inquiry”, Globe and Mail, (December 22, 2003), Volume I, pp. 131-133.

<sup>24</sup> Robert Fife, “Security no excuse for torture, Martin says”, Ottawa Citizen (November 22, 2003), Volume I, p. 121.

<sup>25</sup> Hansard, (October 7, 2003), Volume II, p. 76

request to investigate the leaks, Mr. Easter did not condemn the leaks and refused to answer due to the fact that he should not speak on “operational matters”<sup>26</sup>

33. In testimony before the House of Standing Commons Committee on Foreign Affairs and International Trade on October 7, 2003 Wayne Easter reiterated that the RCMP was not involved in the decision to arrest and deport Mr. Arar and that they did not suggest that he be deported to Syria.<sup>27</sup> He then went on to state that there are no rogue elements in the RCMP.<sup>28</sup> He confirmed the close sharing of information between Canada and the U.S. with 12 integrated border enforcement teams. Deputy Commissioner Garry Loeppky also confirmed the sharing of information and suggested that there were information sharing protocols<sup>29</sup>

#### **Information From Secretary Of State For Foreign Affairs Bill Graham**

34. In testimony before the Foreign Affairs Committee on November 4, 2003, Bill Graham clearly stated that Canadian officials were consulted on the decision to deport Mr. Arar to Syria. He stated that Colin Powell advised him on two occasions that the decision to deport Mr. Arar was made by the U.S. ‘but it was based upon information and discussions they had with Canadians.’<sup>30</sup>

#### **Information from Gar Pardy Former Director Of Consular Affairs**

35. Information provided by Gar Pardy confirms that the RCMP provided information to the U.S. concerning Mr. Arar, that the RCMP and CSIS resisted having Mr.

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<sup>26</sup> Hansard. (October 27, 2003), p. 125

<sup>27</sup> Testimony before Commons Committees Excerpts, Volume III, p. 130

<sup>28</sup> Testimony before Commons Committees Excerpts, Volume III, p. 132

<sup>29</sup> Testimony before Commons Committees Excerpts, Volume III, pp. 130, 132, 141, 157

<sup>30</sup> Testimony before Commons Committees Excerpts, Volume III, p. 209. This information is also contained in numerous media reports as well naming unnamed U.S. Sources.

Arar returned to Canada and that Syrian officials told the Canadians that Mr. Arar had once been in a training camp in Afghanistan.

- Gar Pardy - “Every time we talked to the Americans, the Americans would turn around and say ‘your problem is back in Ottawa. We only acted on information that came from there’” he said. ‘ Everytime we said ‘look tell us why you did this,’ they said go talk to the RCMP.’ . . . Mr. Pardy said the RCMP always refused to discuss the Arar file, and Foreign Affairs was never shown evidence that he belonged to al-Qaeda. But he said senior Syrian intelligence officials told Canadian officials that Mr. Arar, 33, had once been at training camp in Afghanistan in 1993.”<sup>31</sup>
- An e-mail sent by Gar Pardy, the head of consular affairs at Foreign Affairs, to Mr. Arar’s wife, Monia Mazigh, in April also acknowledged that Canadian law enforcement did not want him returned home.”<sup>32</sup>
- Gar Pardy in an interview to the Globe and Mail dated November 8, 2003 entitled RCMP Passed on Arar Name U.S. says noted: “The fundamental issue is the standards that are used here,” said Gar Pardy, former head of consular services at the Department of Foreign Affairs. “Particularly the standards when information is transferred between countries. That's the key issue here. “Nobody is saying that police shouldn't co-operate with one another, particularly given the issue of the bloody world out there. But there is a requirement for standards to be in place,” he said. He argued that that Canadian agencies must place clear conditions on how other countries use the information Canada swaps. “The standards that you use, with respect to the information that is passed, and the hold you put on that information in terms of its use by another country: That's what you have to look for,” he said. “If those two elements are not active in terms of the exchange of information, then you are going to get cases like Arar. “You do it all the time. These are part of the agreements one works out with foreign governments. And if police are not prepared to place conditions on it, then we've got a problem.”<sup>33</sup>

### **Information From Named and Unnamed Sources Within the RCMP**

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<sup>31</sup> Robert Fife & Juliet O’Neill, ““You are safe now’:Minister won’t probe RCMP’s role in Arar case”, Ottawa Citizen (October 7, 2003), Volume I, pp. 45-46.

<sup>32</sup> Robert Fife, “RCMP didn’t turn in Arar, U.S. says: Embassy statement conflicts with claims by Powell, Cellucci”, Ottawa Citizen (August 1, 2003), Volume I, p. 34.

<sup>33</sup>Jeff Sallot & Colin Freeze, “RCMP passed along Arar’s name, U.S. say”, Globe and Mail, (November 8, 2003), Volume I, p. 101.

36. Information disclosed by the RCMP reveals the following:<sup>34</sup>
- a. There is a seamless flow of information between Canada and the U.S. on national security issues;
  - b. The RCMP and CSIS can be involved in the same investigation, the RCMP investigating possible criminal activity and CSIS national security matters
  - c. Although it is not possible for the RCMP to discuss operational matters, the RCMP was not involved in the decision to deport Mr. Arar.
37. The Applicant relies on the testimony of the Solicitor General and RCMP officials before Commons Committees<sup>35</sup> and also on the following media report.
- “The RCMP insisted yesterday it played no role in the U.S. arrest, although Insp. Andre Guertin would not say if the force shared information about Mr. Arar with the U.S. Solicitor General Wayne Easter has speculated that rogue elements within the RCMP may have provided information that led to Mr. Arar’s arrest last September. . . Although Insp. Guertin said the agencies work ‘seamlessly’ in the fight against terrorism through intelligence sharing, he said, ‘we were not involved in any way in the arrest or deportation of Mr. Arar,’ even though Mr. Easter confirmed that U.S. officials have said the RCMP shared information on Mr. Arar.”<sup>36</sup>

### **Information from Unnamed Officials Within the Federal Government**

38. There are various statements by unnamed officials. They indicate that:
- a. The Federal government acknowledged that the U.S. consulted with the RCMP prior to Mr. Arar’s deportation and that Mr. Arar was under investigation since January, 2002 due to his contacts with other persons of interests;
  - b. Mr. Arar provided information to Syria about Al Qaeda and others

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<sup>34</sup> Testimony of Assistant Commissioner Proulx before the Commons Committee and media reports.

<sup>35</sup> Testimony before the Standing Committee on Foreign Affairs and International Trade, Excerpts, (September 25, 2003) Volume III, pp. 37-63; Testimony before the Standing Committee on Foreign Affairs and International Trade, Exerpts, (October 7, 2003), Volume III, pp. 128-152; Standing Committee on Justice and Human Rights, Exerpts, (October 9, 2003), Volume III, pp.156-162; Subcommittee on National Security of the Standing Committee on Justice and Human Rights, Volume III, pp.171-179.

<sup>36</sup> Robert Fife, “Groups question Mounties’ role in deportation of Ottawa man”, Ottawa Citizen (July 31, 2003), Volume I, p. 33.

- c. Mr. Arar has terrorist connections;
- d. Mr. Arar was seen with Mr. Al Malki at an Ottawa restaurant in October 2001. This was connected to the arrest of Mr. EL Maati in Syria;
- e. The RCMP sought to interview Mr. Arar in January 2002 but did not pursue it because he was 'lawyered up.' They believed he had left Canada permanently and were surprised to find out he returned;
- f. Security officials are 100 per cent sure Mr. Arar trained at an Al Qaeda terrorist camp. ;
- g. Disclosures of information commenced long before Mr. Arar's return and continued to well after his return and indeed into January of 2004; and
- h. Canadian officials approved his deportation to Syria.

Particulars of the above information are contained below:

- "The federal government has acknowledged for the first time in heavily edited documents that the United States consulted the RCMP before Maher Arar was arrested and deported to Syria where he spent a year in jail without charges. . . say U.S. law enforcement gave the RCMP 'clear evidence' of Mr. Arar's 'involvement in al-Qaeda' . . . RCMP had the Syrian-Canadian under investigation since January 2002 because of 'Arar's contacts with persons in Ottawa who were of interest to them.' . . . 'The RCMP has confirmed that the Americans consulted them prior to deporting Arar, but did not raise the issues of his possible deportation to Syria nor did the RCMP give any indication that such a course of action would be acceptable to them,' one document said. . . The RCMP believe the 33-year-old software engineer had links to two other Syrian-Canadians, now in jail in Syria, whom he met at the Ottawa Mosque." <sup>37</sup>
- "CTV . . . quotes senior government officials as saying Mr. Arar provided information to Syrians about two Canadians in jail in Syria and one being held in Egypt. The report says the Canadian Security Intelligence Service has transcripts of Mr. Arar's interrogation." <sup>38</sup>
- "Maher Arar provided [valuable] information to the Syrians about al-Qaeda, the Muslim Brotherhood, a radical Islamic group linked to Osama bin Laden about information of cells operating in Canada. Government sources say Arar provided information to the Syrians about four other Canadians: Arwad al Bushi, Abdullah al Malki, both Syrians being held in a Syrian jail; Ahmed Abu al Maatie, an Egyptian Canadian in custody in Egypt; and Mohamed Harkat. Born in Algeria,

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<sup>37</sup> Robert Fife, "U.S. consulted RCMP on Arar arrest", Ottawa Citizen, (October 18, 2003), Volume I, p. 71.

<sup>38</sup> Norma Greenaway, "Supporters say Arar target of smear campaign", Norma Greenaway, Ottawa Citizen (October 25, 2003), Volume I, p. 79.

he's been held under an anti-terrorism security certificate at the Ottawa Detention Centre. All this information, sources say, led to Arar's release.”;<sup>39</sup>

- “They say Arar has terrorist connections, a charge Canada's Foreign Affairs Department disputed.”;<sup>40</sup>
- “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 official refused to provide further details, suggesting ongoing intelligence operations are behind the secrecy. Prime Minister Jean Chretien and Liberal MPs initially objected to Mr. Arar's deportation until it was later learned the RCMP had been investigating Mr. Arar for a year and had quietly asked the U.S. government to pick him up.”<sup>41</sup>
- “Canadian agents trained suspicious eyes on Maher Arar and Abdullah Almalki as the two men ate together in an Ottawa restaurant - a meeting that occurred two years ago, just as an alleged associate was arrested in Syria. . . Days after Sept. 11, [Ahmad Abou El-Maati] and his brother, Amer, had been placed on a global terrorist watch list circulated by the United States. . . The names of Mr. Arar and Mr. Almalki did not appear on that list. But intelligence agents suspected the two men might be linked to Mr. Abou El-Maati or Al-Qaeda. . . [They] were spotted eating together at Mango's, an Ottawa fast-food restaurant. Subsequent interrogations involving Mr. Arar showed that Canadian police or intelligence agents duly noted the encounter“;<sup>42</sup>
- “The Mounties first asked to question Mr. Arar in January 2002, just one month after Bill C-36 came into force. Mr. Arar agreed, with one stipulation. He wanted his lawyer present. It was not an unreasonable request in the circumstances. . . The Mounties never again sought to interview Mr. Arar. He had ‘lawyered up’. Nonetheless, the RCMP kept track of Mr. Arar . . . also noticed when the Arar family moved out of their apartment in the Bayshore neighbourhood of Ottawa. . . The Mounties drew the erroneous conclusion that the Arar family was ‘fleeing the country,’ federal government sources say. ‘Frankly, we were surprised to see him coming back,’ one source said“;<sup>43</sup>

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<sup>39</sup> “The case of Maher Arar takes more twists and turns”, CTV News, (October 23, 2003), Volume I, p. 75.

<sup>40</sup> “An American civil rights group is taking up the case of Maher Arar:”, CBC Radio (November 3, 2003), Volume I, p. 82.

<sup>41</sup> Robert Fife, “Terror threats in Ottawa”, Ottawa Citizen, (July 24, 2003), Volume I, pp. 196-198.

<sup>42</sup> Colin Freeze & Jeff Sallot, “Fast-food encounter drew attention to Arar; Agents noted seemingly banal meeting with fellow Syrian-Canadian in Ottawa”, Globe and Mail (November 11, 2003), Volume I, pp. 106-109.

<sup>43</sup> Jeff Sallot, “Mistaking brawn for brains”, Globe and Mail (December 26, 2003), Volume I, p. 134.

- “Canadian and U.S. intelligence officials are ‘100-per-cent sure’ that a Syrian-born Canadian who was imprisoned for a year in Damascus trained at the same al-Qaeda camp in Afghanistan as a former Montrealer convicted of planning a terrorist attack. American officials have long maintained that Maher Arar underwent training in Afghanistan, but this is the first time they have identified the site as the Khaldun camp. Canadian officials had made no claim about Mr. Arar’s alleged activities in Afghanistan”“High-level sources in Canada and the U.S. who have had access to an extensive secret intelligence file on Mr. Arar say the 33-year-old Ottawa software engineer travelled to Pakistan in the early 1990s and then entered Afghanistan to train at the Khaldun camp. Mr. Bin Laden often visited the camp in the mountains of eastern Afghanistan where western recruits were allegedly schooled in the use of explosives and suicide attacks. ‘This guy is not a virgin,’ said a senior Canadian intelligence source, speaking on background. ‘There is more than meets the eye here.’”“Canadian officials say the Americans made a mistake in deporting Mr. Arar, who was on an international terrorist watch list, rather than allowing the RCMP to monitor his activities upon his return from Tunisia. ‘The Americans made a hell of an error when they deported him to Syria. The better way to operate was to maintain the watch list,’ the source said”<sup>44</sup>
- “Officials say U.S. agencies have an extensive dossier on him that raise serious questions. ‘If the Americans were ever to declassify the stuff there would be some hair standing on end,’ the senior source said.”; <No doubt Al-Aq’ida trained Arar, officials say><sup>45</sup>
- “The federal government admits both the Mounties and CSIS tipped off the Americans about Mr. Arar before his arrest but that they had nothing to do with his deportation.”; <sup>46</sup>
- “Canadian intelligence quietly approved of the United States decision to arrest and deport Syrian-born Canadian Maher Arar to Syria, CBS’s 60 Minutes II reported last night . . . The government conceded Canada exchanged intelligence with the Americans about Mr. Arar’s activities and alleged links to the al-Qaeda terrorist network, but insisted it did not know he would be deported to Syria, which engages in torture. However, 60 Minutes II, citing senior U.S. officials said Canadian law enforcement agencies were fully aware and sanctioned Mr. Arar’s deportation.”“That was a statement (Mr. Cellucci) made at one point at a cocktail party, but he subsequently said that Canada had not been consulted and

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<sup>44</sup> Robert Fife, “U.S., Canada ‘100% sure’ Arar trained with al-Qaeda”, Ottawa Citizen, (December 30, 2003), Volume I, p. 138.

<sup>45</sup> Robert Fife, “No Doubt Al-Aq’ida trained Arar, officials say”, Montreal Gazette, (December 30, 2003), Volume I, p. 139.

<sup>46</sup> Janice Tibbets, “Cotler ends involvement in Arar case”, Ottawa Citizen, (January 17, 2004), pp. 153-154..

he said the decision was made by the United States and by itself without discussing it (with Canada)' Mr Graham said" "Officials say the RCMP had six undercover officers at Montreal's Dorval Airport on Sept. 26, 2002, waiting for Mr. Arar's return from Tunisia through New York's JFK Airport to follow him to gain intelligence on his activities in Canada.";<sup>47</sup>

- "Maher Arar was deported to Syria from the U.S. only after the RCMP informed American counterparts they didn't have enough evidence to detain or charge Mr. Arar if he was returned to Canada, CanWest News has learned. Intelligence sources say the RCMP and U.S. officials were in regular contact after the 33-year-old software engineer was arrested in the fall of 2002 at New York's JFK Airport en route from Tunisia to Montreal. Sources said the U.S. offered to send him home if the RCMP would charge him, but the Americans were informed Canada did not have enough evidence against Mr. Arar, who was a target of an RCMP security investigation."<sup>48</sup>
- "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.'" "Last year, U.S. Ambassador Paul Cellucci said Canadian law enforcement was aware of Mr. Arar's activities and 'wouldn't be happy to see him come back to Canada.' As the controversy developed, however, he has since taken a different stance. He now says the U.S. made its own decision to deport to Mr. Arar without any input from Canada.";<sup>49</sup>
- "Ottawa police participated in the investigation that led to Ottawa resident Maher Arar being jailed in Syria for a year without charges, the city's police force has revealed. . . Chief Vince Bevan said he wanted to tell the community personally about the police involvement, before it became public at an inquiry. . . 'To put it plainly, one of the investigations in which the Ottawa Police Service played a role was the Arar case,' said Chief Bevan. . . 'The Ottawa Police Service works in an integrated fashion with other policing agencies on matters of common interest within out jurisdiction,' the chief said. 'These joint efforts have increased since Sept. 11.' Chief Bevan also mentioned 'the creation of teams that deal specifically with national security issues.'";<sup>50</sup>

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<sup>47</sup> Robert Fife, "Canadian spies OK'd deportation:CBS", Ottawa Citizen, (January 22, 2004), pp. 158-159.

<sup>48</sup> Robert Fife, "Arar deported after RCMP told U.S. he would go free here", Ottawa Citizen (January 23, 2004), Volume I, pp. 160-161.

<sup>49</sup> Robert Fife, "U.S. ready to co-operate in Arar probe", Ottawa Citizen, (January 30, 2004), Volume I, p. 175.

<sup>50</sup> Kate Jaimet, "Chief admits Ottawa police took part in Arar probe", Ottawa Citizen (March 10, 2004), Volume I, pp. 179-180.

## **H. INFORMATION DISCLOSED BY U.S. OFFICIALS TO THE MEDIA**

39. The information provided by named and unnamed U.S. Officials discloses the following points:

- a. an RCMP team in charge of the Arar investigation had had Mr. Arar under investigation since January 2002 because of his relationship with persons of interest. Other reports indicate that Arar had been monitored for a 'long time'.
- b. There is a real connection between the RCMP and the U.S. authorities. This corroborates other information concerning the seamless flow of information between Canada and the United States;
- c. The information provided to the U.S. came from both the RCMP and CSIS.
- d. There are numerous reports and confirmation from Foreign Affairs Minister Bill Graham that Secretary of State Colin Powell indicated on two occasions that the U.S. consulted with the Canadians prior to Mr. Arar's deportation. There are numerous reports that the U.S. took the decision to deport Mr. Arar to Syria because they did not have sufficient evidence to charge him and because he could not be charged in Canada either;
- e. Mr. Arar was on a watch list as a result of information provided by the RCMP and other agencies.

40. The applicant relies on the following sources of information:

- "U.S. authorities indicated yesterday an RCMP team in charge of the Arar investigation co-operated with the United States to ensure Mr. Arar did not return to Canada. 'There is a real disconnect between the Mounties on the street doing the investigations and sometimes the people at the top in terms of acknowledging the problem in Canada with sleeper cells,' a U.S. official said. 'From the American perspective, the RCMP is much better to work with than CSIS because CSIS is a political creature. The RCMP are cops doing their jobs. They are the guys who do the surveillance. They know the score.'";<sup>51</sup>

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<sup>51</sup> Robert Fife, "Ottawa stumped by Syria", National Post, (July 30, 2003), Volume I, pp. 31-32.

- The U.S. Embassy said the RCMP had no direct role in the U.S. arrest and deportation to Syria of an Arab-Canadian on suspicion of being linked to al-Qaeda. . . Beth Poisson, a U.S. Embassy official, told CanWest News yesterday that while U.S. law enforcement has excellent relations with the RCMP, authorities in the United States did not talk to the Mounties before Maher Arar was arrested last September at New York's Kennedy Airport. . . 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 Paul Cellucci and U.S. Secretary of State Colin Powell. . . On a Nov. 14 visit to Ottawa, Mr. Powell informed Foreign Affairs Minister Bill Graham that RCMP tipped off the FBI to Mr. Arar's alleged links to al-Qaeda. In April, Mr. Cellucci told a private audience that Canadian law enforcement had long known about Mr. Arar's activities and did not want him returned to Canada. 'Mr. Arar is very well-known to Canadian law enforcement. They understand our handling of the case. They wouldn't be happy to see him come back to Canada,' Mr Cellucci said. U.S. officials, speaking on background, have also said the RCMP provided information on Mr. Arar that led to him being placed on a watch list used to screen passengers at U.S. ports of entry. 'Arar had been monitored for a long time. Canadian authorities knew about him long in advance of his arrest,' a U.S. source said. <sup>52</sup>
- When it was noted that Arar was a Canadian, Canadian security was contacted. 'They asked: Do you have anything on him,' an official closely involved in the case said, on condition that he not be quoted by name. 'Yes indeed, they were told. He is watched because he has been to Afghanistan several times.' On the basis of that, the officials said, Arar was arrested when the plane landed in New York. 'Then they said to the Canadians: If we transfer that man to you, can you give us the assurance that you will lay charges against him?' the official said. 'And the Canadian police told them: No, we don't have anything to lay charges against him. We can't bring any charges.' And the Americans said 'If you aren't going to do anything, if you are going to let him go free...' According to the official, Canadian officials replied, 'Wait a minute, he has already worked for two years in Boston and you never bothered to do anything about him. And now he's back in Canada ... all we can say is that he has previously been in Afghanistan. That's not enough, given our Charter of Rights.' The Americans said 'Obviously we can

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<sup>52</sup> Robert Fife, "RCMP didn't turn in Arar, U.S. says: Embassy statement conflicts with claims by Powell, Cellucci", Ottawa Citizen, (August 1, 2003), Volume I, p. 34.

do nothing with you,' and without any notification to Canadian consular officials, Arar was transported to Jordan.”;<sup>53</sup>

- “When Mr. Arar was arrested, U.S. officials offered to send him home, but only if the RCMP would charge him. They were told the police did not have enough evidence. Sources say the RCMP told the U.S. they were unable to lay charges because Canada had no counter-terrorism law until December 2001. They were also unable to arrest him on an immigration security certificate because he is a Canadian citizen. . . Imad Mustapha, the Syrian ambassador to Washington, said this week Syria kept Mr. Arar in jail because the U.S. claimed he belonged to al-Qaeda, but they could not ‘substantiate’ the allegations and freed Mr. Arar as a gesture of ‘goodwill’ to Canada.”<sup>54</sup>
- “Mr Graham referred to earlier comments by Mr. Cellucci that the deportation decision was made by U.S. authorities, ‘but it was based on discussion they had with Canadians. That’s what he said. That’s what they’re on the record as saying. Every time I raise it with Mr. Powell, that is the answer that I get.’”<sup>55</sup>
- “U.S. Secretary of State Colin Powell promised to reveal the Canadian mole who provided security information on Mr. Arar to the U.S. intelligence community. . . The Washington Post, quoting unnamed U.S. intelligence officials, reported yesterday that Mr. Arar was arrested because he was on a terrorist watch list after information from ‘multiple intelligence agencies’ linked him to terrorist groups. . . He was deported because the Justice Department did not have enough evidence to detain him in the U.S., the Post said. . . The federal government has acknowledged the U.S. consulted the RCMP before it arrested Mr. Arar who had been under investigation since January 2002 because of ‘contacts with persons in Ottawa who were of interest to them.’”<sup>56</sup>
- “On a visit to Ottawa last fall, U.S. Secretary of State Colin Powell revealed that the RCMP and the Canadian Security Intelligence Service had received classified U.S. information about Mr. Arar’s suspected ties to al-Qaeda.”<sup>57</sup>

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<sup>53</sup> Graham Fraser, “Canada refused to arrest Arar - Americans sent him to Syria”, Toronto Star, (October 9, 2003), Volume I, pp. 57-58.

<sup>54</sup> Robert Fife & Richard Foot, “Cellucci won’t testify on Arar: U.S. ambassador”, Ottawa Citizen (October 11, 2003), Volume I, pp. 69-70.

<sup>55</sup> Mike Blanchfield, “Arar may never find the answers he’s looking for, Graham admits”, Ottawa Citizen; (November 5, 2003), pp. 83-84.

<sup>56</sup> Robert Fife, “PM to U.S.: Name moles in Arar case”, Ottawa Citizen, (November 6, 2003), Volume I, pp. 88-89.

<sup>57</sup> Robert Fife, “Terror threats in Ottawa”, Ottawa Citizen, (July 24, 2003), Volume I, pp. 196-198.

- “U.S. Secretary of State Colin Powell confirmed to Canadian Foreign Affairs Minister Bill Graham that both the Canadian Security Intelligence Service and the RCMP tipped off the Americans about Mr. Arar before he was deported by U.S. officials to his native Syria while he was passing through New York City.”<sup>58</sup>

## **I. INFORMATION FROM OTHER MEDIA SOURCES**

41. The Applicant relies on the following information from various media sources which is relevant to the motion. This information reveals that:
- a. Police were investigating the existence of a possible bomb plot in Ottawa and the possible connection between Maher Arar and Ahmad Abou El Maati. The existence of the bomb plot was first reported by Seymour Hersh who indicated that the information had been provided by Syrian intelligence to the U.S. and Canadian intelligence services;
  - b. El Maati was arrested in Syria in November, 2001. He was tortured there and while under torture admitted being part of a bomb plot although the information was false;
  - c. A few months after El Maati left Canada the RCMP executed search warrants around Ottawa looking for explosives. No explosives were found. One of the residences searched belonged to Al Malki. Arar was arrested because his name was on a watch list as an associate of Al Malki;
  - d. El Maati mentioned the name of Maher Arar to the Syrians under torture. He also falsely confessed to participating in a bomb plot;
  - e. Seymour Hersh reports that Syrian intelligence provided valuable intelligence information to the U.S. This included information about a suspected bomb plot in Ottawa.

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<sup>58</sup> Janice Tibbets, “CSIS linked to Arar’s US arrest”, Ottawa Citizen, (December 21, 2003), Volume I, p. 127.

- f. The policy of rendition i.e. deporting suspected Muslim terrorists to other undemocratic regimes where they are interrogated and tortured commenced prior to September 11. After September 11 its incidences as increased. The practice is well known in the intelligence community.

In support of these assertions Mr. Arar relies on the following documents:

- In a January 16, 2004 article, it is noted that that there was a connection between the arrest of Ahmad Abou El Maati and Maher Arar. The Article noted that the police were investigating a possible bomb plot in Ottawa and that the existence of a possible plot was first reported by Seymour Hersh in an article published 'last summer'. The article noted that Mr. El Maati's arrest in November of 2001 was the first of a series of arrests of Canadians in Syria.<sup>59</sup>
- In a March 20, 2004 Article in the Globe and Mail, the following is noted: Mr. El-Maati flew to Syria in the fall of 2001, where he was immediately arrested. He has since said he was tortured there by captors who asked questions that seemed to be based on information that first surfaced in North America. Aly Hindy, an Islamic religious leader in Toronto, said his friend first came under suspicion because he was known to have spent time in Afghanistan. But the imam said that Mr. El-Maati was never part of any plot, though he was tortured into admitting as much.<sup>60</sup>
- In a January 15, 2004 Article in the Globe and Mail, the following is noted:A few months after Mr. El-Maati left Canada, RCMP investigators executed several search warrants around Ottawa, looking for explosives and documents about government structures. No explosives were found. But one of the searched residences belonged to Syrian-born Canadian computer engineer Abdullah Almalki. He travelled to Syria in May of 2002, where he was arrested and remains jailed. In September, 2002, Maher Arar stopped in New York on the way back to Canada from Tunisia. U.S. agents intercepted him and sent him to Damascus as an alleged al-Qaeda member. They said he was on a watch list as an associate of Mr. Almalki. Mr. Arar spent 10 months in a Syrian jail.<sup>61</sup>
- In a April 29, 2004 Globe and Mail article, the following is noted: Months before the Syrians locked up Maher Arar, he was fingered as a terrorism suspect by a Canadian acquaintance." During my detention and torture by the Syrians I was forced to divulge everyone I knew. This included Mr. Maher Arar," says Ahmad Abou El-Maati, a

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<sup>59</sup> Colin Freeze, "Arar case began amid fear of attack on Ottawa", Globe and Mail, (January 16, 2004), Volume I, pp. 151-152.

<sup>60</sup> Colin Freeze, "Fears of terror cell fade as two freed", Globe and Mail, (March 20, 2004), Volume I, pp. 211-213.

<sup>61</sup> Colin Freeze, "Egypt frees Canadian jailed for two years", Globe and Mail, (January 15, 2004), Volume I, pp. 208-210.

Toronto truck driver first arrested in November, 2001, and released from a series of Middle East prisons just a few weeks ago. Mr. El-Maati says that shortly after his arrest he placated his torturers by falsely confessing to a bomb plot targeting Ottawa, and by falsely implicating others, including Mr. Arar, according to an affidavit he wrote after returning to Canada last month.<sup>62</sup>

- In a July 24, 2003 article, it indicated as follows: “Since the Sept. 11, 2001 terrorist attacks, the RCMP has launched “several investigations” into Islamic terror activity in Canada. Dozens of members of Mr. bin Laden’s network had used Canada as a base, and several suspected agents were arrested in Canada.”<sup>63</sup>
- Seymour Hersh in An Article, published in the New Yorker on July 28, 2003 indicated as follows: " Syria also provided the United States with intelligence about future Al Qaeda plans. In one instance, the Syrians learned that Al Qaeda had penetrated the security services of Bahrain and had arranged for a glider loaded with explosives to be flown into a building at the U.S. Navy’s 5th Fleet headquarters there. Flynt Leverett, a former C.I.A. analyst who served until early this year on the National Security Council and is now a fellow at the Saban Center at the Brookings Institution, told me that Syria’s help "let us thwart an operation that, if carried out, would have killed a lot of Americans." The Syrians also helped the United States avert a suspected plot against an American target in Ottawa. "<sup>64</sup>
- In an article dated July 25, 2003, the following was stated: “The Central Intelligence Agency was alerted to the al-Qaeda conspiracy by Syria’s intelligence service, which has been co-operating with Washington since the Sept. 11, 2001 terrorist attacks, sources say.”.... “Sources would not give a time frame for the attack nor say whether it involved a bomb, but credited Syrian intelligence for alerting the CIA which passed on the information to Canadian authorities”....”What Hersh had in the article, I can confirm is accurate, but I can’t really go further than that”, said Mr. Leverett, now a fellow at the Saban Centre at the Washington-based Brookings Institute....Mr. Leverett said Syria provided Washington with first-rate intelligence about future al-Qaeda plans, including the Ottawa conspiracy and a plot to fly a glider loaded with explosives into the U.S. Navy’s 5<sup>th</sup> fleet headquarters in Bahrain. “The reports we got exceeded (CIA) expectations both in quantity and quality and several of them turned out to be actionable....”<sup>65</sup>
- In an article published in the New Republic Online on May 24, 2004, Peter Beinart noted: The inquiry will spotlight a policy called "extraordinary rendition," in which the United States hands suspected terrorists over to authoritarian Muslim regimes. American officials say those regimes are better culturally equipped to elicit

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<sup>62</sup> Colin Freeze, “Arar accuser says he was tortured”, Globe and Mail, (April 29, 2004), Volume I, pp. 182-183.

<sup>63</sup> Robert Fife, “Terror threats in Ottawa”, Ottawa Citizen, (July 24, 2003), Volume I, p. 196-198.

<sup>64</sup> Seymour Hersh, “The Syrian Bet”, The New Yorker, (July 28, 2003), Volume I, pp. 188-195.

<sup>65</sup> Robert Fife, “Al-Qaeda targeted U.S. Embassy”, Ottawa Citizen, (July 25, 2003), Volume I, pp. 199-201.

information from suspected Islamic militants. But there is little doubt that one of their primary "cultural" tools is torture. As one American official told *The Washington Post's* Dana Priest and Barton Gellman, who broke the "rendition" story in December 2002, "We don't kick the shit out of them. We send them to other countries so they can kick the shit out of them." The policy seems to have begun in the 1990s. According to George Tenet, the CIA took part in over 70 renditions before September 11. No one knows how many have occurred since, as Congress is not notified about individual cases. But the practice has probably increased. According to the *Post*, the Clinton administration stopped sending suspected terrorists to Egypt after repeatedly complaining about Cairo's brutal interrogation methods. "You can be sure," said one Bush administration official of such human rights complaints, "that we are not spending a lot of time on that now." The United States usually hands over lower-level Al Qaeda captives, keeping the key suspects for itself. The most common destinations are Egypt, Jordan, and Morocco, although suspects have also been sent to Syria, Pakistan, Uzbekistan, and Saudi Arabia. In January 2002, for instance, Indonesian authorities picked up Muhammad Saad Iqbal Madni on CIA intelligence that he assisted shoe-bomber Richard Reid in his plot to blow up an American Airlines flight. Madni was put on a U.S.-registered jet and flown to Egypt. In October 2001, Pakistani authorities picked up Jamil Qasim Saeed Mohammed, a Yemeni linked to the attack on the USS *Cole*. A U.S.-registered plane took him to Jordan. Perhaps the Egyptians and Jordanians promised the United States they would not employ torture, as Syria reportedly did in the Arar case. But it's hard to imagine the United States believed them. After all, the State Department has condemned Jordan for "methods of torture," such as "beatings on the soles of the feet" and "prolonged suspension with ropes in contorted positions." It has noted that "[t]he [Egyptian] security forces continued to mistreat and torture prisoners." And it has accused Damascus of "administering electrical shocks; pulling out fingernails; [and] forcing objects into the rectum." The U.N. Convention Against Torture, which the United States has signed, prohibits sending a suspect to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>66</sup>

- In an article dated December 26, 2002, the following was written: "The CIA's participation in the interrogation of rendered terrorist suspects varies from country to country. "In some cases [involving interrogations in Saudi Arabia], we're able to observe through one-way mirrors the live investigations," said a senior U.S. official involved in Middle East security issue. "In others, we usually get summaries. We will feed questions to their investigators. They're still very much in control"...Jordan is a favored country for renditions, several U.S. officials said. The Jordanians are considered "highly professional" interrogators, which some officials said meant that they do not use torture. But the State Department's 2001 human rights report criticized Jordan and its General Intelligence Directorate for arbitrary and unlawful detentions and abuse".<sup>67</sup>

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<sup>66</sup> Peter Beinart, "Outsourcing", *The New Republic Online*, (May 24, 2004), Volume I, p. 214.

<sup>67</sup> Dana Priest & Barton Gellman, "U.S. decries abuse but defends interrogations", *Washington Post*, (December 26, 2002), Volume I, pp. 15-20.

## **J. INFORMATION DICLOSED BY SYRIAN OFFICIALS TO THE MEDIA**

42. Information obtained from Syrian Ambassadors discloses that Mr. Arar was detained at the request of U.S. authorities because they alleged that he was a member of Al Qaeda. It also reveals that the Syrians had no interest in Mr. Arar, that they fully investigated him and concluded that he was not of interest and had no terrorist links. The entire Syrian dossier was given to the Canadian authorities. The applicant relies on the following sources for these assertions.

- Imad Mustapha, the Syrian ambassador to Washington, said this week Syria kept Mr. Arar in jail because the U.S. claimed he belonged to al-Qaeda, but they could not 'substantiate' the allegations and freed Mr. Arar as a gesture of 'goodwill' to Canada.<sup>68</sup>
- Imad Moustapha, Syria's highest-ranking diplomat in Washington - "We did our investigations. We traced links. We traced relations. We tried to find anything. We couldn't," says Moustapha"... "But while Canadian diplomats were demanding answers from the U.S., it turns out that it was the Royal Canadian mounted police who had been passing U.S. intelligence the information about Arar's alleged terrorist associations. However, U.S. government officials we spoke to say they told Canadian intelligence that they were sending Arar to Syria - and the Canadians signed off on the decision. Parly says if that's true, it would have been wrong all around: 'I would dispute that the people who were making any statements in this context were speaking for the Canadian government. A policeman talking to a policeman in this context is not necessarily speaking for the Canadian government.'" "Syrian government now considers Arar completely innocent" "60 Minutes II" has learned that the decision to deport Arar was made at the highest levels of the U.S. justice department, with a special removal order signed by John Ashcroft's former deputy, Larry Thompson.<sup>69</sup>
- "They told us he was an Al Qaeda activist, so we took him and put him in custody," said Imad Moustafa, charge d'affaires at the Syrian embassy in Washington. "The U.S. was pressing us not send him to Canada, the Canadians were pressing us to not send him to Syria."<sup>70</sup>

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<sup>68</sup> Robert Fife & Richard Foot, "Cellucci won't testify on Arar: U.S. ambassador", Ottawa Citizen, (October 11, 2003), Volume I, pp. 69-70.

<sup>69</sup> "His Year in Hell", CBS - 60 Minutes II, (January 22, 2004), Volume I, pp. 155-157.

<sup>70</sup> Susan Delacourt, "Chretien blames the U.S. for deporting Arar to Syria", The Toronto Star, (November 6, 2003), Volume I, pp. 90-91.

- In an article dated July 25, 2003, Mr. Arnous, the Syrian ambassador to Canada was quoted as stating the following: “Ahmad Arnous, the Syrian ambassador to Canada, said yesterday he did not have personal knowledge of the al-Qaeda intrigue, but confirmed Syrian intelligence has provided useful information to the CIA and CSIS. Mr. Arnous said Syria even shared classified information with the CIA and CSIS on Maher Arar...”There is some kind of co-operation between all countries friendly with Syria, including Canada because on Mr. Arar there was a communication between the security people in Canada and Syrian anti-terrorism people”, Mr. Arnous said”<sup>71</sup>
- In an Article in the Globe and Mail dated October 9, 2003, the following is noted: Even after a year-long investigation that went on while the Canadian was in a Syrian prison, "we didn't find complete [or] concrete evidence of his link," Ahmad Arnous, the Syrian ambassador in Ottawa, said in an interview yesterday. Mr. Arar, 33, was arrested in 2002 at Kennedy Airport upon his arrival on a flight from Europe, held at a Brooklyn immigration detention centre as a suspected terrorist and later deported to Syria even though he was travelling on a Canadian passport. He was released on Sunday. Mr. Arnous said U.S. authorities turned over an extensive dossier on Mr. Arar to Syria that the Americans claimed 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 before being turned over to the Syrians. "We tried to verify all the information we had from the Americans," Mr. Arnous said. "And all his files went to be verified in Syria." In the end, Syrian authorities could not prove a link, the envoy said. Syria also provided Canadian officials with the information in the Arar dossier "as a goodwill gesture," Mr. Arnous said.<sup>72</sup>
- Dr. Moustapha in an Interview on November 4, 2003 with CBC Radio Programme As It Happens stated: Mr. Arar was held pending investigation when we were not given convincing evidence about him we released him ... When asked about the Seymour Hersch article concerning an alleged plot to attack U.S. Embassy the Ambassador did not confirm the allegation but noted—I think Seymour Hersch has strong channels . He also noted: “Yes we did help the US on many issues related to Al Qaeda...” Concerning Mr. Arar he noted: “He was detained by the U.S. and extradited—we were caught between two fires the U.S. was asking us not to send us back to Canada and you were asking us to send him back to Canada.. We heard that he was not wanted in Canada... The information that was provided to us by the U.S. did not prove he was connected to terrorism “

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<sup>71</sup> Robert Fife, “Al-Qaeda targeted U.S. embassy”, Ottawa Citizen, (July 25, 2003), Volume I, pp. 199-201.

<sup>72</sup> Jeff Sallot, “Syrians couldn’t link Arar to al-Qaeda”, Globe and Mail, (October 9, 2003), Volume I, pp. 59-62).

43. Based on the following it is submitted that the following information concerning the National Security- Criminal Investigation of Mr. Arar is now in the public domain:

1. Mr. Arar was brought under suspicion as a result of the investigation of Abdullah Al Malki who was believed to be part of an Al Qaeda logistical support group. Mr. Al Malki was under surveillance and Mr. Arar was seen with him. The intelligence/police were also aware that Mr. Al Malki had witnessed a lease signed by Mr. Arar in 1997.

2. On one trip from the U.S. in December 2001 Mr. Arar's palm pilot and notebook were seized. These were accessed by the National Security authorities.

3. In January, 2002 the National Security Agencies attended at Mr. Arar's home for the purpose of interviewing him. When he contacted counsel and offered to make statements under conditions which would protect his rights, they refused to accept his conditions and no statement was taken.

4. In April 2002 Mr. Arar traveled to the U.S. and renewed his work permit without incident.

5. From the interrogations, Mr. Arar learned again that one main area of concern was Mr. Arar's relationship with Mr. Al Malki and Mr. El Maati.

6. Other concerns about Mr. Arar were related to information about his alleged travel to Afghanistan and the fact that he was allegedly moving permanently from Canada when he left for Tunisia in the summer of 2002.

7. Mr. Arar was seen with Mr. Al Malki at an Ottawa restaurant in October 2001. The RCMP sought to interview Mr. Arar in January 2002 but did not pursue

it because he was 'lawyered up.' They believed he had left Canada permanently and were surprised to find out he returned.

8. Syrian intelligence provided intelligence information to the U.S. This included information about a suspected bomb plot in Ottawa. The existence of a suspected Ottawa based Al Qaeda cell is revealed in security information emanating from U.S., Syrian and Canadian investigations.

9. Police were investigating the existence of a possible bomb plot in Ottawa and the possible connection between Maher Arar and Ahmad Abou El Maati. The existence of the bomb plot was first reported by Seymour Hersh who indicated that the information had been provided by Syrian intelligence to the U.S. and Canadian intelligence services. El Maati was arrested in Syria in November, 2001. He was tortured there and while under torture admitted being part of a bomb plot although the information was false; A few months after El Maati left Canada the RCMP executed search warrants around Ottawa looking for explosives. No explosives were found. One of the residences searched belonged to Al Malki. Arar was arrested because his name was on a watch list as an associate of Al Malki. El Maati mentioned the name of Maher Arar to the Syrians under torture. He also falsely confessed to participating in a bomb plot

10. The Canadian authorities received Mr. Arar's file from the Syrians and this included his coerced statement in which he admitted going to Afghanistan and doing military training there.

11. Mr. Arar was detained in Syria at the request of U.S. authorities because they alleged that he was a member of Al Qaeda. The Syrians themselves had no interest in Mr. Arar. They fully investigated him and concluded that he was not of interest and had no terrorist links. The entire Syrian dossier was given to the Canadian authorities.

12. The disclosure of information concerning Mr. Arar by security officials prior to his return was prompted to defend the investigative work of the National Security Agencies. There was no concern expressed over disclosure of information concerning Mr. Arar by the security services after Mr. Arar prior to the actions taken over the disclosures by Juliet O'Neill. Disclosures of information commenced long before Mr. Arar's return and continued to well after his return and indeed into January of 2004.

13. There are no rogue elements within the RCMP and that as a result any information that has been disclosed was disclosed with authorization.

14. There is 'seamless' sharing of information between Canada and the U.S. This same position was reiterated by Deputy Prime Minister Anne McLellan in statements to the media.

15. The RCMP and CSIS persistently opposed Mr. Arar's return to Canada and as a result his return was delayed.

16. Portions of Mr. Arar's file was shared with Tunisian intelligence who were aware of concerns surrounding Mr. Arar's relationship with Abdullah Al Malki.

17. The intelligence agencies visited Syria in late 2002. At around that time the intelligence services obtained Mr. Arar's statements. They had these prior to the end of December, 2002.

18. The RCMP did in fact provide information to the U.S. concerning Mr. Arar; Canada was not the only government that provided information to the U.S.

19. There are strong indications that Canadian officials were consulted on the decision to deport Mr. Arar to Syria. Minister of Foreign Affairs Bill Graham

stated that Colin Powell advised him on two occasions that the decision to deport Mr. Arar was made by the U.S. ‘but it was based upon information and discussions they had with Canadians.’

20. The policy of rendition i.e. deporting suspected Muslim terrorists to other undemocratic regimes where they are interrogated and tortured commenced prior to September 11. After September 11 its incidences as increased. Articles were written in major newspapers by December 2002 about the practice of rendition. It is reasonable to conclude that by the time of Mr. Arar’s detention in the U.S. the practice was well known in intelligence circles.

## **PART II: THE ISSUES**

44. The following issues arise on this motion:
- (a) Is the Government of Canada required to produce to Mr. Arar and to the public records, in whole or in part, that contain the information that has already been publicly disclosed?
  
  - (b) Is the Government of Canada required to produce to Mr. Arar and to the public records, in whole or in part, that contain information emanating from Mr. Arar or his counsel?
  
  - (c) Is the Government of Canada required to produce to Mr. Arar and the public records, in whole or in part, containing information disclosed to Mr. Arar during his interrogations in the United States of America and Syria?

## **PART III: THE LAW**

### **A. Overview and General Principles**

45. On January 28, 2004, the Government of Canada chose to call a public inquiry into the actions of Canadian officials in relation to the deportation and detention

of Mr. Arar in the United States of America and Syria. The Government's decision to order public hearings into this matter, as opposed to an internal review or a departmental investigation, must inform all rulings with respect to the records<sup>73</sup> containing information relevant to the proceedings.

46. According to s. 2 of the *Inquiries Act*, the Government can call a public inquiry "into and concerning any matter connected with the good government of Canada." The Government of Canada has, therefore, determined that the issues to be addressed in this Inquiry relate to the good governance of this country. The Government must not be allowed to hide behind a veil of secrecy, under the guise of National Security Confidentiality, to avoid public scrutiny of incidents of "bad government" or the misconduct of public officials.

*Inquiries Act*, R.S. 1985, c. I-11, s. 2,

47. The decision to call a public inquiry reflects the public concern over the conduct of the very officials who are now trying to hide behind National Security Confidentiality so that their conduct cannot be publicly scrutinized. The following comments of Cory J. of the Supreme Court of Canada in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* are apposite:

[62] One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or skepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone

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<sup>73</sup> For the purposes of these submissions, the Applicant adopts the definition of "record" found in s. 3 of the *Access to Information Act*, R.S.C. 1985, c. A-1) which includes any "correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof."

acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfill an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.

[63] This important characteristic was commented upon by Ontario Supreme Court Justice S. Grange following his inquiry into infant deaths at the Toronto Hospital for Sick Children:

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. [Emphasis in original.]

*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paras. 62 – 63, per Cory J.

48. The Arar Inquiry was also called in the wake of public “shock, horror, disillusionment, or skepticism” about the events surrounding the deportation, imprisonment and torture of a Canadian citizen. Maher Arar was a victim of the American policy of Extraordinary Rendition – described by the Director of the CIA as one of the pillars of American counter-terrorism efforts. Extraordinary Rendition involves the forcible removal of individuals, lawfully or otherwise, to countries that are prepared to detain and torture people in order to obtain intelligence information. This practice has become commonplace in the United States’ “war on terror.” The Commissioner can take judicial notice of the United States’ willingness to use and permit the use of torture to obtain information both

directly and indirectly.

49. The Deputy Prime Minister, Anne McLellan, has made it clear that there is a “seamless exchange” of intelligence information between Canada and the United States. This Inquiry must examine whether that exchange is done without regard to how the United States will use or abuse the information provided. The Inquiry must also examine whether Canadian officials knew or ought to have known that United States would use Canadian intelligence information to justify the detention and rendition of Canadian citizens, found in the United States or elsewhere, to countries such as Syria to be interrogated and tortured. Finally, this Inquiry must consider whether Canadian officials implicitly or explicitly accepted and endorsed the American practice of rendition, which deprives our citizens of due process under Canadian law and the protection of the *Convention Against Torture* and the *International Covenant on Civil and Political Rights*, to which Canada is a signatory. The task falls to the Commissioner to make recommendations that will place controls and limits on the exchange of intelligence information to ensure Canadian citizens are treated in accordance with the rule of law and our international obligations.
  
50. In *Carey v. Ontario*, a case dealing with the disclosure of cabinet documents which traditionally attract the highest levels of confidentiality and protection from disclosure, the Supreme Court of Canada confirmed that confidentiality must not be used to shield misconduct on the part of the government:

There is a further matter that militates in favour of disclosure of the documents in the present case. The appellant here alleges unconscionable behaviour on the part of the government. As I see it, it is important that this question be aired not only in the interests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely, the proper functioning of the executive branch of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government. This has been stated in relation to criminal accusations in *Whitlam*, and while the present case is of a civil nature,

it is one where the behaviour of the government is alleged to have been tainted.

Divulgence is all the more important in our day when more open government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the courts. As Lord Keith of Kinkel noted in the *Burmah Oil* case, *supra*, at p. 725, it has a bearing on the perception of the litigant and the public on whether justice has been done.

*Carey v. Ontario*, [1986] 2 S.C.R. 637 at para. 84 - 85

*Sankey v. Whitlam* (1978), 21 A.L.R. 505 (H.C.)

51. It is also important to note that both the Terms of Reference and the Rules of Procedure and Practice of the Inquiry speak of maximizing openness and disclosure to the public. In particular, s. 5 of the Rules of Procedure and Practice provides that “the Commissioner is committed to a process of public hearings to the greatest extent possible.”
52. It is these principles which must be paramount when determining the scope of the Government’s disclosure obligations.
53. Despite these clear statements favouring openness, the Applicant has been provided with no disclosure emanating from the Government of Canada. The Government of Canada, through Commission counsel, broached the idea of counsel for the Applicant participating in the *in camera* proceedings if security clearance was obtained and undertakings were given. The Government now takes the position that counsel for the Applicant should not be permitted to participate in the *in camera* hearings at all. In fact, the Government appears to have objected to the disclosure of almost all relevant information to the Applicant and the public. It is our understanding that the Government has even refused to disclose information that is in the public domain, information that originated from the Applicant himself or his counsel and information that was provided or shown to the Applicant by the United States authorities. It is our further understanding that

Government has also refused to disclose to Mr. Arar information the Government has about the statements he gave to the Syrian officials while being subjected to torture.

54. It is respectfully submitted that there is simply no basis upon which the Government of Canada, having chosen to call this public Inquiry, can justify withholding records containing information that (a) is already public, (b) originated from the Applicant or his counsel; or (c) was given to the Applicant by United States or Syrian officials. If the Government of Canada is serious about ensuring that the Commissioner and the public can uncover and assess the truth about the role Canadian officials played in the deportation, imprisonment and torture of Mr. Arar, disclosure would be made voluntarily of not only those records sought in this motion but any records that contain information that would further the public's interest in evaluating the conduct of its government and ensuring that Mr. Arar is afforded even the most basic procedural fairness, save and except in those exceptional circumstances where non-disclosure can be demonstrably justified.

**A. The Government of Canada must produce to Mr. Arar and to the public all records containing information that has already been publicly disclosed**

55. Once information has been disclosed to anyone who is not bound by the government's oath of office<sup>74</sup> or the *Security of Information Act*, it is within the public domain and cannot be considered confidential. Information is in the public domain whether it is widely disseminated or not. The Government is, therefore, precluded from claiming National Security Confidentiality over information that is already public and from filing a certificate for non-disclosure pursuant to the *Canada Evidence Act*, R.S. 1985, c. C-5 ("CEA").

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<sup>74</sup> Every person employed by the Public Service must take the following oath of office: "I, ....., solemnly and sincerely swear (or affirm) that I will faithfully and honestly fulfil the duties that devolve on me by reason of my employment in the Public Service and that I will not,

*Security of Information Act*, R.S.C. 1985, c. O-5

*Public Service Employment Act*, R.S.C. 1985, c. P-33, s. 23

Oath or Solemn Affirmation of Office and Secrecy, being Schedule III to the *Public Service Employment Act*, R.S.C. 1985, c. P-33

56. The Applicant assumes that the Government of Canada has provided or will provide all records containing potentially relevant information to the Commissioner and that the Commissioner counsel has determined or will determine what information is, in fact, relevant and likely to be introduced into evidence. Given that no information has been disclosed to the Applicant, it is assumed that the Government of Canada claims that most, if not almost all relevant information is subject to National Security Confidentiality, pursuant to s. 39 of the *Rules of Procedure and Practice*. However, both the Terms of Reference and the Rules of Procedure and Practice make it clear that the Government can only protect information which has not already been disclosed publicly.

*Rules of Procedure and Practice*, ss. 38 and 39

57. Paragraph (k) of the Terms of Reference indicates as follows:

(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. [emphasis added]

Similarly, under the Rules of Procedure and Practice, the Commissioner is required to hold *in camera* hearings to determine whether the disclosure of

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without due authority in that behalf, disclose or make known any matter that comes to my

relevant information to the other parties and the public would be injurious to international relations, national defence or national security (“National Security Confidentiality”). The Commissioner must first determine whether or not the information in question is, in fact, confidential. Information that has been disclosed or is otherwise in the public domain is not confidential and cannot be the subject of a claim for national security confidentiality.

58. There is strong jurisprudential support for Mr. Arar’s position. In *Babcock v. Canada (Attorney General)*, the Supreme Court of Canada made it clear that there can be no objection with respect to information that has already been disclosed. In that case, a number of staff lawyers with the Department of Justice sued the Federal Government. The Government disclosed a number of documents to the plaintiffs, including documents containing information constituting confidence of the Privy Council. The Government later changed its position on disclosure and issued a certificate under s. 39 of the *Canada Evidence Act* objecting to the disclosure of the documents already disclosed and other documents. In relation to those documents already disclosed, McLachlin C.J. held as follows:

Where a document has already been disclosed, s. 39 no longer applies. There is no longer a need to seek disclosure since disclosure has already occurred. Where s. 39 does not apply, there may be other bases upon which the government may seek protection against further disclosure at common law: *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.), at p. 630; *Leeds v. Alberta (Minister of the Environment)* (1990), [69 D.L.R. \(4th\) 681](#) (Alta. Q.B.); *Sankey v. Whitlam* (1978), 142 C.L.R. 1 (Aust. H.C.), at p. 45. However, that issue does not arise on this appeal. Similarly, the issue of inadvertent disclosure does not arise here because the Crown deliberately disclosed certain documents during the course of litigation.

*Babcock v. Canada (Attorney General)* [2002] 3 S.C.R. 3 at para. 26

59. In *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)*, the Federal Court, Trial Division dealt with a disclosure request which the Government claimed to be protected by solicitor-client privilege and under sections 37(1) and 38 (1) of

the *Canada Evidence Act*. The Applicant's request for an export permit was denied by the Minister of Foreign Affairs. The Applicant sought for judicial review of that decision. The Government filed an affidavit which contained three "action memoranda" that had been given to the Minister. These memoranda reflected legal advice received from Ministry lawyers. Some information was excised from the documents. The Applicant sought disclosure of the excised information. When examining the claim to confidentiality over the excised portions of the documents, the judge found that no harm could arise if the information was already publicly known:

On my review of the material, I find that there can be no harm from disclosure of some of the *Canada Evidence Act* deletions. For example, the respondent concedes in the case of deletions [No.]15 and [No.]16 on page 7, the information is already publicly known. In reviewing the material, I find that what is disclosed on page 25 covers essentially the same subject matter as what is kept confidential in deletions 4 and 5 on page 5...

On the basis of the explanations given by counsel, my overall observation is that while I cannot absolutely rule out harm to international or federal-provincial relations by some disclosure, the likelihood of such harm, at its highest, is not great. In many cases, the confidential information constitutes observations on existing policies and practices and how they might relate to a legal challenge. From the submissions of counsel, I am inclined to think that much of what is said to be confidential is already publicly known in one form or another. It appears that if anything, disclosure might result in some embarrassment to the respondent but why that embarrassment would harm international or federal-provincial relations is not readily evident.

*K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)*, [1996] F.C.J. No. 30 (F.C.T.D.) at paras 31 and 35

60. A similar principle has been established within the jurisprudence interpreting the *Access to Information Act*, and in particular the guidelines useful in assessing the "reasonable expectation of probable" harm test prevalent in that *Act*. Here, the Courts have determined that "it is relevant to consider if the information sought to be kept confidential is available from sources otherwise available by the public

and whether it could be obtained by observation or independent study by a member of the public acting on his or her own.”

*Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054 (T.D.) at para 34

*Do-Ky v. Canada (Minister of FAIT)*, 143 D.L.R. (4<sup>th</sup>) 746 (Fed. Ct. T.D.) at 751

*Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989) 27 C.P.R. (3d) 180 at p.210

61. This approach to National Security Confidentiality is also consistent with the approach taken at common law to various forms of privileges. For example, in *Hunter*, a case involving informer privilege, the Ontario Court of Appeal held that the privilege does not apply if the informer’s identity become known or is notorious in the community. Further, it is trite law that solicitor-client privilege, which the Supreme Court of Canada has described as occupying a unique and fundamental position in our legal fabric, does not attach to communicates that have been disclosed outside the lawyer-client relationship:

One of the circumstances by which it is commonly apparent that the communication is not confidential is the *presence of a third person* who is not the agent of either client or attorney. [emphasis in original]

Similarly, spousal privilege under s. 4(3) of the *Canada Evidence Act* does not apply if communications between spouses is disclosed to or comes into the possession of a third party. Even the four conditions articulated by *Wigmore* for establishing privilege on a case-by-case basis include a consideration of whether the communication is still confidential or has been made public. The fourth criteria is that the “the *injury* that would to the relationship by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.” If the communication has already been disclosed, no injury could result from its further disclosure.

*R. v. Hunter* (1987), 34 C.C.C. (3d) 14 (Ont. C.A.) at 26, per Cory J.

*R. v. Leipert* (1997), 112 C.C.C. (3d) 385 (S.C.C.) at 390 – 393

*Wigmore on Evidence, 3rd ed., (McNaughton Revision, 1961)*, Vol. 8, §2285, §2310 and §2339

*Slavutych v. Baker*, [1976] 1 S.C.R. 254

*National Post v. Canada*, [2004] O.J. No. 1058

*R. v. McClure* (2001), 151 C.C.C. (3d) 321 (S.C.C.) at 330 – 333, per Major J.

*R. v. Kotapski* (1984), 13 C.C.C. (3d) 185 (Que. C.A.)

62. In the case at bar, the government has already disclosed both information and documents to the Applicant's previous counsel and to the media, including a summary of the Applicant's statements in Syria. This is not a case of inadvertent disclosure. Based on the facts of this case, it is apparent that the Government of Canada deliberately disclosed information. That information is now in the public domain and can no longer be the subject of National Security Confidentiality. Therefore, any records containing information that is in the public domain should now be disclosed to the Applicant.
  
63. There is evidence of a pattern of ongoing disclosure by the Canadian Government of information intended to discredit Mr. Arar and his claims that he was mistreated by American, Syrian and Canadian officials. For example, Mr. Edelson met with members of the JSTF in late December 2002 who revealed their concerns about Mr. Arar in any early attempt to justify their actions or inactions. Then, in October or November 2003, some or all of RCMP Document #X2002W224702918A was disclosed to a reporter with the Ottawa Citizen, Juliet O'Neill. On November 8, 2003, Ms O'Neill wrote a story that was widely publicized about Mr. Arar based on the RCMP documents she received. The disclosure of information in the Government's possession continued after Ms O'Neill's article. For example, Mr. Easter, the former Solicitor General, stated on the public record that Mr. Arar was not a resident of Canada at the time he was arrested in the United States, a fact which Mr. Arar vehemently denies.
  
64. Any claim of National Security Confidentiality must be made in good faith. National Security Confidentiality cannot now be used to protect information that the Government and/or its agents made public for its own purposes or gains. The government of Canada cannot deliberately and strategically disclose information to the media and other members of the public to arouse suspicion and damage the reputation of Mr. Arar and then later claim that the very same information should be protected under the guise of National Security Confidentiality.

*Babcock v. Canada (Attorney General)*, supra at para. 25

*K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)*, supra at paras. 17 and 23

65. Under different circumstances, the government of Canada could make an argument that there is a public interest in keeping the information confidential. However, in the present case, where there is evidence of intentional and deliberate disclosure of this information, it can hardly be argued now that there is a public interest in withholding from the Applicant records or parts of records containing the very information that has been publicly disclosed.
66. Information that has been placed in the public domain by public officials of foreign states, including but not limited to the Syrian Ambassador to the United States, the Syrian Ambassador to Canada, the United States Ambassador to Canada, Colin Powell and John Ashcroft, is also exempt from the protection of the National Security Confidentiality. The government of Canada cannot object to the disclosure of information that has already been put into the public domain by third party states in justification or explanation of their actions relating to Mr. Arar. This is particularly true if Canada's objection to disclosure under the National Security Confidentiality provisions of the Rules of Procedure and Practice is based upon concerns about maintaining international relations and the confidence Canada shares with the third party state.
67. Other persons who are not bound by the *Security of Information Act* or the oath of public office may disclose to the public information in their possession. In fact, they have a constitutionally protected right to do so. To the extent this has occurred or does occur in the future, the government of Canada cannot maintain a claim of National Security Confidentiality over records containing this information.

*Canadian Charter of Rights and Freedoms*, s. 2(b)

68. Finally, the Applicant also seeks disclosure of records containing facts that are necessarily subsumed or made obvious by information already disclosed, when considered in its entirety. As a simple example, the records of public information

discloses that the Syrian Ambassador has stated that the Syrian Intelligence Agency has provided their file on Maher Arar to the Canadian Intelligence Agency and that Juliet O'Neill saw some part of Maher Arar's file which contained a summary of Maher Arar's interrogation in Syria. This information, which is in the public domain, clearly establishes that the Canadian government received from Syria the proceeds of its interrogation of Maher Arar. Records containing this information cannot be withheld.

69. To the extent that the Government of Canada is inclined to invoke s. 38 of the *Canada Evidence Act* to prevent the disclosure of relevant information that the Commission otherwise feels should be disclosed, that section has no application to information previously disclosed. There is simply no basis upon which the Government of Canada can justify its failure or refusal to disclose to the Applicant and the public records containing information that is already in the public domain. Therefore, the Applicant asks for immediate disclosure of all records containing information that has been publicly disclosed. The Applicant also seeks ongoing disclosure of records containing information that becomes public throughout the course of the Inquiry.

**B. The Government of Canada must produce to Mr. Arar and to the public all records containing information emanating from Mr. Arar or his counsel**

70. The Applicant and his former counsel, Michael Edelson and James Lockyer, will be called as witnesses at this inquiry. Given that they will give evidence in this inquiry, any information provided to Canadian, American or Syrian officials by Mr. Arar, Mr. Edelson or Mr. Lockyer will likely be disclosed to the public during their testimony. To facilitate proper preparation for this Inquiry, the Government must disclose any records containing information emanating from Mr. Arar, Mr. Edelson and/or Mr. Lockyer.
71. The Applicant will testify about his contact and experiences with American, Syrian and Canadian officials. He will describe the interrogations and torture he

endured. He will describe, to the best of his recollection, the statements he gave during his interrogation in the United States. He will also describe, to the best of his ability, the statements he gave while under torture in Syria. In fact, Mr. Arar has already disclosed much of this information publicly in statements to the media and on his website, <http://www.maherarar.ca>.

72. The Government is refusing to disclose records containing information originating from Mr. Arar. The Government is even refusing to disclose to Mr. Arar a copy of the statements he gave in the United States and Syria. There is simply no authority for withholding written versions of oral statements made by the Applicant. Principles of fairness dictate that the Applicant must be given copies of the statements he made with under stress, duress and torture. He must be given an opportunity to refresh his memory about what he said, provide an explanation for his statements and respond to any suggests or allegations made against him.
73. This Commission is charged with the responsibility of investigating the actions of Canadian officials in relation to Mr. Arar's detention in the United States, his deportation to Syria, his imprisonment and treatment in Syria and his return to Canada. Whether or not Mr. Arar has ties to any groups or organizations believed to be involved in terrorist activities is relevant to an assessment of the reasonableness and appropriateness of the conduct of Canadian officials. Mr. Arar has always denied any involvement with any terrorist organizations. He must be given an opportunity to respond, at a minimum, to those statements he made which the Government believes are relevant to this Inquiry. Any record containing statements from Mr. Arar must, therefore, be disclosed to him prior to his testimony before this Inquiry. This request is consistent with the Rules of Practice and Procedure which promote fairness to the witnesses by requiring parties to provide to the witness with any documents upon which the party intends to rely during cross-examination.

74. The Government is also objecting to the disclosure of records containing information received from Mr. Arar's counsel. But Mr. Arar has waived solicitor-client privilege as it relates to his dealings with both Mr. Edelson and Mr. Lockyer. Therefore, any statement made or information provided by Mr. Edelson or Mr. Lockyer, in their capacity as counsel to Mr. Arar, is not secret and cannot, in light of the waiver provided, be the subject of National Security Confidentiality. They will both testify in public about their dealings with Government officials. Any records of those dealings must, in fairness and pursuant to the Rules of Procedure and Practice, be disclosed to the Applicant and to Mr. Edelson and Mr. Lockyer in anticipating of their evidence.

**C. The Government of Canada must produce to Mr. Arar and to the public all records that were provided to or shown to Mr. Arar during his interrogations in the United States, Jordan and Syria**

75. While detained in the United States, the Applicant was given a copy of the Removal Order signed by J. Scott Blackburn and dated October 7, 2002, the Decision of the Regional Director signed by J. Scott Blackburn and dated October 7, 2002 and the Certificate of Service dated October 8, 2002. These documents were taken from Mr. Arar by the Syrian officials and were not returned to him upon his release.

76. These documents are not and must not be considered confidential. Under s. 242 of the *Immigration and Nationality Act*, the applicant was entitled to seek judicial review of his Removal Order. Pursuant to s. 2344 of title 28 of the *United States Code*, any party seeking judicial review must file a copy of the order or decision that is the subject matter of the review. Had the Applicant sought judicial review of the Removal Order, the documents provided to him would have been part of a public court record in the United States. These documents are prepared within a legislative regime that contemplates them being part of a public court record. They cannot, therefore, be the subject of a claim of National Security Confidentiality.

77. Further, this document has already been disclosed, in part, to the media in the United States. Mr. Arar has an edited copy of this document but is entitled to disclosure of the full document from the government. The governments of Canada and the United States cannot object to the disclosure of orders and reasons prepared by quasi-judicial officials in execution of their legislative duties.
78. During his interrogation in the United States, Mr. Arar was shown a copy of a lease which the American officials alleged was signed by Mr. Arar and witnessed Abdullah Al Malki. He was also shown a series of surveillance photographs of Abdullah Al Malki. These documents are not longer confidential. By showing them to Mr. Arar, the American government has placed them into the public domain.
79. No claim can reasonably be made that the disclosure of these documents to the Applicant and the public by the Canada will be injurious to international relations.

**PART IV: ORDER SOUGHT**

80. The Applicant seeks the following orders:
- (1) that the Government of Canada disclose to the Applicant and the public all records, in whole or in part, that contain information that is in the public domain;
  - (2) that the Government of Canada disclose to the Applicant and the public all records, in whole or in part, that contain information subsumed or made obvious by the information in the public domain, when considered in its entirety;
  - (3) that the Government of Canada disclose to the Applicant and the public, on an ongoing basis, records, in whole or in part, containing information that becomes public during this inquiry;

- (4) that the Government of Canada disclose to the Applicant and the public all records, in whole or in part, containing information emanating from the Applicant or his counsel, including but not limited to statements made by the Applicant in the United States and Syria; and
- (5) that the Government of Canada disclose to the Applicant and the public any and all records shown or provided to the Applicant during his interrogations in the United States and Syria.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED BY**

\_\_\_\_\_  
Lorne Waldman  
Counsel for the Applicant

\_\_\_\_\_  
Marlys Edwardh  
Counsel for the Applicant

\_\_\_\_\_  
Brena Parnes  
Counsel for the Applicant

\_\_\_\_\_  
Breese Davies  
Counsel for the Applicant

Dated: May 30, 2004