Federal Court  Cour fédérale

Date: 20070724

Docket: DES-4-06

Citation: 2009 FC 1317

Ottawa, Ontario, July 24, 2007

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR

and MAHER ARAR

Respondents

PUBLIC REASONS FOR ORDER
(Top Secret Reasons for Order issued July 24, 2007)
(Public Reasons for Order issued July 9, 2009)

1. Initial comments

[1] These are my *ex parte* (in camera) reasons and order pursuant to the obligations imposed on a designated judge sitting on matters involving international relations, national defence and national security, as contained in sections 38.04 and following of the *Canada Evidence Act*, (R.S.C. c. C-5)

("the Act or CEA"). They are to be read as a complement to the public judgment issued with this decision. As the order provides, some of the information contained in the redaction will remain subject to the prohibition of disclosure, while other information can be disclosed. In coming to this conclusion, I applied the recipe as described by the Federal Court of Appeal in *Canada (Attorney General) v. Ribic*, 2003 FCA 246, [2005] 1 F.C. 33. For this purpose, I have read the report of the Commissioner (3 volumes) (and reviewed his confidential report (2 volumes)), the records of the Applicant and the Respondent, including the examinations and cross-examinations of witnesses (of the Commission) and affiants, the documentary evidence and the written submissions. I also interviewed *in camera* the affiants of each party (except for one, which mainly filed exhibits) and heard the oral submissions of each party (including Mr. Arar) in public and *ex parte*. These *ex parte* (in camera) reasons cover the sensitive evidence as filed by the parties. Initially, I had hope that these Reasons for Order would be kept to a minimum in favour of the public judgment. However, in the course of drafting, it soon became apparent that keeping these Reasons for order to a minimum would prove arduous as I wanted to expand by providing sufficient background context which is more difficult to do when writing a public judgment as one has to be mindful not to prejudice sensitive information. Having said this, at some time, I hope that parts of these Reasons will be made public. In due course, this objective can be achieved in collaboration with all parties concerned and with the consent of the Court. Finally, as this order shows, I have summarized my reasons (analysis) in the form of a table (using the tables prepared by some of the Affiants of the Attorney General), for ease of reference in understanding a complex determination. This table contains page references to redacted or unredacted passages in the report and a brief explanation of the conclusions for each protected passage. I have also added an annex (which provides the matching pages of the redacted version of the public report (on the left side) and the unredacted

version of the public report (on the right hand side). [redacted]

[2] My analysis of the redacted passages will proceed as follows. First, I will deal with a preliminary issue, [redacted] as it was presented by the Applicant, and then proceed with the analysis of the redacted passages, keeping in mind the steps suggested by the Court of Appeal in *Ribic*, supra. The relevancy criterion has already been dealt with in the public judgment but I will deal with it in the present judgment for the sake of consistency. I will refer to it in some instances when dealing with the public interest in disclosure versus non-disclosure. I propose to proceed with the analysis in the following order and review and analyze some of the redacted passages:

a) passages referring to a country with a poor human rights record, Syria, a "confession" by Mr. El-Maati referred to in the search and in telephone warrants, which triggered recommendations by the Commissioner (page 9);
b) passages referring to the CIA's and the FBI's interest in project A-O Canada and the interaction with the RCMP and to a lesser degree CSIS (page 18);
c) passages referring to the contents of exchanges or parts thereof and assessments made by identified US agencies (page 24);
d) passages referring to CSIS's interest in and knowledge and assessment of Mr. Arar (page 43);

e) passages referring to CSIS's interest in Mr. Almalki and Mr. El-Maati (page 53);

f) passages referring to the RCMP's use of information obtained from Syrian Military Intelligence ("SMI") (page 61);

g) passages referring to Syria's assessment of Mr. Arar (page 64);

h) passages referring to CSIS's and Mr. Hooper's comments on US rendition of prisoners (page 66).

I have included each of the redacted passages in one of these categories. They were selected as they were used in good part by the Commissioner in his *ex parte* (in camera) decisions dated December 2, 2004, April 4, 2006 and July 6, 2006. I have to say that this exercise does not involve black-and-white decisions. Rather, it is mostly a grey area where principles are at stake and refined good judgment has to be exercised. This is what I have tried to do, keeping in mind the high interests at stake.

2. [redacted]

[3] [redacted]

[redacted]

[4] [redacted]

[5] [redacted] only persons cleared through established security clearance procedures would receive the information on a need-to-know basis and that there would be no disclosure other than to the Commission, all subject to Canadian laws such as the *Canada Evidence Act* and also the Commission's terms of reference.

[6] [redacted]

[7] [redacted]

[redacted]

[8] [redacted]

[9] The evidence has shown that neither the Commissioner nor the staff of the Commission were involved in these discussions. The evidence informs that it is only on June 26, 2006, hence two years after the inquiry was established and after the report was drafted, that knowledge of such meetings was ever communicated to the Commission.

[10] Having dealt with this preliminary matter, I now turn to the analysis of the redacted passages.

3. The relevancy of the redacted parts

[11] As in *Ribic*, supra, the first criterion to be met is the relevancy of the protected information. As we have seen, unlike the *Ribic* case, which was a criminal case, the present application involves a commission of inquiry, a fact-finding body, not a proceeding having to deal with questions of

criminal law and facts, and the possibility of compelling potentially injurious information. The Commission of Inquiry is in a different position. The terms of reference provide a detailed procedure on how to deal with such information and the Commission can receive sensitive information under paragraph 38.01(6)(d) and subsection 38.01(8) of the *Canada Evidence Act*. Therefore, the relevancy factor is to be applied to a Commission of Inquiry by considering its uniqueness and utility to the Canadian government and public in providing remedies, often in situations of crisis, and acting in the public interest.

[12] The terms of reference of the Commission of Inquiry at section K and the subparagraphs thereunder give the Commissioner a mandate to ensure non-disclosure of sensitive information and the procedure to follow in considering disclosure of such information, all in accordance with section 38 of the CEA. To that end, the Commissioner may consider releasing a summary of the evidence heard *in camera* and if such a summary is not sufficient in the Commissioner's opinion, he may inform the Applicant and such opinion constitutes notice under section 38.01 of the CEA. That was the route whereby the Applicant filed the present proceeding with this Court.

[13] The Attorney General submits that the contents of the redacted parts are not relevant to the terms of reference of the Commission of Inquiry and that the Commissioner has never explained the relevancy of the information.

[14] The Attorney General adds that some of the protected passages are not related to the actions of Canadian officials, which are the subject of the terms of reference. It categorizes the sensitive information as being about other countries, their activities or the fact that they share information in

confidence with Canada on subjects that CSIS investigates, which information is not pertinent to the terms of reference.

[15] The Commissioner in his *ex parte* (in camera) decisions addressed the relevancy factor when discussing the public interest in disclosure in general and when he commented that some of the information subject to disclosure would help understand the recommendations, and furthermore, that some of the information concerned torture and was already in the public domain. A reading of the Commissioner's three volumes shows that the inquiry dealt with a good number of public interest issues such as human rights when dealing with other countries, the Canadian treatment of information obtained through questionable means such as torture, the use of it, international sharing practices post-9/11, etc. Having reviewed each of the redacted portions and knowing that the threshold to establish relevancy is low and having in mind the words of Cory J. of the Supreme Court on the importance of commissions of inquiry in *Philips v. Nova Scotia* (*Commission of Inquiry into the Westray Mine Tragedy*) [1995] 2 S.C.R. 97, I do find relevancy in the redacted passages for reference purposes. I cite the following paragraph of the Supreme Court decision:

> 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 excellent means of informing and educating members of the public.

After all, the Commissioner clearly identified redacted information as being relevant for the purposes of his report. Surely such an opinion carries some weight. When dealing with the analysis for each redacted part, the relevance thereof in relation to the particulars in question might be

commented on and it may be of some significance when considering the public interest in disclosure versus the public interest in non-disclosure, if the disclosure of the information were found to be injurious.

A) Passages referring to a country with a poor human rights record, Syria, a "confession" by Mr. El-Maati where the information was used in applications for search and telephone warrants and recommendations made by the Commissioner (analysis and recommendations), [redacted]

[16] In the following analysis, I shall deal with three redacted passages, two of which are of a substantial nature, dealing with a search warrant application (January 2002) and a telephone warrant application (September 2002). The third passage only refers to a title in the table of contents of the analysis and recommendations, Volume III, and shall be included by reference to the conclusions of the two main passages.

[17] In summary, the first passage refers to search warrant applications (January 2002) sought and obtained by the RCMP, which referred to an unnamed country with a poor human rights record and contained damaging information collected from a confession of Mr. El-Maati while in Syrian custody. In the Commissioner's comment, the warrant application did not mention Syria's human rights record or the fact that the information might have been obtained from torture and no reliability evaluation of such information was done.

[18] First, the question at issue is whether disclosing this information would be injurious to international relations, national security or national defence. As noted, the information in question refers to a confession made by Mr. El-Maati to Syrian Military Intelligence (SMI). The Attorney General objects to disclosure of this information on the following grounds:

- The information relied on to obtain search warrants originated with SMI. Therefore, such information could affect our international relations and is protected by the third-party rule.
- [redacted]

[19] As an aside, the evidence shows that the confession was obtained by the RCMP directly from the head of SMI in July 2002 without a caveat not to disclose. [redacted]

[20] The Attorney General also submits that disclosing such limited factual information would not give the big picture of the actions of Canadian officials, since other factual information which cannot be disclosed for national security reasons would give the public a more realistic picture. The protected factual information is the following:

- Mr. El-Maati was independently identified by CSIS as a potential threat to Canada's national security.
- [redacted]

- [redacted]
- The RCMP was able to confirm that Mr. El-Maati took flying lessons at Buttonville Airport.
- Mr. El-Maati's last will and testament was subsequently seized from his residence and made reference to seeking a certificate of martyrdom.
- The time frame in which Mr. El-Maati prepared his last will and testament was consistent with the events described in his alleged confession, such as the receipt of instructions from his brother Amar to start training for the mission.
- [redacted]
- Intelligence received in confidence from US authorities regarding the circumstances of Mr. El-Maati's attempt to enter the United States in August 2001 (beyond what was already in the public domain), when he was found in possession of a map of Tunney's Pasture, [redacted]
- [redacted]

[21] There is evidence on the public record that Syria (SMI) used torture to obtain confessions and that in August 2002 Mr. El-Maati told a Canadian consular officer in Egypt that he was tortured and forced to give a false confession while detained in Syria. The record also shows that the Commission appointed a fact-finder, Professor S.J. Toope, who concluded in 2004 in a report for the Commissioner ("the Toope Report") that Mr. Arar and Mr. El-Maati had been tortured while detained by SMI. It found that Mr. El-Maati's description of torture while detained by the SMI was "convincing". [redacted] Furthermore, after this report was published, the Minister of Foreign Affairs, who was then Mr. Pierre Pettigrew, publicly called the Syrian Ambassador to express concerns about the mistreatment of Canadians, pressed Syria to prosecute the ones responsible for "torturing Arar" and said that "all those people should be convicted."

[22] In his decision dated April 4, 2006, the Commissioner explains his reasons for concluding that the release of such a carefully worded passage would not be injurious. Among his reasons, he considers this information important for a recommendation in his report. In Chapter IX of Volume III, Analysis and Recommendations, the Commissioner recommends that when information is obtained from a country with a poor human rights record, the information should be identified as such and steps should be taken to assess its reliability. Furthermore, he recommends that reliability assessments should be updated from time to time and the most current assessments should be used by all Canadian agencies that handle such information or share it with other agencies.

[23] On this redaction, I come to the same conclusion as the Commissioner. I do not think that disclosing such information would be injurious to Canada's international relations, national security or national defence. Even if it were found to be injurious, I think that the public interest in disclosure prevails over the public interest in non-disclosure. My reasons are to be found in the following paragraphs.

[24] I do not think that the third-party rule can help to justify an objection to disclosure. In July 2002, the head of SMI gave the information (the confession) to the RCMP without mentioning verbally or in writing that non-disclosure should apply. [redacted] On the other hand, they might have taken the position that a caveat was no longer necessary.

[25] In any event, the presence or absence of a caveat has little meaning now because the redacted information is already in the public domain. The declaration of Mr. El-Maati about his detention and torture, the conclusions of the Toope Report, and the statement of the then Minister of Foreign Affairs and International Trade commenting on the torture of Canadians, including Mr. Arar and Mr. El-Maati, all show that the redacted passage, as written, does not disclose any sensitive new information that is potentially injurious.

[26] In response to the argument of the Attorney General that releasing such limited information would not report this matter fully in that it would not give a complete depiction of the actions of the Canadian officials involved, and that it could mislead the public, my reading of the contents of the redaction is that the Commissioner, for the purposes of making recommendations, wants to show that a search warrant application did not contain pertinent information on the human rights record of a country and the reliability of the information collected by that country. The objective of the redaction is not to give information on Mr. El-Maati's factual situation but on the process followed to obtain the search warrant. If the purpose of the disclosure was of a different nature, it might be that a larger factual picture would be required, but this is not what is objectively being sought by the Commissioner. Having read the redaction as written, I conclude that it does not mislead the public but that it only informs sufficiently to meet the objective of the Commissioner's recommendations. Careful readers will note the utility of the protected passage to a full understanding of the recommendations.

[27] Note as well that the wording of the redaction contains the opinion of the Commission, not the opinion of the Government of Canada, when it says that the country has a poor human rights record and that the information was possibly obtained from torture. On this, Mr. Daniel Livermore, an affiant for the Applicant, who was Director General, Bureau of Security and Intelligence in Foreign Affairs and International Trade Canada from 2002 to 2006, saw no problem if the Commission expressed such an opinion.

> Question: And if the Commission, in general terms, would say "a" country has a poor human rights record, without being specific about the name of the country, would that be a problem?

> Answer: I don't think that would be a problem, and I could make it more specific too. We would certainly not have a problem if the Commission were to say that Syria and Jordan had poor human rights records either.

[28] This is just what the redacted passage in question does. Therefore, the evidence as presented by the Attorney General does not permit a conclusion that the disclosure of this passage would be injurious to our international relations or national security or would breach the third-party rule. The burden has not been met.

[29] Having said that, even if the disclosure of the redaction caused some injury to our international relations or our national security, the interest in public disclosure prevails over the public interest in non-disclosure.

[30] The facts surrounding the contents of the redaction indicate that Syria may well not have seen the information as requiring a protection not to disclose. [redacted]

[31] The record also shows that Mr. El-Maati's account of torture while detained in Syria was "convincing", in the opinion of Professor Toope, and that it is public knowledge that Syria tortures detainees.

[32] Finally, as noted above, the Commission recommends that if Canada obtains information from a country with a poor human rights record, this fact must be made known and taken into account, and that the country's condition and record must be assessed periodically. Although a recommendation in itself is not a justification to disclose protected information, it can certainly be taken into consideration.

[33] On the other hand, the public interest in non-disclosure is not supported by the facts of this case. The Syrians did not seek protection under the third-party rule when they gave the information to the Canadian agency. [redacted] There is ample evidence of Syria's poor human rights record. The Minister of Foreign Affairs criticized Syria for torturing two individuals in detention there. When weighing all these factors in favour of one interest over another, it is natural to conclude that there is a higher public interest in disclosure.

> **7.6.3.7.**
> **Application for telephone warrant … in September 2002, the RCMP filed an application for telephone warrant …**
>
> **Analysis and recommendations, Volume III p. 87 (127)**

[34] As can be seen from this second redacted passage, it is more informative than the previous one. It refers to Syria, a country with a poor human rights record, to Mr. El-Maati's confession which included some damaging facts and to the telephone warrant application presented in September 2002. The RCMP stated that the information on Mr. El-Maati was accurate and true, without any further comment; the fact that he stated that he was tortured was not documented and that important information was not given to the judge. In particular, the warrant application of September 2002 does not comment on:

- the human rights record of Syria;
- the public record of torture by SMI;
- Mr. El-Maati being in good physical condition in August 2002, not November 2001, the time the confession was given to SMI.

[35] On this redaction, I come to the same conclusion as the previous one for the same reasons as before and the following reasons as well.

[36] This warrant application is for telephone intercepts, not searches. The application was made in September 2002 and the RCMP had obtained Mr. El-Maati's confession from the head of SMI in July 2002. As indicated before, the information was communicated without a non-disclosure caveat. [redacted] This redaction is more detailed than the previous one. It refers to Mr. El-Maati and some of his confession, but his declaration that he was tortured while detained in Syria is not mentioned and there is a statement by the RCMP that it had corroborating information to support the confession. It remains that the application did not state whether or not Mr. El-Maati was tortured when he made his confession, but that when he was interviewed by Foreign Affairs in August 2002, he appeared to be in good condition.

[37] For the reasons given before, the claim for the third-party non-disclosure rule with respect to Syria cannot stand since Mr. El-Maati's confession document was given by the head of SMI without a non-disclosure caveat (explicit or otherwise).

[38] No doubt, such a comment by the Commissioner can affect the RCMP's reputation, but such a situation should not be seen as protection from disclosure on the grounds of international relations, the third-party rule or national security. Embarrassment may result from disclosing such information, but national security may not be invoked to protect one from such embarrassment.

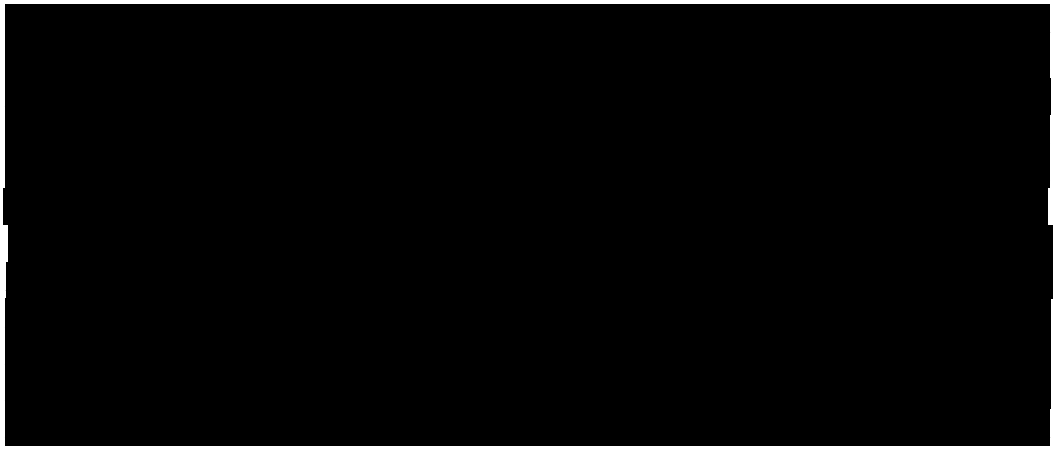
[39] Finally, as the Commissioner explained, the Commission's role under its terms of reference is to make recommendations based on facts gathered during the investigation. Without facts, there can be no meaningful recommendations. Unless strong considerations of international relations or national security indicate otherwise, the Commissioner must be able to associate facts with the pertinent recommendations. This is what he has done and this is what the contents of the redaction show. For the reasons given above for the previous and present redactions, no injury can be identified, and even if there were injury, the public interest in disclosure must prevail for the reasons already mentioned in the analysis of the previous redacted passage.

B) <u>Passages referring to CIA and FBI interest in Project A-O Canada and the interaction with the RCMP and to a lesser degree CSIS</u>

Volume I:

Volume II:

Volume III:



[40] For the purpose of the following analysis and as an opening comment, this application is to be treated separately from other section 38 files. The establishment of the Commission by the Government has created an unusual situation which does not necessarily and automatically apply to other applications under section 38. Each case must be looked at individually, in light of the particular circumstances. A Commission of Inquiry, because of its fact-finding duties, does disclose facts that would not normally be revealed. The present application has to be assessed in that light, keeping in mind that in conventional circumstances certain principles sometimes have to be protected, such as the collaboration of intelligence and law enforcement agencies.

[41] It is the position of the Attorney General that there should be no mention of the CIA's interaction with CSIS's investigation or Project A-O Canada, the RCMP and the FBI's interest in such an investigation or the interaction with the two Canadian agencies.

[42] The Canadian public knows that there is some interaction between Canadian and American agencies. This is in the public domain, especially since 9/11. It is expected that they have some ongoing relations. It would not be in the interest of either country if they did not interact.

[43] A reading of the public report of the Commission shows numerous references to the CIA and the FBI, for many considerations and reasons. In fact, the CIA is mentioned 10 times in Vol. I, 9 times in Vol. 2 and 5 times in Vol. 3 of the report, while the FBI is mentioned 257 times in Vol. 1, 20 times in Vol. 2 and 77 times in Vol. III.

[44] As noted in the Commissioner's decision of July 6, 2006, the interest of the CIA and the FBI in the Arar investigation and others is already officially in the public domain in such a way as to indicate a certain relationship of both American agencies with their Canadian counterparts. Through an access-to-information request, the Government released an expurgated briefing note to the Solicitor General dated June 27, 2003, approved by Assistant Commissioner R. Proulx of the RCMP. This briefing note deals with the circumstances of Mr. Arar's deportation to Syria. Among other things, this document reveals that:

- Mr. Arar was one of the persons in the RCMP's sights as part of a large national security investigation in partnership with other Canadian agencies following the September 11 incidents. He was a peripheral subject of investigation.
- The information developed by the Canadian investigation concerning US linkages was shared with American authorities.
- On October 3, 2002, both the CIA and the FBI requested the RCMP's assistance in acquiring any information to support criminal charges against Mr. Arar in the United States.
- Mr. Arar was currently the subject of a national security investigation in Canada and a subject of interest.

[45] This information clearly indicates that the CIA and the FBI had an interest in Mr. Arar and that they were seeking information from the RCMP. Therefore, this indicates interest and interaction between intelligence and law enforcement agencies. This information is known publicly and the evidence indicates that at no time did the FBI or the CIA complain about such disclosure. During the cross-examinations of some of the affiants for the Attorney General, it was mentioned that such information should not have been made public and that it was an error to do so. The Government did not officially indicate that this disclosure was an error and that the privilege should remain. It is significant that this briefing note was filed as a public exhibit with the inquiry and that *viva voce* evidence was heard on this exhibit in a public hearing. It was disclosed through legal means and is now part of the public record.

[46] Deputy Commissioner Loeppky (now retired) of the RCMP also dealt with the relationship between the CIA, CSIS and the RCMP when he publicly testified for the Commission on July 6, 2004. He recognized that when information of criminal activity was at issue, the CIA had dealings with the RCMP, but that CSIS had the prime responsibility for liaising with the CIA. This information confirms the general perception of Canadians insofar as the CIA's relationship to the RCMP and CSIS is concerned.

[47] [redacted]

[48] How can the disclosure of this particular singular interaction between the agencies be injurious when it is already known that they have such a relationship? How can there be injurious consequences, considering that the known interaction is already public and that the evidence shows that there was no reaction to such disclosure? Therefore, I cannot conclude that the disclosure of such interaction showing the interest of American agencies in this investigation would be injurious to our international relations or national security.

[49] Having said that, even if it were injurious, I think that the public interest in disclosure of this information would clearly outweigh the public interest in non-disclosure. It is on the public record that both the CIA and the FBI had an interest in the investigation of Mr. Arar. It is also known that at least since September 2001, the American agencies collaborate at least occasionally with CSIS and the RCMP. Why keep this precise interaction with the American agencies secret when it is already common knowledge? From the Solicitor General's briefing note and the testimony of Deputy Commissioner Loeppky, it is officially known that this was the reality. It is also worth

noting that one redacted passage among others (volume III, page 50(75)) discloses a factual situation (the RCMP's lack of experience in dealing with the CIA), which is clearly in line with some of the Commissioner's recommendations (see public Report Analysis and Recommendations, Vol. III, summary of recommendations, pages 364 and following).

[50] A last-minute oral argument was made by the Attorney General to the effect that disclosing all of these redacted passages at the same time would be injurious to our interests, relations and/or national security. First, this potential consequence is a result of the Attorney General's objections to disclosure. In itself, total disclosure does not result in injury. When, taken individually, they do not, then taken together, they should not. It is true that total disclosure will have a greater impact than partial disclosure. I suggest that this is due to the amount of information released, not the contents themselves. I have already mentioned that the interactions of the agencies are already known, that the public record already contains ample references to the American agencies, that a briefing note which is part of the Commission's evidence is legally on record and recognizes the interactions of the respective agencies, and one of the most senior RCMP officers described these interactions.

[redacted]

[51] I have reviewed each redaction subject to the present determination and I am satisfied that releasing this information to the public is not injurious and that even if it were injurious, the public interest in disclosure must prevail. They do not disclose the names of human sources or staff or embassy personnel. The passages refer to interaction on Project A-O Canada investigations between

US and Canadian agencies. The concept of injury has to have real meaning. In this particular situation, I fail to see that real injury would result from the disclosure of such passages.

C) <u>Passages referring to contents of exchanges or parts thereof and assessments made by identified US agencies</u>

[redacted]

[52] [redacted]

[53] The Commissioner also considers that the assessment of Mr. Arar based on his questioning by the FBI should be disclosed since the public knows about these interviews and some of the questions used in the interviews came from the RCMP (see [redacted]

[54] [redacted] The Commissioner did not specifically comment on this redacted passage. I shall deal with it separately at the end of my reasons on this issue.

[55] The Commissioner in his ruling of July 6, 2006 (pages 5, 6 and 7) does not specifically state whether or not such disclosure (the two first passages) would be injurious, but he seems to rely more on “the strong public interest in disclosing” by asserting that the nature of the information is such that it is difficult to understand how the FBI could be justifiably concerned. He goes on to say that the Americans themselves were not cooperative during Mr. Arar’s detention in New York, breached some sacrosanct undertakings and sent Mr. Arar, a Canadian citizen, to Syria, where he was tortured and imprisoned for a year. Furthermore, he notes that the Americans declined to participate or assist in the work of the Commission and that under these circumstances they should understand the importance of such disclosure.

[56] It is the Attorney General’s submission that these redacted passages disclose the CIA’s involvement, their opinion of Mr. Arar and the FBI’s assessment of him during his interview. These passages are protected by the third-party rule.

[57] In reference to these two specific redactions, the question at issue is whether or not disclosing such information is injurious to Canada’s interest.

[58] First, it is important to note that information given under the protection of the third-party rule is held sacred by intelligence and police agencies. It is based on confidence, reliability and trust. Breaching such a rule can affect the underlying trust. For an agency to communicate its assessments and conclusions on situations or individuals to another agency indicates that such confidence, reliability and trust exist.

[59] It is important to remember that organized criminal activities are not necessarily limited to one country. Illicit operations can have implications in more than one country. History has shown that terrorist activities are not always planned in the country where the event is to take place. As a matter of fact, it is known that in order to prevent or avoid detection, the planners of terrorist activities are intentionally located in countries other than the one where the act will occur. Therefore, ongoing relationships, cooperation and exchange of information are essential to the operations of the agencies involved and to the public that needs protection.

[60] Canadian agencies require the participation of foreign law enforcement and intelligence agencies to support their investigations. As a matter of fact, Canadian agencies rely on such sources of information when investigating national security activities. It is a recognized fact that Canada imports far more information from agencies based in other countries than it gives them in return. In *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, Madam Justice Arbour writing for the Court clearly recognized at paragraph 44, that situation of dependency when she referred in her analysis to the evidence filed on behalf of the Solicitor General and commented by the Trial Judge:

> The mandatory *ex parte in camera* provision is designed to avoid the perception by Canada's allies and intelligence sources that an inadvertent disclosure of information might occur, which would in turn jeopardize the level of access to information that foreign sources would be willing to provide. In her reasons, Simpson J. reviewed five affidavits filed by the respondent from CSIS, the RCMP, the Department of National Defence ("DND"), and two from the Department of External Affairs ("DEA"). These affidavits emphasize that Canada is a net importer of information and the information received is necessary for the security and defence of Canada and its allies. The affidavits further emphasize that the information providers are aware of Canada's access to information legislation. If the mandatory provisions were relaxed, all predict that this would negatively affect the flow and quality of such

information. This extract from one of the affidavits from the DEA is typical:

> Canada is not a great power. It does not have the information gathering and assessment capabilities of, for instance, the United States, the United Kingdom or France. Canada does not have the same quantity or quality of information to offer in exchange for the information received from the countries which are our most important sources. If the confidence of these partners in our ability to protect information is diminished, the fact that we are a relatively less important source of information increases our vulnerability to having our access to sensitive information cut off.
>
> . . . Without these extra procedural protections [the mandatory *in camera* nature of the hearing and the right to make *ex parte* representations provided for in s. 51] the substantive protections in sections 19 and 21 are greatly diminished in value. The confidence in foreign states would be diminished because, while the Government of Canada could give assurances that a request for such information could and would be refused under Canadian law, it could not give assurances that it would necessarily be protected from inadvertent disclosure during a hearing.

[61] To maintain the steady flow of information among them, law enforcement and intelligence agencies have historically relied on the third-party rule. This rule is an understanding among them that the party providing the information controls the subsequent disclosure and use of the information beyond the receiving party. [redacted] The recipient of the information cannot disclose the information, or if there is a need to disclose it to a third party, the recipient of the information must obtain permission from the originator thereof. For the RCMP, it is recognized that such permission will be sought only for law enforcement purposes.

[62] From the Canadian point of view, it is also known that certain foreign agencies are more important than others and that trust is more naturally present in certain relationships than in others. For Canada to benefit from a steady flow of information, it must be seen to respect the third-party rule. Only in limited cases will Canada circumvent the third-party rule with our most important allies.

[63] For the first redacted passages, three parts are at issue. The first one is [redacted] Second, there is a reference to the US Immigration and Naturalization Service (INS) in that same memorandum. This second part (which reads as follows: “it stated that the US Immigration and Naturalization Service was currently processing Mr. Arar for removal”) can easily be disposed of. It is known by the American and Canadian public that Mr. Arar was processed for removal by the US INS. As a matter of fact, a public exhibit (20) from the US INS filed with the Commission includes the decision dated October 7, 2002 of the regional director which concludes “that the evidence establishes that Arar is inadmissible and I hereby order that he be removed from the United States.” I fail to see how this second part can be justified. It is certainly not injurious to disclose, since the involvement of the US INS with Mr. Arar is fully known and legal documentation supporting their role has been presented publicly. The third part of the first redacted passage relates to the specifics of information requested by the Americans.

[64] [redacted]

[redacted] The gist of his analysis is that it should be known that the CIA was involved in the matter.

[65] I agree with the Commissioner, for the reasons given in the previous analysis, that reference to the CIA's interaction and interest in this particular investigation is not injurious. Having said that, associating the CIA with an opinion on an individual, disclosing the CIA's needs communicated in confidence and doing so publicly go to the heart of what the third-party rule is all about.

[66] For the purposes of my analysis, I have reviewed Mr. R. Morden's affidavit and note that he does not deal specifically with this issue. He was concerned about the direct references to the CIA, which in his opinion was the key point, but I was not able to identify his opinion specifically on associating a reference to the CIA with an opinion on an individual or disclosing the CIA's descriptive needs (see table of concordance of Commission and Vol. II, secret application record of the Applicant, Attorney General of Canada, June 26, 2006, pages 18668 to 18681 (p. 275 to 278) specifically at page 18675).

[redacted] In fairness to his general opinion and his testimony, I have taken note that he believes that the third-party rule is not absolute and that any possible injury can be managed by representatives of the government in discussions with their American counterparts.

[68] From my understanding of the present situation, I can say that associating the CIA publicly with their opinion [redacted] is clearly a breach of the third-party rule. This type of information is covered by the rule. I say this, knowing that the US INS in its decision concludes that Mr. Arar is a member of Al-Qaeda. Other agencies' opinions that Mr. Arar is a member of Al-Qaeda say nothing about the CIA's own assessment and needs. [redacted].

[69] What is at issue in the present circumstances is the Commission disclosing that a memorandum dated October 3, 2002, (for the sake of clarity, I am aware that a briefing note to the Solicitor General from the RCMP dated June 27, 2003, which is an exhibit to the Commission, refers to a request for information by the CIA and the FBI, but it does not disclose the contents of the exchange, and I am also cognizant of the reference at Vol. I, page 157 of the public report) given in confidence by the CIA to the RCMP, says that the CIA considers [redacted] In itself, the information might not be surprising, but divulging it for purposes other than law enforcement and without an agreement breaches the third-party rule, both in principle and in fact. As a consequence, such disclosure would be injurious to our relations with the Americans. It is not easy to assess the consequences of the injury in practical terms. No one can predict the future with certainty. Maybe nothing will come of it or maybe it will have some adverse consequences. The flow of information may or may not be affected. Who can tell? No one can foresee the future. How do you assess the effect of such a breach on trust and confidence? Only the CIA could answer that and we might never know. On this last point, it is important to remember that the CIA wants to protect its documentation. [redacted].

[70] I believe that in Canada's interest, care should be given when dealing with decisions that could threaten this trust and confidence. It is in Canada's national interest to optimize our future relationship unless there is a bigger interest at stake. Of course, any such interest would have to be of overriding concern.

[71] Having found that disclosing such information would be injurious, I now come to the third element, namely the public interest in disclosure versus the public interest in non-disclosure. At paragraph 55 of the present decision, I summarize the Commissioner's opinion on this point.

[72] On pages 11 and 12 of the introduction of Volume I, Factual Background, the Commissioner expresses his satisfaction on being able to render a report that reflects a good understanding of what happened to Mr. Arar, even though much of the evidence was heard behind closed doors or *in camera*, a confidential report was submitted to the Government and 1500 words of testimony were not included in the public report because of the Attorney General's objection:

> There are two versions of this Report. One, which may not be disclosed publicly, is a summary of all of the evidence, including that which is subject to national security confidentiality. The public version that you are reading does not include those parts of the evidence that, in the Commissioner's opinion, may not be disclosed publicly for reasons of national security confidentiality.
>
> A good deal of evidence in the Inquiry was heard in closed, or *in camera*, hearings, but a significant amount of this *in camera* evidence can be discussed publicly without compromising national security confidentiality. For that reason, this Report contains a more extensive summary of the evidence than might have been the case in a public inquiry in which all of the hearings were open to the public and all transcripts of evidence are readily available. While some evidence has been left out to protect national security and international relations interest, the Commissioner is satisfied that this edited account does not omit any essential details and provides a

> sound basis for understanding what happened to Mr. Arar, as far as can be known from official Canadian sources.
>
> Finally, it should be noted that there are portions of this public version that have been redacted on the basis of an assertion of national security confidentiality by the Government that the Commissioner does not accept. This dispute will be finally resolved after the release of the public version. Some or all of this redacted information may be publicly disclosed in the future after the final resolution of the dispute between the Government and the Commission.
>
> (My emphasis)

[73] The governments of the United States, Jordan and Syria declined to give evidence or otherwise participate in the hearings. For reasons that are explained in Volume I, Chapter VIII, 3.13.1 of the analysis, Mr. Arar did not testify. In essence, the Commissioner felt satisfied that it was not necessary for Mr. Arar to testify since the questions raised by the mandate could be answered without his testimony.

[74] Where is the justification for the public interest in disclosure? Since the memorandum was sent by the CIA to the RCMP while Mr. Arar was detained in New York, and even though the exchanges between American and Canadian agencies are at the core of the Commission's mandate, disclosure is not justified in this case. The information may be in the public domain in different forms but this does not justify releasing information that belongs to the CIA. What is the public interest in disclosing information communicated in confidence when such information discloses an opinion of the CIA and its particular needs?

[75] On the other hand, I can identify some justification for the public interest in non-disclosure. The information at issue is not vital or essential for the Commissioner's work. Not mentioning this information does not take anything away from the substance of the report. The American opinion of Mr. Arar is not directly related to the Commission's terms of reference. Disclosing such information would breach the third-party rule and there is no forceful evidence that such release is containable in one way or another. The fact that Canada through its officials has not sought a consent for release is also to be taken into consideration. On this point and solely referring to the particulars of this file, it is not proper to second-guess the Attorney General as to the reasons for not making such a request and it should not be used as a justification for release. It is the responsibility of the executive to fulfil its role and explain or justify its decisions. A negative inference from such a situation would not be appropriate. The evidence to show that such a request would be useless is on the record (see Secret Affidavit of Superintendent R. Reynolds, Secret Application Record of the Attorney General, Volume III, Tab 4, paragraphs 40 …). Our future relations with the American agencies is to be taken into account and the government should ensure that what Canada does encourages the flow of pertinent and substantive information. Therefore, balancing both competing interests, I conclude that the public interest in non-disclosure prevails.

[76] For all of these reasons on this passage, I conclude that it would be injurious to disclose the CIA's opinion of Mr. Arar and its specific request for information to the RCMP. Furthermore, there is a stronger public interest in non-disclosure of the information than in disclosure.

[77] I now turn my attention to the second redacted passage. Briefly, this passage refers to the FBI's assessment of Mr. Arar following an interview held on September 27, 2002 while he was detained in New York. This assessment was given verbally by an FBI official in a telephone conversation with an RCMP officer. That type of information is normally subject to the third-party rule, since it was given in confidence and consent can be sought for the purposes of law enforcement.

[78] On this redacted passage in his decision of July 6, 2006, at pages 5 to 7, the Commissioner does not state whether or not releasing this assessment would be injurious to Canada's interests. He justifies the release by relying on "a strong public interest in disclosing some of the details of what the FBI reported to the RCMP." His expert witness, Mr. Morden, put it differently but gave substantially the same message. He mentioned that such a general passage expresses one official's opinion, which may or may not be shared by senior management of the FBI (see Vol. II, secret record, Commission, Vol. II, page 278).

[79] In the Commissioner's opinion, the public interest in disclosure is justified for the following reasons:

- That the FBI interviewed Mr. Arar is already known since Mr. Arar has described these interviews publicly and they are referred to in the US INS decision (exhibit 20 of the Commission already referred to in paragraph 63 hereof).

- The interviews of Mr. Arar are essential to telling the story of what happened to him in New York. “In particular, it is important to show that the questions that the RCMP sent to New York were in fact asked and answered.” As we will see further, I agree with the Commission that the redacted phrase “Mr. Arar was asked the questions provided by Project A-O Canada” should be disclosed. About the assessment following the interview, I disagree, as I will explain later.
- The Attorney General has not asked the FBI for consent to release the assessment. [redacted].
- The finding that the American authorities had been less than cooperative and not forthcoming while Mr. Arar was detained in New York.
- The Americans breached “sacrosanct” undertakings by releasing Canadian information without Canada’s consent and they sent a Canadian citizen, Mr. Arar, to Syria, where he was tortured and imprisoned for a year.
- The Americans declined to participate or assist in the inquiry.
- For all these reasons, the Commissioner concluded that “in these circumstances, the FBI and the other Americans involved should understand why it is important from a Canadian standpoint to disclose in this report the relatively benign description of the October 7 phone call.”

[80] The Attorney General, as seen in the previous analysis under this heading, considers such disclosure to be a breach of the third-party rule and thus injurious to Canada’s interest in ensuring that the relationship with foreign agencies remains constant, beneficial and undisturbed, and the public interest in non-disclosure must prevail.

[81] Furthermore, the Attorney General argues that disclosing such a limited assessment of Mr. Arar during an interview does not do justice to the bigger picture of Mr. Arar which the Americans had and that such disclosure would be so incomplete as to be misleading. The additional information referred to and described below is information that Canada obtained through confidential channels. This information was known to the Commission and it is as follows:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[82] In order to circumvent the obstacles perceived in the redacted passage, the Attorney General suggested to the Commissioner a formulation that would not divulge specific facts but would in his opinion convey the general message. It reads as follows:

(a) the fact that the Commissioner received evidence *in camera* about information that was obtained by US authorities independently of Canadian authorities;

(b) the fact that this evidence included:

(i) US authorities' analysis of the computer that was seized from Mr. Arar in New York;

(ii) US authorities' assessment of Mr. Arar's demeanour and response during interviews they conducted in New York; and

(iii) the results of other inquiries made by US authorities with their own domestic agencies and with foreign agencies while Mr. Arar was detained in New York.

[83] The Attorney General submits that since the Commissioner elected not to include this in the report, in weighing the competing public interests, the public interest in disclosure must be considered less important, to account for the decision not to use that information which could have been disclosed to provide a more complete picture of the situation.

[84] The Commission forcefully rejects the suggestion that the redacted passage, if released, would give a misleading view of the situation. It says that this is not the real reason for justifying the non-disclosure and that the Attorney General wishes to forbid disclosing information that could embarrass the Government. The Commissioner decides what to put in his report and he has exercised his discretion in this regard.

[85] [redacted] It is argued that to publish the suggested new formulation would be unfair to Mr. Arar and would mislead the public as to the accuracy of this supplementary information. The

undersigned has read the two references at paragraph 24 of the Commissioner's secret memorandum of fact and law regarding how questionable this supplementary information is.

[86] Concerning the part of redacted passage (i), "Mr. Arar was asked the questions provided by Project A-O Canada," the Court notes that it is fully documented in the report that the RCMP had forwarded questions to the FBI to be used in interviewing Mr. Arar. It is definitely in the public record. In this particular situation, the fact that the FBI replied that those questions were asked does not affect the third-party rule. There is a difference between disclosing the contents and saying that questions were asked in an interview, which is of course what an interview is all about. Adding that the RCMP's questions were asked does not affect the third-party rule, since it is already known that questions were forwarded to the FBI for use in interviewing Mr. Arar. I do not see any injury created by such disclosure. I agree with the Commissioner that even if it were injurious, there is a public interest in disclosing that the RCMP's questions were asked in interviewing Mr. Arar, since it is already known that the RCMP sent questions to the FBI and that the purpose of an interview is to ask questions. The fact that the RCMP's questions were asked does not result in a public interest in non-disclosure.

[87] For the remaining part of the redacted passage, which contains a FBI assessment of Mr. Arar during the interview, I conclude that it is a matter clearly falling within the third-party rule and that disclosing such information would be injurious to Canada's interest. In the previous analysis under the present heading, I gave reasons to justify such conclusions which also apply to the present analysis. Having said that, I would like to further explain my reasoning, keeping in mind the particulars of this redacted passage.

[88] I have carefully read the Commissioner's decision of July 6, 2006 and he gives no reasons as to whether or not such disclosure of the information would be injurious. In order to conclude that the disclosure would be injurious, I rely on the concept of the third-party rule, my knowledge of it as explained before, and the legal framework established by the CEA as described in *Ribic*, supra. It is information exchanged in confidence between the FBI and the RCMP, it reveals an FBI assessment of Mr. Arar during an interview, it is not disclosed for the purposes of law enforcement [redacted]. It would be injurious to disclose such information.

[89] I have already dealt with the notion of injury and the potential to harm our relationship with the FBI and the CIA. I do not want to repeat myself, and my earlier comments apply to the present situation.

[90] The Commissioner is of the opinion that there is a "strong public interest" in disclosing some parts of the FBI's assessment of Mr. Arar during his interview. I have already listed the Commissioner's reasons for coming to this conclusion (see paragraph 79 of the present decision).

[91] Although I agree that some of his reasons favour the public interest in disclosure, the balancing of the interests that I have to make brings me to a different conclusion.

[92] I do agree that disclosing the contents of the FBI's assessment would be useful to better understand Mr. Arar' circumstances but it is not essential for the purposes of the report.

[93] It does not follow from the fact that the public knows about the interviews with Mr. Arar that the FBI's assessment of him based on those interviews should be disclosed. I fail to see where the public interest in disclosure applies. It does not follow automatically that since an interview was held, the third-party rule can be breached and the assessment of the interviewee can be disclosed.

[94] The fact that the Attorney General did not ask for consent to disclosure does not justify the public interest in disclosure (see paragraph 75 of the present decision). From evidence on the record, such a request would likely have been refused. Some factors at issue are [redacted] consent being sought for law enforcement purposes only (which is not the case here) and public knowledge of the American position on Mr. Arar.

[95] The findings of the Commission that the Americans were less than cooperative and not forthcoming with their Canadian counterparts, that they breached "sacrosanct" undertakings in releasing Canadian information and that they sent Mr. Arar to Syria, where he was imprisoned for one year and tortured, can certainly be subjects of concern for the Commissioner, his staff, Mr. Arar and his family. Their reaction with such behaviour is understandable. But is that what should be considered when assessing the public interest in disclosure? Does the misbehaviour of a party justify the public interest in disclosure, knowing that disclosure would not be in the national interest? What is in this country's best interest in this particular situation?

[96] Is the fact that the Americans did not participate or assist in the inquiry justification for the public interest in disclosure? It seems to me that other justifications must be considered.

[97] Having said that, I sympathize with the Commissioner, his staff and, of course, Mr. Arar and his family, but it seems to me that understandable as these justifications are, they must be placed in a larger context, namely the principles at stake and the fact that disclosing this information would be injurious to our relations and our national security, which is not in Canada's interest.

[98] The public interest in non-disclosure must also be considered. I have already addressed some of these concerns, which also apply in the present analysis: the Commissioner's opening remarks in which he says that he is satisfied with the report as it is; the information to be disclosed is not vital for the purposes of the report and is not directly related to the terms of reference. Finally, disclosing this information would breach the third-party rule and be injurious to the interests of Canada and there is no precise evidence that there is a containable response to such disclosure.

[99] It seems that evidence which would give a more complete picture of the situation exists, at least in part, and that the redacted passage in question is limited, although factual. I have read the evidence submitted by the Commission (paragraph 24 of the memorandum of fact and law) to support the argument that the supplementary information referred to earlier is not to be taken at face value. Having done that, I do think that limiting the disclosure to the redacted passage would not give a fully understandable picture of what the United States knew about Mr. Arar. In any event, since the essence of my determination is not based on this issue, I will not deal with it any further. I

still think that it is important to mention it, if only to shed some light on my understanding of the present application and my comments below.

[100] The third redacted passage [redacted] I do not have the benefit of specific reasons from the Commissioner on this passage. In any event, it is also information subject to the third-party rule [redacted] It gives information on an American decision which was transmitted to the Canadian agencies. There is no evidence that indicates that the American agencies have made that decision public. Therefore, it is controlled by the third-party rule and would be injurious to Canada's interest if disclosed. For the reasons already given, I conclude that the public interest in non-disclosure must override the public interest in disclosure. The Commissioner is satisfied that his report has dealt with all pertinent matters. [redacted] It does not specifically affect a recommendation made by the Commissioner. This information is not essential for the Commissioner's purposes. I come to this conclusion having in mind another redacted passage [redacted] which discusses the same issue. [redacted] This is the reason for coming to a different conclusion.

[101] I have thought about the factual situation, the Commissioner's decision, the legal arguments and the evidence on file. My conclusion is that the three redacted passages, if disclosed, would be injurious to Canada's interest and that the public interest in non-disclosure must prevail.

D) Passages referring to CSIS's knowledge and assessment of Mr. Arar

[redacted]

[redacted]

[102] In general, the redacted portions reveal what CSIS knew about Mr. Arar and its "intelligence" conclusion about him.

[103] The Commissioner wants CSIS's knowledge and conclusion about Mr. Arar to be part of the public report. Having read the Commissioner's decision dated December 3, 2004 and July 6, 2006, I will summarize his view of the situation to justify disclosure, since in the Commissioner's opinion, there would be no injury in such disclosure:

- The Arar case is highly unusual because a significant amount of information in the redacted passages is already public.
- Disclosing CSIS's assessment of Mr. Arar would not be injurious because the information is already in the public domain. The RCMP's assessment of Mr. Arar and the fact that he was the subject of a national security investigation are public.
- [redacted]

- [redacted] and that it would not create a precedent because of the special circumstances surrounding the Commission of Inquiry.
- It is in the public interest that persons whose interests may be affected by a public inquiry be treated fairly and also considering the harmful publicity created by unnamed government sources being quoted in newspaper articles concerning Mr. Arar.
- CSIS's assessment should come out because it is known publicly that the RCMP and CSIS cooperated on the relevant investigations and the RCMP's assessment is known and therefore they had access to the same information.
- CSIS's policy of not disclosing information about its investigations of individuals is not absolute. For example, CSIS through its second in command, Mr. Hooper, informed the public that a detainee in Guantánamo Bay was interviewed.
- The public knows that CSIS was interested in Mr. Arar, so disclosing the assessment would not come as a surprise.

[104] The Commissioner's view is that even if disclosure is injurious, the public interest in disclosure must prevail over the public interest in non-disclosure. Mr. Arar has received an enormous amount of public attention and "some people wonder if he is in fact a terrorist," even though there is no evidence that he is a threat to the security of Canada or that he has committed any offence. He deserves to have the public informed of his status at relevant times [redacted].

[105] On the other hand, the Attorney General objects to releasing the redacted passages because divulging CSIS's information, assessments and opinions on an individual would be injurious to Canada's national interests. It is CSIS's policy not to release such information. Therefore, such disclosure would be injurious. A summary of the Attorney General's position follows:

- CSIS's mandate is to advise the Government of Canada on threats to Canadian security and to that end, CSIS is authorized to collect, retain and analyze information and intelligence.
- Secrecy is essential for such work, whether in the past or ongoing, and the information gathered must remain confidential, if only to ensure the integrity of past, present or future investigations and to protect CSIS's operations.
- With some legal exceptions, section 19 of the *CSIS Act* forbids disclosing its information.
- Security intelligence investigations are directed to future events and attempt to predict future events by discerning patterns in past and present events.
- Law enforcement activities, with which the public is familiar to some degree, differ considerably from intelligence gathering. Law enforcement investigations are event-specific and concern criminal activities which have already occurred or will occur. They are intended to determine who is responsible for them and to gather sufficient evidence for use in open court.

[106] A security intelligence investigation is carried out to determine the size and composition of the group involved, or the connections or contacts of an individual, its geographic area of operations, its past acts and intended goals, in order to determine its capacity to do harm in future. The information normally sought is not for use in court but for intelligence. Some of the information

gathered may be meaningless alone but useful in combination with other information. Such investigations look at past information with a view to the present situation and project into the future.

[107] Assessing an opinion on injury and the likelihood of damage to national security resulting from disclosure of information cannot be done in the abstract or in isolation. Under the “mosaic” principle, it must be assumed that the information will reach people with knowledge of service targets and its activities. An informed reader of the disclosed information, however trite or simple it might appear to a casual reader, may infer therefrom a more comprehensive view of a situation and thus affect current or future investigations. The more intelligence information disclosed at the same time, the greater the mosaic effect. Releasing subjects of investigation or service interest, the information collected and assessments made is injurious.

[108] [redacted]

[109] If targets or even individuals not under investigation but potentially subject thereto were informed by such disclosure of what is already known or not known, they could react by feeding information, thus affecting its reliability. In the intelligence business, knowledge is everything and the quality of it is essential.

[110] A security intelligence agency is different from a law enforcement agency. Each has a different purpose. The former collects past and present information for the purpose of preventing or predicting threats to Canada's national security. The latter investigates criminal activities in order to lay criminal charges. The assessment for a security intelligence investigation is not comparable to a criminal accusation. In intelligence work, information is gathered to document situations for use in analyzing threats to Canada's security. In a criminal investigation, factual evidence is accumulated in order to lay criminal charges, which will be tried in public.

[111] In both cases, secrecy must prevail throughout the investigations, but with some adjustments. Without concerns for secrecy, investigations could be in peril. When criminal charges are laid, the investigation is no longer secret and the results thereof become evidence in court. This is not normally the case with security intelligence investigations, which must remain secret. These investigations are normally of long duration. They may end for a while and then resume if need be. Past information is to be used with present information in the analysis of possible future threats. The purpose of such investigations is to prevent catastrophic events, not to investigate them after they have occurred.

[112] This public inquiry has created a most unusual situation for Mr. Arar and the public. A great deal of information, whether factual or not, has been made public. This inquiry into the activities of law enforcement and security intelligence agencies, among other Canadian organizations implicated, has brought their work to the forefront as never before. When the Commissioner made his report public, he said that he was satisfied with its contents, so much so that "this edited account does not omit any essential detail and provides a sound basis for understanding what happened to Mr. Arar, as far as can be known from official Canadian sources" (see full reference and quotation at paragraph 72 of the present decision). He made this statement, knowing that 1500 words of testimony were withheld pending settlement of this dispute.

[113] Keeping all of that in mind, the question to be answered is: "Is it injurious to disclose some of the information gathered by CSIS and its opinion of Mr. Arar?"

[114] As noted in paragraph 69 of the present decision, injury and its consequences are not easy to define and sometimes the injury might occur later.

[115] Having said that, I do not think that the information already in the public domain in one form or another automatically justifies releasing CSIS's information and assessment. The information contained in the redacted passages originating from CSIS is not in the public domain.

[redacted]

[116] [redacted] In themselves, these pieces of information may appear insignificant, neutral and inconsequential to a casual observer, but they might give an informed reader a different understanding of the situation. [redacted]

[117] The RCMP's assessment of Mr. Arar does not in itself justify releasing CSIS's assessment of him. I have already explained the different purposes of these two agencies, which pursue different types of investigations. The fact that they have cooperated in the post-9/11 era is not a reason to make a CSIS assessment available. Their cooperation is not always for the same end result. Each situation has to be assessed on its own merits.

[118] The fact that Mr. Arar was prejudiced by newspaper articles which published reports from anonymous sources on him does not in itself justify releasing CSIS's assessment of him.

[119] The fact that CSIS announced that it had interviewed a detainee in Guantánamo Bay does not justify disclosing its assessment of him or some of the information which it had on him. An interview by CSIS of an individual does not make that person a target or a person of interest.

[120] It is the rule in CSIS not to divulge targets, persons of interest, information gathered, modes of operation, etc. Exceptions to the rule are just that; otherwise, the reliability of security intelligence investigations would be affected. Some principles are at stake and they deserve a thorough look.

[121] The Commission of Inquiry in its work made it known explicitly and implicitly that CSIS had an operational interest in Mr. Arar, but exactly when this interest began is not known. A reading of the Commission's report indicates that CSIS is mentioned 762 times in Vol. I, 294 times in Vol. II and 414 times in Vol. III, for a total of 1470 times. CSIS's operational interest in Mr. Arar is definitely in the public domain. There are no justifiable grounds for not disclosing what has already been disclosed. No injury can occur and there is a clear public interest in recognizing what is already disclosed.

[122] The public generally knows of CSIS's interest in Mr. Arar, but [redacted] its scope and the assessment are not known and the non-disclosure rule can apply.

[redacted]

[redacted]

[124] I agree with the Attorney General when he says that disclosing the information in question would be injurious to Canada's national interest. [redacted]

[125] Furthermore, CSIS's knowledge as expressed in such statements could indicate to an interested person how much or how little CSIS actually knew. Such deductions could be informative. [redacted]

[126] As mentioned before, security intelligence investigations do not come to a final end. They progress or not, depending on current events over a period of weeks, months or years. They can stop and start again, depending on circumstances. [redacted] Solely for the purposes of the present decision in showing what an intelligence file is about, Mr. Arar was never interviewed by CSIS, the RCMP or the Commissioner. [redacted] I include some of the information in this decision for the sake of completeness, to understand the present analysis and to exemplify the importance of the mosaic effect. I also include the references for such information:

- [redacted]
- [redacted]

[127] [redacted]

[128] [redacted]

[129] Therefore, I conclude that disclosing CSIS's information and assessments and SIRC's conclusion about using CSIS's information in this case would be injurious to the interest of Canada. Having come to that determination, I will now address the issue of the public interest in disclosure versus the one in non-disclosure.

[130] [redacted].

[131] Regarding the Commissioner's comments in his decision of July 6, 2006 that "some people wonder if he [Mr. Arar] is in fact a terrorist" because of the negative publicity from media reports, the public record shows with the publication of the Commission's report and the settlement Mr. Arar reached with the government, a different perception of Mr. Arar.

[132] Again, the Commissioner said in the public report (which excluded the redacted passages) that the said report) "provides a sound basis for understanding what happened to Mr. Arar, as far as can be known from official Canadian sources" and that he is "satisfied" that the report does not leave out "any essential details."

[133] In conclusion, I come to the conclusion that there is a stronger public interest in non-disclosure.

E) <u>Passages referring to CSIS's interest in Mr. Almalki and Mr. El-Maati</u>

[redacted]

[134] The passages refer directly or indirectly to CSIS's interest in Mr. Almalki; one passage refers to Mr. El-Maati. In summary, the Attorney General opposes such disclosure since it reveals the intelligence agency's investigative interest in Mr. Almalki and Mr. El-Maati. The Commission recommends disclosing this information since it does not specifically reveal CSIS's interest in the individual and this information gives the reader a better understanding.

[135] [redacted].

[137] .

[138] In referring to Mr. Hooper's statement on a detainee interviewed by CSIS in Guantánamo Bay and that in the post-9/11 days, unnamed investigations were transferred from CSIS to the RCMP the Commissioner points out that the rule of not disclosing targets or persons of interest to CSIS is not absolute, and that therefore there is sometimes no injury in disclosing names and even some details about its interest in certain individuals.

[139] He also considers the redacting of the contents of the passages in question important to ensure a fair discussion of what Canadian officials did with respect to Mr. Arar. [redacted] For the Commissioner, this practice sent mixed signals and raised questions about Canada's complicity in the use of torture.

[140] Because of the Commissioner's recommendations on the different roles of CSIS and the RCMP, the transfer of files from CSIS to the RCMP is a factual element that enhances discussion of the recommendations.

[141] The Commissioner considers the release of the redacted passages concerning Mr. Almalki and Mr. El-Maati as not being injurious and in any event, the public interest in disclosure outweighs any possible injury to CSIS's investigative interest.

[142] [redacted]

[143] As benign as the information may appear to a reader, it seems to me that disclosing and confirming that CSIS had information on somebody indicates to an observer that that person is of interest to CSIS and thus reveals something of what the operation was about.

[144] That the public has some idea that CSIS was interested in Mr. Almalki and Mr. El-Maati is one thing, to confirm this interest in them is another. An assumption of a possibility is not the same as a confirmed fact: there is a world of difference between the two.

[145] The fact that Mr. Almalki was interviewed by CSIS many times does not necessarily confirm that he is a person of interest. There is no doubt that it could show that such a person might be a source of information for CSIS, an element to consider in the course of an investigation or a potential human source for the future, but it does not make that person a target or a person of interest. Many people interviewed in the course of an investigation are not targets or persons of interest to CSIS. To presume because someone was interviewed several times that he is a person of interest to CSIS or a target is one thing, but reading officially that he is a person of interest and therefore possibly a target is a completely different situation. The basis for so concluding is totally different. One is speculation, the other is confirmation.

[146] Mr. Almalki could draw a firm conclusion from one scenario but not the other.

[147] The fact that Mr. Hooper, in his public statement, indicated CSIS's interest in a detainee held in Guantánamo Bay and that [redacted] files were transferred to the RCMP [redacted] does not make the interviewee in Guantánamo Bay a person of interest for

CSIS. For the purposes of the interview, he may have been a source of information, a collaborator or something else. As for the [redacted] files transferred to the RCMP, transferring unnamed files does not specifically identify CSIS's interest, targets or persons of interest. Although I agree with the Commissioner when he says that the non-disclosure rule concerning CSIS's targets, persons of interest, operations and information is not absolute, I disagree that the present factual exceptions invoked by the Commissioner justify considering disclosure of the passages in question to be non-injurious.

[148] As for the argument in support of the recommendations concerning the differing roles of CSIS and the RCMP, I note that the transfer of files in the post-9/11 period from CSIS to the RCMP is in the public domain without reference to names. Furthermore, as we have seen, Mr. Hooper spoke about the transfer of [redacted] files to the RCMP and the public report of the Commission of Inquiry refers to these transfers (see Vol. III, page 65 to 69) and to recommendations on the relationship between CSIS and the RCMP (recommendations 2b), d), 6, 11, pages 316 331, 343). Therefore, I do not think it essential for the purposes of the recommendations of the report to disclose the passages dealing with Mr. Almalki specifically or indirectly, since the recommendations and the explanation given for each one are understandable as written.

[149] Having reviewed each of the redacted passages (including the one concerning Mr. El-Maati for which the same reasons are applicable), I find that it would be injurious to disclose such information and furthermore, there is a stronger public interest in non-disclosure. [redacted]

[redacted] In addition, the way the report is written does not justify releasing the passages. As the Commissioner admits, his report does not omit essential details and provides a sound basis of understanding, and I agree. Finally, it is known that a commission of inquiry will deal with Mr. Almalki and Mr. El-Maati.

[150] [redacted].

[151] I note that the Commissioner did not give any specific reasoning to support the public interest in disclosure. For the reasons given in the previous analysis and also in the previous

paragraphs, I determine that the public interest in non-disclosure overrides the public interest in disclosure.

F) Passage referring to the RCMP's use of information obtained from Syria

[redacted]

[152] The information in this redacted passage refers to the RCMP's request for further information from the Syrians (SMI) following their interviews of Mr. Almalki and Mr. El-Maati. Therefore, it shows a transfer of information between SMI and the RCMP on specific individuals and the need for further information.

[153] The Commissioner thinks that this information should be disclosed for the following reasons:

- the principal target of investigation for the RCMP's Project A-O Canada was Mr. Almalki and this information is in the public domain;
- the RCMP's interest in Mr. El-Maati is public knowledge;
- it is a publicly known fact that these two men were detained in Syria and tortured while in Syrian custody and it is well documented in the public report of the Commission of Inquiry;
- there is a significant public interest in disclosing that the RCMP, in November 2002, was asking for information obtained from interviews conducted by SMI, an agency known to

torture detainees, and this information is pertinent to several findings and recommendations;

- the reasons for disclosing Mr. El-Maati's "confession" in the decision of April 4, 2006 apply to the present analysis (see paragraphs 34 ff. of this decision).

[154] The Commissioner does not consider this disclosure as being injurious and the public interest in disclosure is evident.

[155] The Attorney General objects to such disclosure since it refers to an exchange of information from SMI to the RCMP and the third-party rule must apply (see testimony of Superintendent Reynolds, Secret Commission Record, Vol. II, Tab 5, pages 37 to 41).

[156] On this point, I agree with the Commissioner for the same reasons that he has given. A close reading of the redacted passage does not specifically divulge that SMI information was transferred to the RCMP. It does not divulge SMI's information. The explanation given by the Attorney General in support of the non-disclosure position is not sufficient to meet the burden of showing injury.

[157] In coming to this conclusion, I have read Chapter VII of Volume III of the public report of the Commission of Inquiry, entitled "Abdulhah Almalki and Ahmad El-Maati." Such a reading is informative since it fully describes their respective situations while detained in Syria and Egypt. It is

even mentioned at page 269 that "it was contended that the RCMP and CSIS had sought to advance their investigations through communication with SMI." Such a statement informs any reader that information was communicated with SMI. This is already on the public record. Therefore, I fail to see how the passage in question reveals more than what is already public. As a matter of fact, it reveals less.

[158] The disclosure of this passage is not injurious and even if it were, the public interest in disclosure prevails. To come to this conclusion, I have considered the fact that [redacted] the public statement of the Canadian Minister of Foreign Affairs against Syria's practices and [redacted]

[159] I am also aware of the genuine public interest in dealing publicly with the subject of torture of detainees and the use of information derived from such objectionable practices, especially when a Canadian agency requests information from a country with a poor human rights record.

[160] Therefore, disclosing this passage as written is not injurious and if it ever were found to be injurious for the reasons mentioned above, the balancing of interests favours the public interest in disclosure.

G) Passage referring to the Syrians' assessment of Mr. Arar

[redacted]

[161] This redacted passage discloses the Syrians' assessment of Mr. Arar, to the effect that it was not a major case and more of a nuisance for them, and CSIS's interest in Mr. Arar. I have already dealt with the latter point by concluding that since the interest has been so widely publicized, such references were not injurious and in any event the public interest in disclosure was determinative (see paragraphs 122, 123 of the present decision). The first matter raises a question of international relations and the third-party rule.

[162] The Commissioner admitted implicitly that such disclosure is injurious but decided that there was a "strong public interest" in favour of disclosure for the following reasons:

- there is a public interest in disclosing SMI's assessment of Mr. Arar;
- since the Syrians kept Mr. Arar in jail for a year and gave an opinion on him, the public and Mr. Arar have a legitimate interest in this information;
- when considering these assessments, it is important to evaluate the way Canadian officials (both agencies) responded to Mr. Arar's imprisonment, a central issue of the inquiry;
- Professor Toope's report on the abuse and torture of Mr. Arar, even though the Syrians did not consider him a major case but rather more of a nuisance, certainly justifies a high public interest in disclosure;
- [redacted]

[163] Again, on this matter, I agree with the Commissioner for the same reasons that he has given but with the following comments.

[164] In principle, the disclosure of this redacted passage would be injurious, based on international relations and the third-party rule. The assessments were obtained from the Syrians and such transfer of information is covered by the non-disclosure caveat.

[165] The information at stake relates to the torture of detainees, even though the person interviewed by SMI was assessed by them as not being a major case and more of a nuisance. Torture is never justified. It is a highly reprehensible and inhuman practice. The fact that our Canadian agencies knew these assessments and were seeking more information from a country with a poor human rights record is noteworthy. It is surely in the public interest to disclose such information. Disclosure might embarrass our Canadian agencies, but I believe that our national security laws are not intended to protect them from embarrassment.

[166] Therefore, I think that while such disclosure is in principle injurious, the strong public interest in disclosure must prevail. Balancing the two competing interests clearly favours disclosure.

H) CSIS and Mr. Hooper's comments on US rendition of prisoners

[redacted]

[167] The redacted passage first refers to a comment of a CSIS security liaison officer (SLO) about the United States rendering prisoners to countries where they will be questioned in a "firm manner." The second comment refers to an internal CSIS communication of Mr. Hooper, who then was second in command at CSIS and is now retired, in which he is quoted as saying in the fall of 2002: "I think the US would like to get Arar to Jordan where they can have their way with him."

[168] The Commissioner is of the opinion that this information should be disclosed because the American practice of rendition is known throughout the world. In Canada, the then-director of CSIS, Mr. Elcock, and his deputy director, Mr. Hooper, have spoken in public on this practice. The Commission has already disclosed information, mentioning that in October 2002, a CSIS official knew that the Americans sent Mr. Arar to a country where he could be questioned in a "firm manner." The US rendition policy is on the public record and it is the public position of the US Government that this policy is legal.

[169] The Attorney General considers this information as being potentially offensive to our relations with the United States administration. It argues that it is injurious to disclose the personal opinion of Mr. Hooper on the practice of rendition.

[170] After reading the affidavit and the cross-examination of the affiant of the Attorney General, Mr. O'Brian, on this passage (see Commission's Secret Report, Vol. II, Tab 4, pages 331 to 340), I find that his reasons for objecting to the disclosure do not meet the burden of showing that disclosure of such information would be injurious to our relations with the US Government.

[171] The information on US rendition of prisoners is already known around the world. This practice is already fully documented in the public report. DFAIT has agreed on making public its position on US rendition of prisoners. This passage is related to the Commission's mandate, since it shows that officials at the highest level of CSIS in October 2002 knew about the US rendition of prisoners and the statement as written reflects this reality.

[172] The first part of the passage refers to a SLO's understanding of a trend in identifying the US rendition of prisoners. The second part refers to a comment made by Mr. Hooper which repeats the same idea but it adds a specific purpose for this practice, which is to enable them "to have their way with him (Mr. Arar)." This information was disclosed in a generic way by the Commission of Inquiry in the public report with the Government's agreement (see Volume I, page 245, 2nd paragraph). The difference with the comment at issue is that it is personalized as originating from a SLO in Washington and Mr. Hooper, the Deputy Director of CSIS.

[173] Mr. O'Brian explains that since Mr. Hooper's comment was contained in an internal CSIS memorandum, that type of document is protected. It is also informative to note that DFAIT's message in the fall of 2002 reflects the same opinion: "there are concerns that Arar may be aggressively questioned by the Syrian Security Services" (see public report, Vol. I, pages 229 and 230). The Attorney General and DFAIT representatives have approved including this information in the public report.

[174] Under normal circumstances, internal CSIS documents are protected. In the present case, the situation is different. The contents disclose what is already known internationally and the US Government has commented publicly on this practice. It tells us that at the highest levels of CSIS in October 2002, this practice was known and also that the objective of rendering Mr. Arar was so that "they can have their way with him." Knowledge of this practice and its objective is in the public domain. Such a statement does not come as a surprise and it is pertinent to the terms of reference of the Commission of Inquiry.

[175] The Attorney General has not convinced me that disclosing this information would be injurious to Canada's interests with the United States. Such disclosure might upset some officials but any reasonable person must admit that such a statement reflects the realities of the time. It might embarrass some, but again, such embarrassment in itself does not constitute injury.

[176] I do not find that disclosure of the redacted passage would be injurious to Canada's interests.

[177] Even if there is injury, I believe that the public interest in disclosure has been supported. The comments add to the factual knowledge of the situation at the time and help the Commissioner in his work and in making recommendations. There is a genuine legitimate public interest to inform the public of such knowledge within CSIS, in order to be able to assess the work done by the agency at the time. Not disclosing such information would not give a true picture of what officials at the highest level of CSIS knew in October 2002. Protection from embarrassment is not covered in our security laws. Finally, Mr. Hooper has retired and it remains that it is his opinion, which reflects the factual realities of the time. In balancing both interests, I have to favour the public interest in disclosure over non-disclosure.

4. Conclusion

[178] In accordance with section 38.06 of the CEA and its subparagraphs and for the reasons explained above, I have found that sometime disclosing some of the redacted passages, would be injurious and sometime, not injurious. I have also done in each situation a balancing of the competing interest in disclosure and non disclosure. For each redacted passages for which injury was found if disclose, I have determine that drafting a summary of the information (or part of it) would not have been appropriate. The Order that follows, addresses each redacted passage for a better understanding of my reasons.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-4-06
STYLE OF CAUSE:	AG CANADA v. COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR AND MAHER ARAR
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	Teleconferences – April 25, 2007 and May 14, 2007 Public Hearings – April 30, 2007 and May 23, 2007 Ex parte (in camera) Hearings – May 1, 2, 3 and 23, 2007
PUBLIC REASONS FOR ORDER:	NoëL, S. J.
DATED:	July 24, 2007

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