Report of the Events Relating to Maher Arar

Analysis and Recommendations

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

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

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Analysis and Recommendations

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I
An Overview of My Findings

1.
BACKGROUND

Maher Arar is a Canadian citizen. He is married and has two children. He has a Bachelor of Engineering in Computers from McGill University and a Master's degree in Telecommunications from the University of Quebec's *Institut national de la recherche scientifique*.

On September 26, 2002, while passing through John F. Kennedy International Airport in New York, Mr. Arar was arrested and subsequently detained by American officials for 12 days. He was then removed against his will to Syria, the country of his birth, where he was imprisoned for nearly a year. While in Syria, Mr. Arar was interrogated, tortured and held in degrading and inhumane conditions. He returned to Canada after his release on October 5, 2003. Not surprisingly, the effects of this ordeal on Mr. Arar have been devastating and he and his family continue to suffer to this day.

Mr. Arar has never been charged with any offence in Canada, the United States or Syria. Indeed, although RCMP officers conducting a terrorism-related investigation were interested in interviewing Mr. Arar, they did not consider him a suspect or a target of that investigation. They wished to interview him as a witness because of his associations with certain other individuals. I have heard evidence concerning all of the information collected about Mr. Arar in Canadian investigations, and there is nothing to indicate that Mr. Arar committed an offence or that his activities constitute a threat to the security of Canada.

There was a great deal of media coverage of Mr. Arar's case in the later stages of his imprisonment in Syria and even more after his return to Canada. Concerns were raised about the role Canadian officials might have played in relation to his detention in the United States, his removal to Syria and his

imprisonment and treatment in that country. In response to mounting public pressure, the Government of Canada called this public inquiry and I was appointed Commissioner.

The Inquiry mandate is divided into two parts. The first, referred to as the Factual Inquiry, requires me to investigate and report on the actions of Canadian officials in relation to Mr. Arar. The second, the Policy Review, directs me to make recommendations concerning an independent, arm's-length review mechanism for the RCMP's activities with respect to national security. Given the different nature of the two parts, I established a separate process for each. This report pertains only to the Factual Inquiry.

The Factual Inquiry process was thorough and comprehensive, and I am satisfied that I have been able to examine all the Canadian information relevant to the mandate. Over 70 government officials were called as witnesses, and the government produced approximately 21,500 documents, of which some 6,500 were entered as exhibits. The process was complex because of the need to keep some of the relevant information confidential, to protect national security and international relations interests. I received some of the evidence in closed, or *in camera*, hearings and am unable to refer to some of the evidence heard in those hearings in the public version of this report. However, I am pleased to say that I am able to make public all of my conclusions and recommendations, including those based on *in camera* evidence.

2.
ORGANIZATION AND CONTENT OF REPORT

The Factual Inquiry Report is presented in two parts. The first part, which you are now reading, contains my analysis of the different aspects of the evidence and all of my conclusions (chapters I through VII), a description of the Inquiry process (Chapter VIII) and my recommendations arising from the evidence I heard during the Inquiry (Chapter IX).

I have written the analysis in such a way as to avoid disclosing information that is subject to national security confidentiality. For that reason, I sometimes leave out detail. For example, I occasionally refer to times generally, rather than specifically, and I do not always identify individuals or agencies. I am nonetheless satisfied that the lack of detail does not mislead the reader about what occurred. Moreover, I have been careful to ensure that my conclusions are based on an assessment of all of the evidence, regardless of whether or not it may be publicly disclosed.

The second part of my Report presents the detailed factual background, based on the evidence I received during the hearings. There are two versions

of the factual background. 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 other is a public version, from which I have removed those parts of the evidence that, in my opinion, may not be disclosed publicly for reasons of national security confidentiality.

A good deal of evidence in the Inquiry was heard *in camera*. As it turns out, I have included a significant amount of *in camera* evidence in the public version. However, because of the amount of evidence not heard in public and not readily available to the public, I considered it important to prepare 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.

This Report is based primarily on the evidence of Canadian officials. The governments of the United States, Jordan and Syria declined my invitation to give evidence or otherwise participate in the hearings. Despite their failure to participate, I have for the most part been able to determine what actually happened and reach the conclusions required by the mandate. In a few instances, however, I have been hampered by the lack of evidence of officials of these other countries. I point these instances out in the Report.

In addition, I have not heard the evidence of Mr. Arar. For reasons of fairness, it was not deemed appropriate for Mr. Arar to testify before the release of the Report, the idea being that the Report would provide the maximum amount of disclosure of information to him about what had occurred. I have indicated to him that, if he wishes, he may apply to me to testify in the future. Should he do so, I will consider his request at that time. I do occasionally point out in the Report that Mr. Arar's evidence might shed additional light on a particular event or conclusion. In the main, however, I do not think that I was limited in any significant way by not hearing Mr. Arar's evidence.

3.
SCOPE OF MY MANDATE AND THE ISSUE OF CAUSATION

An Order in Council sets out the mandate for the Inquiry. The parts relevant to the Factual Inquiry read as follows:

> (a) to investigate and report on the actions of Canadian officials in relation to Maher Arar, including with regard to
>
> (i) the detention of Mr. Arar in the United States,
>
> (ii) the deportation of Mr. Arar to Syria via Jordan,
>
> (iii) the imprisonment and treatment of Mr. Arar in Syria,

(iv) the return of Mr. Arar to Canada, and

(v) any other circumstance directly related to Mr. Arar that the Commissioner considers relevant to fulfilling this mandate . . . .[1]

There are two purposes to this part of the mandate: to investigate and report fully on the matters described in the mandate; and to make recommendations with respect to matters that are disclosed in the evidence. In order to fulfill these purposes, it is necessary that I make findings of fact and, in some circumstances, assess those facts and make evaluations about what happened and why.

Government counsel and counsel for certain RCMP officers have argued that I should not make any negative or critical findings with respect to their clients unless I am able to find as a fact that the actions of their clients "caused or contributed to" what happened to Mr. Arar. They have contended that, because the American and Syrian authorities declined to testify at the Inquiry, there is no evidence about what caused American officials to detain and remove Mr. Arar to Syria or what caused the Syrian authorities to imprison and torture him. They have submitted that, absent findings that link actions of their clients to Mr. Arar's fate as described in the mandate, I am not permitted to make findings of misconduct — negative or critical comments — in relation to their clients.

I do not accept this argument. It invokes an overly technical and legalistic approach to the Inquiry and is based on an unduly narrow interpretation of the mandate. The mandate, by its terms, is not limited to examining actions that can be established to have caused Mr. Arar's fate; rather, it directs me to consider actions of Canadian officials "in relation to Mr. Arar." The use of the phrase "in relation to" suggests a broader investigation and report than one focused solely on the "causes" of what happened to Mr. Arar.

Moreover, the mandate is not limited to examining the events set out in subparagraphs i) to iv). The list is preceded by the word "including" and, in subparagraph v), the mandate directs that I also examine "any other circumstance directly related to Mr. Arar that [I consider] relevant to fulfilling the mandate."

I agree with those who argue that a public inquiry should not be turned into a fault-finding exercise. Indeed, in preparing this report, I have avoided making unnecessary negative or critical comments about individuals or agencies. That said, I have found it necessary in some instances to make comments that may be viewed as negative or critical in order to fully report on what occurred. In addition, I thought it necessary, in several places in the Report, to point to the shortcomings, as I viewed them, in what Canadian officials did or did not do in

relation to Mr. Arar, for purposes of making the recommendations contained in Chapter IX. I discuss this issue of causation further in Chapter VIII.

4.
SUMMARY OF MAIN CONCLUSIONS

The following are my main conclusions, presented under four headings that reflect the different stages examined: information sharing prior to Mr. Arar's detention, Mr. Arar's detention in New York and removal to Syria, his imprisonment and mistreatment in Syria, and the period after his return to Canada.

4.1
INFORMATION SHARING PRIOR TO MR. ARAR'S DETENTION

- The RCMP provided American authorities with information, including the entire database from the aforementioned terrorism investigation, in ways that did not comply with RCMP policies requiring screening for relevance, reliability and personal information. Some of the information related to Mr. Arar.
- The RCMP provided American authorities with information about Mr. Arar that was inaccurate, portrayed him in an unfairly negative fashion and overstated his importance in the RCMP investigation.
- The RCMP provided American authorities with information about Mr. Arar without attaching written caveats,[2] as required by RCMP policy, thereby increasing the risk that the information would be used for purposes of which the RCMP would not approve, such as sending Mr. Arar to Syria.
- The RCMP requested that American authorities place lookouts for Mr. Arar and his wife, Monia Mazigh, in U.S. Customs' Treasury Enforcement Communications System (TECS). In the request, to which no caveats were attached, the RCMP described Mr. Arar and Dr, Mazigh as "Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement."[3] The RCMP had no basis for this description, which had the potential to create serious consequences for Mr. Arar in light of American attitudes and practices at the time.
- Project A-O Canada was the front-line investigative unit in the RCMP that conducted the investigation in which Mr. Arar was a person of interest, and it was that unit that provided information about Mr. Arar to American agencies. The RCMP, as an institution, gave Project A-O Canada unclear and, in some instances, misleading direction concerning the manner in which

information should be shared, and failed to properly oversee the Project's investigation, including its information-sharing practices.
- CSIS did not share any information about Mr. Arar with the American authorities prior to his detention in New York and removal to Syria.

4.2
DETENTION IN NEW YORK AND REMOVAL TO SYRIA

- There is no evidence that Canadian officials participated or acquiesced in the American authorities' decisions to detain Mr. Arar and remove him to Syria.
- It is very likely that, in making the decisions to detain and remove Mr. Arar, American authorities relied on information about Mr. Arar provided by the RCMP.
- While Mr. Arar was being detained in New York on September 26, 2002, the RCMP provided the U.S. Federal Bureau of Investigation (FBI) with information about him, some of which portrayed him in an inaccurate and unfair way.
- Without the evidence of the American authorities, I am unable to conclude what role, if any, the TECS lookout requested by the RCMP played in the American decisions to detain Mr. Arar and remove him to Syria.
- During Mr. Arar's detention in New York, consular officials with the Canadian Department of Foreign Affairs and International Trade (DFAIT)[4] took reasonable steps to provide Mr. Arar with consular services, including addressing the possibility that he might be sent to Syria.

4.3
IMPRISONMENT AND MISTREATMENT IN SYRIA

- Mr. Arar arrived in Syria on October 9, 2002 and was held incommunicado until October 22, 2002. In the intervening period, he was interrogated and tortured.
- I am unable to conclude whether or not Canadian officials could have obtained Mr. Arar's release from Syrian imprisonment at an earlier point in time. However, there is cause for serious concern in regard to a number of

actions taken by Canadian officials during Mr. Arar's imprisonment, including some that could have had an effect on the time taken to release Mr. Arar:

- On receiving a summary of a statement made by Mr. Arar while in Syrian custody in early November 2002, DFAIT distributed it to the RCMP and CSIS without informing them that the statement was likely a product of torture. That statement became the basis for heightened suspicion in some minds about Mr. Arar's involvement in terrorism. That was unfair to him.
- In November 2002, CSIS received information about Mr. Arar from the Syrian Military Intelligence (SMI) and did not do an adequate reliability assessment as to whether the information was likely the product of torture. Indeed, its assessment was that it probably was not.
- In January 2003, the RCMP, acting through the Canadian Ambassador, sent the SMI questions for Abdullah Almalki, the subject of the relevant investigation and also in Syrian custody. This action very likely sent a signal to Syrian authorities that the RCMP approved of the imprisonment and interrogation of Mr. Almalki and created a risk that the SMI would conclude that Mr. Arar, a person who had some association with Mr. Almalki, was considered a serious terrorist threat by the RCMP.
- In March and April 2003, DFAIT failed to take steps to address the statement by Syrian officials that CSIS did not want Mr. Arar returned to Canada.
- In May and June 2003, the RCMP and CSIS were not supportive of a DFAIT initiative to send the Syrians a letter conveying that Canada spoke with one voice in seeking Mr. Arar's release.
- From time to time, DFAIT distributed reports of consular visits with Mr. Arar to the RCMP and CSIS. Ostensibly, this was done to seek assistance for Mr. Arar. However, DFAIT failed to make that purpose clear or to ensure that the reports were used only for that purpose.
- On several occasions, there was a lack of communication among the Canadian agencies involved in Mr. Arar's case. There was also a lack of a single, coherent approach to efforts to obtain his release.
- DFAIT consular officials took reasonable steps to obtain consular access to Mr. Arar throughout his imprisonment in Syria.

4.4
AFTER MR. ARAR'S RETURN TO CANADA

- Following Mr. Arar's return, reports were prepared within government that had the effect of downplaying the mistreatment or torture to which Mr. Arar had been subjected.
- Both before and after Mr. Arar's return to Canada, Canadian officials leaked confidential and sometimes inaccurate information about the case to the media for the purpose of damaging Mr. Arar's reputation or protecting their self-interests or government interests.
- When briefing the Privy Council Office and senior government officials about the investigation regarding Mr. Arar, the RCMP omitted certain key facts that could have reflected adversely on the Force.

5.
SUMMARY ANALYSIS

In the sections that follow, I provide an overview of the analysis on which I have based my conclusions concerning the actions of Canadian officials in relation to Mr. Arar, again broken down by stage.

5.1
PRE-DETENTION

5.1.1
Formation of Project A-O Canada

Project A-O Canada was the investigative unit of the RCMP that conducted the investigation that in time involved Maher Arar. Created in the aftermath of the September 11, 2001 terrorist attacks on the United States, the Project was directed to carry out an investigation, centred in Ottawa, into the activities of Abdullah Almalki, a person suspected of being associated with al-Qaeda. The Project was also charged with investigating any leads about the threat of a second wave of attacks after the events of 9/11. In the months that followed, the scope of the Project's investigation expanded to include new information that it received about other individuals and activities.

During the Inquiry, two issues arose with respect to the formation of Project A-O Canada. First, there was some suggestion that, in the wake of 9/11, the RCMP had been thrust back into the national security field and that, as a law enforcement agency, it inappropriately had become involved in investigations

within the mandate of CSIS, Canada's civilian security intelligence agency. I will comment on this suggestion only as it relates to Project A-O Canada.

In late September and early October 2001, CSIS transferred to the RCMP prime responsibility for a number of investigations, which subsequently led to the creation of Project A-O Canada. I have no reason to believe that the transfer of this investigation was inappropriate. CSIS witnesses testified that investigations were selected for transfer when they were found suitable for continued investigation by a law enforcement agency. By that, they meant that there had to be a sufficient nexus to criminal activity to engage the RCMP's mandate to either prevent, or prosecute the commission of, criminal offences. That said, I did not review all of the information about the previous CSIS investigations. To do so would have been an enormous task and well beyond my mandate. However, there was nothing in the evidence that I did hear about the Project A-O Canada investigation that raised a concern in my mind that the investigation that eventually involved Mr. Arar should not have been transferred to the RCMP.

I hasten to point out that one should not read into my comments a conclusion that Abdullah Almalki, the subject of that investigation, has committed any offence or is a threat to Canada's national security. On the contrary, Mr. Almalki, who has been the subject of investigation for a considerable period of time, has never been charged with any offence and is presumed to be innocent of any criminal activity.

The second issue with respect to the formation of Project A-O Canada had to do with the training and experience of its members. The officers assigned to Project A-O Canada were, in the view of their superiors, among the best investigators available. Many of them had extensive experience with large and complicated investigations involving financial transactions. Others had a wide array of skills of value to the investigative team. The major shortcoming was that, with few exceptions, the officers assigned to Project A-O Canada, including the Project managers, lacked experience and training in conducting national security investigations and in addressing human rights and cultural sensitivity issues that might arise in such investigations.

While I accept that, given the circumstances immediately after 9/11, the RCMP had no choice but to form the Project team as it did, it was incumbent upon the RCMP to ensure that the Project received clear direction and proper oversight with respect to the unique aspects of a national security investigation that fell outside the previous experience of the great majority of the officers. In this regard, the RCMP failed completely, particularly in the critically important area of information sharing with American agencies.

The officers of Project A-O Canada were given little guidance. They were largely left on their own. Even more troubling, the directions the RCMP did provide about how information should be shared with the American agencies were unclear and misleading. As events developed, the Project provided those agencies with information about Mr. Arar that was inaccurate and unfairly prejudicial to him. The information was provided in contravention of RCMP policy requiring that information be screened for relevance, reliability and personal information before being shared and that written caveats be attached to control the use to which the information is put.

5.1.2
Early Investigative Steps

Mr. Arar first came to the attention of Project A-O Canada as a result of a meeting he had with Abdullah Almalki at Mango's Café in Ottawa on October 12, 2001. I am satisfied that, based on the information available to them, the Project members had reasonable grounds to conduct surveillance of this meeting. This was a routine and proper investigative step and was not the result of racial profiling.

I am also satisfied that, as a result of the meeting at Mango's Café, the Project properly considered Mr. Arar to be a person of interest in its investigation. While the meeting might have been innocent, there were aspects of it that reasonably raised the investigators' antennae. Messrs. Almalki and Arar were seen walking together in the rain and conversing for 20 minutes. Given that Mr. Almalki was a target of the investigation, it was reasonable for the Project to investigate Mr. Arar, about whom it had no information at the time.

The investigators conducted background searches on Mr. Arar using public source information. The process included obtaining copies of Mr. Arar's rental application and tenancy agreement from his landlord's management company. The emergency contact given on Mr. Arar's rental application was Mr. Almalki.

Mr. Arar's counsel questioned whether obtaining the rental documents had been proper, given that there had been no search warrant or even the basis for obtaining one. I conclude that there was nothing improper in Project A-O Canada obtaining these documents without a warrant. The officers asked for the documents and the property manager, who had a proprietary interest in them, produced them. There was no compulsion, and the property manager did not suggest that Mr. Arar had a privacy interest in any information in the documents.

5.1.3
Border Lookouts

Towards the end of October 2001, Canada Customs[5] placed border lookouts for Mr. Arar and his wife, Dr. Mazigh, at the request of Project A-O Canada. The lookouts were intended to ensure that Mr. Arar and Dr. Mazigh would undergo both primary and secondary examinations when entering Canada. Any person entering Canada may be subjected to a secondary examination; however, when there is a lookout, the front-line Customs officers must refer the person for a secondary examination.

I am satisfied that Project A-O Canada had sufficient reason at the time to request a lookout for Mr. Arar. In any investigation, it is important to determine the role, if any, of persons associated with the subject of the investigation, in this case Mr. Almalki. By then, Mr. Arar was properly a person of interest to the investigators, who were aware that he had met with Mr. Almalki at Mango's Café and that he had listed him as an emergency contact on his rental application, indicating they might have close ties.

There is a reduced expectation of privacy at the border when any person is entering Canada, and secondary examinations are frequently conducted where search warrants cannot be obtained. In the circumstances, requesting a lookout for Mr. Arar was an appropriate investigative step.

Once a lookout request is received, it falls to Canada Customs to decide whether there are "reasonable grounds" for issuing the lookout. For the same reasons I conclude it was reasonable for Project A-O Canada to request a lookout for Mr. Arar, I am satisfied that Canada Customs had reasonable grounds for issuing it.

That said, the lookout for Mr. Arar was designated a "terrorism" lookout. According to a Canada Customs bulletin, that designation is used when someone is suspected of being a member, associate or sympathizer of a known terrorist organization. Mr. Arar did not meet these criteria. He was not suspected of being a member of a terrorist organization and should not have been labelled in this fashion in the lookout. To do so was unfair to Mr. Arar, who was merely a person of interest. It is essential that precise and accurate language be used when describing an individual's role in a terrorism-related investigation, particularly in these times of heightened concern about public safety and national security. Labels have a way of sticking to individuals, reputations are easily damaged and when labels are inaccurate, serious unfairness to individuals can result.

In regard to Dr. Mazigh, I conclude that there was no basis for the RCMP to request a lookout for her and no basis for Canada Customs to place the

lookout. The important distinction between Mr. Arar and Dr. Mazigh is the factual connection with Mr. Almalki. Mr. Arar was a person of interest because of his association with Mr. Almalki, but the RCMP had no information suggesting a link between Dr. Mazigh and Mr. Almalki. While it may make sense to include the spouse of a suspect in a lookout because that person might be involved in the suspect's activities, that rationale does not extend to the spouse of someone who is merely a person of interest and not suspected of any wrongdoing, such as Mr. Arar.

Further, the lookout for Dr. Mazigh, as for Mr. Arar, was a "terrorism" lookout. Labelling Dr. Mazigh in this fashion was inaccurate. It was wrong and very unfair to her.

At the same time Project A-O Canada requested Canada Customs lookouts for Mr. Arar and Dr. Mazigh, it also requested U.S. border lookouts for them. U.S. Customs has a computer system called the Treasury Enforcement Communications System (TECS), which provides lookout information on suspect individuals, businesses, vehicles, aircraft and vessels.

U.S. authorities declined the invitation to testify at the Inquiry. According to my understanding of the system, organizations around the world may submit requests to have individuals placed on a TECS lookout, and RCMP officers routinely make such requests. However, I have little information about how American agencies would have used the Project A-O Canada request and what the consequences might have been for Mr. Arar and Dr. Mazigh in the post-9/11 environment in the United States.

There was no RCMP policy or directive laying down the criteria for submitting foreign lookout requests. It appears, however, that making such requests was considered a normal investigative step at the time. In Chapter IX, I recommend that the RCMP develop guidelines for submitting lookouts to foreign countries, giving specific consideration to the use to be made of the lookouts and the potential impact of the lookouts on the civil liberties of the individuals affected. It is important that the RCMP have policies that set out the circumstances under which such potentially important steps as requesting a foreign border lookout should be taken.

In regard to the U.S. lookout for Dr. Mazigh, it is clear that the RCMP should not have requested such a lookout, for the same reason that it should not have requested a Canadian lookout.

One aspect of the Canadian and American lookout requests that is highly alarming is the most unfair way in which Project A-O Canada described Mr. Arar and Dr. Mazigh. The requests indicated they were part of a "group of Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist

movement,"[6] a description that was inaccurate, without any basis, and potentially extremely inflammatory in the United States in the fall of 2001. I discuss the language used in this letter in more detail below, in my comments on Project A-O Canada's information-sharing practices.

5.1.4
Canada Customs Secondary Examinations

Canada Customs carried out three secondary examinations that warrant comment: two of Mr. Arar, on November 29 and December 20, 2001, and one of Dr. Mazigh, on November 14, 2002.

During Mr. Arar's secondary examinations, officials photocopied documents found in his possession. With the exception of some teaching materials, those documents related to Mr. Arar's travel and personal identification. I am satisfied that, in copying these documents, Canada Customs officials acted in accordance with the *Customs Enforcement Manual* and relevant Enforcement Bulletin as they existed then. There was nothing of a particularly private nature about the travel and personal information obtained from the documents. The one possible exception to this conclusion involves the teaching materials, on which I cannot comment without hearing from Mr. Arar. I also conclude that, under the *Customs Act*, Customs officials had the authority to provide the RCMP with the information copied from Mr. Arar's documents.

During the December 20, 2002 secondary examination, apart from copying documents found in Mr. Arar's possession, Customs officials seized Mr. Arar's computer and personal digital assistant (PDA) for non-payment of duties and then copied information from those devices that was accessible without the use of a password. Based on the description of what occurred set out in a report by the Customs official who conducted the secondary examination, I find that Canada Customs had authority to seize the articles for non-payment of duties.[7]

I am also satisfied that the Customs officials who copied information from Mr. Arar's computer and PDA believed, reasonably in the circumstances, that they were authorized to do so. However, I do not have sufficient information to determine whether in fact they had the authority under the *Customs Act* to conduct those examinations or whether such examinations breached Mr. Arar's privacy rights under the *Canadian Charter of Rights and Freedoms*. I would need the evidence of Mr. Arar as a starting point.

As I have indicated, Dr. Mazigh should not have been the subject of the lookout that triggered her secondary examination on November 14, 2002. The examination therefore should not have taken place. Moreover, Canada Customs uploaded the profiles of Dr. Mazigh and her children, who were travelling with

her, into the Intelligence Management System (IMS), an automated facility for reporting and compiling intelligence information on targets known or suspected to be potential border risks. While the uploaded information was basic information obtained from the travel itinerary and identification documents of Dr. Mazigh and her children, it should not have been uploaded into the IMS, as Dr. Mazigh and her children were not known or suspected to be potential border risks.

5.1.5
Information Sharing With American Agencies

I want to start the discussion about information sharing by making it clear that nothing in this report should be taken to indicate that Canadian agencies should not share information with American agencies. On the contrary, I strongly endorse the importance of information sharing. Sharing information across borders is essential for protecting Canada's national security interests, in that it allows more complete and accurate assessments of threats to our security. The importance of information sharing has increased in the post-9/11 era, when it is clear that the threats that need to be addressed are globally-based and not confined within national borders. However, information must be shared in a principled and responsible manner. There is good reason for the RCMP's written policies governing information sharing. Those policies make sense and it is important that they be followed.

The most significant problems arising from the Project A-O Canada investigation pertained to information sharing with the United States. Unfortunately, the RCMP gave Project A-O Canada unclear and even misleading directions on how to share information with the American agencies primarily responsible for terrorist activities in the U.S. and then failed to adequately oversee the Project's practices in that regard. As a result, Project A-O Canada did not comply with RCMP policies with regard to screening information and attaching caveats to information provided to other agencies.

5.1.5.1
RCMP Policies

As indicated above, the RCMP has policies requiring that information to be shared with other agencies be screened for relevance, reliability and personal information and that caveats be attached.

The RCMP has a legitimate concern, indeed a responsibility, to ensure that information it provides to other agencies is accurate and appropriate for sharing in the particular circumstances; hence the need for screening.

It is also important that the RCMP control, to the extent it is able, the use to which information provided to other agencies may be put. Written caveats are used by the RCMP and other agencies that share information to try to prevent recipient agencies from further disseminating information or using it for purposes of which they do not approve. While such caveats do not guarantee protection against unacceptable use, common sense tells us that they should significantly reduce the risk.

The fact that Project A-O Canada did not attach written caveats to the information about Mr. Arar provided to American agencies increased the risk that those agencies would use the information for purposes unacceptable to the RCMP, such as removing him to Syria.

5.1.5.2
Original Arrangement

Immediately after the events of 9/11, the RCMP, CSIS, and the American agencies primarily responsible for terrorist activities in the U.S. met to discuss the threat of another terrorist attack and the need for increased co-operation and coordination among the agencies, including the sharing of information in "real time," that is, in a prompt manner. In making its information-sharing arrangement, the RCMP did not intend to deviate from existing policies requiring that information be screened before being shared and that caveats be attached to any documents provided to other agencies.

The senior officer with the Criminal Intelligence Directorate (CID) at RCMP Headquarters discussed the arrangement with senior officers in the various divisions, including those at "A" Division in Ottawa. They in turn discussed it with Project A-O Canada managers. Instructions connected with the information-sharing arrangement were passed down the RCMP chain of command by word of mouth. Those involved now have varying recollections about what was intended and what instructions were given.

In the end, the Project managers had a very different understanding of the arrangement than what was intended by the senior CID officers. According to their testimony, they understood that "caveats were down" — in other words, notwithstanding RCMP policy, there was no need to attach written caveats to documents being shared with the other partner agencies. However, in their minds, there was an implicit understanding that the information would be used for intelligence purposes only. Further, the Project managers understood that all information obtained by the Project could be transferred to the "partners to the agreement," that is, CSIS and the American partner agencies, without

screening the information for relevance, reliability or personal information, pursuant to RCMP policy.

Project A-O Canada also understood that it could share information received from one party to the arrangement with the other parties without the consent of the originator, even if caveats had been attached by the originator. This was another departure from RCMP policy not intended by senior CID officers. Moreover, CSIS, which was a party to the original arrangement, did not believe there had been such an arrangement or agreement.

As a result of these understandings, Project A-O Canada provided a large amount of information to the American agencies in a manner that contravened RCMP policies and was very different from what had been intended by senior CID officers. These highly alarming practices began shortly after the start of the Project's investigation in October 2001 and continued until the summer of 2002, when officers with CID took steps to bring the Project's information-sharing practices into line with RCMP policy.

The most serious incident in this regard in the period leading up to Mr. Arar's detention in New York occurred in April 2002, when Project A-O Canada provided the American agencies with its entire investigative database, in the form of three compact discs (CDs), without screening the information beforehand or attaching written caveats.

These failures should never have occurred. It was incumbent upon the RCMP and its senior officers to ensure that Project A-O Canada received clear and accurate direction with regard to how information was to be shared and to exercise sufficient oversight to rectify any unacceptable practices. Indeed, there was an especially strong need for direction and oversight because of the lack of training and experience in national security investigations of most of the Project A-O Canada members, including the managers.

5.1.5.3
Inaccurate Information

Project A-O Canada supplied the American agencies with a good deal of inaccurate information about Mr. Arar, some of which was inflammatory and unfairly prejudicial to him.

As mentioned above, in its request for U.S. border lookouts, Project A-O Canada described Mr. Arar and his wife as Islamic extremists suspected of being linked to the al-Qaeda movement. Everyone who testified accepts that this description was wrong and should not have been given to the Americans. There was no basis for such an assertion. The request was sent to U.S. Customs in late October 2001, but it was also given directly to the American agencies five

months later, in April 2002. The potential consequences of labelling someone an Islamic extremist in post-9/11 America are enormous.

Prior to Mr. Arar's detention in New York on September 26, 2002, Project A-O Canada provided documents to the American agencies that variously described Mr. Arar as a suspect, a target, a principal subject of its investigation, a person with an "important" connection to Mr. Almalki, a person directly linked to Mr. Almalki in a diagram titled "Bin Laden's Associates: Al Qaeda Organization in Ottawa," and a business associate or a close associate of Mr. Almalki.

These descriptions were either completely inaccurate or, at a minimum, tended to overstate Mr. Arar's importance in the Project A-O Canada investigation. I repeat that Project A-O Canada's view was that Mr. Arar was never a suspect — he was merely a person of interest. While it might be that, in meetings, the Project's officers communicated this actual view of Mr. Arar's status in the investigation, there was no justification for the improper and unfair labels attached to him in written documents. Written labels, particularly when no caveats are attached, have a way of sticking to an individual and then spreading to others and becoming the accepted fact or wisdom. Threats of terrorism understandably arouse fear and elicit emotional responses that, in some cases, lead to overreaction. The need for accuracy and precision when sharing information in terrorist investigations cannot be overstated. This is especially so when the information is contained in a document that, rightly or wrongly, carries an air of authority. Statements made by police officers tend to be taken at face value.

In addition to unfairly labelling Mr. Arar, Project A-O Canada provided U.S. agencies with some factually inaccurate information about him. For example, it passed on erroneous notes taken by RCMP officers during an interview with Abdullah Almalki's brother that indicated that the brother had said Mr. Arar had a business relationship with Abdullah Almalki, when in fact the brother had indicated that he wasn't sure whether Mr. Arar had a business relationship with his brother. Further, a report supplied to the Americans about the meeting at Mango's Café erroneously stated that Mr. Arar had travelled from Quebec to meet Mr. Almalki, giving an unfounded sense of importance to the meeting.

In a presentation to American authorities in May 2002, Project A-O Canada provided information that tended to link Mr. Arar to certain other individuals who were suspects in the investigation. That information turned out to be inaccurate. At the same time, the Project informed the American authorities that Mr. Arar had refused to be interviewed by it in January 2002. That was also incorrect. Mr. Arar had actually agreed to be interviewed, but subject to

conditions recommended by his counsel, which Project A-O Canada had found unacceptable. The statement about the refusal to be interviewed had the potential to arouse suspicion, especially among law enforcement officers, that Mr. Arar had something to hide.

While Project A-O Canada might have provided the American authorities with a good deal of accurate information, there is no excuse for its sharing of inaccurate or imprecise information. I do not accept the arguments made by some that the inaccuracies were minor or hair-splitting. In my view, they were not. During the Inquiry, investigators frequently emphasized the need to share all relevant information, even seemingly insignificant details, with other agencies, as one never knows what importance information may have in the overall picture being pieced together. A series of relatively minor details, when taken together, can create a picture of someone who is heavily involved in illegal activities. This rationale for sharing information highlights the importance of accuracy and precision in the details being shared. If details are important, they should be accurate.

I accept that the members of Project A-O Canada did not intend to provide inaccurate information to American authorities. However, proper screening would have prevented most, if not all, of the inaccuracies. In any event, this is an instance where the Project members' lack of training and experience in national security investigations appears to have played a part.

5.1.6
Role of RCMP Headquarters

Project A-O Canada provided CID at RCMP Headquarters with a considerable amount of information about its investigation on an ongoing basis. It routinely supplied daily situation reports describing the investigative steps taken, and Project officers met periodically with CID officers to inform them about the investigation.

Nonetheless, there were a number of serious failures of communication between the Project and CID, the most important being the misunderstanding about how information should be shared with other agencies, discussed above. Ultimately, it was the responsibility of the RCMP as an institution to ensure that information was shared properly and in accordance with established policies. It failed to discharge that responsibility.

There was another problem with communications between Project A-O Canada and senior RCMP officers. During its investigation, the Project provided senior officers at "A" Division and CID at RCMP Headquarters with essentially the same information it gave the American agencies, which, as described

above, was sometimes inaccurate in regard to Mr. Arar and tended to unfairly overstate his importance in the Project investigation. Later, when Mr. Arar was in Syrian custody, these inaccuracies might have played a role in the RCMP's institutional responses to requests for assistance in obtaining his release. I discuss this issue below.

More generally, I observe that, given that Project A-O Canada had few officers with experience or training in national security investigations, I would have expected CID to exercise more, rather than less, oversight. That did not happen. While CID, like other units of the RCMP, might have been burdened with an increased workload in the aftermath of 9/11, it would not have been terribly time-consuming to ensure that Project A-O Canada received clear instructions with regard to information sharing and the need to comply with RCMP policies.

5.2
DETENTION IN NEW YORK AND REMOVAL TO SYRIA

5.2.1
Canadian Investigators

On September 26, 2002, Mr. Arar arrived at John F. Kennedy International Airport in New York on a flight from Zurich, Switzerland. He had started his trip in Tunisia and was connecting though New York on his way to Montreal. Upon his arrival at the airport in New York, he was detained by American authorities.

Mr. Arar is a citizen of both Canada and Syria. On October 7, 2002, the Regional Director of the U.S. Immigration and Naturalization Service (INS) issued an order finding Mr. Arar to be a member of al-Qaeda and directing his removal from the United States. On October 8, Mr. Arar, still in American custody, was flown to Jordan. A short time later, he was driven to Syria, where he was imprisoned for almost a year.

The RCMP had several communications with members of the American agencies about Mr. Arar shortly before and during the time he was detained in New York. Three of those communications are noteworthy.

Prior to Mr. Arar's arrival in New York on September 26, 2002, the FBI contacted Project A-O Canada to inform it of the American authorities' intention to question Mr. Arar and deny him entry into the United States, and to ask whether the RCMP had any questions it wanted put to Mr. Arar while he was in New York. The same day, the Project faxed the FBI a list of questions for Mr. Arar. I conclude that Project A-O Canada did not act improperly in sending the questions. At the time, the Canadian officers believed Mr. Arar would be denied entry to the United States and promptly sent back to Zurich. There was a legitimate

investigative reason for sending the questions, as Mr. Arar was a person of interest in the Project's investigation and might have information as a witness that would further the investigation. Moreover, the Project members believed that the American authorities would extend a person in Mr. Arar's position similar protection to that provided by Canadian law.

However, in sending the questions, Project A-O Canada included information about Mr. Arar that was inaccurate and portrayed him in an unfair way. It indicated that Mr. Arar had been in the vicinity of Washington, D.C. on September 11, 2001, which was false. This information could have unfairly raised a suspicion about Mr. Arar's connections. Also, a concluding section of the fax stated that Mr. Arar had declined to be interviewed in January 2002 and, soon after, had suddenly left Canada for Tunisia. There are a number of problems with this information. Mr. Arar did not decline an interview. He agreed to be interviewed, subject to certain conditions. He did not leave Canada soon after the interview request. He left five months later. There is no evidence that he left "suddenly." Linking these inaccurate pieces of information together painted an incorrect and potentially inflammatory picture of someone who had refused to be interviewed, probably because he had had something to hide, and had quickly pulled up roots and left Canada, where he had been living with his family, in order to avoid further investigation. The Project did not attach a caveat to this information.

Earlier in this chapter, I discuss the importance of providing accurate and precise information. The provision of this inaccurate information, particularly without a caveat, at what turned out to be a critically important time in Mr. Arar's ordeal was unfortunate, to put it mildly, and totally unacceptable.

On October 3, 2002, [***] sought the assistance of the RCMP's CID in a fax containing seven specific questions about Mr. Arar and his activities and associations. The fax indicated two potential purposes for the information: Mr. Arar's removal from the United States pursuant to the INS process, and law enforcement proceedings. CID forwarded the fax to Project A-O Canada, which responded the next day.

I am satisfied that it was appropriate for the RCMP to respond to the questions. Importantly, the response made it clear that the Project had yet to complete a detailed investigation of Mr. Arar and was unable to indicate links to al-Qaeda. Moreover, the information in the response was accurate, the way it was provided complied with RCMP screening policies, and a caveat was attached. It is also worth noting that, at the time, the RCMP still did not know that the United States was contemplating sending Mr. Arar to Syria.

Unfortunately, the RCMP did not take the opportunity presented by this exchange to point out that all previous disclosures of information made without written caveats were subject to the same caveat as the October 4 response. Further, while the Project pointed out that it was unable to indicate links between Mr. Arar and al-Qaeda, it did not go further and correct the inaccurate information already provided to the American agencies about Mr. Arar, including the label of Islamic extremist.

Finally, I note that, in its response, the RCMP provided information received from CSIS that was subject to caveats without obtaining the consent of CSIS to do so. This was a breach of both the CSIS caveats and RCMP policy.

The RCMP's third communication of note with American authorities during Mr. Arar's detention in New York actually involved two phone calls between Corporal Rick Flewelling of CID and an FBI agent, the first on October 4 and the second on October 5. During the second call, the FBI agent said that the United States did not have enough information to charge Mr. Arar and was looking to remove him. He indicated that Mr. Arar had asked to be sent to Canada, and Washington wanted to know whether the RCMP could charge him or refuse him entry to Canada. The corporal responded that there was not enough evidence to charge Mr. Arar in Canada and that it was likely that he could not be refused entry to Canada.

I accept Corporal Flewelling's evidence that it did not occur to him that the American authorities were considering Syria as an option. He believed that Mr. Arar would either be returned to Zurich or be sent to Canada. I am satisfied that the RCMP was not informed of the possibility of Syria as a destination until at least October 7.

On October 7, 2002, the U.S. INS ordered that Mr. Arar be removed from the United States because he had been found to be a member of al-Qaeda. Much of the information relied upon to make the order was contained in an appendix that has not been disclosed publicly.

I reach the following conclusions in regard to the two American decisions of interest to my mandate, that is, the decision to detain Mr. Arar in New York and the decision to remove him to Syria:

- Canadian officials did not participate or acquiesce in the American decisions to detain Mr. Arar and remove him to Syria. I have thoroughly reviewed all of the evidence relating to events both before and during Mr. Arar's detention in New York, and there is no evidence that any Canadian authorities — the RCMP, CSIS or others — were complicit in those decisions.

- It is very likely that, in making the decisions to detain and remove Mr. Arar to Syria, the U.S. authorities relied on information about Mr. Arar provided by the RCMP. Although I cannot be certain without the evidence of the American authorities, the evidence strongly supports this conclusion. Over time, a good deal of information about Mr. Arar that would undoubtedly have raised suspicions about him was supplied without caveats to the American agencies by the RCMP. Indeed, although the appendix containing the confidential information in the removal order has not been disclosed, the publicly available portion of the order refers to information that originated in Canada. Moreover, on many occasions after the event, several American officials, including then Secretary of State Colin Powell, said that the American authorities had relied on information provided by Canada in making the decision to send Mr. Arar to Syria. Tellingly, the Americans have never provided the Canadian authorities with any information of their own about Mr. Arar that would have supported the removal order. Given the close co-operation between the RCMP and the American agencies, it seems likely that, if they had such information, they would have supplied it to the Canadians.
- Finally, without the evidence of the American authorities, I am unable to conclude what role, if any, the TECS lookout for Mr. Arar requested by the RCMP in late October 2002 played in the American decisions to detain Mr. Arar and remove him to Syria.

5.2.2
Consular Officials

DFAIT first became aware of the possibility that Mr. Arar was being detained in New York on September 29 and was actually informed that he was being detained on October 1.

I conclude that, during Mr. Arar's detention in New York, DFAIT officials took reasonable steps to provide Mr. Arar with consular services, including addressing the possibility that he might be sent to Syria.

A number of signs alerted consular officials to the possibility that the United States was considering sending Mr. Arar to Syria. On October 1, Mr. Arar's brother informed DFAIT that Mr. Arar had told him that he would be sent to Syria. On the same day, a senior U.S. INS officer advised that the case was of such seriousness that it should be taken to the highest level, and on October 3, Mr. Arar told the Canadian consul that investigating officers had informed him that they were going to send him to Syria.

The DFAIT officials considered these warning signs, but based on their past experience with individuals in "terrorism-related" cases and the information they had received, they did not believe that there was an imminent risk that Mr. Arar would be sent to Syria. Individuals in these types of cases had always been held for months. Moreover, the officials had never known the Americans to remove a Canadian citizen to a country other than Canada when the individual had requested to be sent to Canada and was travelling with Canadian documents, as was the case with Mr. Arar.

At no time did the American authorities give consular officials any indication of their intention to send Mr. Arar to Syria. They were not open and forthcoming about what was happening with respect to the detainee. Canadian officials were caught completely off guard when they learned of Mr. Arar's fate.

A point of note is that, five days before Mr. Arar's removal, consular officials assisted Mr. Arar and his family in retaining counsel to represent his legal interest in any American proceeding. It was reasonable for consular officials to expect that the American lawyer who would represent Mr. Arar would take appropriate steps to protect his interests and would notify them if there was anything that they could do to assist with the case. The lawyer, who visited Mr. Arar on October 5 and also spoke with INS officials, did not raise the possibility of removal to Syria with Canadian consular officials or suggest any further action by Canadian officials to assist Mr. Arar. That lawyer declined an invitation to testify at the Inquiry. However, it appears that she, like the consular officials, was unaware that the American authorities were intending to remove Mr. Arar to Syria in the very sudden way that they did.

5.2.3 Interagency Communication

As discussed above, during the period of Mr. Arar's detention in New York, DFAIT and the RCMP were each dealing directly with American authorities in regard to Mr. Arar's situation without knowledge of what the other was doing and without benefit of the information in the other's possession.

The RCMP has no policy requiring it to communicate with DFAIT when it learns that someone connected with one of its investigations has been detained abroad. Canadians detained outside Canada are entitled to consular services on request, and the RCMP's general approach is based on the notion that detainees will be able to contact a consular officer if they wish. In Mr. Arar's case, it had no reason to believe that any request made by Mr. Arar for consular assistance in the United States would not be granted. There was consequently no reason for the RCMP to contact DFAIT about Mr. Arar's situation. Further, I am satisfied

that there was no requirement for the RCMP to notify DFAIT that it was providing information about Mr. Arar to the U.S. authorities.

DFAIT, for its part, undertook a reasonable course of action in trying to sort out what was actually occurring and in involving legal counsel to act for Mr. Arar. I do not think that, in the circumstances, DFAIT should be faulted for not having informed the RCMP about the threat of Syria as it was assessed at that time.

Nevertheless, given the international environment in which they must operate when someone is detained in connection with a terrorism investigation, Canadian agencies in any way involved in such cases should consult with one another and develop a coherent and consistent approach to the situation for all Canadian agencies. The reality of terrorism investigations calls for extraordinary care by Canadian officials in relation to Canadians detained abroad for suspected links to terrorism.[8]

5.3
IMPRISONMENT AND MISTREATMENT IN SYRIA

5.3.1
Initial Period

Mr. Arar arrived in Syria on October 9, 2002. He was held incommunicado by the Syrian Military Intelligence (SMI) at its Palestine Branch until October 21, when the Canadian ambassador, Franco Pillarella, was informed that Mr. Arar was in Syria. Prior to that time, Canadian officials had made a number of inquiries of Syrian officials about Mr. Arar's whereabouts and had been told that he was not in Syria. This was false.

In view of what followed, I conclude that Syrian officials would not say that Mr. Arar was in Syria during the initial period of his imprisonment because the SMI wanted to interrogate and torture him in order to obtain a statement. Clearly, the SMI did not want any interference from Canadian officials while it was conducting "the interrogation."

The actions of the SMI with respect to Mr. Arar were entirely consistent with Syria's widespread reputation for abusing prisoners being held in connection with terrorism-related investigations. The U.S. State Department and Amnesty International have publicly reported on Syria's poor human rights record in relation to prisoners. In particular, these reports state that Syrian intelligence agencies such as the SMI are known to hold prisoners incommunicado at the beginning of their imprisonment for purposes of interrogation using torture.

I am satisfied that, during the period Mr. Arar was held incommunicado, Canadian officials did everything they reasonably could to locate him. The fact is that the Syrian officials lied to them and there was little more they could do.

On October 21, the Syrian deputy foreign minister contacted Ambassador Pillarella and advised him that Mr. Arar was in fact in Syria, having just arrived from Jordan earlier that day. The next day, General Hassan Khalil, the head of the SMI, also told Ambassador Pillarella that Mr. Arar had just arrived in Syria, and that he had already admitted having connections with terrorist organizations. The general agreed to allow Canadian consular officials to visit Mr. Arar and the first visit was arranged for the following day, October 23.

Léo Martel, the Canadian consul in Damascus, visited Mr. Arar the next day in an office at the Palestine Branch. He did not observe any physical signs of torture on Mr. Arar and indicated in his report of the meeting that Mr. Arar had appeared healthy, but added, "of course, it is difficult to assess."

There were actually many indications that all was not well. The visit was very controlled and Mr. Arar's demeanour was submissive. Syrian officials were present throughout and insisted that Mr. Arar speak in Arabic, with one of them serving as interpreter. Mr. Arar sent eye signals communicating that he could not speak freely. He was made to say that he was "happy to have come back to Syria" and "my Syrian brothers have not exercised pressure on me," statements that were transparently artificial and contrived. He did manage to say that he had spent only "a few hours" in Jordan, which meant that he had been in Syria for about 12 days.

5.3.2 Torture

I am satisfied that the October 23 consular visit should have alerted Canadian officials to the likelihood that Mr. Arar had been tortured when interrogated while held incommunicado by the SMI. As I said earlier, what happened to Mr. Arar fit squarely within the publicly reported Syrian practices of torturing prisoners. The fact that Syrian officials misled the Canadians about when Mr. Arar had arrived in Syria suggests they had something to hide. And if there was any doubt, the controlled nature of the first consular visit and Mr. Arar's submissive demeanour and prompted statements during that visit were further indications that he had been abused.

Some Canadian officials did operate under the "working assumption" that Mr. Arar had been tortured. Others, including the Ambassador, were not prepared to go that far based on the information available. In my view, after the first consular visit, all Canadian officials dealing with Mr. Arar in any way should

have proceeded on the assumption that he had been tortured during the initial stages of his imprisonment and, equally of importance, that the "statement" he had made to the SMI had been the product of that torture.

5.3.3 Continuing Investigations

5.3.3.1 *Bout de Papier*

On November 3, 2002, the SMI provided Ambassador Pillarella with a *bout de papier*, or informal written communication, setting out certain information that the SMI had obtained from Mr. Arar, including the fact that he had taken *mujahedeen* training in Afghanistan in 1993.

The Ambassador passed the *bout de papier* on to DFAIT Headquarters, which distributed it to the RCMP and CSIS. By this point, DFAIT should have been aware that Mr. Arar's statements to the SMI were likely the product of torture.

Given the circumstances, I do not think that it was improper or inappropriate for the Ambassador to receive the *bout de papier* from the SMI. By this point, the SMI was permitting Canada access to Mr. Arar and it would have seemed unlikely that he would be subjected to any physical abuse in the future. Moreover, it was General Khalil who raised the subject of information obtained from Mr. Arar and made the information available to the Ambassador. Furthermore, there was potentially a benefit to Canadian officials' knowing what Syrian authorities considered to be "the case" against Mr. Arar. As stated by Gar Pardy, Director General of Consular Affairs at DFAIT, they might have been better able to assist him armed with that information.

That said, when they received the information, DFAIT officials should have conducted a proper assessment of its reliability. Had they done so, they would have concluded that it was likely the product of torture and therefore of doubtful reliability. That assessment should then have accompanied the *bout de papier* when DFAIT distributed it to the RCMP and CSIS. As it turned out, some RCMP officers did not consider the likelihood of torture when assessing Mr. Arar's possible involvement in terrorism-related activities. This was unfortunate and unfair to Mr. Arar. In Chapter IX, I recommend that, when Canadian officials receive information from a country with a questionable human rights record, such as Syria, they conduct a reliability assessment and ensure that their conclusions accompany the information if they disseminate it.

5.3.3.2
CSIS Trip

On November 19, 2002, CSIS officials travelled to Syria for the purpose of meeting with the Syrian Military Intelligence (SMI). One of the purposes of the trip was to obtain information on Mr. Arar's case.

When they met with the SMI, the CSIS officials received some information regarding Mr. Arar's case, but did not provide the Syrians with any information about him. They did not visit Mr. Arar, nor did they provide the Syrians with any questions for him. However, I am not satisfied that CSIS did an adequate reliability assessment of the information received from the SMI, in particular with respect to whether the information could be a product of torture. Indeed, its assessment was that it was probably not the product of torture, which I find was not the case. As a result, any reliance on this information by CSIS or others was misguided or misplaced.

I am satisfied that it was appropriate for CSIS officials to meet with the SMI in the circumstances that existed in November 2002. There was a legitimate investigative reason for the trip, and DFAIT was consulted and approved of the trip, even though it had reservations about the timing. The Minister of Foreign Affairs was informed. The CSIS officials involved did nothing more than receive information in regard to Mr. Arar's case. They testified that they had been careful not to say anything that could negatively affect Mr. Arar's circumstances or his release.

That said, there are significant risks whenever Canadian investigators interact with a country with a questionable human rights record, particularly when a Canadian is being detained in that country. Although decisions to interact must be made on a case-by-case basis, they should be made in a way that is politically accountable, and interactions should be strictly controlled to guard against Canadian complicity in human rights abuses or a perception that Canada condones such abuses. In Chapter IX, I recommend a process for making such decisions.

5.3.3.3
RCMP Investigation

Project A-O Canada continued its investigation from October 2002 until after Mr. Arar's return to Canada and took steps to gather as much information about Mr. Arar as it could. The investigation was comprehensive and thorough, and involved co-operation with American agencies. In the end, this extensive investigation of Mr. Arar did not turn up any evidence that he had committed any

criminal offence. Further, there is no evidence indicating that Mr. Arar constitutes a threat to the security of Canada.

5.3.4 Efforts to Obtain Release

5.3.4.1 Mr. Edelson's Letter

On October 31, 2002, Michael Edelson, a lawyer who had previously acted for Mr. Arar, wrote Project A-O Canada a letter requesting confirmation of information it was hoped could be used to try to obtain Mr. Arar's release. Mr. Edelson sought confirmation that 1) the RCMP had not requested that Mr. Arar be deported to Syria; 2) Mr. Arar did not have a criminal record; 3) Mr. Arar was not wanted in Canada for any offence; and 4) Mr. Arar was not a suspect with respect to a terrorism-related offence.

There was considerable discussion within the RCMP about how to respond. On November 16, 2002, Inspector Michel Cabana, the officer in charge of Project A-O Canada, sent a reply confirming only the first two points, adding that it would be improper for the RCMP to comment on Mr. Arar's position in relation to the RCMP investigation and referring Mr. Edelson back to DFAIT. Not surprisingly, the response was of no use to those seeking Mr. Arar's release and return to Canada.

I have two observations to make about this issue. First, the response to Mr. Edelson's request reveals a lack of a coordinated and cohesive approach by Canadian officials with respect to obtaining Mr. Arar's release. The Director General of Consular Affairs at DFAIT was supportive of Mr. Edelson's efforts to obtain a letter. However, the RCMP was of the view that the matter was entirely DFAIT's responsibility and that the RCMP had no role to play. In fact, the RCMP officers were quite upset about even being asked to write a letter. DFAIT and the RCMP had potentially different interests in relation to what should be done. There were no policies or guidelines addressing the need to reconcile differing positions regarding cases of Canadians detained abroad. A process is needed to ensure that Canadian officials proceed in a coherent and co-operative way. In Chapter IX, I recommend such a process.

My second observation about Mr. Edelson's request is that at least one RCMP officer was disinclined to indicate that Mr. Arar was not a suspect because the *bout de papier* received from Syria stated that Mr. Arar had admitted attending a training camp in Afghanistan in 1993. However, in attaching significance to this admission, the officer gave no weight to the fact that the so-called

admission was likely the product of torture. When the *bout de papier* was distributed within the Canadian government, a cautionary note about the likelihood of torture should have been attached.

5.3.4.2
Ambassador and Minister

During the months that Mr. Arar was imprisoned in Syria, Ambassador Pillarella met with General Khalil and other Syrian officials on many occasions. The Ambassador testified that he had stated repeatedly that Canada's position was that Mr. Arar should be released and returned to Canada. According to the Ambassador, there could not have been any doubt in the minds of the Syrians that he, as Canada's representative in Syria, had held that position. However, the Ambassador also testified that dealing with Syrian officials could be difficult. They were not always forthcoming and their practice in regard to prisoners detained in terrorism-related cases was to do what suited their best interests as they saw them.

Ambassador Pillarella testified that the fact that the SMI had permitted Canadian consular access to Mr. Arar was unprecedented. He also described the cordial relationship that he had developed with General Khalil, the head of the SMI. In the end, however, despite the Ambassador's efforts, the Syrian authorities were not responsive to the many requests that Mr. Arar be released.

While no one can say for sure why Mr. Arar was finally released in early October 2003, it does not appear that the Ambassador's entreaties played a role. I do not make this comment as a criticism, but rather to underline the Ambassador's point that making requests of the Syrian authorities was often an exercise in futility.

Canada's Foreign Affairs Minister Bill Graham also became involved in attempting to secure Mr. Arar's release. Beginning in November, plans were made for him to speak directly to Syria's Foreign Minister about Mr. Arar's case. However, a phone call scheduled for November 19, 2002 was delayed to allow the Minister to be briefed on the results of the CSIS trip to Syria, planned for about the same time. It made sense for him to have as much information as possible about Syria's view of Mr. Arar's case before discussing the matter with the Syrian minister. In December, the phone call was further delayed because of scheduling problems. Minister Graham eventually spoke to his Syrian counterpart on January 16, 2003. By then, Syrian officials were alleging that CSIS had said it did not want Mr. Arar returned to Canada. In his phone call, Minister Graham spelled out clearly and forcefully that Canada wanted Mr. Arar returned. I will come back to the alleged statement by CSIS below.

I am satisfied that Minister Graham's message to Syria's Foreign Minister was entirely appropriate and that his decision to become involved in the case was the correct step. Although the Syrian authorities did not respond positively to Minister Graham's entreaty, it was important nonetheless that a senior government minister clearly and firmly state Canada's position to the Syrians. Minister Graham did that.

5.3.4.3
Mixed Signals

5.3.4.3.1
Questions for Mr. Almalki

On January 15, 2003, the Canadian consul, on the instructions of the Ambassador, delivered a letter from the RCMP to General Khalil enclosing a series of questions to be posed to Abdullah Almalki, who, like Mr. Arar, was imprisoned at the Palestine Branch at the time. In the letter, the RCMP offered to share with the SMI "large volumes of highly sensitive documents and information, seized during investigative efforts or obtained from confidential informants associated to terrorist cells operating in Canada."[9]

Among the questions for Mr. Almalki were some about his relationships with a number of individuals, most of whom the SMI would have considered to be very heavily involved in terrorist activities. Mr. Arar, although only a person of interest and not a terrorist suspect, was included with these individuals.

There was conflicting evidence about whether DFAIT had given its approval to the RCMP to send the questions for Mr. Almalki.

In the latter part of 2002, the RCMP and DFAIT's Foreign Intelligence Division, referred to as "ISI," had a number of discussions about sending questions for Mr. Almalki to Syria. ISI witnesses testified that they had believed that a "credible risk" existed that the SMI would use torture in seeking answers to any questions sent and had advised the RCMP against sending questions.

In contrast, RCMP witnesses testified that DFAIT had never advised against sending questions; indeed, Ambassador Pillarella had obviously approved, as he had arranged for delivery of the questions to the SMI.

Ambassador Pillarella stated that he had understood from the RCMP liaison officer (LO) from whom he had received the questions that Ottawa had given its approval. The LO could not recall the conversation. There is virtually no written record of what was discussed among the parties.

What emerges is a complete failure of communication among Canadian officials with regard to whether or not the questions should have been sent. I

am satisfied that DFAIT ISI properly assessed the situation. Sending questions raised a "credible risk" that the SMI would torture Mr. Almalki to obtain answers. In those circumstances, questions should not have been sent.

In any event, what is relevant for the Inquiry is that the questions were delivered to the SMI on January 15, 2003, the day before Minister Graham telephoned Syria's Foreign Minister to ask for Mr. Arar's release. The problem is that providing the questions to the SMI created a risk that the SMI would conclude that the RCMP considered Mr. Arar a serious terrorist threat (which it did not) and that, despite Minister Graham's entreaty, it would decide to hold Mr. Arar until it had completed all of its investigations that might involve Mr. Arar, including the one relating to Mr. Almalki. Ambassador Pillarella testified that, in the Syrian officials' minds, the cases of Mr. Arar and Mr. Almalki had been linked. I have no way of knowing whether the SMI in fact interpreted the letter and questions in this fashion. The fact remains, however, that sending the questions created a risk that they would be interpreted as a "mixed signal" from Canada.

5.3.4.3.2

Alleged CSIS Statement

In early 2003, Syrian officials informed Ambassador Pillarella on three separate occasions that the SMI had been told by CSIS that it did not want Mr. Arar returned to Canada. If true, this would have undermined Canadian efforts to obtain Mr. Arar's release. They did not indicate exactly who at CSIS had made the statement or under what circumstances it had been made. CSIS denied that any of its personnel had made the statement.

Each time Ambassador Pillarella was told about the CSIS statement, he assured the Syrian officials that Canada did want Mr. Arar back. In addition, when Minister Graham spoke with Syria's Foreign Minister by telephone on January 16, Minister Graham specifically raised the matter of the suggestion that Canada did not want Mr. Arar returned and emphasized that the Government of Canada's official and complete position was that Canada wanted him back and that there was no impediment to his return.

It seems to me that, in the circumstances, the Minister's telephone call was a reasonable way to address the concern about the CSIS statement. The Minister made Canada's position very clear and one could reasonably expect that a minister-to-minister conversation would be sufficient to deal with the issue. There was nothing in the responses of the Syrian foreign minister at the time or in the responses of other Syrian officials on hearing of the phone call that signalled that more needed to be done.

The issue remained dormant for about two months, until March 2003, when the Syrian ambassador to Canada, Ahmad Arnous, raised it again. He mentioned it to the two Canadian members of Parliament who were planning to visit Mr. Arar in Syria. The MPs reiterated the official Canadian position that Canada wanted Mr. Arar returned and reported the matter to DFAIT.

DFAIT did nothing further to try to clarify the matter at that time. The fact that the issue surfaced again two months after Minister Graham's phone call is troubling. Without the evidence of Syrian authorities, I cannot know what their thinking might have been about the "CSIS statement." However, it seems to me that, when the issue was raised again in March, more should have been done to address the matter.

It would have been helpful and sensible at that time for DFAIT to have asked that CSIS clarify directly with the SMI that it was not opposed to Mr. Arar's return and that it agreed with the official Canadian position. CSIS should have been asked to dispel any misperception on the part of the Syrians that Canada was sending mixed messages. Unfortunately that did not happen.

5.3.4.4

Visit by Members of Parliament

In the period from late October 2002 to February 2003, the SMI permitted the Canadian consul to meet with Mr. Arar on seven occasions.

Moreover, on April 22, 2003, two Canadian members of Parliament, Marlene Catterall and Sarkis Assadourian, visited Mr. Arar while he was in custody in Syria. They also delivered a letter from Minister Graham to the Syrian foreign minister seeking Mr. Arar's release. In that letter, Minister Graham indicated that there was no impediment to Mr. Arar's return to Canada. The MPs were informed that Mr. Arar was soon to be sent to trial on charges of belonging to al-Qaeda.

The MPs, together with Ambassador Pillarella, met with Mr. Arar for approximately twenty minutes. The meeting was very controlled. The MPs were confined to discussing Mr. Arar's health and family. Mr. Arar was required to answer in Arabic and his responses were then translated for the visitors. Mr. Arar appeared somewhat disoriented and thin. During the meeting, Ms. Catterall assured Mr. Arar that the Canadian government was doing everything it could to have him returned to Canada.

Prior to the meeting with Mr. Arar, Ambassador Pillarella had met with the MPs and told them that the Syrian authorities had serious concerns that Mr. Arar might be involved with al-Qaeda and might have attended a training camp in Afghanistan. Although the source of this latter information was probably the

Syrian interrogation of Mr. Arar, the Ambassador did not caution the MPs that the information was likely the result of torture.

In his report to Ottawa concerning that meeting, Ambassador Pillarella noted that, had the MPs been more fully briefed in Ottawa, they would have reconsidered going to Damascus. Ms. Catterall denied that the Ambassador had been told this and indicated that she did not know where the Ambassador had gained that impression. DFAIT distributed the report of the consular visit to the RCMP and CSIS. I discuss the issue of the distribution of consular reports below.

5.3.4.5
"One Voice" Letter

During the months of May and June 2003, the concern that Syrian officials believed or said that they believed that CSIS did not want Mr. Arar returned to Canada lingered on. DFAIT made a number of proposals for a letter from Canada to Syria seeking Mr. Arar's release. The thrust of the proposals was to send a message that Canada — including the RCMP and CSIS — spoke with one voice in seeking Mr. Arar's release and that there was no reason Mr. Arar could not be returned to Canada. There were a number of meetings or discussions between officials from DFAIT, the RCMP and CSIS to discuss the "one voice" letter. However, in my view, the RCMP and CSIS were not supportive of DFAIT's efforts.

The first proposal was for a letter to be signed by both the Minister of Foreign Affairs and the Solicitor General, the minister responsible for the RCMP and CSIS. Initially, DFAIT suggested that the letter state that there was "no evidence" that Mr. Arar was a member of al-Qaeda or was involved in terrorist activity. In point of fact, the RCMP, the lead Canadian investigator, had no evidence to lead it to suspect that Mr. Arar had committed any offence. He was merely a person of interest, whom the RCMP wished to interview as a witness because of certain associations with others suspected of terrorism-related activity.

The RCMP and CSIS objected, understandably I think, to the unequivocal nature of the proposed "no evidence" language, taking the position that there was information that made Mr. Arar a person of interest to the Canadian investigators. However, the result of that objection was that CSIS advised the Solicitor General "very strongly" against signing any letter. Moreover, when the proposal evolved into the idea of a letter from the Minister of Foreign Affairs alone, the RCMP, with CSIS approval, suggested language that was unhelpful and indeed overstated Mr. Arar's status. It indicated that "Mr. Arar was a subject of a national security investigation," when he was not. This language would have had a prejudicial effect on DFAIT's efforts to have Mr. Arar released.

In the end, the Minister of Foreign Affairs did not send a letter and the Prime Minister did. I will come back to the Prime Minister's letter.

I conclude that the RCMP and CSIS should have supported DFAIT's efforts to obtain a "one voice" letter, because of a number of factors. First, it was clear, or should have been clear, to everyone that Mr. Arar's human rights had been and likely continued to be seriously abused. Syria's reputation for mistreating prisoners was well known and the likelihood of Mr. Arar receiving a fair trial in Syria was remote. By this time, it was also clear that the U.S. authorities had relied on information from Canada in removing Mr. Arar to Syria using their questionable practice of extraordinary rendition. In addition, the official Canadian position was that Canada should seek Mr. Arar's release. Next to the Prime Minister, the Minister of Foreign Affairs was the most senior Canadian official politically accountable for handling Mr. Arar's case. Minister Graham wanted Mr. Arar released. Moreover, it was likely that the support of CSIS and possibly the RCMP would be very important to the Syrian government. It was well known that the SMI, which was holding Mr. Arar, would be more influenced by the views of a security intelligence agency (CSIS) than those of a politician (Minister Graham). Finally, Mr. Arar, a Canadian husband and father, had been separated from his young family for over half a year.

Had the RCMP and CSIS put their minds to the task and approached it with a view to offering real support, they could have done so. In the end, proposing a letter that inaccurately said that Mr. Arar was a subject of a national security investigation was not helpful.

In Chapter IX, I recommend a protocol for addressing situations such as Mr. Arar's in the future. When Canadians are detained abroad in connection with a terrorism-related matter, there should be a consultative and coherent process for developing a Canadian course of action. Decisions should be made in a politically accountable way and, once a course of action is adopted, all agencies should be supportive.

5.3.4.6
Prime Minister's Letter

When DFAIT's initiatives to obtain a "one voice" letter that would be helpful in obtaining Mr. Arar's release stalled, DFAIT struck on the idea of obtaining a letter from the Prime Minister.

As a result, the Prime Minister sent a letter seeking Mr. Arar's release to Syria's President through an envoy, Senator Pierre De Bané. The letter, delivered on July 22, 2003, stated that there was no Canadian impediment to Mr. Arar's return. It did not contain the "no evidence" language about which

the RCMP and CSIS had expressed concern. In the end, the letter coming from Canada's Prime Minister likely went a long way towards sending the message that all Canadian agencies, including the RCMP and CSIS, wanted Mr. Arar returned. I note that the letter was sent about three and a half months after DFAIT first attempted to obtain a "one voice" letter.

5.3.5 Consular Services

5.3.5.1 Consular Visits

In the period of approximately one year during which he was imprisoned in Syria, Mr. Arar had nine consular visits. Mr. Martel, the Canadian consul, was the only person permitted to visit him, except once, on April 22, 2003, when the two Canadian members of Parliament, Marlene Catterall and Sarkis Assadourian, and Ambassador Pillarella were allowed to see him.

I am satisfied that Mr. Martel and Ambassador Pillarella did everything reasonably possible to obtain access to Mr. Arar. Mr. Arar is a dual citizen of Canada and Syria. The Syrian government, however, does not recognize any other citizenship if a person was born in Syria, as is the case with Mr. Arar. It consequently does not accept that a dual citizen is entitled to consular services from another country. Given this position, the ability of Canadian officials to obtain access to Mr. Arar depended entirely on the willingness of the SMI to grant what it considered favourable treatment. Over time, the SMI became much less responsive to requests to visit Mr. Arar. I believe Ambassador Pillarella and Mr. Martel exercised good judgment in seeking as much access as possible without unduly provoking Syrian officials.

Dealing with a country such as Syria, which may act arbitrarily and unpredictably, can at times require difficult decisions about how hard to press requests. While some might have adopted a more aggressive approach with Syrian officials, I see no reason to question the judgments the Ambassador and Mr. Martel made at the time.

5.3.5.2 Consular Reports

I am satisfied that, with the exception of the report on the August 14, 2003 visit, the reports of the consular visits were satisfactory.

Admittedly, the reports did not describe the terrible conditions in which Mr. Arar was being held. However, the controlled nature of the visits made it

impossible for Mr. Martel to explore this issue with him. The one exception in this respect occurred during the August 14 visit, when Mr. Arar told Mr. Martel that he was being held in a cell that measured three by six by seven feet. This was important information, yet Mr. Martel failed to include it in his report. During that visit, Mr. Arar also told Mr. Martel that the press would know the truth when he returned home, suggesting that he did not consider it wise to provide details about his treatment while still in Syrian custody.

During the August 14 visit, Mr. Arar also said that he had not been beaten, tortured or paralyzed. Mr. Martel was understandably sceptical of this last comment, yet his report made no reference to his scepticism. As I indicate below, the report was distributed to other agencies and Mr. Arar's statement about not being tortured was accepted by some as fact.

After the August 14, 2003 consular visit, Minister Graham made a public statement to the effect that Mr. Arar had had an independent consular visit — which he had not — and had said he had not been tortured. While Mr. Arar had made such a statement, its accuracy was highly doubtful. It appears that the Minister had not been fully or properly briefed. His statement that Mr. Arar had said he had not been tortured was particularly unfortunate, as that piece of misinformation became the accepted fact for many and worked most unfairly against Mr. Arar.

DFAIT distributed a number of the consular reports on visits with Mr. Arar, including the report of the August 14 visit, to the RCMP and/or CSIS. Consular visits are intended to assist detainees, not to help collect information for investigative agencies. Reports of consular visits should accordingly be kept confidential except in certain specified situations. The purpose behind distributing the reports about Mr. Arar to the RCMP was ostensibly to assist Mr. Arar by dissuading RCMP officers from travelling to Syria in connection with his case. However, that purpose was never communicated to either the RCMP or CSIS, and the reports were used as part of the investigative file. Moreover, the Consular Affairs Bureau distributed the report of the August 14 visit, which stated that Mr. Arar had said he had not been tortured, to others without attaching an explanatory note indicating that this statement should be viewed with serious scepticism. In the recommendations in Chapter IX, I address issues relating to consular visits and the preparation and distribution of consular reports.

5.3.5.3
Legal Assistance

Prior to August 14, 2003, consular officials did not take any steps to obtain a lawyer in Syria for Mr. Arar. In my view, this was understandable. Clearly, it

would have been possible for consular officials to put Mr. Arar's family in touch with a lawyer, or to at least suggest they contact one. However, Mr. Martel considered that retaining a lawyer at that time would be pointless, as the SMI was still investigating, there were no charges, and there were no legal proceedings underway. As a matter of practice, Syria did not permit lawyers to have access to detainees.

On August 14, the SMI indicated that Mr. Arar would be going to trial shortly. A search for the best lawyer began. Consular officials were strongly of the view that Mr. Arar and his family should retain a particular lawyer and conveyed that preference to the family. I am satisfied that their preference was motivated solely by Mr. Arar's best interests. In any event, in relatively short order, before any legal steps were necessary, the family retained counsel of its own choice. Consular officials could have acted more quickly in providing that lawyer with assistance; however, it is important to note that, throughout this period, the Syrians did not inform anyone of the charges against Mr. Arar and the case remained rather amorphous. I have no doubt that, if the case had crystallized, consular officials would have been as supportive as they could of Mr. Arar and his counsel.

5.3.5.4
Mr. Arar's Release

On October 5, 2003, Mr. Arar was released to Mr. Martel. Mr. Arar had lived through a nightmare. While the physical beatings had ended after the first few weeks, the conditions of his imprisonment in the Palestine Branch had been abysmal. He had been confined in a tiny cell with no natural light. He had slept on the floor and endured disgusting sanitary conditions. Mr. Arar had suffered enormously. He continues to experience the after-effects to this day.

Mr. Martel accompanied Mr. Arar back to Canada, where Mr. Arar was reunited with his family at the Montréal–Dorval International Airport on October 6, 2003.

5.4
POST-RETURN

5.4.1
Mr. Arar's Statement

On the plane trip home to Canada, Mr. Arar related to Mr. Martel some of what had happened to him in Syrian detention. Among other things, he told him that he had had a "difficult time" during the first two weeks of detention and that he

had been hit from time to time, but nothing really serious. He also described the degrading conditions of imprisonment.

On October 7, 2003, at a meeting with DFAIT officials, Mr. Martel repeated what Mr. Arar had told him on the trip home — that he had been "beaten" occasionally during the first two weeks of detention.

On November 4, 2003, Mr. Arar spoke about his ordeal publicly for the first time. In his public statement, he described how he had been beaten while being interrogated by his Syrian jailers during the first two weeks of his detention. I note that the description of the abuse Mr. Arar gave during his press conference was essentially the same, albeit more detailed, as that he had given Mr. Martel on the plane trip home.

In November 2003, Mr. Martel prepared a memorandum and other written communications in which he stated that Mr. Arar had not told him during the trip home that he had been beaten while in Syrian custody.

In his testimony, Mr. Martel acknowledged that these were incorrect. He explained that he had prepared them from memory and had forgotten that Mr. Arar had told him that he had been beaten.

The reason I raise these written communications is to point out the potential harm that can flow from recording information inaccurately. After Mr. Arar's return, some officials in the Canadian government did not believe Mr. Arar's public statements that he had been beaten or tortured. As it turns out, their conclusions were wrong. Mr. Arar had indeed been beaten and physically tortured during the first two weeks of his imprisonment in Syria. Inaccurate memoranda and other written communications such as those I refer to above can contribute to and support false conclusions. The need for accurate and fair reporting is obvious.

5.4.2 Leaks

When Mr. Arar returned to Canada, his torment did not end, as some government officials took it upon themselves to leak information to the media, much of which was unfair to Mr. Arar and damaging to his reputation.

Over a period of time, Government of Canada officials intentionally released selected classified information about Mr. Arar or his case to the media. The first leak occurred in July 2003, even before Mr. Arar's return to Canada, and the leaks intensified in the period immediately following his return in October 2003.

There were at least eight media stories containing leaked information about Mr. Arar and/or the investigation that involved him. Typically, the leaked information was attributed to an unnamed government official, an official closely

involved in the case, or some similar source. Some of the leaks sought to portray Mr. Arar as someone who had been involved in terrorist activities, mentioning, for example, that he had trained in Afghanistan. In one, he was described as a "very bad guy;"[10] in another, the source was reported to have said that the guy was "not a virgin,"[11] adding that there was more there than met the eye.

Several of the leaks were inaccurate, unsupported by the information available from the investigations, and grossly unfair to Mr. Arar. At least one leak sought to downplay the mistreatment and torture Mr. Arar had suffered in Syria.

The most notorious of the leaks occurred on November 8, 2003, when information from classified documents was published in the *Ottawa Citizen*, in a lengthy article by Juliet O'Neill that contained a large amount of previously confidential information.

The O'Neill article reported that security officials had leaked allegations against Mr. Arar in the weeks leading to his return to Canada "in defence of their investigative work — against suggestions that the RCMP and the Canadian Security Intelligence Service had either bungled Mr. Arar's case or, worse, purposefully sent an innocent man to be tortured in Syria."[12] This rationale implies that officials believe leaking confidential information is justified if it suits the interests of investigators. According to this thinking, leakors get to be selective — picking and choosing what to leak to paint the picture that suits their interests.

There have been several investigations into the sources of the Arar leaks. To date, none of the sources have been identified. All witnesses at the Inquiry who were asked about them denied any knowledge. The sources of the leaks appear to be a complete mystery to everyone and the prospects of identifying those responsible seem uncertain at best. The only remaining investigation is the criminal investigation into the O'Neill leak, which is now two years old.

Leaking confidential information is a serious breach of trust. Obviously, it is important that all available steps be taken to prevent it.

Quite predictably, the leaks had a devastating effect on Mr. Arar's reputation and on him personally. The impact on an individual's reputation of being called a terrorist in the national media is severe. As I have stated elsewhere, labels, even unfair and inaccurate ones, have a tendency to stick.

Professor Toope, the fact-finder I appointed to report on the circumstances of Mr. Arar's detention in Syria, has indicated that the leaks have had severe psychological and emotional impacts on Mr. Arar. Moreover, Mr. Arar, an educated, hard-working engineer, has had great difficulty finding employment. It seems likely that the smear of his reputation by the leakors has taken its toll.

5.4.3
Incomplete Briefing

When briefing the Privy Council Office and senior government officials about the investigation relating to Mr. Arar, the RCMP omitted certain key facts that could have reflected adversely on its investigation.

After Mr. Arar's press conference on November 4, 2003, the RCMP was asked to prepare a detailed timeline relating to the Arar investigation to assist the government in deciding how to proceed, including in particular whether to call a public inquiry.

On November 14, the RCMP produced a timeline that omitted several significant facts. It did not disclose that, throughout its investigation, the RCMP had provided information to American agencies without attaching written caveats, as required by RCMP policy. It also failed to reveal that, in April 2002, the RCMP had taken the unprecedented step of supplying its entire Supertext database containing the relevant investigation file to the U.S. agencies, and that it had done so without screening the information for relevance or accuracy and without attaching caveats, as required by policy. The timeline also did not disclose that the RCMP had contacted U.S. Customs to request border lookouts for Mr. Arar and his wife and, in doing so, had described them as Islamic extremists suspected of having links to al-Qaeda. Moreover, the timeline omitted to mention the two phone calls that Corporal Flewelling of RCMP CID had had with an American agent on October 4 and 5, 2002, during the critically important time Mr. Arar was being detained in New York.

These omissions were serious and the effect of the timeline was to downplay the potential problems with the RCMP investigation. In the circumstances that existed in November 2003, it was very important that the RCMP accurately brief the government on what had occurred, to enable the government to make an informed decision on how to proceed. Since the RCMP had in effect been asked to report on itself, there was a heightened obligation for it to be complete and forthcoming. I would expect that, in future, briefings such as that provided through the timeline would be accurate and balanced.

Notes

1 Order in Council P.C. 2004–48, Appendix 1(A).

2 "Caveats" are written restrictions on the use and further dissemination of shared information.

3 Exhibit C-30, Tab 44.

4 Changes were made to the structure and organization of Foreign Affairs and International Trade over recent years. Prior to and during Mr. Arar's ordeal, it was a single entity (DFAIT). In 2004, two separate departments (Foreign Affairs and International Trade) were created. Recently, the two departments were reintegrated. In this report, I refer to DFAIT or Foreign Affairs, as appropriate.

5 I refer to "Canada Customs" frequently throughout this report. Prior to December 12, 2003, Canadian customs operations came under the Customs branch of the Canada Customs and Revenue Agency (CCRA). They have since come under the Canada Border Services Agency (CBSA). This change in organizational structure is not significant for the purposes of my report.

6 Exhibit C-30, Tab 44.

7 This is one instance where I might arrive at a different conclusion if Mr. Arar were to testify.

8 See Chapter IX.

9 Exhibit C-359, Tab 10.

10 Exhibit P-80, pp. 1–2. Robert Fife, "Terror threats in Ottawa: Two kinds of fear: Report says Syrian intelligence helped U.S. to foil al-Qaeda plot on target in Ottawa," *Ottawa Citizen* (July 24, 2003), A1.

11 Ibid., pp. 7–8, Robert Fife, "U.S., Canada '100% sure' Arar trained with al-Qaeda: Family spokeswoman accuses intelligence officers of anonymous smear campaign," *Ottawa Citizen* (December 30, 2003), A1.

12 Ibid., pp. 5–6, Juliet O'Neill, "Canada's dossier on Maher Arar: The existence of a group of Ottawa men with alleged ties to al-Qaeda is at the root of why the government opposes an inquiry into the case," *Ottawa Citizen* (November 8, 2003), A1.

II
Maher Arar and the Right to Be Free From Torture

1.
OVERVIEW

Maher Arar lived through a nightmare that included being tortured at the hands of the Syrian Military Intelligence. This chapter describes the nature of the right to be free from torture, as well as Mr. Arar's personal circumstances and his own account of the horrendous experiences he endured.

2.
PROHIBITION ON TORTURE

In a recent address, the Secretary-General of the United Nations said, "Let us be clear: torture can never be an instrument to fight terror, for torture is an instrument of terror."[1] That statement succinctly captures the special nature of the right to be free from torture: it is absolute. Some human rights, such as the right to privacy, may be lawfully suspended under certain conditions in the name of public emergency. This is made explicit in international human rights treaties such as the International Covenant on Civil and Political Rights and is implicit in Canada's constitutional standards. But the right to be free from torture is different, in a very important way.

The infliction of torture, for any purpose, is so fundamental a violation of human dignity that it can never be legally justified. Article 5 of the Universal Declaration of Human Rights provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[2] The same prohibition is found in the International Covenant on Civil and Political Rights[3] and all regional human rights instruments.[4] Torture is specifically prohibited in times of armed conflict by international humanitarian law, including the Geneva Conventions of 1949[5] and their two Additional Protocols.[6] Two international

instruments deal specifically with torture: the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations Torture Declaration)[7] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).[8] In adhering to these treaties, Canada has manifested its commitment to uphold the right to be free from torture.

Under the Convention Against Torture, a state party is bound to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.[9] But the prohibition in the Convention Against Torture extends beyond the act of torture itself. States party may contravene their treaty obligations when they consent to or acquiesce in torture inflicted by another state. For example, article 3 prohibits a state party from expelling, returning or extraditing a person to another state where there are substantial grounds for believing that the person would be in danger of being subjected to torture.[10] In addition, as Professor Peter Burns, an expert on the international prohibition against torture, testified at the Inquiry, a state may contravene the Convention Against Torture if it shares information with a regime known to practice torture with the knowledge that the transfer of information would be used for the purpose of torture.[11]

Article 2, paragraph (2) of the Convention Against Torture makes the absolute nature of the prohibition against torture very clear: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[12] Indeed, the prohibition against torture in international law is so fundamental that it has reached the level of a *jus cogens* norm — a peremptory norm, which overrides any contradictory customary international law, treaty law, or state practice.[13]

Domestically, the *Canadian Charter of Rights and Freedoms* confirms the absolute rejection of the use of torture. In a recent case, the Supreme Court of Canada characterized torture as "so inherently repugnant that it could never be an appropriate punishment, however egregious the offence."[14] Torture is also a criminal offence in Canada. Subsection 269.1(1) of the *Criminal Code* of Canada provides that "Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."[15] The *Criminal Code* in fact does more than criminalize specific acts of torture, in that its provisions relating to attempts,

conspiracies, counselling and parties apply to the offence of torture in the same way they apply to other criminal offences.

Canada has adopted the definition of torture set out in article 1 of the Convention Against Torture.[16] "Torture" is any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining information or a statement, punishing, or intimidating or coercing that person, or for any reason based on discrimination of any kind, but does not include any act or omission inherent in lawful sanctions.[17] It is no defence that the act or omission was ordered by a superior or took place in exceptional circumstances such as a state of war, a threat to war, internal political instability or any other public emergency.[18] Further, under section 269.1, any evidence obtained as a result of the commission of an offence is inadmissible in "any proceedings over which Parliament has jurisdiction."[19]

3.
MAHER ARAR

Maher Arar is a Canadian citizen. He was born in Syria in 1970 and, as a teenager, immigrated to Canada with his family, which settled in Montreal.

Mr. Arar is a highly educated person. Upon completing high school in 1989, he attended Ahuntsic CÉGEP, in the sciences stream. After graduating in 1991, he enrolled at McGill University, from which he obtained a Bachelor of Engineering in Computers in 1995. He then went on to specialize, earning a Master's degree in Telecommunications from the University of Quebec's *Institut national de la recherche scientifique*.[20]

While at McGill, Mr. Arar met Monia Mazigh, and the two later married. Ms. Mazigh completed a doctorate in Finance at McGill University in 2001. The couple has two young children, a girl and a boy.[21]

In 1997, the family moved from Montreal to Ottawa, where Mr. Arar, a professional in the telecommunications engineering field,[22] took a job with a high tech firm. In 1999, Mr. Arar followed career opportunities to the United States, taking a position with a Boston firm, The MathWorks, Inc. His job involved extensive travel between Canada and the United States.[23]

Mr. Arar is a practicing Muslim. As discussed below, one of the devastating effects of Mr. Arar's experiences has been his sense of disconnect from the Ottawa Muslim community since his return to Canada.

As regards Mr. Arar's personal character, the fact-finder for the Commission, Professor Stephen Toope,[24] indicated that Mr. Arar is a hardworking person who values his professionalism immensely, is strongly committed to his family, and derives a large part of his sense of self from his ability to provide for it. Professor

Toope remarked that "Mr. Arar strikes me as a person with what one might describe as moral courage."[25]

3.1
MAHER ARAR'S EXPERIENCES

The Inquiry was called because of what Mr. Arar lived through from September 26, 2002, when he boarded an airplane in Switzerland, to October 6, 2003, when he arrived home in Canada. His story is harrowing.

Unless otherwise noted, the facts that follow are taken from Professor Toope's report.

On September 26, 2002, Mr. Arar, who had been in Tunisia with his family, was returning to Canada by plane via Switzerland and the United States. He boarded an American Airlines flight in Zurich and, at about two o'clock in the afternoon, arrived in New York, where he was pulled aside by American customs officials. Two hours later, he was fingerprinted and photographed, and told this was regular procedure. His possessions were searched and his passport photographed.[26]

Mr. Arar was then placed under arrest and strip-searched, an experience he found "humiliating." He was held, first at the John F. Kennedy International Airport and later at the Metropolitan Detention Centre, for 12 days, during which time he was interrogated by American officials. Initially, he was denied access to a lawyer. His request to pray during the interrogation sessions was denied.

On October 8, 2002, Mr. Arar was awakened at three o'clock in the morning and told that he was to be removed to Syria. Mr. Arar told Professor Toope that, at that point, he had begun to cry and say that he would be tortured if sent to Syria. He said he had felt "destroyed."

Mr. Arar was taken to New Jersey, put on a corporate jet, and flown to Amman, Jordan, with brief stops in Washington, D.C., Portland, Maine, and Rome, Italy. Throughout the journey, he was chained and shackled in the back of the plane. The shackles were removed only at the end of the trip, when he was given the opportunity to have a meal with his guards. He could not eat.

It was the middle of the night when he arrived in Amman and was transported to a detention centre. He had not slept since leaving New York. He suffered blows at the hands of his Jordanian guards and was blindfolded. He was then taken into a room, where the blindfold was removed. He was asked routine questions and then blindfolded again before being led to a cell. The next morning, he was told that he was going to Syria. Later that day, he was blindfolded and put into a car or van. By the time he arrived at his destination at around five o'clock in the afternoon, Mr. Arar was exhausted, hungry, and

terrified. His blindfold was removed, and he saw portraits of Presidents Assad, father and son. Mr. Arar later learned that he was in Syria, in the Far Falestin detention centre, also called the Palestine Branch, which was run by the Syrian Military Intelligence (SMI).

Later that day, Mr. Arar was interrogated for approximately four hours by a man called "George," subsequently identified as George Salloum, the head interrogator at the Palestine Branch. Two other interrogators were present, taking notes. The questions mostly concerned his family.

Mr. Arar told Professor Toope that, at this point, he had decided to "say anything" necessary to avoid torture. Although no physical violence was used during this interrogation session, ominous threats were made. Whenever Mr. Arar was slow to answer, George would threaten to use "the chair," a reference Mr. Arar did not understand.

By the next day, October 9, 2002, Mr. Arar was even more exhausted, as he had not been able to sleep in the cell. He was called up for interrogation. When George arrived, he immediately started hitting Mr. Arar. The chair on which Mr. Arar had been sitting was taken away, so that he was now on the floor.

George brought a black cable, which might have been a shredded electrical cable, about two feet long, into the room with him. Mr. Arar told Professor Toope that, when he had seen the cable, he had started to cry. George told Mr. Arar to open his right hand, then raised the cable high and brought it down hard. Mr. Arar recalled the moment vividly; he told Professor Toope that he had felt like a bad Syrian school boy. He stood up and started jumping, but he was forced back down and the process was repeated with his left hand.

Mr. Arar was then made to stand near the door, and the questions began. The theme throughout was "you are a liar." He was given breaks, during which he was put into a different room, where he could hear other people screaming. Sometimes, he was blindfolded and left to stand in the hallway for an hour or more. The screaming continued. Each time Mr. Arar was brought back into the interrogation room, he was beaten about the upper body and asked more questions. On the second day in the Palestine Branch, the interrogation lasted approximately 10 hours.

Day three, October 11, 2002, was the most "intensive" for Mr. Arar. He was questioned for 16 to 18 hours, and was subjected to great physical and psychological abuse. The questions were in part about Abdullah Almalki. Mr. Arar was beaten with the black cable on numerous occasions throughout the day, and was threatened with electric shock, "the chair" and "the tire."[27] The pattern was three or four lashes with the cable, then questions, followed by more

beating. After a while, he became so weak that he was disoriented. He remembers being asked if he had trained in Afghanistan. By this time, he was so afraid and in so much pain that he replied, "If you want me to say so." He was asked which border he had crossed and whether he had seen Mr. Almalki in Afghanistan. Mr. Arar told Professor Toope that he had urinated on himself twice during this questioning, and had had to wear the same clothes for the next two and a half months. He had been "humiliated."

Mr. Arar was questioned about his relationships with various people, his family, his bank accounts, and his salary. His interrogators could not understand what he did for a living. They did not believe his description of providing services in the computer sector or the amount he said he was paid in salary, which they thought impossibly high. Mr. Arar was beaten for these "lies."

After the beatings on the third day, the interrogation became less intense physically. There was much less use of the cables, and more punching and hitting. On October 16 or 17, even those beatings diminished. However, the threats intensified, and the psychological pressure remained extreme. For example, Mr. Arar was put in "the tire," though not beaten. Warnings about "the chair" were also used to scare him. At the end of each interrogation session, an interrogator would say "tomorrow will be tough" or "tomorrow will be worse for you." Mr. Arar found it almost impossible to sleep for more than two or three hours a night.

Mr. Arar's conditions of detention were atrocious. He was kept in a basement cell that was seven feet high, six feet long, and three feet wide. The cell contained only two thin blankets, a "humidity isolator," and two bottles — one for water and one for urine. The only source of light in the cell was a small opening in the middle of the ceiling, measuring roughly one foot by two feet. According to Mr. Arar, cats would sometimes urinate through the opening. There were also rats in the building; Mr. Arar stuffed shoes under the door to his cell to prevent them from entering. The cell was damp and very cold in the winter and stifling in the summer. Mr. Arar was known to guards only by his cell number: Two.

Over time, as the beatings diminished in intensity, the most disturbing aspect of Mr. Arar's detention came to be the daily horror of living in the tiny, dark and damp cell all alone and with no reading material (except the Koran later on). While at first the cell was a refuge from the infliction of physical pain, later it became a torture in its own right. Mr. Arar described for Professor Toope nights alone in his cell, when he had been unable to sleep on the cold concrete floor and had had to turn over every 15 minutes or so. He had thought of his

family constantly, worrying about their finances and safety, and had been "bombarded by memories."

Mr. Arar remained in this cell for 10 months and 10 days, during which he saw almost no sunlight other than when he was transferred for consular visits. His first visit to the courtyard of the prison did not take place until April 2003. Mr. Arar described the cell as "a grave" and a "slow death." By June or July of 2003, he had reached his limit. Although he had tried to keep in shape by doing push-ups and pacing in his cell, he was losing all hope and stopped his modest exercise regime.

In July 2003, one of his interrogators, "Khalid," upon seeing him for the first time in months, told Mr. Arar that his wife would divorce him if she saw him as he was then: thin, listless and crying. The consular visits with Léo Martel, the Canadian consul, provided a little hope and some connection to Mr. Arar's family, but Mr. Arar also found them immensely "frustrating."

On August 20, 2003, Mr. Arar was transferred to Sednaya Prison, where conditions were "like heaven" compared with those in the Palestine Branch. On October 5, 2003, he was released from custody after signing a "confession" given to him in court by a Syrian prosecutor.

3.2
EFFECTS OF TORTURE

The fact-finder for the Inquiry concluded that Mr. Arar's treatment in Syria constituted torture within the meaning of article 1 of the Convention Against Torture. I agree. The consequences of Mr. Arar's ordeal have been profound, and include physical, psychological, family and community, and economic effects.

The purely physical effects of the torture suffered by Mr. Arar were mostly short-lived. This is consistent with Mr. Arar's account that physical force had been used as part of the interrogation process at the beginning of his detention. His detention in Sednaya Prison toward the end of his time in Syria also gave him a chance to heal physically.

Mr. Arar nevertheless had some physical complaints upon his return to Canada and over the following three to four months. He experienced hip pain, which was likely connected with his sleeping in cramped and damp quarters on a hard floor for over 10 months. He also complained of pain around his face and head and in his neck, shoulders and lower back. Bad dreams continue to disrupt Mr. Arar's sleep, and he suffers from stress and headaches.

Psychologically, Mr. Arar's experiences in Syria were devastating. When Mr. Arar returned to Canada, he was in a "fragile" state. He was suffering from post-traumatic stress and did not know whom to trust. Mr. Arar's distrust is

rooted in continuing fear. Professor Toope reported that Mr. Arar could not yet contemplate travel by air, even within Canada. He was afraid that the plane might be diverted to the United States and, if this occurred, he might be seized and the ordeal might begin again. He was afraid that he would not be able to resume any kind of "normal" life. He was afraid that his story would not be believed.

Professor Toope noted that even the Commission of Inquiry process itself has caused Mr. Arar and his family anxiety and stress. Mr. Arar's focus on the Inquiry and on his "security" concerns has become a significant source of tension within the family. Professor Toope observed that Mr. Arar was particularly disturbed by certain "leaks" from sources allegedly inside the Canadian government that cast him in a negative light. According to Professor Toope, Mr. Arar was "devastated" by those leaks.

Mr. Arar's ordeal has had a profound effect on his family life. Dr. Mazigh told Professor Toope that she had married a focused, easygoing, patient man. She described that man as an optimistic person who had believed that he could work hard and make a good life for his family. Mr. Arar had apparently been very caring with their daughter, born in 1997, and had been a patient father. His son, born in 2002, had turned out to be colicky, and so Mr. Arar had often taken the baby for car rides to try to settle him. As it turned out, Mr. Arar was absent for much of the boy's second year of life.

Dr. Mazigh had found the contrast between that man and the man who had arrived home from Syria shocking. He had been submissive, without any light in his eyes. Dr. Mazigh reported that, for many weeks, Mr. Arar had seemed "confused." He would pace back and forth as he talked to his wife. He was always tired. He told Dr. Mazigh that he just wanted "a normal life," which to him meant a life without conflict.

Professor Toope also noted that, since his return, Mr. Arar has had a difficult relationship with the Muslim community in Canada. Mr. Arar stopped going to the mosque that he had previously attended. He told Professor Toope that he was disappointed at the reaction of many Muslims to him and his story. He felt that this distancing had been exacerbated by the press leaks mentioned previously.

Finally, Mr. Arar's ordeal has had devastating economic effects. Mr. Arar went from being an engineer and a member of the middle class, to having to rely on social assistance to help feed, clothe and house his family. He told Professor Toope that not being employed was "destroying" him. By the conclusion of the Inquiry, Mr. Arar had finally been offered a small, part-time position as a computer advisor in his daughter's school. However, this was little

comfort for a man who had derived a large part of his sense of self from his professionalism and ability to support his family.

3.3
MR. ARAR'S REPUTATION

Mr. Arar has asked that I "clear his name." His concern, understandably, is that the publicity surrounding his case has raised suspicions that he has been involved in illegal activities. Unfortunately, Mr. Arar has been the subject of a good deal of publicity, some of which has inaccurately portrayed his status in Canadian investigations and his possible connections to terrorist activities. The result has been that Mr. Arar, already the victim of inhumane and degrading treatment in Syria, has been subjected to further suffering owing to the release of information that has unfairly damaged his reputation here in Canada.

I have heard evidence concerning all of the information gathered by Canadian investigators in relation to Mr. Arar. This includes information obtained in Canada, as well as any information received from American, Syrian or other foreign authorities. I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada.

The public can be confident that Canadian investigators have thoroughly and exhaustively followed all information leads available to them in connection with Mr. Arar's activities and associations. This was not a case where investigators were unable to effectively pursue their investigative goals because of a lack of resources or time constraints. On the contrary, Canadian investigators made extensive efforts to find any information that could implicate Mr. Arar in terrorist activities. They did so over a lengthy period of time, even after Mr. Arar's case became a *cause célèbre*. The results speak for themselves: they found none.

Of course, it is virtually impossible to establish a negative, that is, to establish that Mr. Arar has never been involved in any illegal activities connected with national security. The same would hold true for any individual. However, my conclusion, coupled with the RCMP's position that Mr. Arar was never even a suspect in its investigation — that, at most, he was a person of interest[28] — should remove any taint or suspicion about Mr. Arar that has resulted from the publicity surrounding his case.

3.4
A MISPERCEPTION GROWS

At the beginning of the Inquiry, many people within government and likely some members of the public believed that Mr. Arar had not been tortured while in Syria and that he had voluntarily admitted links to terrorist activities.

It is instructive and disturbing to trace how this misunderstanding grew. Let me recount a few of the milestones. After the Canadian consul first visited Mr. Arar in Syrian custody on October 23, 2002, it should have been apparent that Mr. Arar had likely been tortured in the preceding two weeks. Some Canadian officials, including Gar Pardy, Director General of Consular Affairs at DFAIT, operated on that assumption. However, others did not, saying they required more evidence.

At the beginning of November 2002, the Syrian Military Intelligence gave Canada's ambassador a brief summary of a statement Mr. Arar had apparently given Syrian authorities during his first two weeks in custody. In that statement, Mr. Arar had said that he had attended a training camp in Afghanistan in 1993. DFAIT distributed the statement to the RCMP and CSIS without attaching a note cautioning that it was likely the product of torture and that, even if true, the admission was of doubtful significance for establishing terrorist links.

In late April 2003, a briefing note to the RCMP Commissioner indicated that Mr. Arar had "volunteered" to Syrian authorities that he had attended a training camp in Afghanistan in 1993, the implication being that he might have terrorist links.

In July 2003, the Syrian Human Rights Committee[29] published a report saying Mr. Arar had been tortured while in Syrian custody. The Canadian consul visited Mr. Arar on August 14, 2003. Syrian officials were present throughout the visit, and Mr. Arar, who was anxiously hoping to be released, was very careful about what he said in front of them, indicating that the truth would come out when he returned to Canada. He also stated that he had not been tortured, beaten or paralyzed. Understandably, the consul was sceptical of this last comment, given the circumstances in which it was made.

Later the same day, Canada's Minister of Foreign Affairs made a public statement about the consular visit. He had not been properly briefed. He indicated that, during an "independent" visit, Mr. Arar had confirmed that he had not been tortured. This statement created an inaccurate picture, as the visit had not been independent. Syrian officials had been present throughout. Moreover, the Minister made no reference to the need to view Mr. Arar's statement about not being tortured with scepticism.

When Mr. Arar was released on October 5, 2003, he flew back to Canada with the Canadian consul. He gave the consul some details about his ordeal, stating that he had been beaten on occasion during the first two weeks of his detention. The consul reported his conversations to other officials at DFAIT a few days later. However, subsequently, in memoranda, he reported that Mr. Arar had said that he had not been beaten. No mention was made of the statements Mr. Arar had made on the plane trip back to Canada.

Mr. Arar first spoke publicly of what had happened to him in early November 2003. He described how he had been beaten during the first two weeks of his imprisonment and had given the Syrians a statement. Although somewhat more detailed, the description was consistent with what he had said on the plane. Professor Toope found Mr. Arar's description completely credible.

In the months following Mr. Arar's release, there were a number of leaks from unnamed government sources indicating that Mr. Arar had admitted to having terrorist links in Syria and stating that he was not a "nice guy" or a "virgin," as would be seen when the truth came out.

It is fair to assume that some government officials and members of the public had the impression that Mr. Arar had admitted to having connections to terrorist activities and they formed a negative impression of him. If nothing else, some assumed that "where there is smoke, there is fire." Certainly, at the beginning of the Inquiry, it was obvious to me that many within government believed that Mr. Arar had not been tortured and that he had voluntarily admitted links to terrorist activity to the Syrians. They were of the view that the truth would come out during the Inquiry.

Well, the truth did come out. When Professor Toope's report was made public over a year later, the government did not challenge the findings in the report and, indeed, through counsel, the government indicated that Mr. Arar had given "a credible" account that he was tortured.

The disturbing part of all of this is that it took a public inquiry to set the record straight. Getting it right in the first place should not have been difficult, and it should not have been a problem to keep the record accurate. However, over time, the misperception grew and seemed to become more entrenched as it was reported.

In this report, I speak often of the need for accuracy and precision when collecting, recording and sharing information. Inaccurate information can have grossly unfair consequences for individuals, and the more often it is repeated, the more credibility it seems to assume. Inaccurate information is particularly dangerous in connection with terrorism investigations in the post-9/11 environment. Officials and the public are understandably concerned about the threats

of terrorism. However, it is essential that those responsible for collecting, recording and sharing information be aware of the potentially devastating consequences of not getting it right.

Notes

1 Kofi Annan, "Message on Human Rights Day" (December 10, 2005) [online] http://www.ohchr.org/english/events/day2005/hrd2005.htm.

2 GA Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [online] http://www.un.org/Overview/rights.html [accessed November 10, 2005].

3 GA Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966)19 December 1966, 999 U.N.T.S. 171, Can.T.S. 1976 No. 47 (entered into force 23 March 1976, in accordance with art. 49). [online] http://www.unhchr.ch/html/menu3/b/a_ccpr.htm [accessed November 10, 2005] (entered into force 23 March 1976, in accordance with art. 49).

4 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5, art. 3 [online] http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf ; American Convention on Human Rights, 22 November 1969, OAS Treaty Series No. 36, 1144 U.N.T.S. 123, art. 5(2) [online] http://www.oas.org/juridico/english/Treaties/b-32.htm; African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 1520 U.N.T.S. 217, art. 5 [online] http://www.achpr.org/english/_info/charter_en.html; Arab Charter on Human Rights, 15 September 1994, art. 13 [online] http://www1.umn.edu/humanrts/instree/arabhrcharter.html [all accessed November 10, 2005].

5 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S. 31, arts. 3, 12, 50 (entered into force 21 October 1950); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, arts. 3, 12, 51 (entered into force 21 October 1950); Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, arts. 3, 13, 14, 130 (entered into force 21 October 1950); Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, arts. 3, 27, 32, 147 (entered into force 21 October 1950) [online] http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions [accessed November 15, 2005].

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3, art. 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609, art. 4 [online] http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions [accessed November 15, 2005].

7 GA Res. 3452(XXX), Annex, 30 UN GAOR Supp. (No. 34) at 91, UN Doc. A/10034 (1975) [online] http://www.unhchr.ch/html/menu3/b/h_comp38.htm [accessed November 10, 2005].

8 GA Res. 39/46, Annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984)10 December 1984, 1465 U.N.T.S. 585, C.T.S. 1987/36 (entered into force on June 26, 1987, in accordance with art. 27 (1)) [online] http://www.ohchr.org/english/law/cat.htm

[accessed November 10, 2005] (entered into force on June 26, 1987, in accordance with art. 27 (1)) [Convention against Torture].

As of October 7, 2005, there were 140 state parties to the Convention against Torture, including Canada (ratified June 24, 1987), Jordan (acceded November 13, 1991), the Syrian Arab Republic (acceded August 19, 2004) and the United States of America (ratified October 21, 1994). Canada, the Syrian Arab Republic and the United States of America have made declarations or reservations with regard to the Convention. Canada has recognized the competence of the Committee against Torture, the treaty body created by art. 17 of the Convention against Torture, to receive and consider communications under art. 21 to the effect that a state party claims that another state party is not fulfilling its obligations under the Convention. The Syrian Arab Republic does not recognize the competence of the Committee against Torture in that regard. Syria has also declared that its accession to the Convention "shall in no way signify recognition of Israel or entail entry into any dealings with Israel in the context of the provisions of this Convention." The United States of America submitted three lengthy reservations at the time of its ratification, relating to the interaction of the Convention and U.S. constitutional law, the definition of torture, and the non-self-executing nature of certain provisions of the Convention. Finland and Sweden have objected to the United States' reservations as being contrary to the nature and purpose of the treaty. The full text of the reservations and objections is available at [online] http://www.ohchr.org/english/countries/ratification/9.htm#reservations [accessed November 10, 2005].

9 Art. 2(1) of the Convention against Torture.

10 Art. 3(1) of the Convention against Torture. See also *Prosecutor v. Anto Furundzija*, ICTY Trial Chamber, IT-95-17/1-T, Judgment (10 December 1998) at para. 144 [online] http://www.un.org/icty/furundzija/trialc2/judgement/index.htm [accessed November 11, 2005]; "Human Rights Committee, General Comment 20, Article 7" (Forty-fourth session, 1992), U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) [online] http://www1.umn.edu/humanrts/gencomm/hrcom20.htm [accessed November 15, 2005]; *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A) (1989) at paras. 86–91 (extradition to the United States for a - capital crime would violate article 3 of the Convention against Torture) [online] http://www.worldlii.org/eu/cases/ECHR/1989/14.html [accessed November 15, 2005].

11 [P] Burns testimony (June 8, 2005), pp. 5850 and 5957. In this respect, art. 4(1) of the Convention against Torture requires that states parties "ensure that all acts of torture are offences under [the] criminal law" and that the same apply to an "act by any person which constitutes complicity or participation in torture."

12 See also [P] Burns testimony (June 8, 2005), pp. 5886–5887.

13 See *Bouzari et al. v. Islamic Republic of Iran*, 71 O.R. (3d) 675 (2004) at para. 87; see also *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147 (H.L.), [1999] H.L.J. No. 12 (QL) per Lord Browne-Wilkinson at para. 28; see also United Nations, "Human Rights Committee, General Comment No. 24," November 4, 1994, para. 10 (the prohibition on torture has the status of a peremptory norm).

14 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at paras. 51, 52. The Court noted that torture would constitute cruel and unusual punishment under section 12 of the Charter.

15 R.S.C. 1985, c. C-46, as amended by R.S.C. 1985, c. 10 (3rd Supp.), s. 2.

16 [P] Burns testimony (June 8, 2005), p. 5884. Note, however, that the Canadian *Criminal Code* definition explicitly includes omissions, whereas the Convention against Torture definition does not.

17 *Criminal Code*, s. 269.1(2).

[18] *Ibid.*, s. 269.1(3).

[19] *Ibid.*, s. 269.1(4). Such evidence is admissible only as evidence that the statement was so obtained.

[20] Exhibit C-206, Tab 403.

[21] Mr. Arar's November 4, 2003 press conference, Exhibit P-42, Tab 693.

[22] Closing submissions on behalf of Maher Arar – Submissions to Commissioner O'Connor, p. 1, para 1.

[23] Mr. Arar's November 4, 2003 press conference, Exhibit P-42, Tab 693.

[24] The Report of Professor Stephen J. Toope is attached as Appendix 7 in Volume II of the *Factual Background* [Toope Report].

[25] Toope Report, p. 808.

[26] Mr. Arar's November 4, 2003 press conference, Exhibit P-42, Tab 693.

[27] "The chair" and "the tire" are methods of torture. The first involves using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine, and the second, restraining a person and whipping exposed body parts.

[28] I discuss the RCMP investigation as it related to Mr. Arar in chapters III, IV and V.

[29] The Syrian Human Rights Committee is an émigré organization based in London, United Kingdom.

III
Events Prior to Mr. Arar's Detention in New York

1.
OVERVIEW

Project A-O Canada was the investigative unit within the RCMP that carried out the investigation that in time involved Maher Arar.

In this chapter, I review the Project A-O Canada investigation from the Project's inception in early October 2001 to September 26, 2002, when Mr. Arar was detained in New York. I discuss the Project's formation, its relationship with RCMP Headquarters, the investigative steps it took with respect to Mr. Arar, its requests for border lookouts in Canada and the United States for Mr. Arar and his wife and, most importantly, the way it shared information with the American agencies.

Project A-O Canada shared information arising from its investigation with the Americans on a regular basis and, in April 2002, it provided the American agencies with its entire investigative file. Moreover, it shared information in ways that contravened RCMP policy requiring that information be screened for relevance, reliability and personal information, and that caveats[1] be attached. The information shared by the Project included information about Mr. Arar, some of which was inaccurate and grossly unfair to him.

2.
FORMATION OF PROJECT A-O CANADA

2.1
TRANSFER OF INVESTIGATIONS FROM CSIS TO RCMP

Following the events of September 11, 2001, those involved in protecting Canada's national security were confronted with unprecedented challenges. An

all-out effort was being made by western intelligence and law enforcement agencies, including Canada's, to track down individuals involved in the 9/11 conspiracy. Moreover, there was a significant fear, not without foundation, of a second wave of attacks.

The Americans were under tremendous pressure to bring those who directed or assisted the 9/11 terrorists to justice. They, in turn, pressed their allies to assist by investigating terrorist threats within their borders. Canada received an enormous number of requests for information from the FBI and the CIA related to all aspects of 9/11, as well as other potential or suspected terrorist threats.

It immediately became apparent to senior officers in the Canadian Security Intelligence Service (CSIS), the Royal Canadian Mounted Police (RCMP) and other police forces in this country that Canadian co-operation in the investigation of terrorist threats would require manpower and resources far exceeding anything that had been devoted to these types of investigations in the past. Within weeks of the 9/11 attacks, senior officials from Canadian agencies met to discuss the best way for Canada to address this challenge. Shortly thereafter, CSIS transferred to the RCMP prime responsibility for the investigation of a number of individuals suspected of terrorist links. [***]. It provided the RCMP with some of the details of its investigations, as well as information from its holdings. There was no mention of Maher Arar. However, in time, Mr. Arar came to the attention of the RCMP through its investigation of Abdullah Almalki.

I have no reason to believe that the transfer of these investigations was inappropriate.[2] CSIS was deluged with work as a result of the 9/11 crisis. Jack Hooper, Assistant Director of Operations for CSIS, described how, in the wake of 9/11, CSIS had directed all of its available resources to terrorist investigations, including round-the-clock surveillance of certain targets. He explained that CSIS would have been unable to maintain this kind of coverage on a continuing basis. The increasing demands had made it imperative that it receive assistance, and the RCMP had been the obvious agency to provide it.

CSIS reviewed its files and resources, initially selecting targets to be transferred based on the belief that, following investigation, the RCMP might be able to lay charges of supporting terrorism. The *Canadian Security Intelligence Service Act* (*CSIS Act*) authorizes CSIS to disclose information it has collected to a law enforcement agency where the information may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province.[3] CSIS considered that the cases transferred to the RCMP were appropriate for continued investigation by a law enforcement agency and that the transfers were authorized by the *CSIS Act*.

The RCMP quickly recognized that the investigations that had been transferred would be focused, at least initially, on preventing or disrupting terrorist acts, rather than on prosecution. The primary objective of the investigations would be to protect Canadians and others from terrorist activities and try to prevent any further attacks from being carried out. Thus, the main focus of the RCMP investigations became prevention, although prosecution continued to be one of the possible outcomes.

My statement that I have no reason to believe that CSIS should not have transferred these investigations to the RCMP may seem contrary to the recommendations of the Commission of Inquiry Concerning Certain Activities of the Canadian Mounted Police (McDonald Commission)[4] and the resulting changes to Canada's national security landscape. That report is sometimes interpreted as indicating that the RCMP should not be involved in any national security activities whatsoever. That interpretation is wrong.

Clearly, the mandates of CSIS and the RCMP are different. However, those mandates contemplate a continuum in the collection of information concerning national security threats. CSIS collects information at an earlier phase and on a broader basis than does the RCMP. It collects information and/or intelligence under section 12 of the *CSIS Act* in respect of activities "that may on reasonable grounds be suspected of constituting threats to the security of Canada" and advises government of perceived threats to the security of Canada. However, CSIS is not a law enforcement agency, and once it makes a determination that sufficient indicators of criminality are present to warrant a criminal investigation, the RCMP may become involved.

Law enforcement agencies such as the RCMP become involved in investigations relating to national security when the investigations are directed at apprehending criminals or preserving the peace and preventing crime. Unlike CSIS, the RCMP conducts investigations that require the exercise of powers and practices associated with law enforcement and criminal investigations.

After the McDonald Commission, the RCMP continued to assume responsibility for conducting national security investigations from a law enforcement perspective.[5] Thus, it was quite properly involved in any investigation with national security implications directed towards prosecuting offences under the *Criminal Code*. Moreover, the *Security Offences Act* enacted in 1984 conferred on the RCMP specific authority to conduct investigations of national security offences, being those that relate to conduct constituting a threat to the security of Canada.[6]

In addition to conducting criminal investigations for purposes of prosecution, the RCMP has a preventative mandate under section 18 of the *Royal*

Canadian Mounted Police Act (*RCMP Act*),[7] which gives it authority to conduct investigations aimed at taking steps to preserve the peace and prevent crimes.

Although some have suggested that 9/11 inappropriately thrust the RCMP back into the national security business contrary to the direction of the McDonald Commission, that is not the case. The RCMP has conducted investigations with national security implications in the years since the McDonald Commission. In furtherance of this responsibility, the Force has, over time, developed specific operational and Headquarters units devoted to these types of investigations and implemented policies focused on them. What has changed since 9/11 is the number and intensity of the RCMP's national security investigations and the enactment of Bill C-36 which, among other things, created new criminal offences relating to national security, as well as certain new investigative powers.[8] In the months and years since 9/11, the RCMP has devoted a significantly larger proportion of its resources to these types of investigations, and it would seem that this higher level of activity will continue to be required for the foreseeable future.

I heard evidence about certain aspects of the RCMP's investigation of Mr. Almalki as it related to Mr. Arar. Although that investigation initially had some of the earmarks of an intelligence-gathering probe that might be carried out by CSIS, the powers and investigative steps that are part of a normal criminal investigation came into play in relatively short order. For example, in January 2002, the RCMP obtained search warrants and carried out searches of seven residences and also conducted several interviews related to the investigation. The RCMP investigations of Mr. Almalki and others continued for some time. Again, although I heard evidence about only some aspects of the Almalki investigation, I do know that the RCMP continued to consider prevention and intelligence gathering the primary objectives of that investigation. To date, no charges have been laid. Given that prevention, rather than prosecution, was the primary goal of the investigation that in time involved Mr. Arar, questions arise as to whether, at some point, the investigation ceased to have a focus that could properly be investigated by the RCMP as a law enforcement agency and should therefore have been discontinued, or whether it could have been more properly handled by CSIS as a security intelligence probe. While the line between the two types of investigations may be blurred in some cases, it is nonetheless important that the distinction between what is appropriately the subject matter for an investigation by the RCMP on the one hand, and what should be handled by CSIS on the other, be respected and maintained.[9] The fact that a particular investigation is being conducted by the RCMP does not mean that it must necessarily remain a law enforcement investigation indefinitely.

Throughout this report, I review in detail the investigative steps taken by the RCMP in relation to Mr. Arar. However, the RCMP's investigation was not focused on Mr. Arar, but on Mr. Almalki and others. Mr. Arar was merely a person of interest. I have no reason to believe that it was not appropriate, throughout the relevant time period, for the RCMP as a law enforcement agency to continue its main investigation, in which Mr. Arar came to the investigators' attention from time to time.[10]

Following the transfers, the RCMP agreed to keep CSIS advised of the investigations by means of periodic briefings and meetings and, in the case of the Almalki investigation, the provision of copies of situation reports (SITREPs) describing its day-to-day progress. CSIS moreover continued its own investigations of the transferred targets, although with significantly less intensity than prior to the transfers.

2.2
PROJECT A-O CANADA

The investigation transfers from CSIS led the RCMP to set up new projects, including Project A-O Canada in Ottawa and Project O Canada in Toronto. Here, I focus on the formation in early October 2001 of Project A-O Canada, which was given responsibility for investigating Mr. Almalki.

For operational purposes, the RCMP is divided into 14 divisions, each with responsibility for a specific geographic region. In October 2001, each RCMP division had a National Security Investigation Section (NSIS), which normally handled national security investigations. Typically, NSIS officers were provided with some training in RCMP policies and practices relating to national security investigations, and they would presumably develop experience in these types of investigations over time.

It made sense to locate the Almalki investigation in Ottawa, as Mr. Almalki lived there and the information showed that that was where the investigation would largely be centered. However, the NSIS in "A" Division, which had operational responsibility for the National Capital Region, did not have the capacity to undertake the investigation.

In the aftermath of 9/11, "A" Division NSIS, comprising some 20 people, was swamped with leads and tips. By late November 2001, the RCMP had a backlog of nearly 10,000 tips. "A" Division also had primary responsibility for providing protective services for a large number of Canadian and foreign public officials, as well as many of Canada's federal buildings, and demand for protective services had increased dramatically after 9/11.

The senior officers in charge of "A" Division consequently set up a new project — Project A-O Canada — to conduct the Almalki investigation. With few exceptions, the officers they appointed to work on the Project were not members of NSIS, had not received any special training in the conduct of national security investigations, and had no experience in carrying out such investigations.

That said, I am satisfied that the decision concerning the composition of Project A-O Canada was appropriate and reasonable in the circumstances. To begin with, there does not appear to have been much choice. Although "A" Division NSIS had no capacity to conduct the Almalki investigation, the investigation was important and "A" Division was the logical place to locate it.

More importantly, it was apparent from the outset that the investigation would be extensive and complicated, involving the examination and analysis of large numbers of financial transactions. The officers chosen for Project A-O Canada were, in the view of their supervisors, among the best criminal investigators available. This was especially true of Inspector Michel Cabana, who was asked to be the project leader.[11] Inspector Cabana was widely respected as a good investigator with experience in managing large and complex investigations, including ones involving complicated financial transactions.

The senior officers at "A" Division moreover determined that the project should involve officers from other police services. That made a good deal of sense, given the nature of the investigation, the importance of dealing with the local community, and the need to bring together as much investigative experience as possible.[12] As a result, officers from the Ontario and Quebec provincial police forces and the Ottawa, Gatineau and Hull police services became involved in the project. Both of the officers appointed as assistant project managers were staff sergeants, one from the Ontario Provincial Police, and the other from the Ottawa Police Service. Both had excellent investigative credentials for regular criminal investigations. They had worked with the RCMP in the past and, together with Inspector Cabana, formed a strong, experienced management team.

The remainder of the team, which grew to include about 20 investigators, also had an impressive range of experience and skills. Expertise was added as required, either from other RCMP units or through the participation of partner agencies. The recruiting focus was on experience related to criminal investigations, such as writing affidavits, conducting covert entries and taking part in undercover operations. Legal officers from the Department of Justice were also involved.

In view of the serious concern about the imminent threat of another 9/11-type attack at the time Project A-O Canada was formed, it made sense to have experienced criminal investigators to quickly address possible threats to Canada's national security. Initially, it was expected that Project A-O Canada would focus on Mr. Almalki's alleged procurement activities, but it was important that these activities be investigated quickly and thoroughly to see if they brought to light any other threats. Indeed, the investigation soon expanded to include matters relating to other possible terrorist activities in the Ottawa region.

In short, Project A-O Canada had a first-rate team of investigators who were ideally suited to conducting a criminal investigation, particularly one involving financial transactions such as those expected in the Almalki investigation. However, the officers assigned to the Project had little training or experience in investigations concerning national security and terrorism.

2.3
TRAINING

At the outset, only one regular member of Project A-O Canada had any training in national security investigations or experience in conducting this type of investigation.

That person, the only member of "A" Division NSIS initially assigned to the Project, had completed the RCMP's course in criminal extremism investigation techniques and had worked on several projects involving Islamic extremism. As matters progressed, he spent the majority of his time on the Project. Over time, a few other members of "A" Division NSIS with training or experience in national security investigations were also assigned to the Project, at least on a part-time basis.

Significantly, however, the officer in charge and other members of the Project team had no training or experience in national security investigations. Moreover, the investigators were given no orientation or training on RCMP policies or practices governing information sharing with other agencies as they might be applied in the national security context. Nor did they receive any orientation or training about the analysis of terrorism-related information and the need for precision in such analysis, the cultural values and mores of the community that would be affected by their investigation, or human rights issues in the context of a national security investigation.

That said, it must be remembered that Project A-O Canada was formed in the midst of the post-9/11 crisis. There was little time for training. Indeed, because of the increased pressures being applied, the RCMP suspended the "criminal extremism" course it had offered until early 2002. Further, the nature

of Project A-O Canada meant that there would be a certain amount of learning on the job. The one officer who had training and experience testified that he had become a kind of consultant on issues such as the background of terrorist organizations, the roles of CSIS and the RCMP's Criminal Intelligence Directorate (CID), and liaison officer systems.[13] As time passed, a few team members took relatively short courses on matters that might arise in national security investigations.

During the time preceding Mr. Arar's detention in New York, Project A-O Canada provided American authorities with a great deal of information, some of which likely played a role in what happened to Mr. Arar.[14] The Project shared much of this information in ways that contravened RCMP policies. Moreover, some of the information relating to Mr. Arar was inaccurate. These problems resulted largely from three factors: members' lack of training and experience in national security investigations and terrorism, a lack of proper direction about information sharing, and a lack of adequate oversight.

Although the circumstances surrounding Project A-O Canada's creation made the lack of training and experience among team members understandable, it was incumbent on more senior RCMP personnel to ensure that the Project was provided with clear instructions about how to conduct its investigation, particularly in the critical area of information sharing. It was also extremely important for the RCMP to ensure that the lack of training and experience of Project members was properly addressed, either by providing the required training or, if that was not possible, by adequately overseeing the investigation, in particular its information-sharing practices.

2.4
PROJECT A-O CANADA INVESTIGATION

At the outset, the mandate of Project A-O Canada was to investigate Abdullah Almalki, because of his suspected terrorism-related activities.

In the fall of 2001, Project A-O Canada learned from confidential sources that a person by the name of Ahmad El Maati was allegedly implicated in a terrorist plot directed at a major Canadian target.[15] Up to that point, Mr. El Maati had been a target of the Project O Canada investigation in Toronto. However, based on this new information, the Project A-O Canada investigation expanded to include Mr. El Maati and the newly identified terrorism threat.

By the end of November 2001, the targets of the Project A-O Canada investigation, Messrs. Almalki and El Maati, were no longer in Canada. The investigation thus turned its focus to organizing searches of certain residences in Ottawa, Toronto and other Canadian cities. Searches conducted on

January 22, 2002 produced new information about Messrs. Almalki and El Maati and others, much of which formed the basis of the Project's investigation in the months leading up to Mr. Arar's detention in New York on September 26, 2002.

The Project A-O Canada investigation was a criminal investigation that clearly related to national security matters. Its focus was to investigate terrorist threats to Canada's national security and to co-operate with others, particularly CSIS and its American partner agencies, in the investigation of those threats.

There were four aspects of the Project A-O Canada investigation that made it different from the types of investigations with which the majority of its member officers had previously dealt:

- the content — terrorism;
- the amount of information sharing;
- the preventative mandate; and
- the human rights and cultural sensitivity issues.

With respect to the content, investigators collected or received a large amount of information about actions or associations that might or might not point to involvement in terrorism-related activities. For example, Project A-O Canada obtained information about individuals who had connections to Arab or Muslim organizations, had attended training camps in Afghanistan at different periods of time, or had associated or communicated with others whose actions had raised suspicions. It also received information that originated with other agencies, including some in the United States and Syria.

In conducting the investigation, it was important that members of Project A-O Canada be able to assess all of this information in order to properly weigh the significance of an individual's actions and associations and the possibility of a connection with terrorist activity. This often required a sophisticated understanding of terrorism networks, Muslim and Arab norms and values, the ideologies that motivated terrorists, and the geopolitical realities in the areas where information originated. A regular criminal investigator could not be expected to have the knowledge or experience needed to analyze the various types of information that might be collected in a terrorism investigation and put it into the proper context. Without special training or experience, there was a danger that officers would attach too much or too little significance to a particular piece of information. There was also a danger that they would not fully appreciate the significance that others, including American officials to whom they provided information, might attach to particular pieces of information or to the way the Project labelled or assessed information.

Agencies such as CSIS have personnel who have spent years studying and analyzing information related to their counter-terrorism mandate. CSIS has a section made up of thoroughly trained and highly sophisticated counter-terrorism analysts. Project A-O Canada members did not have this type of expertise, and while they could draw on CSIS expertise or the counter-terrorism expertise at RCMP Headquarters, they rarely did.

Project members viewed the investigation as being much like other criminal investigations and tended to make their own assessments and decisions. For the most part, they operated autonomously. They gathered and analyzed information, pursued all possible leads, and shared a great deal of information with other agencies with little guidance or oversight from those who had specific responsibility for national security investigations within the RCMP.

The second aspect of the Project A-O Canada investigation that was different from other criminal investigations was the type and amount of information shared with the American agencies. Although RCMP officers often share information with other agencies in the course of criminal investigations, as time progressed, members of Project A-O Canada interacted with the American agencies on a more regular basis than usual.[16] The Project passed on an enormous amount of information to its American counterparts, eventually taking the unprecedented step of providing them with its entire Supertext database,[17]in the form of three compact discs (CDs).

It is important to share information in national security investigations, particularly with foreign agencies, but it is a highly sensitive and potentially risky exercise. It is crucial that the shared information be accurate and that assessments of it be correct. There is no room for imprecision or loose language. Imprecision, even in what appear to be small details, can be misleading and can sometimes operate very unfairly against those affected. Misperceptions created by inaccurate information can become entrenched over time and be difficult to dispel.

It is also necessary that those who provide information be aware of and control, to as great an extent as possible, the use to which the information may be put. Those involved in the national security milieu need to understand the importance of sharing information, but they also need a sophisticated understanding of the risks involved in doing so. An appreciation of the perspectives and cultures of the agencies to which they provide information makes them better able to assess how the information provided may be interpreted and to what uses it may put it. Sharing information in the national security context may entail very different considerations and concerns than doing so in other criminal investigations.

Again, members of Project A-O Canada had little experience or training to assist them in handling the information-sharing challenges confronting them. This was a new environment for them. [***] Project A-O Canada was dealing with American agencies that were more sophisticated in matters of national security and might not always play by the rules Project members would expect.

The third aspect of the Project A-O Canada investigation that differed from other investigations was that its mandate was primarily preventative in nature. Preventative investigations can be significantly different from investigations focused on prosecution, which are directed at obtaining evidence about specific, concrete events. They can be more nebulous. While such investigations must be connected with criminal behaviour, investigators collect and analyze information about something that has not yet occurred and may never occur. The capacity to assess how information relates to a threat and to evaluate in what direction investigative efforts should be channeled is obviously important. Given that the threats being investigated may be far from certain, investigators in preventative investigations must make judgments about whether or not leads are worth pursuing. Doggedly following every possible lead, as one would in a prosecution-oriented investigation, in order to establish, for example, that an individual does not constitute a threat — essentially proving a negative — could be a highly unproductive, not to mention interminable, exercise. A different type of analytical and investigative approach is sometimes called for in a prevention-oriented investigation.

The fourth aspect of the Project A-O Canada investigation that made it different from other criminal investigations was the need to have regard for certain human rights and cultural sensitivities. Certainly, all criminal investigators must give appropriate consideration to these issues. However, national security investigations can sometimes raise them in a context unfamiliar to the standard criminal investigator. Moreover, the human rights issues that arose during the Project A-O Canada investigation were different from any the Project members had encountered previously.

For instance, Project A-O Canada officers had to weigh how to use information from Syria, a country with a poor record of human rights. Evaluating such information required an informed appreciation of the role Syrian practices might have played in obtaining the information and, importantly, the impact those practices might have had on the information's reliability. The Project was also confronted with issues about sharing information with Syria, including how Syrian authorities might use such information and how they might interpret the fact that the RCMP was investigating certain individuals.

Further, the Project's investigation was focused entirely on members of the Muslim community. Undoubtedly, an understanding of the cultural norms and practices of that community would have given investigators a distinct advantage in assessing the significance of specific activities and associations.[18]

In summary, while Project A-O Canada involved a criminal investigation that could benefit from the investigative skills of its members, it also involved a national security investigation, the primary focus of which was the prevention of terrorist acts. It was that focus that distinguished the investigation from the criminal investigations in which most of the Project members, including the managers, had previously been involved.

2.5
REPORTING STRUCTURE

Since Project A-O Canada was conducting a criminal investigation, it reported to Criminal Operations, or CROPS, at "A" Division. Inspector Cabana reported to the Assistant CROPS Officer, Inspector Clement, who in turn kept Chief Superintendent Antoine Couture, the CROPS Officer, up to date on the investigation. In addition to regular briefings, the CROPS officers were provided with the Project's daily situation reports (SITREPs), which detailed the progress of the investigation.

Project A-O Canada also kept CID at RCMP Headquarters informed of the investigation by providing it with copies of its daily SITREPs, holding periodic meetings and preparing briefing notes. However, because Project members and senior officers at "A" Division considered this to be solely a criminal investigation, the Project reported to and received instructions from the "A" Division CROPS officers rather than Headquarters personnel.

In regular criminal investigations, investigators enjoy a high degree of operational independence and report only to CROPS through the division's chain of command. Given the potentially far-reaching implications of a national security investigation, one would expect that such an investigation would be subject to greater coordination and control from Headquarters CID. NSISs — and Integrated National Security Enforcement Teams (INSETs), since their inception in 2002[19] — which ordinarily conduct national security investigations, are under divisional command, but have a more centralized reporting relationship with Headquarters than do other operational units in a division. However, in the case of the Project A-O Canada investigation, RCMP Headquarters was not always involved in the same way as for other national security investigations.

Over time, tensions developed between Project A-O Canada and CID. There were disagreements about whether CID was being kept adequately

involved in the investigation. CID was of the view that it was not being fully informed. It sometimes learned about actions taken by the Project only after the fact. Project A-O Canada, for its part, believed that providing SITREPs and periodic briefings was sufficient. I discuss the relationship between Project A-O Canada and CID throughout this report as I review many of the specific steps in the Project's investigation. However, there is one general comment that I will make here.

In my view, the RCMP, through CID and senior officers at "A" Division, failed to properly direct and oversee the Project A-O Canada investigation. The circumstances were such that senior officers with greater experience in national security investigations should have been more heedful of the possibility of some of the problems that ultimately arose. RCMP Headquarters was aware that the Project team lacked training and experience in national security investigations, and it was also aware, or should have been aware of the types of problems that can arise in these kinds of investigations. The RCMP had an institutional responsibility to ensure that Project A-O Canada conducted its investigation and, especially, provided information to the American agencies, in a proper and appropriate way.

2.6
PROBLEMS WITH THE PROJECT A-O CANADA INVESTIGATION

In the analysis that follows, I identify several problems that arose in the course of the Project A-O Canada investigation. Those problems related primarily to information sharing with American agencies. In general terms, there were three difficulties:

- Project A-O Canada provided information to American agencies in a manner that contravened RCMP policies requiring that information be screened for relevance, reliability and personal information and that caveats be attached to documents shared with other agencies. Some of this information related to Mr. Arar.
- Project A-O Canada provided American agencies with information about Mr. Arar that was inaccurate or imprecise and that tended to overstate Mr. Arar's importance in its investigation and his possible involvement in terrorism-related activities.
- Project A-O Canada provided American agencies with information containing third-party caveats without obtaining the originators' consent.

In reaching these conclusions, I do not attribute bad faith to members of Project A-O Canada. They were dedicated officers who did their jobs in what

they considered was an appropriate manner. However, in the time leading up to Mr. Arar's detention in the United States on September 26, 2002, they were often working under great pressure because of both the urgent nature of the possible threats and the sheer volume of work in the investigation. Moreover, they lacked the proper preparation to deal with some of the national security issues that arose.[20]

3.
EARLY INVESTIGATIVE STEPS

Mr. Arar first came to the attention of Project A-O Canada as a result of a meeting he had with Abdullah Almalki at Mango's Café in Ottawa on October 12, 2001. Mr. Almalki, the investigation of whom had been initiated by the RCMP on October 5, 2001, was suspected of being a member of al-Qaeda. As a result of information I heard *in camera*, Project A-O Canada arranged for surveillance of the meeting.

I am satisfied that Project A-O Canada's decision to conduct surveillance of this meeting was a reasonable step in the course of investigating its target, Mr. Almalki,[21] and entirely proper in the circumstances. Although I did not conduct a thorough review of the Almalki file, I did hear some evidence about the nature of the investigation into Mr. Almalki's activities and the level of interest of the various agencies. Having received information that a meeting was to take place, Project A-O Canada made a routine decision to conduct surveillance. There is nothing in the evidence to suggest that the decision was motivated by the fact that Messrs. Almalki and Arar were Muslims or of Arab origin, or that the surveillance was the result of racial profiling.

Surveillance of the meeting at Mango's Café led Project A-O Canada to take a closer look at Mr. Arar. Again, I think that it was reasonable for it to do so. While the meeting may have been innocent, there were aspects of it that reasonably raised investigators' suspicions. Messrs. Almalki and Arar were seen walking together in the rain and conversing for 20 minutes. After the meeting, they proceeded to a local shopping mall, where they went into a computer equipment store. On leaving, they continued their discussion, reportedly taking pains not to be overheard. Given that Mr. Almalki was the target of Project A-O Canada's investigation, it was reasonable for the Project to investigate Mr. Arar, about whom investigators had no information whatsoever.

This was how Mr. Arar became a "person of interest" in the Project's investigation. Investigators conducting intelligence or criminal investigations must follow up on leads. Associations with suspects or targets of an investigation are important. Calling someone a person of interest does not mean the person is

suspected of any wrongdoing. It may be that the person's role is not clear to investigators and more information is required, as was the case with Mr. Arar.

Project A-O Canada conducted a background search on Mr. Arar, obtaining open-source biographical data, and carried out limited surveillance on him in November 2001. Although officers indicated that it was unusual for surveillance to be conducted on someone who was merely a person of interest, Project A-O Canada officials reasoned that it had been warranted, given the seriousness of a possible imminent terrorist threat in the fall of 2001. However, nothing untoward was observed, and it appears that the Project subsequently ceased its surveillance of Mr. Arar.

In gathering background information on Mr. Arar, the Project obtained a copy of his rental application and tenancy agreement from Minto Developments, his landlord's property management company. The rental application showed Mr. Almalki as Mr. Arar's emergency contact.

Project A-O Canada did not have a search warrant to obtain the tenancy documents or even a sufficient basis for obtaining a warrant. There were no grounds to believe that Mr. Arar had committed any offence or that he was involved in terrorist activities. I note that, when Project A-O Canada applied for warrants to search the residences of targets of their investigation in January 2002, it did not include Mr. Arar's residence in its application.

That said, I am satisfied that Project A-O Canada did not act improperly in obtaining the rental application and tenancy agreement. Project officers asked for the documents and the property manager, who had an interest in the documents, voluntarily produced copies. There was no compulsion. There was nothing to suggest to the officers that the property manager was breaching an agreement or understanding with Mr. Arar in producing the documents, and the property manager did not suggest that Mr. Arar had a privacy interest in any information contained in them.

I recognize that, were the Government to seek to introduce the documents in a future court proceeding, there might be an argument that the documents were seized contrary to Mr. Arar's rights under the *Canadian Charter of Rights and Freedoms*. Mr. Arar might assert that he had an expectation of privacy in information contained in the documents, including the name of his emergency contact. However, the success of such an argument is uncertain.[22] In any event, I do not need to decide that legal issue here. The fact that evidence might eventually be found to be inadmissible does not necessarily mean that police officers acted improperly in obtaining it.[23]

4.
BORDER LOOKOUTS

Towards the end of October 2001, Project A-O Canada requested that Canada Customs and U.S. Customs place border lookouts for Mr. Arar and his wife, Monia Mazigh, as well as certain other individuals.

4.1
CANADIAN LOOKOUTS

I am satisfied that it was appropriate for Project A-O Canada to request a border lookout for Mr. Arar and for Canada Customs to place the lookout in its system. I conclude that there was no basis to request or issue a lookout for Dr. Mazigh.

The lookouts requested for Mr. Arar and Dr. Mazigh were to ensure that they underwent both primary and secondary examinations when entering Canada. A primary examination involves questioning by a front-line officer. A secondary examination, conducted by a different officer, is more thorough. At the discretion of the Customs officer, the secondary examination may be minimally intrusive, with questions only, or may involve a full search of the traveller's luggage and, in some circumstances, the traveller's person.

Any person entering Canada may be referred for a secondary examination. There are various types of referrals. Some are made by the front-line officer, who has discretion to refer an individual for a secondary examination. Others are randomly generated by a computer, and still others are mandatory. Whenever there is a lookout, the referral for a secondary examination is mandatory.

The request for lookouts in respect of Mr. Arar and Dr. Mazigh was one of several measures taken by Project A-O Canada in building profiles of Mr. Almalki's associates.[24] The purpose of the lookouts was to determine travel patterns, how many times they crossed the border, and the dates and circumstances of the border crossings, as well as to gather any information brought to light through documents and goods examined.

The lookouts placed by Canada Customs in response to the RCMP's request directed that officers conduct a "very thorough" secondary examination. They specified that travel and business-related or commercial documents were to be examined and that photocopies were to be made of all documents. They also directed that Customs officers prepare narratives of the interviews and contact the Regional Intelligence Officer (RIO), and that they refrain from divulging the

nature of the interest of Canada Customs and the RCMP to the person being examined.

When considering the issue of lookouts, it is important to bear in mind that the Supreme Court of Canada has affirmed that, when entering Canada, individuals have a lower expectation of privacy at Customs than they would in most other situations.[25] People do not expect to be able to cross international borders free from scrutiny. Canada has the right to control who crosses its borders and to conduct examinations of individuals and goods entering the country, for the general welfare of the country.

Indeed, all travellers entering Canada must provide information on an E311 Customs Declaration Card and must be prepared to undergo a secondary examination, which means that they may be subjected to questioning and to examination of their belongings in circumstances in which there would be insufficient grounds to obtain a search warrant under the provisions of the *Criminal Code*.[26]

4.1.1
Mr. Arar

The lookout requested for Mr. Arar would put him in a different position from the normal traveller entering Canada in two respects: he would be subjected to a secondary examination each time he entered Canada[27] and, because of the lookout's specific instructions, the examination would likely be more thorough (more intrusive) than a routine secondary examination. I note, however, that the examination envisioned for Mr. Arar was still far from the most intrusive type of search. The RCMP did not request a search of Mr. Arar's person. The lookout that was issued indicated only an examination of his travel and business-related or commercial documents.

In any event, placing the lookout would impinge on Mr. Arar's privacy in ways that normal travellers would not experience. Nonetheless, I am satisfied that Project A-O Canada had sufficient reason at the time to request the lookout for Mr. Arar.

By the time Project A-O Canada requested the lookout, Mr. Arar was a person of interest in its investigation. In any investigation, it is important to determine the role, if any, of persons associated with the principal subject — in this case, Mr. Almalki. Project investigators were aware that Mr. Arar had met with Mr. Almalki at Mango's Café and that the two men had conversed in the rain. This raised suspicions. They were also aware that Mr. Arar had listed Mr. Almalki as his emergency contact on a rental application. This could be indicative of close ties.

Project A-O Canada thus had legitimate reasons for being interested in Mr. Arar. In these circumstances, ascertaining his travel movements could be a useful investigative step, and the information sought was reasonably connected with the purpose for which Project A-O Canada requested the lookout. All of the RCMP officers asked about the lookout request, including Commissioner Giuliano Zaccardelli, considered the request to have been an appropriate investigative step.[28]

Although it can fairly be said that Project A-O Canada might have been able to obtain information through a lookout that it would not have been able to obtain by means of a search warrant, I do not consider that that, by itself, means that a lookout should not have been requested. As mentioned earlier, the fact of travelling outside Canada and then re-entering the country brings with it a reduced expectation of privacy. Secondary examinations are routinely conducted in circumstances in which search warrants could not be obtained and can involve examinations of travellers' belongings that, in other circumstances, would require warrants. Absent bad faith, it was open to the RCMP to use the opportunity presented by Mr. Arar's crossing of the border to try and collect information that might assist with its investigation.

Once a lookout request is received, it falls to Canada Customs alone to decide whether to issue the lookout. Canada Customs policy[29] provides that it must independently have "reasonable grounds" for issuing the lookout, but does not spell out what constitutes reasonable grounds. Frequently, Canada Customs officers will review the information in a request and decide whether or not reasonable grounds exist. However, Canada Customs officers testified that a lookout request may also be approved if a Customs intelligence officer is associated with a particular investigation and is generally familiar with the basis for the request, the theory being that that officer can satisfy himself or herself of the "reasonable grounds." In the case of Mr. Arar, a Customs officer was involved with Project A-O Canada and had a general knowledge of the investigation. For the same reasons that I conclude that it was reasonable for Project A-O Canada to request a lookout for Mr. Arar, I am satisfied that Canada Customs had "reasonable grounds" for issuing it.

One other aspect of the lookout for Mr. Arar is important. Lookouts are classified in different ways, depending on the reason for the request. Among the various reasons is a wide range of crimes, including terrorism. The lookout for Mr. Arar was designated as a "terrorism" lookout. According to a Canada Customs bulletin,[30] a terrorism lookout is used for someone suspected of being a member, associate or sympathizer of a known terrorist organization. Mr. Arar did not meet these criteria. He was not suspected of anything and, in particular,

there was no basis for saying he was suspected of being a member of a terrorist organization. Labelling someone in this way is a very serious matter. Mr. Arar was a person of interest, nothing more.

In fairness to Canada Customs, the RCMP must bear its share of the blame. The designation was in keeping with the wording used in the RCMP's initial letter to Canada Customs requesting the lookout for Mr. Arar, Dr. Mazigh and certain other individuals, which stated: "We are presently investigating in Ottawa, a group of Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement. The following individuals and or vehicles have been identified." (The letter went on to list all the individuals, their vehicles and related biographical data.) The RCMP had no justification for describing Mr. Arar in this way.

Despite the wording of this request, Canada Customs should not have designated Mr. Arar as the subject of a terrorism lookout, as this contravened Canada Customs policy. Instead, Canada Customs should have entered an accurate description that Mr. Arar was a person of interest, but not a suspect, in an investigation relating to a person suspected of being involved in terrorism-related activities. The Customs officer involved with Project A-O Canada had a general knowledge of the investigation, and should have brought that knowledge to bear on how the lookout was classified.

While some might suggest that the distinction is hair-splitting, I do not agree. It is important that precision be used when attaching labels to individuals, particularly in terrorism-related investigations in these times. There is a danger that loose language can lead to unfair and misleading or erroneous conclusions. If Canada Customs policy does not permit entries of the kind, I suggest that it be amended to do so. If Canada Customs is going to place lookouts for persons of interest, not merely suspects, then its policy should make the distinction.

An example of how misdesignation of the type of lookout may be used in an unfair manner is found in a document obtained through an Access to Information request and produced by Mr. Arar's counsel.[31] The document appears to be a Canada Customs printout showing Mr. Arar's entry into Canada on December 20, 2001 and again on January 24, 2002. A note appears in each instance, indicating "L" (presumably lookout) and "Terrorism." Thus, in a document that was made available to the public, Mr. Arar's name was associated with terrorism and, for anyone familiar with Canada Customs policy, he was shown as someone suspected of being associated with a known terrorist organization. Given that Mr. Arar was not suspected of such an association, linking his name with "terrorism" was unnecessary and was unfair to him. It is never

helpful to state the status of an individual inaccurately. And while the harm from mislabelling may be greater in the case of a document that could be made public, there is still a risk of harm where documents will not be disclosed publicly. Anyone who requests a lookout — and Canada Customs, when it places a lookout — should be precise in describing the reasons for the lookout and in attaching labels to the subject of the lookout. Labels, once applied, have a way of sticking to individuals and assuming an unintended importance.

Indeed, when the lookout for Mr. Arar was renewed in January 2002, he was described as an individual "suspected of belonging to or being connected to a terrorist organization." The misleading label in the original lookout became more specific.

4.1.2
Dr. Mazigh

With regard to the lookout for Dr. Mazigh, I conclude that the RCMP had no basis for requesting it. The important distinction between Mr. Arar and Dr. Mazigh is the factual connection with Mr. Almalki. Mr. Almalki, not Mr. Arar, was the target of the Project A-O Canada investigation. Mr. Arar was a person of interest because of his association with Mr. Almalki, and given that association, his travels and business connections were relevant to the investigation. However, there was no information even suggesting a link between Dr. Mazigh and Mr. Almalki.

The RCMP has no policy or directive setting out criteria for making a lookout request. In explaining why Dr. Mazigh had been included in the lookout request, one Project officer stated that it was not unusual for spouses to be involved in the activities of their husbands or wives. Another said that investigators are often interested in the associates of targets, and that a spouse, such as Dr. Mazigh, might be included out of an abundance of caution.

Although it is not altogether clear, it seems that there is a practice in the RCMP of requesting lookouts for spouses of individuals who are not suspected of any wrongdoing, such as Mr. Arar. That practice, if it exists, is inappropriate and makes little sense. The rationale for including the spouse of a suspect is that the spouse may be involved in the suspect's activities. However, the same rationale does not apply to the spouse of a person of interest, who is not suspected of any wrongdoing. When there is no information to indicate that a spouse has any connection whatsoever with the person suspected of some wrongdoing, it is inappropriate to request a lookout. Given Dr. Mazigh's lack of connection with Mr. Almalki, there was no basis to expect that information about

Dr. Mazigh's travels would help shed light on Mr. Almalki's activities as a suspected procurement officer for al-Qaeda.

While secondary examinations at the border may not be the most intrusive type of search, they are still an intrusion, especially if documentation is seized, copied and provided to third parties.

When there is no basis for expecting that any information useful to an investigation will be gained from placing a lookout, the RCMP should not request one. Thus, while Dr. Mazigh might have had to undergo a discretionary or randomly generated secondary examination when entering Canada, she should not have been subject to a mandatory examination each time she crossed the border. The factual linkage to an investigation to justify a lookout request need not be substantial; however, the fact that someone is the spouse of someone who is merely a person of interest, a potential witness, falls short of the mark.[32]

For the same reasons that I consider it was inappropriate for the RCMP to have requested a lookout for Dr. Mazigh, I am satisfied that Canada Customs should not have placed the lookout. Canada Customs policy requires an assessment of the basis for the request and a determination of whether or not the request is reasonable. As I point out above, the fact that a Customs officer is involved in the investigation and is familiar with the reasons for the request may be considered sufficient cause. However, if that is the approach Canada Customs adopts, then the officer should obtain sufficient information concerning the basis for the request to ensure that it is reasonable.

Another very important point is that, in placing the lookout for Dr. Mazigh, Canada Customs indicated that it was a "terrorism" lookout, as it did for Mr. Arar. The comments I made about Mr. Arar in this respect apply to an even greater extent in the case of Dr. Mazigh. There was no basis to "suspect" that she was a member or sympathizer of a terrorist organization. The label "terrorism" on Dr. Mazigh's lookout was inaccurate and unfair.

4.2
U.S. LOOKOUTS

When Project A-O Canada requested Canada Customs lookouts for Mr. Arar and Dr. Mazigh, it also requested U.S. border lookouts for them.

U.S. Customs has a computer system called the Treasury Enforcement Communications System (TECS), which, like the Canadian system, provides lookout information on suspect individuals, businesses, vehicles, aircraft and vessels.

American authorities declined the invitation to testify at the Inquiry. RCMP officers testified that the American TECS system is different from a terrorist watch

list, which has been mentioned occasionally in evidence and in the public discussion of the Arar matter. However, I do not have enough information to comment on this issue or to conclude whether or not a request for a TECS lookout might result in a person being placed on a terrorist watch list.

It appears that organizations around the world, including Canadian agencies, can submit requests to have individuals placed on a TECS lookout. RCMP officers testified that they routinely request TECS lookouts for individuals who surface in Canadian criminal investigations. One of the results of a TECS lookout is that U.S. Customs will inform the person or agency requesting the lookout if the target enters the United States.

In late October 2001, Project A-O Canada sent a written request to U.S. Customs to have Mr. Arar, Dr. Mazigh and certain other individuals placed on TECS lookouts. In its request, Project A-O Canada repeated the grossly unfair descriptions of Mr. Arar and Dr. Mazigh as being part of a "group of Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement."[33]

I discuss the implications of the language used in this letter to American authorities in greater detail in the section of this chapter dealing with information sharing.[34] Here, I note only that this inaccurate, inflammatory and potentially dangerous description was improper and should not have been included in the letter. As I state often throughout this report, the importance of accuracy and precision when characterizing an individual's role in a terrorist investigation cannot be overstated.

I have concluded that it was reasonable for Project A-O Canada to request a Canadian lookout for Mr. Arar. However, making a similar request to another country raises the question of the use that country will make of the request. Unfortunately, I have little information about how American agencies or officers would have used Project A-O Canada's request, or what the ramifications might have been for Mr. Arar. The fact that the request was made in the post-9/11 environment was certainly of consequence. Many witnesses have indicated that, in the aftermath of 9/11, American authorities were more aggressive than their Canadian counterparts in taking intrusive steps against those allegedly involved in terrorist activities, in particular men of Muslim or Arab origin.

That said, I accept the evidence that, in 2001 and 2002, the RCMP's usual practice was to make requests for TECS lookouts for persons of interest in criminal investigations. There was no policy or directive laying out criteria for submitting foreign lookout requests and no direction regarding the care needed when dealing with terrorist investigations because of the new post-9/11 environment in the United States. I see no basis for critical comment about Project

A-O Canada's request for an American lookout for Mr. Arar other than its use of inflammatory language. Quite properly, the RCMP was co-operating with American agencies in a common investigation. Placing lookouts in both countries would be a reasonable step in their respective investigations. Without evidence about the use to which the United States might have put the lookout requested for Mr. Arar, I am unable to comment further on whether the request was appropriate or not.

In Chapter IX, I recommend that the RCMP develop guidelines for submitting lookout requests to foreign countries. In particular, I think it important that those with special expertise in national security investigations be involved in decisions to request foreign lookouts. An important factor in arriving at such a decision should be the potential effect of a lookout on an individual's rights and liberty.

Project A-O Canada should not have requested a U.S. lookout for Dr. Mazigh, for the same reasons it should not have requested a Canadian lookout.

Finally, with respect to the lookouts, I note that neither "A" Division CROPS (perhaps with the exception of Inspector Clement), nor CID at RCMP Headquarters was involved in making the decisions to seek lookouts or in preparing the wording used in the request for the American lookouts. And while senior officers would have been advised by way of a situation report that the requests had been made, they were not provided with a copy of the request letter to U.S. authorities.[35]

I discuss the effect of the American lookout on what happened to Mr. Arar in New York in Chapter IV, when I address Mr. Arar's detention in New York.

5.
CANADA CUSTOMS SECONDARY EXAMINATIONS

5.1
EXAMINATIONS

Canada Customs carried out two secondary examinations of Mr. Arar, on November 29 and December 20, 2001, and one of Dr. Mazigh, on November 14, 2002. The discussion that follows is based solely on the evidence of Canadian officials. Mr. Arar and Dr. Mazigh have not testified. Were they to testify, they might give different accounts of what happened and additional or different facts might emerge.

When Mr. Arar returned from a trip to Massachusetts on November 29, 2001, he was subjected to a secondary examination by Canada Customs officials

at the Ottawa International Airport. During the examination, Canada Customs seized and copied several documents, including travel agent itineraries, a passport, airline tickets, identity cards, an AT&T customer card and membership cards.

The following day, a Customs official turned copies of the documents over to Project A-O Canada. A caveat[36] was attached. Although the Customs officer did not receive specific authorization to share information with the RCMP, he acted under a general instruction to lend assistance to the Project.

Project A-O Canada entered the information from this examination into its Supertext database. As a result, the information was provided to the American agencies when the contents of the database were given to those agencies in April 2002. Some information from the November 29, 2001 secondary examination was also faxed to the FBI on October 4, 2002, while Mr. Arar was in custody in New York.

On December 20, 2001, Mr. Arar underwent another secondary examination at the Ottawa International Airport. The Customs officer conducting the examination made photocopies of documents in Mr. Arar's possession, including a map and directions, a boarding pass, a motel receipt, an Air Canada receipt and a travel itinerary, as well as Mr. Arar's driver's license, social insurance card, health card and passport. The officer also copied documents relating to a course Mr. Arar had taught in Massachusetts. He did not advise Mr. Arar that his documents were being photocopied, nor did he seek Mr. Arar's consent in this regard.

Mr. Arar was also carrying an IBM laptop computer and a Visor personal digital assistant (PDA). When questioned about them, he reportedly said he had purchased them in the United States (apparently on an earlier trip) and had not paid duty or taxes on either. Officials requested that Mr. Arar provide access to his computer. He refused.[37] The computer and PDA were seized for "non-report" (failure to declare the items when they were first brought into Canada) and were held for appraisal and possible viewing by "the RCMP NSIS" (Project A-O Canada) or CSIS.

The following morning, a Canada Customs official seconded to Project A-O Canada spent about an hour examining Mr. Arar's computer and PDA. He gathered as much information as he could from the computer without the password, including domain names, the user name, serial and registration numbers, warranty expiration date, and type of computer. This information came from stickers on the computer and from the screen when the computer was turned on. Although technical staff at Canada Customs had the capability to access the computer without a password, this was not done. The officer also copied

information from Mr. Arar's PDA (for which a password was not required), including names and phone numbers.

Canada Customs attributed a value of $500 to the laptop and $200 to the PDA. Mr. Arar was able to retrieve the items at the Ottawa International Airport the following day after paying a penalty of 25% of the attributed value, plus sales tax.

Canada Customs provided Project A-O Canada with all of the information obtained from the December 20, 2001 secondary examination, including the information from Mr. Arar's computer and PDA. A caveat was attached. The information was subsequently entered into the Project A-O Canada Supertext database and, thus, passed on to the American agencies in April 2002.

On November 14, 2002, when Mr. Arar was being detained in Syria, Dr. Mazigh was subjected to a secondary examination at the Montréal–Dorval International Airport. Customs officials photocopied some of Dr. Mazigh's documents, including her personal identification, ticket stubs, traveller's declaration card and passport, as well as passport information about her children. Officials subsequently passed this information on to Project A-O Canada.

On November 21, 2002, a Customs official entered the report of Dr. Mazigh's secondary examination into the Intelligence Management System (IMS) (administered by Canada Customs), together with some "tombstone data," including information from Dr. Mazigh's driver's license, passport and certificate of citizenship. The official also entered references to Dr. Mazigh's daughter and son, aged 5 years and 9 months respectively, along with their passport information.

5.2
POLICY ISSUES ARISING FROM SECONDARY EXAMINATIONS

Four aspects of the secondary examinations of Mr. Arar and Dr. Mazigh give rise to policy issues:

- examining and photocopying documents;
- examining Mr. Arar's computer and PDA;
- providing information to the RCMP; and
- uploading the profiles of Dr. Mazigh and her children into the IMS.

I discuss these below, having regard to the *Customs Act,* the *Customs Enforcement Manual* and the Canada Customs enforcement bulletins, which give direction as to how that Manual should be applied.

5.2.1
Examination and Photocopying of Documents

5.2.1.1
Mr. Arar

The *Customs Act* does not provide direction on examining and photocopying documents of persons seeking entry to Canada. The *Customs Enforcement Manual* and relevant Enforcement Bulletin address this issue.

I am satisfied that, in examining and photocopying Mr. Arar's documents on November 29 and December 20, 2001, Canada Customs officials acted in accordance with the relevant provisions of the *Customs Enforcement Manual* and the related Enforcement Bulletin[38] as they existed then. In general terms, the documents in question consisted of travel and personal identification papers. The one possible exception to my conclusion relates to some teaching materials for a course Mr. Arar taught while in Massachusetts.

The Enforcement Bulletin in force during the two examinations of Mr. Arar is dated October 17, 1996 and entitled "Examination of Personal Papers and Journals." It refers to the *Customs Enforcement Manual*, Part 4, Chapter 1, paragraph 39, which states in part: "private papers[39] and personal journals should not be reviewed unless there is reason to believe that the papers or journals contain receipts for goods or refer to the acquisition of the goods or may afford evidence of an offence."

The Bulletin goes on to say that reading personal diaries or letters found in a purse or wallet is not permissible unless the officer has reason to believe they contain evidence of an offence against an Act administered or enforced by Canada Customs. Apparently, Canada Customs administers or enforces 95 different Acts.

In addition, the Bulletin indicates that documents not relating to such an offence may not be examined or copied and that documents may only be photocopied if they relate to goods under seizure or to a *Customs Act* offence under investigation.

The title of the Bulletin and the language in paragraph 39 of the *Customs Enforcement Manual* appear to limit the direction prohibiting examination and copying of documents, unless they relate to goods under seizure or a *Customs Act* offence, to personal papers and journals, rather than extending it to all documents in the possession of a person being examined. According to that interpretation, the direction in the Bulletin would not apply to documents not considered "personal." That is the way the Customs officers who testified at the

Inquiry interpreted the Bulletin, and I believe that was a reasonable interpretation on their part.

The Bulletin provides little direct guidance as to what would constitute "personal papers and journals" and therefore fall within the prohibitions contained in it. However, its reference to personal diaries or letters found in a purse or wallet would suggest that the prohibitions are not directed at all types of documents that may be found on a person being examined.

I am satisfied that it was reasonable for the Canada Customs officers who conducted the two secondary examinations of Mr. Arar to examine the documents they found in his possession. They did not consider examining these documents to be prohibited. With the exception of the teaching materials, the documents related to Mr. Arar's travel and personal identification. There was nothing of a particularly private nature about the information obtained from the documents, particularly in the context of someone entering Canada. Much of the information obtained would likely have been available from publicly accessible sources.

It must be remembered that travellers entering Canada are required to complete an E311 Customs Declaration Card and submit it to a Customs officer. The information provided on that form includes the person's name, date of birth and address, the date of departure from Canada, mode of arrival into Canada, country of departure, countries visited while outside Canada and purpose of the travel, and a description and the value of goods imported. Travellers are also required to produce their passports, which contain their date of birth and information about their past travels.[40]

While the information contained in Mr. Arar's documents went somewhat beyond what was required on an E311 declaration card and what might be found in his passport, it was, generally, of the same nature. It seems to me, therefore, that the Customs officers' interpretation of what constituted "personal" information for purposes of the prohibition against examining and copying documents in the Enforcement Bulletin was consistent with the general approach taken in regard to information about travellers entering Canada.

As for the teaching materials, it is possible that the information in those documents would fall within the type of personal papers and journals addressed in the Bulletin. However, without hearing more about the content of those documents and what, if any, expectation of privacy Mr. Arar had in their regard, I am unable to comment about whether or not it was appropriate for those documents to be examined and copied.

I conclude that the examination by Canada Customs officers of the documents obtained from Mr. Arar during his secondary examinations did not breach

existing Canada Customs directions. Moreover, I am satisfied that the prohibition in the Bulletin against photocopying documents was intended to apply only to "personal" documents, as that term is used in the Bulletin, and not to the kind of documents obtained from Mr. Arar. Thus, I see no basis for criticism of the actions of the Customs officers with respect to the examination and photocopying of Mr. Arar's documents on November 29 and December 20, 2001.

I note that on May 31, 2002, Canada Customs amended its Enforcement Bulletin with respect to examining and photocopying personal documents. I discuss the amended Bulletin in the context of the examination and copying of Dr. Mazigh's documents on November 14, 2002.

5.2.1.2

Dr. Mazigh

Above, I set out my conclusion that Dr. Mazigh should not have been the subject of a lookout. As a result of that lookout, she was subjected to a secondary examination on November 14, 2002. It is fair to say that it is highly unlikely that she would have undergone such an examination had there not been a lookout.

The Government submitted that I should not consider the events relating to the secondary examination of Dr. Mazigh because they fall outside my mandate, which relates only to Mr. Arar. I disagree. Dr. Mazigh's secondary examination resulted directly from the investigation of Mr. Arar and, in my view, warrants comment pursuant to the part of my mandate that directs me to report on "any other circumstance directly related to Mr. Arar that [I consider] relevant to fulfilling this mandate."

During Dr. Mazigh's examination, a Canada Customs officer examined and photocopied certain travel and personal identification papers in her possession.[41] These related to Dr. Mazigh and to her children, who were travelling with her.

By the time of Dr. Mazigh's secondary examination, the relevant Canada Customs Enforcement Bulletin had been amended. While still not entirely clear, the amended Bulletin, entitled "Examination and Photocopying of Personal Documents,"[42] appears to broaden the prohibition against examining and photocopying travellers' documents set out in the earlier Bulletin. It, too, limits the restriction on examining and reading documents to "personal papers and journals," then goes on to explain the prohibition against reviewing personal papers and journals, noting that a review of such documents might have more of an impact on privacy rights than a review of commercial documents, one of the possible messages being that reviewing some documents, at least commercial documents, is permissible.

Under the heading "Photocopying," the Bulletin states, "Under no circumstances, are documents of any nature unrelated to the administration or enforcement of the *Customs Act* to be photocopied unless they are seized for some other purpose under lawful authority, or permission to photocopy the document is received…." As an example, the Bulletin provides specifically that personal identification of persons entering Canada may not be photocopied and passed to the police for intelligence purposes.

Finally, the Bulletin provides that "in all instances, individuals are to be advised when documents are photocopied."

Apparently, there was some controversy within Canada Customs about the amended policy. There were discussions about what it meant and the wisdom behind some possible interpretations. I must say that I find it to be very poorly drafted. While the title suggests that it relates only to "personal" documents, and the prohibition against examining and reading documents appears to apply to only those types of documents, the direction relating to photocopying extends much more broadly to "documents of any nature."

Leaving aside my conclusion that Dr. Mazigh should not have been the subject of a lookout in the first place, it appears that photocopying her documents on November 14, 2002 contravened the directions in the Canada Customs Enforcement Bulletin then in force.

That said, I find the manner in which Canada Customs has set out its policies with respect to examining and copying documents in the possession of those seeking entry to Canada to be very confusing. For example, there is no direction as to what may be examined and copied. The directions are cast only in the negative, and even these are far from clear.

In Chapter IX, I recommend that Canada Customs carry out a review of its policies in this area and that it set out, in one place, clear directions with respect to what is permitted and what is not. I imagine that front-line Customs officers have enough trouble carrying out their duties without having to wrestle with unclear enforcement bulletins. I have not heard sufficient evidence, and I do not believe it comes within my mandate, to make recommendations as to the specific content of Canada Customs policies in this area, other than to say that they will need to strike an appropriate balance between the enforcement role of Canada Customs and the need to avoid intruding unnecessarily on the privacy interests of travellers.

5.2.2
Examination of Mr. Arar's Computer and PDA

Canadian officials took two steps with respect to Mr. Arar's computer and PDA: they seized the articles for non-payment of duties, and they examined the articles and made notes of the information they found.

I am satisfied that the Customs officers acted within the authority conferred by the *Customs Act* in seizing Mr. Arar's computer and PDA. Subsection 110(1) of the *Customs Act*[43] provides that:

> An officer may, where he believes on reasonable grounds that this Act or the regulations have been contravened in respect of goods, seize as forfeit (a) the goods . . . .

Based on the information available to me, I conclude that the Customs officers involved in the seizure of Mr. Arar's computer and PDA had reasonable grounds to believe that Mr. Arar had contravened the *Customs Act* with respect to those items. Mr. Arar reportedly told them that he had not paid the duties required by the Act when these items had first been imported into Canada. That failure would be a contravention of the Act.[44]

The Customs officers testified that there had been another basis for seizing the computer and PDA. When asked to provide access to the computer, Mr. Arar had refused. Taken together, paragraph 13(b) and subsections 99.1(1) and (2)[45] of the *Customs Act* require that someone in Mr. Arar's circumstance co-operate with Customs officials by answering questions about goods being imported and, if requested, opening any package or container that the officer wishes to examine. The Canadian officials involved in the decision to seize Mr. Arar's computer and PDA understood these provisions to mean that Mr. Arar was required to provide his computer password to enable them to examine the contents. They apparently viewed his refusal as a circumstance giving rise to suspicion and as a separate basis for seizing the computer and PDA. I have difficulty accepting this rationale. I am very doubtful that, on its own, the refusal of an individual to provide a computer password to a Customs officer would form the basis for seizing the computer.

In any event, I am satisfied that, given Mr. Arar's reported admission that the computer and PDA had been purchased in the United States and that he had not paid the applicable duty when bringing them into Canada the first time, Customs officials had the statutory authority to seize and forfeit those articles.

On the morning following the seizures, Customs officials examined and made notes of information on the exterior of Mr. Arar's computer and

information that appeared on the screen without the use of a password. They also examined and made notes of information found on Mr. Arar's PDA, including telephone contact information.[46]

It is clear that the purpose of the examinations was to collect information connected with the lookout placed for Mr. Arar. Thus, while the articles had been seized and forfeited for non-payment of duty, the Customs officers were not seeking information relevant to that issue; they were looking for information that could help Project A-O Canada's investigation.

Although, as I point out below, I am not able to opine on whether the examinations of the computer and the PDA breached any of Mr. Arar's Charter rights, I am satisfied that the actions of Customs officers in examining the computer and PDA do not warrant criticism. I say this for three reasons. First, the articles had been seized and forfeited under subsection 110(1) of the *Customs Act*, and it was the Customs officers' understanding that, once goods were forfeited to the Crown, they were authorized to examine the contents, for whatever reason.

Next, the Customs officers believed they could examine the articles under the provisions of the *Customs Act* authorizing them to examine goods being brought into Canada where there is a reasonable suspicion that the Act has been contravened, as in this case. Paragraphs 99(1)(a) and (e), together with section 99.1,[47] authorize officers to open packages or containers and to examine goods.

Finally, the officers were aware that a lookout had been issued and, in examining the goods, they were responding to the lookout. The examinations were not inconsistent with previous practices, and there was no Canada Customs policy or directive indicating the limits, if any, on the examination of goods that had been seized and forfeited.[48] In these circumstances, I see no basis for critical comment concerning the actions of those involved in the examinations.

That said, I recognize that there may be an argument that the examinations were not authorized on a proper interpretation of the *Customs Act*, or that they contravened Mr. Arar's privacy rights under the Charter. The Government's position that the examinations were authorized rests on the propriety of the seizure under subsection 110(1). However, the seizure was for non-payment of duties, while the examinations were for an unconnected and different purpose: to further the national security investigation that had given rise to the RCMP's request for the lookout for Mr. Arar.

In Chapter IX, I recommend that Canada Customs develop a policy to provide direction to officers about the extent of their examinations of seized articles and, in particular, the examination of computers and other devices that may contain highly personal information.

5.2.3
Provision of Information to RCMP

Canada Customs officials provided Project A-O Canada with copies of the documents obtained during the secondary examinations of Mr. Arar, as well as information obtained from Mr. Arar's computer and PDA, with the appropriate caveats.

I am satisfied that Canada Customs officials reasonably believed that they had the authority under the *Customs Act* to provide this information to the RCMP.

The *Customs Act* was amended on November 29, 2001, the very day that Mr. Arar first underwent a secondary examination. In the amended Act, paragraph 107(4)(h) reads as follows:

> 107(4) An official may provide, allow to be provided, or provide access to customs information if the information. . . .
>
> (*h*) is reasonably regarded by the official to be information relating to the national security or defence of Canada.[49]

Subsection 107(1) defines "customs information" as

> information of any kind and in any form that
>
> (*a*) relates to one or more persons and is obtained by or on behalf of
>
> (i) the Minister for the purposes of this Act or the *Customs Tariff* . . . .

Customs officials believed, reasonably, in my view, that they had the authority under the *Customs Act* to examine the information, make copies and notes, and provide it to Project A-O Canada. The Customs officials gave the information to Project A-O Canada to assist it with its ongoing investigation into matters relating to Canada's national security, thus satisfying paragraph 107(4)(h) of the *Customs Act*. At the time, Project A-O Canada was investigating serious threats to Canada's national security. The events of 9/11 were very recent, and there was significant concern about a possible second wave of terrorist attacks. In addition, Project A-O Canada had recently received information of a possible threat to a major Canadian target. Mr. Arar, while not a suspect, was a person of interest in the Project's investigation. Above, I conclude that he was properly made the subject of a lookout by virtue of his connection to Mr. Almalki, who was a target. A Canada Customs officer had been assigned to the Project A-O Canada investigation team and had some knowledge, at least in general terms, of the investigation and Mr. Arar. Given the circumstances, I

am satisfied that the Customs official involved had reasonable grounds to regard the documents and information obtained from Mr. Arar as relating to the national security of Canada. The *Customs Act* accordingly gave the official the authority to provide the information obtained from Mr. Arar to Project A-O Canada.

Before leaving this issue, I wish to point out that, prior to the November 29, 2001 amendment to the Act, Canada Customs had provided Customs officials with guidance on sharing information with other agencies, in its *Customs Enforcement Manual* and enforcement bulletins. However, when the relevant sections of the Act were amended in 2001, Canada Customs did not immediately establish guidelines on providing information to other agencies. In fact, it did not release new guidelines to accompany the statutory amendments for more than two years. Thus, at the time the Canada Customs officer provided Mr. Arar's documents and information to Project A-O Canada, there were no guidelines. The officer had only the statutory provision on which to rely.

Interestingly, the new guidelines, which were eventually issued on November 26 and December 5, 2003,[50] require that authorization be obtained from a senior official in order to exchange information. In this respect, the guidelines are stricter than the statute. Given the potential implications of sharing information with other agencies, the greater control specified in the new guidelines makes sense.

As far as the information obtained from Dr. Mazigh's secondary examination on November 14, 2002 is concerned, I am satisfied that Customs officers should not have provided copies of the documents to the RCMP, as doing so clearly did not fall within the authority conferred by the *Customs Act*.

The Government has argued that the transfer was authorized under paragraphs 107(4)(h) and 107(5)(a) of the Act. Paragraph 107(4)(h) grants the authority to provide information where it is reasonably considered to relate to the national security of Canada. In my view, there was no reasonable basis to conclude that information about Dr. Mazigh came within that criterion. There was no evidence connecting her to suspects or targets of the Project A-O Canada investigation, and no information in Dr. Mazigh's documents that related even remotely to the investigation being conducted by the Project. Dr. Mazigh's sole connection was the fact that she was married to Mr. Arar who, by that point in time, had been in custody in Syria for over a month. Given the lack of any connection between the information about Dr. Mazigh and the Project A-O Canada investigation, there was no reasonable basis for a belief that would trigger the authority found in paragraph 107(4)(h) of the *Customs Act*.

Paragraph 107(5)(a) authorizes the provision of customs information to a peace officer (RCMP officer) if the Customs official believes that the information relates to an alleged offence. In the case of the Project A-O Canada investigation, there was no alleged offence. Moreover, there was no connection whatsoever between the information obtained from Dr. Mazigh's secondary examination and the matters being investigated by Project A-O Canada.

Thus, I am satisfied that the Customs officers should not have provided Project A-O Canada with Dr. Mazigh's information and documents.

5.2.4
Uploading of Profiles of Dr. Mazigh and Children into IMS

Canada Customs should not have uploaded the profiles of Dr. Mazigh and her children into the IMS, an automated facility for reporting and compiling intelligence information on targets "known or suspected to be a potential border risk."[51] Neither Dr. Mazigh nor her children fall into this category.

While the uploaded information was basic information obtained from the travel itinerary and identification documents of Dr. Mazigh and her children, that does not afford a reason for storing the information in an intelligence data bank, nor does the claim that there is limited access to the data bank. Dr. Mazigh and her children should not have been subjected to the negative connotations associated with the database, even if only Canada Customs intelligence personnel had access to it, which is by no means clear from the evidence. Information may be released to the broader public in certain circumstances (e.g., Access to Information requests), and other government departments and law enforcement agencies may have access to it.

In its submissions, the Government argued that the information had been uploaded into the intelligence data bank because Dr. Mazigh had been the subject of a lookout. My conclusion that no lookout should have been placed for Dr. Mazigh disposes of that as a reason for uploading the information.

Since information stays in the IMS system for 10 years unless expressly purged, I recommend that Dr. Mazigh's information and that of her children be purged forthwith from IMS, if this has not already been done.

6.
JANUARY 22, 2002 SEARCHES AND INTERVIEWS

6.1
SEARCHES

On January 22, 2002, Canadian agencies conducted simultaneous searches, pursuant to search warrants, of a number of locations in Ottawa, Toronto and other Canadian cities. At the same time, the RCMP interviewed various individuals.

Project A-O Canada considered and decided against applying for a search warrant for Mr. Arar's residence. It did not have sufficient evidence to obtain one. Nonetheless, Project members decided that they would attempt to interview Mr. Arar, as a witness, regarding his associations with Mr. Almalki and others.

[***]. The reliability of such information is always in question. As Deputy Commissioner Garry Loeppky explained in reference to RCMP policy, the RCMP has significant concerns about information that is received from another country where human rights abuse may occur. The information is noted because it relates to law enforcement, but so is its questionable validity or worth. If the information cannot be substantiated or corroborated, it is given little weight.

[***].

The question of the validity of the search warrants is not before me and it is not, therefore, appropriate for me to comment further at this time.

In Chapter IX, I recommend that, when information is received from countries that have questionable human rights records, the information be identified as such and steps be taken to assess its reliability. Further, reliability assessments should be updated from time to time and the most current assessments should be used by all Canadian agencies making use of such information or sharing it with other agencies.

I deal with the issue of the documents and articles obtained by Project A-O Canada during the searches in Section 7 of this chapter.

6.2
ATTEMPT TO INTERVIEW MR. ARAR

On January 22, 2002, the day the searches were conducted, members of Project A-O Canada went to Mr. Arar's residence with a view to interviewing him. On learning that he was in Tunisia and might be back in a few days, they left a business card.

Apparently, Mr. Arar learned of the visit and tried to contact the RCMP while he was still in Tunisia, without success. On January 25, after Mr. Arar had

returned home, an RCMP officer asked him to attend an interview at RCMP offices. It seems that, after some discussion, Mr. Arar consented to be interviewed the following day.

Mr. Arar then attempted to contact Michael Edelson, a criminal lawyer in Ottawa, but was unable to arrange to see him before January 30. As a result, the proposed interview on January 26 did not take place. Subsequently, Mr. Edelson contacted a government lawyer assigned to Project A-O Canada and indicated that Mr. Arar was prepared to meet with the police. The government lawyer told Mr. Edelson that the RCMP wanted to videotape the statement and have it made under oath, but would not indicate in what capacity Mr. Arar would be interviewed (as a witness or a suspect) or what the investigation was about.

Although Mr. Arar was willing to speak with the police, Mr. Edelson considered it prudent to impose conditions precluding the use of any statement in subsequent legal proceedings, the idea being that any statement would be for the purpose of providing information to the RCMP and nothing more. Mr. Edelson advised Mr. Arar that he should only agree to an interview with conditions attached. Mr. Arar accepted that advice and Mr. Edelson informed Project A-O Canada of the conditions.

Inspector Cabana considered the conditions exceptionally stringent. He testified that, for all intents and purposes, the interview would have been useless because of the condition that anything Mr. Arar said could not be used in any proceedings against Mr. Arar or anyone else. Project A-O Canada therefore decided not to proceed with the interview.

I do not accept Inspector Cabana's view that interviewing Mr. Arar would have been "for all intents and purposes…useless." Information gained from the interview could have been used for intelligence purposes. Moreover, information initially provided for intelligence purposes might subsequently have been used for other purposes, with Mr. Arar's consent. Bearing in mind that Project A-O Canada's primary focus at the time was on prevention of any terrorist actions, rather than prosecution, it is difficult to understand why the Project would not have wished to obtain as much information as possible, whether or not it could ultimately be used as evidence.

In any event, the fact remains that Mr. Arar agreed to be interviewed, albeit with conditions. Agreement to be interviewed subject to conditions such as those stipulated by Mr. Edelson on Mr. Arar's behalf does not amount to a refusal to be interviewed.

After Project A-O Canada decided against proceeding with Mr. Arar's interview, Project members told American authorities on at least two separate occasions that Mr. Arar had refused to be interviewed.[52] Those statements were

inaccurate and unfair to Mr. Arar. The fact that Project members made such statements is cause for serious concern. One should not underestimate the seriousness of a statement that an individual "refused to be interviewed," particularly in the minds of law enforcement officers such as FBI agents. The inference, of course, is that the person had something to hide. Such statements inevitably raise suspicions — suspicions that, in Mr. Arar's case, were unfounded and unfair.

7.
INFORMATION SHARING WITH U.S. AGENCIES

7.1
OVERVIEW

The most significant problems arising from the Project A-O Canada investigation concerned information sharing with the United States. The information about Mr. Arar provided to the American agencies is set out in Section 4.10 of the Factual Background. I do not repeat it here. Rather, I focus on those areas where I judge that there were problems with the sharing of information or where I think my comment is warranted. My main conclusions are as follows.

- Project A-O Canada provided the American agencies with information in a way that did not comply with RCMP policies respecting screening for relevance, reliability[53] and personal information and respecting the use of written caveats on documents being shared. Some of this information related to Mr. Arar.
- Project A-O Canada took the unprecedented step of providing the American agencies with its entire Supertext database, which included all documents obtained during its investigation.
- Project A-O Canada provided the American agencies with information about Mr. Arar that was inaccurate, in that it unfairly overstated his importance in the investigation or misdescribed facts in a way that would tend to increase suspicions about his activities.[54]
- Project A-O Canada provided the American agencies with third-party information to which caveats were attached without obtaining the originators' consent.
- The RCMP gave Project A-O Canada unclear and misleading direction with respect to sharing information and failed to adequately oversee the Project's information-sharing practices.

7.2
IMPORTANCE OF INFORMATION SHARING

Sharing information with domestic and foreign agencies is often critically important to a national security investigation. In recent years, terrorism threats at the basis of most of these investigations have been global and many investigations have involved associations reaching across international borders. In order for those responsible for protecting Canada's national security to effectively investigate many of those threats, they must have the capacity to share information with law enforcement and intelligence agencies in Canada and other countries.

Jack Hooper, Assistant Director of Operations for CSIS, stated plainly that Canadian authorities could not possibly tackle the threat of terrorism without sharing information with other agencies, including foreign agencies. The threat posed by terrorism from al-Qaeda was and continues to be real, and it is international. As Mr. Hooper said, "compromising al-Qaeda operations requires an unprecedented level…of cooperation between police, law enforcement, immigration officials and the like, not just domestically, but internationally as well."

Prevention is frequently the primary objective when investigating terrorist threats. The harm resulting from a terrorist attack is potentially devastating. Investigators often work under great pressure to identify the source of a threat and ascertain ways of disrupting or preventing an attack. To this end, they must obtain as much information as possible from domestic and foreign sources.

Not surprisingly, information sharing must be reciprocal if it is to be effective. If an agency wishes to receive information from other agencies, it must be prepared to provide information in return. The networks within which terrorism-related information is shared must function on a co-operative basis.

Information sharing among agencies allows a more comprehensive picture to emerge. Viewing different pieces of information together may allow a more complete and accurate assessment of the threat being investigated and the steps needed to address that threat. Sometimes, seemingly inconsequential bits of information may take on an importance not otherwise apparent when viewed alongside other information. Broad information sharing is therefore essential to effective prevention.[55]

Information sharing became even more important in the aftermath of 9/11. Threats from international terrorist networks were real and there was an immediate concern about a possible second wave of attacks. In such an environment, there was no room for investigative agencies to adopt an isolated, stand-alone approach to terrorist investigation and to refuse to pass on information to other agencies investigating the same or similar threats. As RCMP Deputy

Commissioner Loeppky put it, the "traditional stovepipes" needed to come down. He suggested that in certain circumstances, the RCMP might even have a duty to share information, domestically and internationally, to prevent the commission of an offence.[56]

7.3
NEED FOR CAUTION

While there is a great need to share information with other agencies, there is also a need for caution in relation to the content of that information and the use to which it may be put by the recipient. That is the reason the RCMP has information-sharing policies that apply to all criminal investigations.

7.3.1
Content of Shared Information

The RCMP has a legitimate concern, indeed a responsibility, to ensure that information it provides to other agencies is appropriate for sharing in the particular circumstances.

When an agency such as the RCMP collects information in the course of an investigation, it assumes a type of proprietary interest in and control over that information. The information becomes its work product. The RCMP stores the information in its files or information storage systems and does not routinely make it available to the public. It controls the use to which the information may be put, subject to the requirements of law.

In the interests of conducting thorough investigations, the RCMP collects as much information as possible that may be related to what is being investigated. The inclination of a good investigator is to cast a wide net and, as the investigation proceeds, analyze the information to determine what is useful and what is not. The information gathered may include some of a personal nature about individuals targeted by an investigation or others connected in some way with those individuals.

In a normal investigation, the information collected will have varying degrees of value over time. Some may turn out to be irrelevant, unreliable or even inaccurate. In some circumstances, the information may be potentially misleading because it creates an inaccurate or unfair picture about a particular event or individual.

That being the case, the RCMP does not indiscriminately provide all of the information it collects to others. It, like other agencies that share information, has developed policies aimed at carefully screening the content of information that may be shared for relevance and reliability, as well as for personal information.

Screening for relevance involves considering why another agency is requesting the information, including the nature of that agency's investigation and how the agency might use the information. It is often said that information should be given only to those who have "a need to know."[57] Moreover, if it is determined that a recipient agency intends to use information for a purpose of which the RCMP does not approve, the information need not be provided.

RCMP policy also requires that information be screened for the reliability of the sources of the information. The policy sets out different categories of reliability and requires that the appropriate label be attached to each source, to ensure the recipient is made aware of the reliability rating. The obvious intent is to ensure that recipients are not misled about the value of information. There is also a practice, not specifically set out in the policy, of screening information for accuracy. As one would expect, the RCMP is careful to ensure that the information it provides to others is accurate. If there is any doubt in this respect, that doubt should be flagged. Providing unreliable or inaccurate information to other agencies is in no one's best interests and can create potentially serious problems for those who rely on it and possibly those who are the subjects of the inaccuracies.[58]

Finally, RCMP policy requires that information being provided to other agencies be screened to ensure compliance with applicable laws relating to the disclosure of personal information. Those laws prohibit the disclosure of personal information, subject to exceptions for consistent use disclosure, disclosure for law-enforcement purposes, and public interest disclosure.[59] Screening for personal information may also require the RCMP to take into account the consequences of providing personal information, the safety of the individuals involved, and what might occur if those individuals travel to certain places.

All in all, the RCMP has very sensible policies that require a thorough vetting of information before it is provided to other agencies. These policies do not in any way diminish the importance of information sharing. Rather, they help ensure that information is shared for appropriate purposes only, that recipients are not misled about the reliability or accuracy of information, and that personal information is properly protected. Sharing irrelevant, unreliable or inaccurate information does not serve the legitimate security interests of information sharing. Indeed, sharing such information may be worse than not sharing information at all.

7.3.2 Control of Information

It is important that the RCMP control, to the extent it is able, the use to which information provided to other agencies may be put. Given that any information provided is the product of the RCMP's information-gathering and, in some cases, analysis efforts, it is reasonable that the RCMP try to maintain as much control as possible over how it is ultimately used. Controlling information provided to other agencies is standard practice in the law enforcement and security intelligence communities.

The reasons behind the need for the RCMP to control shared information are obvious. Recipients may wish to use information in unacceptable ways, ways that would lead the RCMP to refuse to share the information if it knew about them in advance. For example, if it knew that information it was considering providing to another agency would be used as part of an interrogation involving torture, it could decide not to share that information.

Another example relevant to the Inquiry relates to the American practice of rendition. The evidence shows that members of the RCMP were unaware of this practice of sending individuals to other countries for interrogation and possible torture. It is also clear from the evidence that the RCMP disapproves of the practice and would not provide information to American officials with the knowledge that it would be used to support a decision to render an individual, particularly a Canadian citizen, to a country where that person would likely be tortured. RCMP policy directs that the Force not become involved in activities that might violate the rights of an individual, subject only to some very narrow exceptions.[60]

Since the RCMP has a reasonable and legitimate interest in controlling, to as great an extent as possible, the way in which shared information will be used, RCMP policy requires that caveats be attached to correspondence, messages and documents provided to other agencies. The use of caveats is standard in the law enforcement and security intelligence communities. It enables agencies to share information for intelligence or information purposes[61] while retaining the capacity to control how their own information is used. RCMP caveats require that recipients of RCMP information seek the consent of the RCMP before disseminating that information to others. They are a means of attempting to ensure that Canadian information is not used in a way that would be inconsistent with Canadian values and objectives.

There is no guarantee that a recipient of information to which a caveat is attached will honour that caveat. The system is based on trust and caveats are not legally enforceable. However, the ability and willingness of agencies to

respect caveats and seek consent before using information will affect the willingness of others to provide information in the future — a significant incentive for agencies to respect caveats.

Common sense tells us that this incentive is greater when caveats are clear and in writing. Some witnesses suggested that implied caveats — unwritten understandings — were an ample substitute for the written ones required by RCMP policy. I disagree. While written caveats do not provide a complete assurance of compliance, those who are considering breaching a caveat, which is a type of agreement, will be less likely to do so in the face of a clear and express written directive. It leaves little, if any, opportunity to justify the breach of trust.

In honouring an RCMP caveat, which evidence suggests is the normal practice, the recipient seeks consent from the RCMP to use the information for a specified purpose or share it with another party. In deciding whether to consent or not, the RCMP typically considers the nature of the information, the consequences of the proposed use, and the potential impact on individuals. If the RCMP does not approve of the use of the information as proposed, it may refuse its consent, and the recipient, honouring the caveat, will not use the information for that purpose.

The RCMP also has a policy providing that, when it receives information with caveats from another agency, its members must respect the caveats and seek the consent of the originating agency before using or disseminating the information. This is the other side of the coin. Respecting the caveats of others promotes effective information sharing in the future.

7.3.3 Centralization of Decision Making

The RCMP also has a policy directed at centralizing decisions about information sharing within the Force. The normal procedure for providing information, particularly national security information to foreign agencies, involves first going through CID at RCMP Headquarters. The idea is that Headquarters staff have expertise in matters related to information sharing and can therefore ensure that the information being shared is appropriate and that the RCMP's information-sharing policies are uniformly applied. Given that decisions with respect to information sharing can sometimes be difficult and sensitive, it is sensible to centralize these types of decisions within the RCMP.

However, there are certain exceptions to this centralized approach that allow continuous investigator-to-investigator information exchange, provided CID is involved in establishing the initial relationship. It is often not practical or necessary for CID to be involved in decisions about each piece of information

to be shared. That said, the practice is that CID is kept informed, at least in general terms, about the type of information sharing that is taking place.

7.3.4 Post-9/11

RCMP policies on information sharing did not change after the events of 9/11. Information-sharing policies are national in scope and may only be changed by written amendment. According to senior officers who testified at the Inquiry, there was no direction or intention that the then-existing policies on information sharing be suspended or amended.

If anything, the need for adherence to RCMP information-sharing policies when dealing with American agencies was even greater in the aftermath of 9/11. American authorities appeared ready to use extreme measures to deal with terrorism threats, possibly including some that might be unacceptable to the RCMP.[62] I note that the evidence shows that, since the Arar affair, the RCMP has developed a greater sensitivity to and awareness of the risks to Canadians accused of links to al-Qaeda when they are in the United States.[63] Ward Elcock, Director of CSIS in the period immediately following 9/11, testified that, despite the fact that Canada and the United States have what is probably one of the closest information-sharing relationships in the world, neither side actually shares everything with the other, and information-sharing policies should continue to be as vigorously applied as before 9/11.[64] CSIS, which has similar information-sharing policies to those of the RCMP, did not relax its policies in the wake of 9/11.

The one possible exception to the need to strictly adhere to RCMP policy in the aftermath of 9/11 related to the centralization of information sharing. In the months following 9/11, officers at the operational level and at CID at Headquarters were swamped with matters arising from increased national security concerns. It was understandable in this situation that instructions would be given for operational units, such as Project A-O Canada, to share information directly with their American counterparts, provided RCMP Headquarters was kept informed of the nature of these information-sharing practices.

However, it was precisely because of the impracticability at the time of channeling all information to be shared through Headquarters for screening that there was a heightened need to clearly and firmly instruct operational staff that RCMP policies respecting screening and caveats were to be properly applied to any information shared.

Despite this need, some RCMP officers testified that, because of the imminent threat of another terrorist attack following 9/11, it had no longer been prac-

tical or desirable at the time to adhere to policies on screening information and using caveats for information shared with the United States. As some expressed it, "caveats were down." Both Deputy Commissioner Loeppky and Assistant Commissioner Richard Proulx, the officer in charge of CID, rejected this position completely. They were clear that the RCMP, as an institution, had not intended that RCMP officers, including members of Project A-O Canada, deviate from RCMP policies, except in regard to centralization, as discussed above.

I am satisfied that, in the period after 9/11, there was no need to depart from established policies with respect to screening and the use of caveats. The urgency of investigations and the workload of investigators did not justify such a departure. Attaching caveats to documents being provided to American agencies is a very simple, straightforward exercise and is not time-consuming. Similarly, reviewing documents obtained during the course of the RCMP's investigation for relevance, reliability and personal information would not generally be a complicated matter. Because these documents were a product of an RCMP investigation, one would expect that they had already been reviewed and analyzed as part of the investigation. The additional screening before sharing information with another agency is extremely important and, in most cases, should not create an undue burden on investigators.[65] Indeed, CSIS routinely shares information without deviating from its information-sharing policies.

In short, I agree with the senior officers of the RCMP that there was no basis for changing RCMP information-sharing policies after 9/11.

7.4
ORIGINAL ARRANGEMENT

Immediately after 9/11, the RCMP, CSIS and the American agencies met to discuss the threat of another terrorist attack and the need for increased co-operation and coordination among the agencies, including the sharing of relevant information in a timely manner. These discussions were the starting point for the information-sharing arrangements that, in time, led Project A-O Canada to provide the American agencies with a significant amount of information about a number of individuals, including Mr. Arar.

RCMP Assistant Commissioner Proulx testified that there had been an understanding at the meeting that the parties would share all information relating to terrorist threats in "real time," that is, in a prompt manner, so that appropriate preventative or disruptive action could be taken before another tragedy like 9/11 could occur.

According to Assistant Commissioner Proulx, in making this arrangement, the RCMP had had no intention of deviating from its existing policies related to

criminal and national security investigations. It had never intended for information to be shared without prior screening in accordance with RCMP policy or for caveats not to be attached to all correspondence, messages and documents provided to other agencies.

This information-sharing arrangement was not set down in writing. Following the September meeting, Assistant Commissioner Proulx discussed it verbally with senior RCMP officers in the various divisions, including "A" Division in Ottawa. In turn, the senior officers at "A" Division discussed the arrangement with Project A-O Canada's managers. Although there are a few notes concerning these communications, RCMP Headquarters did not give the senior officers at "A" Division any formal direction, and those officers did not formally provide Project A-O Canada members with details of the arrangement that had been reached at the September meeting. Rather, instructions about information sharing were passed down the RCMP's chain of command by word of mouth. The result was confusion. Those involved in the communications have different recollections of what was said. In the end, Project A-O Canada's understanding of the arrangement, as testified to by the project managers, differed in several important respects from the arrangement described by Assistant Commissioner Proulx.

According to Assistant Commissioner Proulx, the arrangement among the partner agencies had not involved departing from RCMP policies.[66] Superintendent Wayne Pilgrim, Inspector Rick Reynolds and Corporal Rick Flewelling of CID had a similar understanding. However, they also spoke of an arrangement involving an implicit caveat, suggesting a potential for departure from the requirement for written caveats on shared documents.

The senior officer at "A" Division, Assistant Commissioner Dawson Hovey, indicated that RCMP policies had continued to apply to the Project A-O Canada investigation despite the new information-sharing arrangement. However, he had little direct involvement in the investigation and was unaware until later that Project A-O Canada had shared information without following RCMP policy. According to Chief Superintendent Couture, the CROPS Officer at "A" Division, there had been a general understanding among the partner agencies that information was to be shared without caveats. He had formed this impression, in part, based on something Assistant Commissioner Proulx had said in December 2001. While he believed caveats had been down, he did not believe that the policy requiring consent to share third-party information to which caveats were attached had been suspended.

The Assistant CROPS Officer at "A" Division, Inspector Clement, testified that there was to have been an "open-book arrangement" among the partner

agencies. He had understood from Chief Superintendent Couture in December 2001 that caveats had been down. However, the understanding among the partner agencies had been that information was to be shared for intelligence purposes and not used for court proceedings.

By the time the communication about information sharing reached members of Project A-O Canada, it was often referred to as an "open-book investigation" or a "free-flow-of-information agreement." Members of Project A-O Canada referred to the parties to the original discussions as "partners to an agreement." More specifically, the project managers for Project A-O Canada testified that they had understood the "agreement" to include the following:

- Caveats were down. Project managers testified that they had understood that it was not necessary to attach caveats to documents being shared with the other agencies, and that RCMP policies requiring this to be done did not apply. However, they said there had been an implicit understanding that information shared would be used for intelligence purposes only.
- All information obtained by Project A-O Canada could be transferred to the "partners to the agreement." It was not necessary to screen information transferred to the other agencies for relevance and reliability or for personal information. RCMP policies and practices requiring such screening did not apply.
- The parties could share information received from one party to the agreement with the other parties without the consent of the originator, even if caveats had been attached by the originator.

As a result of these understandings, Project A-O Canada provided information to the American agencies in a manner that was very different from that contemplated by Assistant Commissioner Proulx when he had discussed the arrangement at the September 2001 meeting, and very different from the direction Assistant Commissioner Proulx testified he had given the senior officers in the divisions, including "A" Division.

The Project transferred information to U.S. agencies without first screening it for relevance or reliability, or for personal information. Moreover, it did not attach written caveats to most of the documentary information provided to the U.S. agencies prior to Mr. Arar's detention in New York on September 26, 2002. The Project also transferred to the U.S. agencies some third-party documents that contained caveats, including documents received from CSIS and Canada Customs, without first obtaining the consent of the originators.

This situation should never have arisen. The way information is shared is critically important to a national security investigation. Furthermore, the lack of

training and experience of Project A-O Canada members in such investigations, a fact that was well known to senior officers, made the need for clear direction concerning this vital aspect of its investigation even more imperative. Yet instructions from RCMP senior management about how information was to be shared with the American agencies were unclear and misleading.

It was incumbent on Assistant Commissioner Proulx at RCMP Headquarters and senior officers in "A" Division to exercise more care to ensure that divisional staff who would be sharing information, such as officers in Project A-O Canada, received clear and accurate information about what the arrangement with the other partner agencies entailed and, in particular, how information was to be shared.

While I can understand that there were great pressures as a result of 9/11, it would not have been difficult to communicate the details of the arrangement clearly and in writing. Indeed, I have difficulty understanding why no one responsible for passing instructions down the chain of command set out what was intended in writing, particularly since some understood that there was to be a significant departure from the RCMP's written policy. The result was an unacceptable case of miscommunication owing to a far too casual approach to matters that could have a serious impact on the Project investigation and on the interests of individuals who became involved in that investigation.

Project A-O Canada consequently began its investigation with a serious misunderstanding about the ways in which information could or should be shared with the U.S. agencies. That misunderstanding played an important role in the events that followed.

7.5
PROJECT A-O CANADA'S APPROACH

Project A-O Canada first met and communicated with the American agencies about its investigation in late October or early November 2001, and continued to do so regularly after that time. These contacts were mainly to exchange information, seek help with analysis, and obtain operational support. In the early stages, Project A-O Canada generally provided information verbally.

It is important to note that the other parties to the arrangement did not always follow Project A-O Canada's practice of sharing information without caveats. CSIS witnesses testified there had been no agreement along the lines understood by Project A-O Canada, that CSIS had never agreed to share information without caveats. Whenever it had provided information to the RCMP, it had always attached caveats. Moreover, CSIS had not agreed that its information could be transferred to any of the other agencies without its consent. CSIS wit-

nesses maintained that the provisions of the 1989 memorandum of understanding between CSIS and the RCMP requiring consent had continued to apply. In other words, CSIS had decided how its own information would be shared and with whom.

The American agencies also frequently attached caveats when they provided information to Project A-O Canada in documentary form. Whether this was happenstance or by design, I cannot say, but Project A-O Canada's practice of sharing virtually all of the information collected during its investigation with the other agencies without attaching caveats stands apart from the practice of the other agencies.

It is worth noting that when the Project wanted to use information from the U.S. agencies in its applications for search warrants in January 2002, it first sought the consent of the providing agencies.

Department of Justice lawyers assigned to Project A-O Canada throughout its investigation occasionally provided legal advice, which very likely included advice about the Project's information-sharing practices. However, the Government refused to disclose such advice, claiming solicitor-client privilege. Therefore, I am unable to comment on the nature of that advice or the effect it might have had.[67]

7.6
INVESTIGATION OF MR. ARAR

Project A-O Canada first became aware of Mr. Arar in October 2001, in connection with his meeting with Mr. Almalki at Mango's Café in Ottawa. During the subsequent investigation, the Project collected assorted information about Mr. Arar, including:[68]

- publicly available biographical data;
- Mr. Arar's tenancy agreement and his rental application, which showed Mr. Almalki as an emergency contact; and
- information that Canada Customs had obtained from Mr. Arar during the secondary examinations of November 29 and December 20, 2001.

It is important to note that Project A-O Canada did not consider Mr. Arar to be a suspect or a target of its investigation. It did not believe that he had committed a criminal offence or that he was about to do so. When the Project sought authority to search the residences of persons suspected of being involved in illegal activities in January 2002, it did not include Mr. Arar's residence in its application. It did not have sufficient information to obtain a search warrant with respect to Mr. Arar.

From Project A-O Canada's perspective, Mr. Arar was a "person of interest," peripheral to the investigation of Mr. Almalki, an individual suspected of conducting activities for al-Qaeda. When the Project's investigation revealed that Mr. Arar knew Mr. Almalki and had associated with him on occasion, officials became interested in interviewing him. As a result, when the Project conducted searches on January 22, 2002, it also sought to interview Mr. Arar, although the interview never took place.

Further, when Mr. Arar was being held in New York, Project A-O Canada sent questions to be asked of him and considered going to interview him directly. It is important to remember that, both times Project A-O Canada sought to question Mr. Arar, in January and September 2002, it was interested in him merely as a potential witness, as someone who knew and had some association with Mr. Almalki and others, and who might have information that would advance its investigation.

Even though Mr. Arar was only a person of interest in the investigation, I am of the view that it was appropriate for Project A-O Canada to share information about him with the U.S. agencies. The agencies were co-operating in the investigation, and information sharing was vital. Project A-O Canada was properly interested in Mr. Arar, and it was important that it investigate his connections to Mr. Almalki and others. There is nothing wrong with sharing information about a person of interest.

However, when sharing information about Mr. Arar, it was vitally important that the Project be accurate and precise, so as not to overstate its interest in Mr. Arar or his status in the investigation.

Project A-O Canada provided documents to the American agencies on several occasions prior to Mr. Arar's detention in New York, sometimes inaccurately describing Mr. Arar's status in its investigation. Over time, it variously described Mr. Arar as:

- an "Islamic Extremist...suspected of being linked to the Al Qaeda terrorist movement;"
- a suspect or target;
- a principal subject of the investigation;
- a person with an "important connection" to Mr. Almalki;
- a person linked to Mr. Almalki in a diagram titled "Bin Laden's Associates: Al Qaeda Organization in Ottawa;" and
- a business associate or close associate of Mr. Almalki.

These descriptions of Mr. Arar were either completely inaccurate or, at a minimum, tended to overstate his importance in the Project A-O Canada inves-

tigation. The Project did state its actual interest in Mr. Arar in some documents. For example, on September 26, 2002, in referring to its attempt to interview Mr. Arar on January 22, 2002, it called Mr. Arar a witness. On October 4, 2002, in a fax to American authorities, it said that it was unable to indicate that Mr. Arar had links to al-Qaeda. The fact remains, however, that the written record provided to American agencies contained many inaccuracies, some of which were very serious.

It is important to note that, in addition to its written communications with the U.S. agencies, Project A-O Canada met frequently with U.S. officers, sometimes on a daily basis, and exchanged information verbally. It may be that some of the discussions either expanded upon or qualified what had been said about Mr. Arar and his status in the written information provided. Some Project members testified that the U.S. agencies had been told of the extent of their interest in Mr. Arar and had understood that he was merely a person of interest. This does not change the fact that several documents provided to the American agencies presented Mr. Arar in a much more serious light.

The need to be precise and accurate when providing information is obvious. Inaccurate information or mislabeling, even by degree, either alone or taken together with other information, can result in a seriously distorted picture. It can fuel tunnel vision, the phenomenon on which Justices Kaufman and Cory commented in the Morin and Sophonow inquiries,[69] which led investigators astray. The need for accuracy and precision when sharing information, particularly written information in terrorist investigations, cannot be overstated.

It is not clear whether, on the occasions Project A-O Canada provided inaccurate descriptions of Mr. Arar's status in its investigation, it had screened the information for reliability or accuracy. I suspect that the mischaracterizations resulted from either a lack of attention or a failure to appreciate the significance that might be attached to the descriptions by the American agencies. Investigators more familiar with the national security milieu would likely have been more sensitive to the potential risks and unfairness to Mr. Arar. CSIS, for example, appears to be generally very careful and precise, as it should be, when analyzing information, making assessments, and passing them on to others.

Further, in providing the descriptions of Mr. Arar, Project A-O Canada did not attach caveats and therefore did not, to the best extent possible, maintain control over how the American agencies might use the information, in accordance with RCMP policy. In my view, the failure to attach caveats made it more likely that the inaccurate descriptions would be used without seeking the consent of the RCMP.

I will turn now to four specific instances when Project A-O Canada shared information about Mr. Arar with U.S. agencies: the lookout requests, an FBI visit in February 2002, the three CDs, and a presentation on May 31, 2002.

7.6.1
U.S. Border Lookout Request

In late October 2001, Project A-O Canada sent written requests to Canada Customs and U.S. Customs for border lookouts for Mr. Arar and Dr. Mazigh, and their vehicles.[70] In those requests, it provided some information about Mr. Arar and Dr. Mazigh. The request to U.S. Customs was also provided directly to the U.S. agencies in April 2002.

As I noted earlier, the letters requesting the Canadian and American lookouts described Mr. Arar and Dr. Mazigh as Islamic extremist individuals suspected of being linked to the al-Qaeda terrorist movement. There was clearly no basis or justification for this description. Moreover, it was highly inflammatory and, in the post-9/11 environment in the United States, had the potential to prove enormously prejudicial to them.

There are two parts to the statement. First, there is the assertion that those named were part of a "group of Islamic Extremist individuals." I note that this was not put forward merely as suspicion, but as a statement of fact, even though Project A-O Canada had no information to support the statement.

The RCMP treats statements from other law enforcement agencies, absent any credibility problems, as coming from "reliable sources." It is reasonable to expect that U.S. agencies would treat statements in the RCMP's lookout requests the same way, as would Syrian authorities if the information was passed on to them by the Americans.

Branding someone an Islamic extremist is a very serious matter, particularly in the post-9/11 environment, and even more so when it is done in information provided to American agencies investigating terrorist threats. In the world of national security intelligence and counter-terrorism, anyone viewed as an Islamic extremist is automatically seen as a serious threat in regard to involvement in terrorist activity.[71]

The second part of the statement was that Mr. Arar and Dr. Mazigh were suspected of being linked to the al-Qaeda terrorist movement. Again, there was no basis for this assertion. The RCMP had no information concerning Dr. Mazigh other than that she was Maher Arar's wife. As for Mr. Arar, at most, Project A-O Canada had information that he knew and had associated to some extent, possibly in suspicious circumstances, with Abdullah Almalki, a man suspected of being a member of al-Qaeda; he had listed Mr. Almalki as an emergency

contact on his rental application; and he was also known to Ahmad El Maati, a suspect in the Project O Canada investigation at the time. However, Mr. Arar was not suspected of any criminal activity and Project A-O Canada had no information on which to base the statement that he was suspected of being linked to the al-Qaeda network.

Members of Project A-O Canada who testified about these letters, including one of the signatories, Inspector Cabana, acknowledged that the wording concerning Mr. Arar and Dr. Mazigh was inaccurate. Basically, their explanation for the offensive language was that they had been under time pressure and had not considered the implications of branding Mr. Arar and Dr. Mazigh in this way.

Inspector Cabana suggested that the problem would have been avoided had the word "suspected" been moved three words forward, to indicate that Mr. Arar and Dr. Mazigh were "suspected" of being Islamic extremists. I disagree. Project A-O Canada had no information to support such a suspicion. In fact, it had no information, one way or the other, about Mr. Arar and Dr. Mazigh's beliefs in Islam, let alone about any extremist beliefs.

I accept that those responsible for sending the letters did not act maliciously, but that does not excuse the grossly inaccurate and potentially inflammatory description of Mr. Arar and Dr. Mazigh. I do not accept the pressure of time as a valid reason. Surely, when sending a letter of this nature, it would not have required an undue amount of time for experienced police officers to ensure that it did not contain seriously inaccurate and potentially very harmful language.

The letters in question were sent at a time that made the consequences particularly dangerous to those named: not even two months after 9/11 and two weeks after the invasion of Afghanistan in pursuit of al-Qaeda. In the words of President Bush, America was at war with al-Qaeda. It was obvious to Canadian investigators that the threshold for taking steps that might be very intrusive to an individual's rights and liberties was lower for American authorities involved in counter-terrorism investigations than for their Canadian counterparts. A number of witnesses at the Inquiry testified that Canadian officials were aware of the U.S. authorities' propensity to deal with anyone suspected of terrorist links, particularly Muslim or Arab men, in ways that were different from what Canadian authorities would do in similar situations, ways that would be unacceptable under Canadian law.

The request sent to U.S. Customs officials by Project A-O Canada was for lookouts to be placed in TECS, an information and communication system also employed by agencies such as the United States Bureau of Alcohol, Tobacco, Firearms and Explosives, the Internal Revenue Service, the National Central

Bureau of INTERPOL, the Drug Enforcement Administration, the State Department, and the U.S. Coast Guard. Apparently, the CIA also has access to this system, as does the FBI when working on a joint operation. Evidence at the Inquiry indicated that more than 30,000 officials have access to TECS.

Since American authorities declined the invitation to testify at the Inquiry, there is no direct evidence as to whether or not the letter itself was entered into the TECS system.[72] In any event, the letter requesting the lookout was provided directly to the U.S. agencies in April 2002, as it was included in the three CDs that Project A-O Canada gave the U.S. agencies — CDs containing the entire contents of its Supertext database on the investigation. Thus, regardless of whether the letter with the offensive descriptions found its way to the American agencies when it was initially sent, there is no question that those agencies received it in April 2002 and were in possession of it when Mr. Arar was detained in New York five months later.

When considering the letter's significance, it is also important to note that Project A-O Canada did not attach caveats to it or to the information contained in the three CDs.[73] Thus, there were no restrictions on how the information in the letter could be used other than those that might flow from an implicit understanding. Even then, the letter itself was sent to U.S. Customs, which was not one of the partner agencies party to the unwritten "information-sharing agreement."

It is worth noting as well that the letter requesting the lookouts was never withdrawn or amended. In November 2001, the Americans informed Project A-O Canada that the individuals named in the Canadian lookout request and their respective vehicles had been entered into the TECS system. There was no indication of the duration of the lookouts or whether they had to be renewed periodically. Project A-O Canada never withdrew the request for lookouts, nor did it ask that the language describing Mr. Arar or Dr. Mazigh as "Islamic Extremist[s]...suspected of being linked to the Al Qaeda terrorist movement" be amended or removed. Indeed, the fact of supplying the letter to the American agencies again four months later could have been viewed by those agencies as an indication that the Project continued to stand behind the statements in the letter.

The lookout request was sent without prior approval from either the CROPS officers in "A" Division or CID at Headquarters. I was told that requesting a lookout is a relatively routine investigative step and does not require authorization from senior officers.[74] While a situation report forwarded to CROPS officers and CID indicated that Project A-O Canada would put "all our target names, addresses and vehicle information…on the U.S. Customs TECS system," it made no reference to the offensive description of Mr. Arar and Dr. Mazigh.[75]

I note that this is one instance where team members' lack of training and experience with respect to national security investigations and the lack of oversight by senior officers in the RCMP likely combined to create a situation that was grossly unfair to Mr. Arar. The offensive language in the lookout request led to serious and unacceptable risks for Mr. Arar in the United States. Officers properly trained in national security investigations would have been aware of the risks in describing individuals — especially Muslim or Arab men — in this way and of the dangers in making such an assertion, particularly to American agencies in the period following 9/11.

7.6.2
February FBI Visit

In February 2002, members of the FBI visited Project A-O Canada offices to review and analyze certain documents. Project officers testified that the American agents had been permitted to view materials strictly for "intelligence purposes."

The Project gave the FBI agents access to the products of the January 22, 2002 searches, as well as materials from the broader investigation. The agents reviewed two binders of information relating specifically to Mr. Arar. These binders contained the rental application, a profile of Mr. Arar, a photo of Mr. Arar and his home, police reports, past employment information, information related to the NSIS inquiry on Mr. Arar, surveillance reports on the meeting at Mango's Café, the results of the November 29, 2001 secondary examination of Mr. Arar, and other investigative materials related to Mr. Arar.

It is unclear whether the FBI agents obtained copies of the material in the binders or the rental documents. In any case, they took extensive notes.

The agents were also permitted to review information the RCMP had received from CSIS that contained caveats requiring CSIS consent prior to any further sharing of the information. There is no evidence that CSIS provided its consent. However, Inspector Cabana indicated that the content of the CSIS letters had already been the subject of extensive discussions in a number of meetings involving all partner agencies, including CSIS.

The February visit is a good example of the informal information-sharing practices followed by Project A-O Canada and shows the type of access to the results of its investigation it was giving the FBI.

7.6.3
Supertext Database on Three CDs

7.6.3.1
Background

Project A-O Canada burned three CDs containing its entire Supertext database in late March 2002 and provided copies to the American agencies in April 2002. Included were documents seized during the January 22, 2002 searches and, of note, all of the documents relating to the Project A-O Canada investigation, including exhibits, statements, memoranda and reports.[76] This material contained a considerable amount of information relating to Mr. Arar.

By everyone's account, the scope of the disclosure by means of the three CDs was unprecedented. None of the officers who testified were aware of any other instance where an entire file, including the products of an investigation, had been turned over to another agency, let alone a foreign agency. Senior officers at "A" Division and CID at Headquarters were not aware that the entire Supertext database was being disclosed and, with one possible exception, would not have authorized the disclosure had they known.[77]

I discuss the problems relating to the disclosure of information via the CDs in detail below. These problems must be viewed in the context of how Project A-O Canada had been sharing information with the American agencies up to that point. From the outset, Project members had been given to understand that senior RCMP officers at "A" Division and CID at Headquarters had authorized them to conduct an "open-book investigation" in co-operation with CSIS and the American agencies. Their interpretation was that all information the Project collected should be shared with the other agencies without restraint. They were authorized — in fact, had been directed — to provide information without attaching caveats or screening for relevance, reliability or personal information, and without obtaining consent in the case of documents with caveats received from any of the other three agencies involved in the arrangement.

Project A-O Canada members correctly pointed out that, in the months between October 2001 and April 2002, they had been meeting on an increasingly regular basis with American officials and had verbally disclosed much of the information on the CDs that was unrelated to the searches. They had also disclosed a significant portion of the information obtained through the searches. They stated, with some justification, I believe, that senior officers had been, or should have been, aware that Project A-O Canada was providing information and had not objected.

As I mention above, the senior officers at RCMP Headquarters and, to a lesser extent, in "A" Division denied having given instructions that RCMP policies were not to apply when Project A-O Canada provided information to other agencies. With one or possibly two exceptions, they also denied being aware that Project A-O Canada had been sharing information without following RCMP policies in the months before the U.S. agencies were provided with the three CDs. In short, the confusion and misunderstanding that accompanied the original direction to Project A-O Canada about information sharing continued as the investigation progressed.

The events that led to the sharing of information on CDs began with the searches of January 22, 2002.

7.6.3.2

Products of January 22, 2002 Searches

On January 22, 2002, the RCMP, with the assistance of other police forces, conducted searches of the residences of seven individuals in Ottawa, Toronto and other Canadian cities. Mr. Arar's residence was not among them. During the searches, Project A-O Canada seized a substantial amount of material that required processing and analyzing, including 26 computer hard drives, almost 100 CDs and diskettes, some 20,000 pages of documents, about 40 videotapes and two boxes of shredded documents. Some of the seized information related to Mr. Arar.

In light of the resources required to analyze this material, Project A-O Canada decided to share the seized information with CSIS and the American agencies, as a way of enlisting their help.[78] I believe this was a reasonable decision. It was imperative that the information be analyzed and, given the continuing concern about terrorist attacks, that this be done as quickly as possible, but the RCMP lacked sufficient resources to undertake this enormous task.

Moreover, the volume of material and lack of resources made it impractical for the RCMP to screen the search material for relevance, reliability or personal information before providing it to the American agencies. Indeed, undertaking that task would have largely defeated the purpose of enlisting help. Even a preliminary review would have been so time-consuming that it would have jeopardized timely analysis. In the circumstances, I am of the view that sharing the information from the searches with the American agencies without first screening it was a necessary action.

I wish to emphasize, however, that this departure from policy is not something that should be repeated, as the information-screening policies are extremely important. It was unfortunate, though perhaps understandable, that

in early 2002, Canadian authorities did not have sufficient resources to review the search materials without U.S. assistance. I would hope that the resource shortage is being addressed in order that this situation may be avoided in the future.

Project A-O Canada also departed from policy when it failed to attach caveats to any of the search materials and information provided to the American agencies in the months following the searches or to the three CDs.

On January 31, 2002, a number of agencies, including the American agencies, met with RCMP officers to formulate a plan for analyzing the search material. Senior officers from CID at Headquarters and "A" Division were present. Everyone agreed that the products of the searches should be shared among all the agencies for the purpose of analysis.

There was apparently no discussion of caveats at that meeting. However, some Project A-O Canada officers testified that the American officials had verbally confirmed to Project members that none of the shared information would be released more widely without the RCMP's authorization. Similarly, at a meeting in February, when Project A-O Canada discussed sharing the seized documents with the FBI, it was agreed that the documents would be used for intelligence purposes only. If the FBI wanted to use the information for prosecution purposes, a Mutual Legal Assistance Treaty (MLAT) application would be required.

The process of handing over the seized documents to the American agencies for analysis began in February. Following its normal practice, Project A-O Canada did not attach caveats to any documents transferred during this period. In discussions about sharing documents, Project A-O Canada asked the agencies to send letters formally requesting the information.

In a letter dated February 22, 2002,[79] the FBI requested that the RCMP provide it with items from the searches (referring to the January 22, 2002 searches), and then set out a list of specific documents. The last item on the list was other relevant material related to the investigation. Although, in my mind, the letter seems to limit the request to seized documents, all of the RCMP witnesses who were asked were of the opinion that the request had gone beyond seized documents to include other relevant material from the Project A-O Canada investigation.

The letter from the FBI to the RCMP acknowledged that an MLAT request would be necessary if the material was to be used in support of a formal criminal prosecution in the United States. This acknowledgement is useful in addressing the issue of the provision of the three CDs to the FBI without caveats. On the face of it, however, the undertaking relating to MLAT proceedings was

limited to criminal prosecutions and did not include other proceedings, such as the removal proceedings that eventually led to Mr. Arar's removal to Syria. Moreover, the FBI's acknowledgement did not address the issue of sharing information with third parties.

7.6.3.3

The Three CDs

There were four problems connected with the transfer of the documents contained on the three CDs:

- The information on the CDs should not have been provided to U.S. agencies without written caveats.
- The portion of the documents not related to the searches should have been reviewed for relevance, reliability and personal information.
- Third-party materials to which caveats were attached, such as letters received from CSIS and documents received from Canada Customs, should not have been transferred without the originators' consent.
- Some of the information about Mr. Arar included on the three CDs was inaccurate.

I have mentioned several times the importance of attaching written caveats when information is shared. Caveats should have been attached to the three CDs, in compliance with RCMP policy. In addition to protecting the products of the searches, this would have protected the balance of Project A-O Canada's investigation file, including memoranda and reports, ensuring that the information could not be used in ways the RCMP did not intend or, importantly, in proceedings of which the RCMP did not approve.

Although some conditions were set out in the letter of request received from the FBI, that letter goes only partway to addressing the Project's failure to attach caveats. Even if the undertaking about the use of the information in the FBI's letter could be interpreted to apply to material other than that seized during the searches — an interpretation I question — it was still limited to making an MLAT request in the event of criminal prosecution.

I heard a number of arguments as to why the failure to attach caveats to the three CDs was not a significant matter. It was argued that most, if not all, of the information in the documents not related to the search had already been provided verbally to the American agencies during the many meetings that had taken place before the transfer of the CDs, including during the FBI's visit to Project A-O Canada's offices in February 2002. Even accepting this to be the case, the fact of handing over information in documentary form raises additional

concerns. It increases the risk of the information being used in proceedings not intended by, or acceptable to, the RCMP, and of greater weight being attached to the information. Common sense tells us that documentary evidence, particularly in the form of RCMP reports or memoranda, is likely to be accorded more weight than conversations between officers and agents.

It was also argued that caveats were not necessary because there was an implied understanding that the information would be used for intelligence purposes only. I repeat that implied understandings are not an adequate substitute for written caveats. In a matter as important as this, it is difficult to understand why, when providing an unprecedented amount of information to American agencies, including search materials that had not been reviewed for relevance, reliability or personal information, the RCMP would not have exercised the greatest care possible to protect how that information might be used.

It has been further argued that, in the end, caveats would not have made any difference, that the American agencies would still have done whatever they were going to do and used the information as they saw fit. This might be true, but it is far from certain. Surely, clearly spelling out in writing that the information was not to be used for any purpose other than intelligence without RCMP consent would have reduced the risk of the dishonourable conduct suggested by those making this argument. Common sense and experience indicate that a recipient of information is more likely to respect a clearly written caveat than an unwritten, perhaps even unspoken, implied understanding. That is precisely why the RCMP and other agencies have policies requiring written caveats.

Moreover, a failure to attach written caveats in an environment where the use of caveats has become an accepted practice may actually be used to justify a departure from an implied understanding.

The second problem relating to the CDs was that materials not related to the searches were not screened for relevance, reliability and personal information. This failure was not caused by time constraints. The urgency attached to the analysis of the search materials did not apply to the balance of the Supertext database. Those materials included information that had been collected over a number of months and actually accounted for a relatively small portion of the total information on the three CDs. Further, it was information that had served as the basis for the Project A-O Canada investigation and, as such, had likely already been analyzed, at least to some extent. It should not have been difficult for Project A-O Canada to screen this information before turning it over to the American agencies. RCMP policy and practices requiring this type of screening are there for a purpose and should not have been breached.

The third problem was that the CDs contained third-party information to which caveats applied, including information from CSIS and Canada Customs,[80] yet, as was the Project's practice, that information was transferred to the U.S. agencies without seeking prior consent from the originators. I accept the evidence of the CSIS witnesses who testified that CSIS had not agreed to the transfer of information subject to caveats without its specific consent. The Canada Customs information was information obtained from Mr. Arar on November 29 and December 20, 2001, and also had caveats attached. Even though Canada Customs was not a party to the so-called information-sharing agreement, Project A-O Canada provided this information to the U.S. agencies without first seeking the consent of Canada Customs.

The final problem is that some of the biographical and other information on Mr. Arar in the Project CDs was inaccurate. As mentioned, the CDs contained several references overstating Mr. Arar's status as "a suspect," "target," "principal subject," or important figure, as well as the letters with the offensive language requesting the Canada and U.S. border lookouts.

The CDs also contained information about Mr. Arar that was misleading. For example, they included erroneous notes taken by RCMP officers during the interview of Youssef Almalki on January 22, 2002. The notes indicated that Youssef Almalki had said that Mr. Arar had a business relationship with Abdullah Almalki. In fact, what Mr. Almalki had said was that he was not sure whether or not Mr. Arar and Abdullah Almalki had such a relationship. Further, one situation report about the meeting at Mango's Café erroneously said that Mr. Arar had travelled from Quebec to meet Mr. Almalki, even though he was living in Ottawa at the time. A second report noted that Mr. Arar was living in Ottawa.

When taken alone, details like these may seem insignificant. However, it is important to bear in mind the nature of the intelligence-gathering process and the frequently-repeated mantra that every bit of information, no matter how seemingly inconsequential, should be shared because it might turn out to be the missing piece of a puzzle.

It is possible that a proper review of the information that was being provided to the American agencies would have uncovered some of the inaccuracies.

7.6.3.4
Authority to Transfer CDs

Finally, the question arises as to whether or not the CROPS officers at "A" Division and the officers with CID at Headquarters were aware that, apart from providing the documents seized during the searches, Project A-O Canada was providing its entire Supertext database to the American agencies on the CDs.

There is conflicting evidence on this issue. Some Project A-O Canada members said that senior officers had been aware of the fact. The senior officers, with the possible exception of Inspector Clement, said they had not. Indeed, some of the senior officers suggested in closing submissions that Project A-O Canada had not intended to include anything other than the search-related material on the CDs; since the inclusion of the entire Supertext database had been a mistake, they, the senior officers, could not possibly have known about it.

While there is some support for this submission in the evidence, Inspector Cabana flatly denied it. According to the inspector, he had intended that the whole database be included on the CDs, and senior officers had known that at the time. I accept that Inspector Cabana intended that the whole Supertext database be transferred, although it is far from clear whether other members of Project A-O Canada understood this to be the case. Indeed, the situation report describing the transfer indicated that only search-related materials had been included.

Given Project A-O Canada's intention to take the unprecedented step of transferring its entire Supertext investigation file to the U.S. agencies, senior officers at CROPS and CID at Headquarters should have been involved in the decision in this regard. I do not propose to review the evidence of Inspector Cabana and the senior officers on this issue. I accept that Inspector Cabana thought he had approval to transfer the entire database. I also accept that the senior officers did not know that anything more than the search material was to be provided and that, with the possible exception of Inspector Clement, they would not have approved the broader transfer. Certainly, CID would not have approved it, particularly if RCMP policies concerning screening and caveats were not being followed.

This is another example — a glaring one — of the misunderstandings and confusion that existed within the RCMP about what Project A-O Canada was authorized to do and in what instances it needed to involve CID in its operational decisions. The confusion surrounding the transfer of the three CDs flowed from the October 2001 misunderstanding about information sharing between Project A-O Canada and other agencies and the applicability of RCMP policies.

7.6.3.5
May 31 Presentation

Starting in April 2002, Project A-O Canada made several presentations about its investigations to a number of Canadian agencies, as well as to the American agencies. All these presentations had a similar format: a description of the Project A-O Canada investigation in general, followed by a look at the "Present

Situation," focusing on specific individuals. Although Mr. Arar was generally included among the individuals mentioned, he was given varying degrees of prominence.

On May 31, 2002, Project A-O Canada made a major presentation in Washington, D.C. Its purpose was to persuade the American authorities to initiate a criminal investigation of Mr. Almalki and his associates.

The "Present Situation" portion of the presentation made mention of several individuals, including Messrs. Almalki and El Maati and others[81] who, by anyone's assessment, were serious terrorist threats — some used the phrase "heavy hitters." Mr. Arar's name was included in this list. At the same time, the presentation indicated that Mr. Arar and others might be part of an investigative hearing under Bill C-36, a type of hearing limited to people who may be witnesses. It is not clear whether Project A-O Canada explained the significance of the investigative hearing process to the Americans.

Mr. Arar was not the focus of the presentation in Washington, DC. However, the presentation did provide some information about him collected by Project A-O Canada that showed his associations with Mr. Almalki and others. In addition, it provided two "facts" about Mr. Arar that were inaccurate. Evidence relating to one of these "facts" was heard *in camera* and may not be disclosed for national security reasons. Suffice it to say that this inaccurate fact tended to unfairly link Mr. Arar to certain individuals.

The other inaccurate "fact" may be disclosed. In the presentation, Project A-O Canada incorrectly informed the Americans that Mr. Arar had refused to be interviewed in January 2002. As discussed earlier, Mr. Arar, through his counsel, had actually agreed to be interviewed, but under conditions that Project A-O Canada had found unacceptable. Even assuming, for the sake of argument, that the conditions attached by Mr. Arar's lawyer were overly stringent, there would likely be a difference in the minds of law enforcement officers between someone who "refuses" to answer questions, and someone who agrees to answer questions, but with his lawyer's conditions attached.

The Americans requested a written copy of the May 31 presentation, and Project A-O Canada sent them an updated copy, excluding speaking notes, on July 22, 2002.

This presentation is another example of the problems that persisted with Project A-O Canada's information-sharing practices. It overstated Mr. Arar's status in the Project's investigation and included inaccurate information about Mr. Arar. The fact that Mr. Arar was also identified in the presentation as a candidate for a Bill C-36 examination as a witness might have mitigated the overstatements to some extent.

[***].

7.6.3.6

Mr. Arar's Departure for Tunisia

In July 2002, Project A-O Canada learned that Mr. Arar and his family had left for Tunisia several weeks earlier. There were some indications that the move had been a permanent one. On July 15, 2002, Project A-O Canada verbally informed American authorities of Mr. Arar's departure. They discussed whether Mr. Arar's departure had been prompted by the Project A-O Canada investigation or whether it had already been planned.

7.6.3.7

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8.
PROJECT A-O CANADA'S RELATIONSHIP TO HEADQUARTERS

In this section, I discuss the relationship between Project A-O Canada and the Criminal Intelligence Directorate (CID) at RCMP Headquarters. In earlier sections, I have described this relationship in connection with several investigative steps taken by Project A-O Canada. Here, I draw these descriptions together and summarize how that relationship functioned.

8.1
CENTRALIZATION OF NATIONAL SECURITY INVESTIGATIONS

Normally, RCMP investigations are carried out at the divisional level with little, if any, reporting to Headquarters. Thus, criminal investigators operate in a relatively autonomous fashion, reporting up the chain of command within a division to the Criminal Operations (CROPS) officer, not to Headquarters in Ottawa.

However, for some time now, RCMP investigations involving national security matters have been treated differently. While investigators in these types of investigations report to the CROPS officer at the divisional level, they are also required to report to CID at Headquarters, the premise being that CID should exercise greater control and coordination over national security investigations than it does over other types of criminal investigation. Assistant Commissioner

Proulx testified that it is important that CID be kept up to date about national security investigations, for monitoring purposes. Since national security is both a national and international issue, CID needs to be aware of developments in order to brief the RCMP Commissioner and ensure that the Solicitor General, the minister responsible for the RCMP, has accurate and timely information. It also needs to have current information for meetings with other departments or agencies.

In the normal course of events, national security investigations were carried out by the NSIS in the relevant division (and Integrated National Security Enforcement Teams (INSETs) in Vancouver, Toronto, Ottawa and Montreal beginning in April 2002). Witnesses indicated that the culture within the NSISs had supported reporting to Headquarters and NSIS members had understood the important relationship between those conducting an investigation and CID.

The RCMP had policies directing NSISs in the divisions to notify the National Security Intelligence Branch (NSIB)[82] at CID immediately when any new investigation began, and to remain in regular contact with field units to ensure the NSIB was kept abreast of ongoing investigations. At the time of 9/11, the Officer in Charge at the NSIB was involved in an exercise to build the investigative capacity of the RCMP's national security program across the country and create a vision for centralized coordination and direction of national security matters.

On November 4, 2003, the Solicitor General issued three ministerial directions to the RCMP aimed at promoting greater centralization of its national security activities.

The RCMP's view of a need for greater central control of national security investigations is not unique. Other agencies conducting these types of investigations, including both security intelligence and law enforcement agencies, commonly adopt a centralized and coordinated approach to their investigations. As an example, CSIS has a highly centralized process for managing all aspects of its investigative operations.

8.2
PROJECT A-O CANADA

Project A-O Canada was different from most previous RCMP investigations involving national security matters for at least four reasons.

To begin with, Project A-O Canada was formed in the aftermath of 9/11, at a time when there was widespread concern that another terrorist attack might be imminent. For at least the first several months, there was a sense of urgency about this investigation that had not existed with previous investigations. The need to quickly investigate possible threats and share information with other

investigative agencies was far greater than that normally experienced by RCMP investigative units.

In addition, with few exceptions, members of Project A-O Canada had never been involved in a national security investigation. They were experienced criminal investigators accustomed to reporting to divisional CROPS or assistant CROPS officers. Reporting to and interacting with officers at CID was not part of the culture within which they had conducted criminal investigations in the past.

The third and perhaps most important reason is that a fundamental misunderstanding existed from the outset between senior officers at RCMP Headquarters and Project A-O Canada about the way in which the Project was authorized to share information with other agencies, including the American agencies.

Finally, Project A-O Canada had much more interaction with the American agencies than NSISs had had during previous national security investigations.

8.3
REPORTING TO HEADQUARTERS

Even though it viewed its reporting relationship to be with the "A" Division CROPS officer alone, Project A-O Canada provided CID with a considerable amount of information on an ongoing basis, keeping it informed of its investigative steps.

Shortly after its creation, Project A-O Canada began to regularly provide copies of its daily situation reports (SITREPs) to CID. SITREPs describe the investigative steps taken in the course of each day. Thus, a reader of the daily SITREPs would have a large amount of information about the investigation, some of it quite detailed. It is important to note that, in providing the SITREPs to CID, Project A-O Canada was exceeding the reporting requirements set out in the RCMP policy regarding national security investigations, which requires at least monthly updates on ongoing national security investigations by means of summaries entered into the SCIS national security database.

In addition to providing SITREPs to CID, Project A-O Canada met periodically with CID officers to inform them about the investigation. Members of CID attended the all-agency meeting on January 31, 2002 to discuss analyzing the material seized during the January 22 searches. CID officers were also present in April 2002, when Project A-O Canada made a presentation describing its investigation to a number of agencies.

From time to time, Project A-O Canada also provided RCMP Headquarters with briefing notes on a variety of issues related to the investigation. It must be

emphasized that there is no suggestion that members of Project A-O Canada ever withheld or concealed any information about the investigation from CID. When officers from CID made inquiries about the Project's investigation, members responded appropriately. Thus, the fact that certain information about the investigation failed to reach CID should not be attributed to any lack of willingness on the part of the Project to provide CID with information.

Indeed, it would appear that officers at CID who received the information from Project A-O Canada did not always review it with a view to monitoring the investigation or providing direction about how it should proceed. Undoubtedly, in the aftermath of 9/11, officers in CID with national security responsibilities were extremely busy and had difficulty managing the huge flow of new information. CID resources dedicated to national security issues fell far short of what was required following the terrorist attacks. Be that as it may, the fact remains that Project A-O Canada did provide CID with extensive information about its investigation.

8.4
FAILURES IN COMMUNICATION

Despite Project A-O Canada's willingness to provide CID with information, there were a number of serious failures in communication.

The most serious involved the misunderstanding about information sharing. As I describe above, it led to the sharing of information with the American agencies without attaching caveats and, in some instances, the sharing of third-party information to which caveats applied without obtaining the consent of the originators. While some officers at CID might have been aware of the former practice, Assistant Commissioner Proulx and Deputy Commissioner Loeppky were not. Had they been, they would have ordered that it be discontinued.

Responsibility for this failure in communication falls primarily on the RCMP as an institution. Ultimately, the RCMP is responsible for ensuring that clear and proper direction is provided to operational units such as Project A-O Canada and that there is adequate monitoring of operational practices.

Nevertheless, Project A-O Canada also bears responsibility for some failures to properly inform senior officers about what was occurring in its investigation. There were some instances where the Project shared information with American agencies without making the content known to senior officers. For instance, senior officers at "A" Division or CID were not apprised of the fact that Project A-O Canada had described Mr. Arar and Dr. Mazigh as Islamic extremists in its border lookout request to U.S. Customs.

Moreover, some of the information the Project provided to CID with regard to Mr. Arar was inaccurate and unfairly overstated Mr. Arar's importance in its investigation or misdescribed facts in a way that would increase suspicion about Mr. Arar's activities.

All in all, the communications between Project A-O Canada and senior officers, particularly at CID, fell short of what one would have expected from a professional law enforcement agency such as the RCMP.

8.5
TENSIONS

Periodically, tensions arose between Project A-O Canada and CID. There were likely a number of reasons for this, but in my view I need comment on only two here. First, there was a difference of culture. While Project A-O Canada provided extensive information to CID, its officers considered that seeking CID concurrence in regard to its investigative steps, including the transfer of specific information to other agencies, was an unnecessary impediment. In particular, Project A-O Canada considered it essential to share information with U.S. agencies directly, without channeling it through CID. According to Project members, the NSIB was so overworked in the post-9/11 period that there would have been unacceptable delays if the NSIB had had to process material passed on to it by the Project. The Project preferred a process whereby it shared information directly and then reported generally on its activities through SITREPs.

CID initially accepted that, after the original information-sharing arrangement was established with U.S. agencies, it would be permissible for Project A-O Canada to share information directly. However, as time went on and officers at CID became aware of the volume of information being shared, they became increasingly concerned about the lack of control over the Project's activities. Concern grew when some officers at CID, including Superintendent Pilgrim, became aware that Project A-O Canada was sharing information without following RCMP policy regarding caveats. Because of that concern, in June 2002, CID appointed Corporal Rick Flewelling as "file coordinator" for the Project A-O Canada investigation and directed him to bring information-sharing practices back into line with pre-9/11 methods of operation.

Unfortunately, CID did not go the next step and ask Project A-O Canada to confirm in writing with the American agencies that all the information provided to that point was subject to the usual RCMP caveats.

Project A-O Canada and CID discussed these tensions periodically, including, somewhat ironically, at a meeting on September 26, 2002, the day Mr. Arar was detained in New York. That time at least, it was decided that Project

A-O Canada would continue to provide information directly to the U.S. agencies, but Corporal Flewelling of CID would be informed of certain contacts with the U.S. agencies and Project A-O Canada would maintain a log of contacts with American officials. Further, Corporal Flewelling would be seconded to monitor Project A-O Canada's dealings with third parties.

Corporal Flewelling testified that problems had continued for a time after he had become involved. For instance, he had not always received timely notice of meetings and had sometimes been informed of actions only after the fact. Eventually, however, the problems had been resolved.

8.6
CONCLUSION

The relationship between Project A-O Canada and CID was far from ideal. CID should have exercised greater control over the Project's investigation, particularly in view of the lack of training and expertise in national security investigations of most of its members, including its managers. As well, CID should have ensured that the Project was provided with clear direction in regard to sharing information with the American agencies and that the Project complied with RCMP policies.

For its part, Project A-O Canada provided CID with extensive information about its investigation. While members did not always welcome CID's involvement, they complied with directives and requests for information from Headquarters. The Project did share information in ways that contravened RCMP policies, but Project members believed they were authorized to do so. On some occasions, however, CID was unaware of the content of information the Project shared with U.S. agencies.

It is worth repeating that, in the period following 9/11, CID was significantly understaffed and under-resourced. The volume of work flowing from 9/11 created workloads that, understandably, had not been anticipated. The role of CID and its relationship with Project A-O Canada should be viewed with this fact in mind.

Notes

1 "Caveats" are written restrictions on the use and further dissemination of shared information.

2 I phrase my conclusion in this way because I did not consider it necessary or practical to hear evidence about the investigations transferred to the RCMP. Further, while I did hear some evidence regarding Mr. Almalki, it was only evidence that related to my mandate. I am therefore not in a position to opine more conclusively on the transfer of responsibility for the investigations.

One should not read into my statement concerning the appropriateness of the transfer of the investigations that Mr. Almalki did anything wrong, or that he is a threat to the security of Canada. Mr. Almalki has not been charged with any offence and has publicly maintained that he has never been involved in any terrorism-related activities. Like any other person being investigated, Mr. Almalki is presumed to be innocent.

3 R.S.C. 1985, c. C-23. Paragraph 19(2)(a) of the Act reads:

"19(2) The Service may disclose information referred to in subsection (1) for the purposes of the performance of its duties and functions under this Act or the administration or enforcement of this Act or as required by any other law and may also disclose such information,

(a) where the information may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province, to a peace officer having jurisdiction to investigate the alleged contravention and to the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged contravention may be taken . . . ."

4 Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report: Freedom and Security under the Law* (Ottawa: Supply and Services Canada, 1981).

5 When I use the term "national security investigation" in connection with the RCMP, I am referring to an investigation carried out by the RCMP under the authority conferred by section 18 of the *Royal Canadian Mounted Police Act* (*RCMP Act*), hence a criminal investigation with national security implications. Section 18 of the Act reads:

"It is the duty of members who are peace officers, subject to the orders of the Commissioner,

(a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody . . . ."

6 R.S.C. 1985, c. S-7. The Act covers a potentially long list of offences, including any that relate to a threat to the security of Canada, such as conspiracy, attempt, murder, kidnapping, arson, mischief and the use of explosives.

7 R.S.C. 1985, c. R-10.

8 See my Policy Review report for a more detailed discussion of the RCMP's involvement in national security investigations and the structure within the RCMP for handling these types of investigations.

9 I discuss the difference between the roles of the RCMP and CSIS in Chapter IX of this analysis and throughout the Policy Review report.

10 Again, I word this conclusion in this manner because I have not reviewed all of the information gathered in investigations of persons other than Mr. Arar. In Chapter IX, I recommend that the RCMP periodically review its national security investigations, particularly those with a preventative mandate, to determine whether they continue to be appropriate for investigation by a law enforcement agency.

[11] After he left Project A-O Canada in February 2003, Inspector Cabana was promoted to Superintendent. For reasons of simplicity, I refer to him throughout this report as "Inspector," the rank he held at the relevant time.

[12] An integrated approach to policing is very important in investigations that may cross jurisdictional borders or ones that will require the broad range of skills available in different police forces. In Chapter IX, I make recommendations related to an integrated policing approach for national security investigations.

[13] Liaison officer systems are designed to facilitate interaction and information sharing between agencies.

[14] In Chapter IV**,** I discuss the use by American officials of information supplied by Project A-O Canada.

[15] In August 2002, Project A-O Canada received information that, while in custody in Egypt, Mr. El Maati had told Canadian consular officials that his alleged confession to Syrian authorities was the product of torture and was false.

[16] The RCMP had a long-standing relationship with the FBI and, in the post-9/11 era, institutionally, there were periodic interactions between the RCMP and the CIA. Moreover, after 9/11, the CIA assumed a more operational role in the United States than it had before and any information shared by Project A-O Canada with U.S. agencies could have been obtained by the CIA. This was understood by Project A-O Canada managers.

[17] Project A-O Canada used Supertext to store and manage all documents associated with the Project, including exhibits, statements, memos, reports and, at least to some extent, officers' notes. In theory, every piece of paper generated or received by Project A-O Canada was to be scanned into Supertext, including situation reports, surveillance reports, and reports from outside agencies.

[18] I heard evidence from members of the Muslim and Arab communities about the "immigrant experience" and how some activities or associations could be erroneously interpreted as more significant than was actually the case.

[19] In 2002, the RCMP established Integrated National Security Enforcement Teams (INSETs) to conduct national security investigations in Vancouver, Toronto, Montreal and Ottawa. In 2003, Project A-O Canada was placed under the direction of the Ottawa INSET. I discuss INSETs in detail in the Policy Review report.

[20] While doing so may not be totally appropriate, I cannot help comparing the training and experience of Project A-O Canada members with those of some of the CSIS personnel who testified at the Inquiry, who dealt with similar challenges in assessing and sharing national security information. While the mandate of CSIS is different from the RCMP's, there are many common elements when it comes to sharing information. The CSIS personnel had undergone extensive training and had a good deal of experience with information-gathering and information-sharing practices. As a matter of routine, they strictly adhered to CSIS policies when sharing information.

[21] I repeat that Mr. Almalki has never been charged with any offence and is presumed innocent of criminal wrongdoing.

[22] See, for example, *R. v. Plant*, [1993] 3 S.C.R. 281.

[23] I recognize that Chief Superintendent Brian Garvie, who prepared a report for the RCMP in response to a complaint made to the Police Complaints Commission about the Arar matter, concluded that the RCMP should have obtained a search warrant for the lease documents. For the reasons given above, I do not think that the officers acted improperly in proceeding without obtaining a warrant. Mr. Garvie's report is summarized in the Factual Background.

[24] Project A-O Canada requested lookouts for other individuals at the same time.

[25] *R. v. Simmons,* [1988] 2 S.C.R. 495 at 528.

[26] I leave aside the issue of the search of an individual's person because it does not arise with respect to Mr. Arar.

[27] As it turned out, Mr. Arar was not subjected to a secondary examination on one occasion when he entered Canada after the lookout was placed. This was due to human error.

[28] I note that the RCMP has no policy or directives setting out when officers may request a border lookout. I will come back to this issue when I discuss the request relating to Dr. Mazigh.

[29] *Customs Enforcement Manual*, Exhibit C-188, Tab 11.

[30] CCRA Enforcement Bulletin, Exhibit C-188, Tab 19.

[31] Exhibit P-174.

[32] Exhibit C-87. I note that Chief Superintendent Garvie's report concluded that there was no justification for the lookout request for Dr. Mazigh other than the fact that she was Mr. Arar's wife.

[33] Exhibit C-30, Tab 44.

[34] See Section 7.7.

[35] Exhibit C-30, Tab 43.

[36] The caveat provided that the RCMP was not to disseminate the information without the consent of Canada Customs.

[37] This information is found in a report of a Canada Customs officer, now living in the United States, who declined to testify. Thus, this information was not given under oath or subjected to cross-examination.

[38] Exhibit C-188, Tab 16.

[39] The use of the word "private" is somewhat confusing. Elsewhere in the Manual, the word "personal" is used. A question arises as to whether "private" is different from "personal." The title of the Bulletin suggests not and, in evidence, no one suggested there was a difference. As a result, I proceed as if the two terms are interchangeable in the context of interpreting this Bulletin.

[40] In *Smith v. Canada (Attorney General)*, [2001] 3 S.C.R. 902, 2001 SCC 88, the Supreme Court approved the collection, storing and sharing of this information with another agency of the Crown. I note, however, that that case involved unemployment insurance, which may engage different considerations from those that apply to information concerning a national security investigation.

[41] These included Dr. Mazigh's personal identification documents, ticket stubs, the E311 Customs Declaration Card, her passport and her children's passports.

[42] Exhibit C-188, Tab 17.

[43] R.S.C. 1985, c. 1 (2nd Suppl.).

[44] Let me repeat that my analysis is based solely on the information provided by government officials. It is possible that I would reach different conclusions if Mr. Arar were to testify.

[45] Paragraph 13(b) of the Act provides that:

"13. Every person . . . stopped by an officer in accordance with section 99.1 shall

. . . (b) if an officer so requests, present the goods to the officer, remove any covering from the goods, unload any conveyance or open any part of the conveyance, or open or unpack any package or container that the officer wishes to examine."

Subsections 99.1(1) and (2) read as follows:

"99.1 (1) If an officer has reasonable grounds to suspect that a person has entered Canada without presenting himself or herself in accordance with subsection 11(1), the officer may stop that person within a reasonable time after the person has entered Canada.

(2) An officer who stops a person referred to in subsection (1) may

(a) question the person; and

(b) in respect of goods imported by that person, examine them, cause to be opened any package or container of the imported goods and take samples of them in reasonable amounts."

[46] In the next section, I discuss the issue of providing the RCMP with information obtained from the examination of Mr. Arar's computer and PDA.

[47] Section 99.1 is set out above. Paragraph 99(1)(a) states that "An officer may, at any time up to the time of release, examine any goods that have been imported and open or cause to be opened any package or container of imported goods and take samples of imported goods in reasonable amounts."

Paragraph 99(1)(e) reads:

"where the officer suspects on reasonable grounds that this Act or the regulations or any other Act of Parliament administered or enforced by him or any regulations thereunder have been or might be contravened in respect of any goods, examine the goods and open or cause to be opened any package or container thereof."

[48] I note that the *Customs Enforcement Manual* and Enforcement Bulletin as they existed at the time appeared to permit photocopying of documents relating to goods under seizure.

[49] Under the previous regime, the Minister or persons authorized by the Minister had to give authority for any communication of information to other agencies. Only more senior individuals in the Canada Customs hierarchy had authority from the Minister to release information.

[50] Exhibit C-189, Tab 6.

[51] Exhibit C-371, p. 1.

[52] I refer to the presentation to American authorities on May 31, 2002 and the letter of September 26, 2002, when Mr. Arar was being detained in New York. I discuss both in more detail below.

[53] I recognize that "screening for reliability" frequently refers to determining the reliability of sources. I also include ensuring that information being shared is accurate and put in its proper context, so as not to mislead.

[54] Project A-O Canada provided most of this same information to senior officers in "A" Division and CID at RCMP Headquarters. In Chapter V, I discuss the impact of this on the RCMP's institutional response to Canadian efforts to have Mr. Arar released from Syrian custody.

[55] Shortly after September 11, 2001, the U.N. Security Council adopted Resolution 1373, which, among other things, directs that all states find ways of "accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks . . . ."

[56] In this regard, he made reference to the RCMP's mandate under section 18 of the *RCMP Act*, which directs the RCMP to, among other things,

"perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada . . . ."

[57] Many witnesses explained that, when referring to "relevance," what is intended is the recipient's "need to know." This is a well-established approach. The U.S. National Commission on Terrorist Attacks upon the United States (9/11 Commission) suggested a shift from the "need-to-know" to a "need-to-share" approach, envisioning that this change would promote greater information sharing among agencies. I am not sure that these labels are particularly helpful. In Chapter IX, I emphasize the importance of information sharing in national security investigations. I suggest that the proper test for sharing information is its "relevance" to an investigation. I do not use the term "relevant" in the legal or evidentiary sense. Rather, I suggest that relevance should refer to a possible connection or use to the recipient's investigation.

[58] The RCMP's 2001 *Criminal Intelligence Program Guide* (Exhibit P-12, Tab 44) appropriately stresses that "information must be accurate, have integrity, be complete and be up-to-date" and that "information/intelligence must undergo a review for relevance and an evaluation for source reliability and information validity prior to filing" in data banks.

59 I discuss screening for privacy concerns and the applicable exceptions in Chapter IX.

60 Exhibit P-12, Tab 31, paras. M.3.a and M.3.b.

61 In this report, I sometimes refer to the RCMP's sharing of information "for intelligence purposes." I use that phrase because it was frequently used by many witnesses. In using it, I am not suggesting that the RCMP should be collecting or sharing information unless doing so is properly part of its mandate as a law enforcement agency.

62 [IC] Proulx testimony (December 9, 2004), pp. 7750–7759.

63 [P] Loeppky testimony (July 28, 2005), pp. 8708–8721.

64 [P] Elcock testimony (June 22, 2004), pp. 307–312.

65 In the context of the Project A-O Canada investigation, there was one very significant exception. The materials obtained during the searches of January 22, 2002 were very extensive and so screening them was not practical. I discuss the provision of those materials to the U.S. agencies in Section 7.9.2.

66 Jack Hooper confirmed that CSIS had not been a party to any arrangement among the partner agencies to depart from existing information-sharing policies.

67 While I did not consider it necessary to reject the claims of solicitor-client privilege in the circumstances where they were made in the Inquiry, I am satisfied that, as a general rule, an independent review body must have access to such information in order to effectively carry out its mandate. I make a recommendation to this effect and set out my reasons for this position in the Policy Review report.

68 I include here information about Mr. Arar collected by Project A-O Canada that is not subject to national security confidentiality.

69 Ontario, *Commission on Proceedings Involving Guy Paul Morin: Report* (Toronto: Ministry of the Attorney General, 1998) (Commissioner: The Honourable Fred Kaufman); Manitoba, *Report of The Inquiry Regarding Thomas Sophonow* (Winnipeg: Manitoba Justice, 2001) (Chairman: The Honourable Peter Cory).

70 In this section, I discuss only the information provided in the request sent to U.S. Customs. I look at the practical effects of the lookout requests and state my views as to the propriety of those requests in Chapter IV.

71 See, for example, Exhibit P-259, "Islamic Extremists in Detention: How Long Does the Threat Last?"

72 I discuss this issue further in Chapter IV. I restrict my remarks here to noting that the INS order directing that Mr. Arar be removed from the United States says that Mr. Arar's name had been entered into the TECS system. It is possible that the entry was created by American authorities for reasons unrelated to the Canadian request.

73 I discuss the transfer of the three CDs in more detail below.

74 The RCMP has no policies or guidelines specifying when lookouts may be requested and what information should be included in such requests. In Chapter IX, I make a recommendation dealing with lookout requests.

75 Exhibit C-30, Tab 43.

76 Project A-O Canada did not provide its case management database (E&R III) to the U.S. agencies.

77 Some members of Project A-O Canada disputed the claim that senior officers had not been aware of their intention to disclose the entire Supertext database. They suggested that senior officers had implicitly approved the disclosure. I discuss this issue in Section 7.9.4 below.

78 As it turned out, CSIS was unable to help with the analysis owing to a lack of resources.

79 Exhibit C-30, Tab 127.

80 CSIS information provided on the CDs does not appear to have related to Mr. Arar.

[81] For reasons of national security confidentiality, these names cannot be disclosed.

[82] The RCMP has a specialized branch within CID to monitor national security investigations. This branch has been reorganized since 9/11. At the start of Project A-O Canada, RCMP Headquarters monitored national security investigations through the National Security Investigations Branch (NSIB). I use that appellation.

IV
Detention in New York and Removal to Syria

1.
OVERVIEW

On September 26, 2002, Maher Arar arrived at John F. Kennedy International Airport in New York on a flight from Zurich, Switzerland. He had started his trip in Tunisia and was connecting through New York on his way to Montreal. Upon his arrival at the airport in New York he was detained by American authorities.[1]

On October 7, the Regional Director of the U.S. Immigration and Naturalization Service (INS) issued an order finding Mr. Arar to be a member of al-Qaeda and directing his removal[2] from the United States. On October 8, 2002, Mr. Arar, still in American custody, was flown to Jordan. A short time later he was driven to Syria, where he was imprisoned for almost a year.

In this chapter, I review the interactions of Canadian and American officials during the period Mr. Arar was detained in New York. There were several communications between the RCMP and American officials. The most noteworthy were on September 26, the day Mr. Arar was initially detained, when the RCMP provided the FBI with questions to be asked of Mr. Arar and, on October 4, when it answered a number of questions concerning its investigation of Mr. Arar.

I also review the actions of the Canadian consular officials in New York who were advised of Mr. Arar's detention. In particular, I review how consular officials responded to Mr. Arar's statement that American immigration officials had told him that he would be sent to Syria.

2.
ROLE OF RCMP

2.1
DECISION TO DETAIN MR. ARAR

Approximately one hour before Mr. Arar was scheduled to arrive in New York on September 26, 2002, the FBI called Project A-O Canada to notify it of his pending arrival and of the American authorities' intention to question him and deny him entry into the United States. The FBI indicated that Mr. Arar would be sent back to Zurich, where his flight had originated.

I am satisfied that that telephone call to Project A-O Canada was the first indication that Canadian officials had that the American authorities would take any action with respect to Mr. Arar. While the RCMP had information that Mr. Arar was in Tunisia, Canadian officials had no reason to believe that he would travel through the United States if he returned to Canada or that the American authorities would detain him or otherwise interfere with his travel plans if he did.

The RCMP, particularly Project A-O Canada, had had extensive communications with American agencies over the previous year about the Project's investigation, which only incidentally related to Mr. Arar. I have carefully reviewed all of the evidence of communications between Canadian and American authorities that in any way related to Mr. Arar. There is no evidence to suggest that members of the RCMP or any other Canadian officials ever discussed a scenario with American officials that involved Mr. Arar's being detained or sent to Syria if he travelled to the United States.

There is also no evidence that Canadian officials otherwise participated or acquiesced in the American decision to detain Mr. Arar on his arrival in New York.

That said, I do conclude that it is very likely that American officials relied on information the RCMP had provided to American agencies in making the decision to detain Mr. Arar on his arrival in New York. I refer here to information about Mr. Arar, some of which was inaccurate, that was given to the American agencies at different times in the months preceding his detention in New York, as discussed in Chapter III.

The reasons for this conclusion relating to Mr. Arar's detention in New York are essentially the same as those for my conclusion that American authorities very likely relied on that same information in deciding to remove him to Syria. For simplicity, I discuss those reasons only once, in Section 2.7.

For the time being, I merely note that, in responding to Canadian inquiries, American officials have consistently said that American agencies were interested in Mr. Arar because of information provided by Canadian officials.

That leads to the question of what effect, if any, the Treasury Enforcement Communications System (TECS) lookout requested by Project A-O Canada in November 2001[3] had on the American decision to detain Mr. Arar. In the lookout request, Project A-O Canada stated that Mr. Arar and others should be entered into the data bank (as lookouts) "so as to provide information to U.S. Customs line officers."[4] Without the evidence of the American authorities, I am unable to conclude whether or not the lookout played any kind of role, as I cannot say whether that lookout was still in effect on September 26, 2002 and, if so, what steps, if any, were taken because of it.

I recognize that the order removing Mr. Arar from the United States refers to a TECS lookout, and there is evidence that the Americans had entered Mr. Arar's name in the TECS system prior to the Canadian request, on their own initiative.[5] However, that evidence does not establish that Mr. Arar was the "subject of a TECS/NAILS[6] lookout as being a member of a known terrorist organization," as the wording in the removal order indicates. It is possible that the TECS lookout referred to in the removal order was a separate lookout initiated by American authorities and not the one resulting from the Project A-O Canada request. Without the American evidence, I can go no further than that.

2.2
QUESTIONS SENT BY FAX ON SEPTEMBER 26, 2002

When, on September 26, 2002, the FBI agent informed Project A-O Canada of the American government's intention to deny Mr. Arar entry to the United States, he asked whether the RCMP had any questions it wanted put to Mr. Arar while he was in New York. Project officers testified that it had been their understanding that the FBI had thought the answers to the questions might be useful in its own investigation as well as the Project A-O Canada investigation. The Project quickly assembled a list of questions for Mr. Arar, relying primarily on questions that had been prepared for a proposed interview with Mr. Arar in January 2002, which had never taken place.

2.2.1
Submission of Questions

Within an hour of receiving the FBI's request for questions, Project A-O Canada sent a list of questions to the FBI by fax. I conclude that Project A-O Canada did not act improperly in sending these questions.

Mr. Arar's counsel raised the concern that it had been improper and contrary to the *Canadian Charter of Rights and Freedoms* for the RCMP to send those questions to be asked of Mr. Arar while he was in American custody. The basis for this concern relates back to Project A-O Canada's earlier attempt to interview Mr. Arar in January 2002. At that time, Mr. Arar, through his counsel, had set out certain conditions under which he would be willing to be interviewed — conditions that would have precluded the use of his answers in legal proceedings. Because the RCMP officers had considered the conditions to be unduly restrictive, they had not proceeded with the interview.

Mr. Arar's counsel suggested that, when the Project had sent questions to New York, it had known that those conditions would not be honoured and that Mr. Arar would not have access to a lawyer, since he was being detained at the border and not in connection with some other, more formal, process. The RCMP would therefore accomplish through questioning in New York what it had been unable to do in January 2002: have Mr. Arar interviewed without the conditions set by his Canadian counsel.

While one may have great sympathy for Mr. Arar's situation in being detained and questioned in New York, I do not think that the members of Project A-O Canada should be faulted for sending the questions to the American authorities.

To begin with, I am satisfied that, in sending the questions, the officers were not intentionally trying to circumvent the conditions attached by Mr. Arar's lawyer to the proposed January 2002 interview. The Americans were the ones who introduced the idea of sending questions, indicating that there was some urgency involved, as Mr. Arar was going to be refused entry to the United States and returned to Zurich without delay. Project A-O Canada merely responded to the request.

Project A-O Canada officers expected that American authorities would question Mr. Arar in accordance with American law and, rightly or wrongly, believed that American law would provide someone in Mr. Arar's position with similar protections to those afforded by Canadian law. They knew of the requirement in American law to give accused persons a Miranda warning, for example. The officers testified that they had thought Mr. Arar would be able to ask for legal assistance if he wished, that he would be free to refuse to answer the questions if he saw fit, and that the outcome for him, whether he answered the questions or not, would be the same: he would be returned to Zurich in relatively short order.

As it turned out, the American authorities treated Mr. Arar quite differently from what Project officers expected. However, at the time they sent the

questions, the officers had no idea of what would eventually transpire. It did not occur to them that the American authorities were contemplating sending Mr. Arar to Syria. Quite understandably, they believed what the Americans had told them, that is, that Mr. Arar would be sent back to Zurich.

Moreover, there was a legitimate investigative reason for sending the questions. Project A-O Canada had been working closely with the Americans for nearly a year, investigating what were considered to be serious threats of terrorism-related activities. Mr. Arar was properly a person of interest in its investigation, and the Project had wanted to interview him as a witness for some time. Quite reasonably, the Project wanted to know if he had information that could assist the investigation.

The purpose of the questions, at least as Project A-O Canada understood it when it sent them, was to gather information related to the investigations being conducted in Canada and the United States. At that point, there was no indication that the American authorities intended to institute legal proceedings. On the contrary, Project A-O Canada expected, reasonably, that there would be no legal proceedings. Mr. Arar would be questioned, refused entry to the United States and put on a plane back to Zurich.

It is important to bear in mind that, in January 2002, Mr. Arar did not refuse to be interviewed. In fact, he agreed, subject to certain conditions that would prevent the answers from being used in any legal proceedings. While those conditions previously set by Mr. Arar's lawyer may be the basis for an argument that the answers provided in New York would not be admissible in Canadian legal proceedings against Mr. Arar, it is not a question that I need to address.

For the reasons given above, I am satisfied that, in the circumstances as they understood them on September 26, 2002, the officers of Project A-O Canada acted reasonably and in good faith in sending the questions for Mr. Arar to the FBI.

However, in sending the questions, it was extremely important — particularly since the American authorities were going to interview Mr. Arar in connection with a terrorism-related investigation — that Project A-O Canada ensure that any information about Mr. Arar included in the communication be accurate and that its use be restricted by attaching caveats, in accordance with RCMP policy. Unfortunately, this was not done.

2.2.2
Inaccurate Information

The list of questions faxed to the FBI by Project A-O Canada contained information about Mr. Arar that was inaccurate and portrayed him in an unfair way.[7]

It indicated that Mr. Arar had been in "Herndon, Va., D.C." on September 11, 2001, implying that he had been in the Washington, DC area on the day hijackers had flown a plane into the Pentagon. Needless to say, any possible connection with the events of 9/11 would be treated very seriously by the Americans. However, Project A-O Canada now accepts that the information about Mr. Arar's whereabouts on 9/11 was incorrect. In fact, he was in San Diego, California on business that day.

Further, the two concluding paragraphs of the fax indicated, among other things, that Mr. Arar had declined to be interviewed in January 2002 and "soon after…departed the country rather suddenly for Tunisia." The opening paragraph of the fax also referred to Mr. Arar's "sudden" departure from Canada.

There are a number of problems with these statements. Mr. Arar did not decline to be interviewed in January 2002. As I have said above, he agreed to be interviewed on condition that the answers not be used in legal proceedings. There is an important difference between someone who is willing to provide information, albeit not for legal proceedings, and someone who refuses to answer any questions whatsoever. Further, Mr. Arar did not leave Canada "soon after" the interview exchange. He left five months later. There is no evidence that he left "suddenly."

Taken together, these inaccurate pieces of information paint a suspicious and potentially inflammatory picture of someone who refused to be interviewed, probably because he had something to hide, and who quickly pulled up stakes, leaving Canada in order to avoid further investigation. In the eyes of law enforcement officers such as the FBI agents, this misleading picture could raise suspicions that Mr. Arar was involved in illegal activities, probably terrorism-related, that were serious enough to cause him to flee the country where he and his family had lived for many years. It is worth noting that the Canadian and American investigators already believed that two of the primary targets had fled Canada in response to investigative activity. The way Project A-O Canada portrayed Mr. Arar's departure from Canada suggested a similar pattern of behaviour. The problem, of course, is that this was unfair to Mr. Arar, who was not a target, had not refused an interview and had not left Canada suddenly.

A member of Project A-O Canada explained that the American agencies had already been given the information in earlier Project A-O Canada disclosures. It is true that the Americans had been told previously that Mr. Arar had declined an interview. They had also been told that he had left the country. It is not clear, however, whether the descriptive language that linked his departure to the refusal to be interviewed and characterized the departure as "sudden" had been used previously. In any event, even if they had been given this

inaccurate information before, it hardly helped to repeat it, particularly at a time when Mr. Arar was in the United States being confronted by U.S. authorities who were conducting a terrorism-related investigation.

I emphasize here, as I do several other times throughout this report, the need for care and precision when sharing information in the security intelligence environment. The fax containing the erroneous information is a prime example of a recurring problem throughout the Project A-O Canada investigation. Sharing inaccurate information about individuals in connection with a terrorism investigation can create serious risks and operate very unfairly against those affected. In this instance, the inaccurate information was provided at a time when Mr. Arar was particularly vulnerable. Viewed from his perspective, when he was initially being detained in New York and his fate was probably still up in the air, the last thing Mr. Arar needed was for Canadian officials to provide their American counterparts with inaccurate information suggesting he had something to hide and was avoiding investigation.

It is disappointing that, when they testified at the Inquiry, some members of Project A-O Canada still did not appear to understand the unfairness or the risks to which they had exposed Mr. Arar by providing this inaccurate information to the American authorities. One officer explained that Mr. Arar's departure had been described as "sudden" because it had been sudden in the minds of Project members, in that they had not expected it. It seems that he did not appreciate the fact that the statement that "soon after [he] departed the country rather suddenly for Tunisia" might convey a very different meaning to the FBI.

Having heard the evidence of the Project A-O Canada officers, I do not attribute any bad faith to them in relation to these statements. Rather, I think that the statements resulted from a failure to consider properly what message they were conveying and to appreciate some of the potential implications. This is another instance where, in my view, the lack of training and experience of the Project A-O Canada officers in investigations relating to national security played a role.

2.2.3
Caveats

Project A-O Canada sent the September 26, 2002 communication to the FBI without attaching caveats, in contravention of RCMP policy.

While by far the largest part of the communication was a list of questions for Mr. Arar, the communication also contained specific information about him, some of which was incorporated into the questions. In addition to the inaccuracies discussed above, there was information showing links to Abdullah

Almalki, who was suspected of being a member of al-Qaeda. The information provided included the following:

- Mr. Arar had listed Mr. Almalki as an emergency contact on his tenancy agreement (actually on his lease application).
- Mr. Arar had met Mr. Almalki at Mango's Café in Ottawa and they had walked in the rain.

Again, RCMP witnesses pointed out that this information about Mr. Arar had been provided to the U.S. agencies previously. It is important to note that, on those earlier occasions, the information had also been provided without written caveats. In Chapter III, I discuss the importance of written caveats and how attaching them reduces the risk that information will be used for unacceptable purposes.

There are four points I wish to make about the failure of Project A-O Canada to attach caveats in the circumstances existing on September 26, 2002.

To begin with, I reject the suggestion that the Project could not have attached caveats because doing so would have rendered the questions to be asked useless. It was argued that, if honoured, caveats would have prevented the American authorities from asking the questions. I suppose that is one possible interpretation of what caveats would have meant, although I would have thought that, since the RCMP had sent the questions, it would have been clear to the FBI that the RCMP was consenting to the questions being asked. Thus, asking the questions would not be a breach of the caveats. Be that as it may, Project A-O Canada could have very easily addressed the perceived problem by attaching the caveats as required, along with a note to the effect that the RCMP consented to the use of the questions and information for the purpose of asking Mr. Arar questions, but that, in all other respects, the attached caveats applied.

The second point I wish to make is that the time at which the information was sent turned out to be significant. On September 26, 2002 and the days that followed, the American authorities were apparently considering Mr. Arar's fate. Although they had indicated to Project A-O Canada that Mr. Arar would be sent back to Zurich almost immediately, they actually held him for about 12 days. On October 3, they sent the RCMP a request for information, indicating that the information might be used for removal or law enforcement purposes. It would therefore appear that Mr. Arar's fate had not been settled when Project A-O Canada provided the information without caveats on September 26.

The order issued on October 7, 2002 by the Regional Director of the INS, which found Mr. Arar to be a member of al-Qaeda and directed that he be removed from the United States, specifically referred to information obtained from the questions for Mr. Arar provided by Project A-O Canada on September 26. The American authorities did not seek the consent of the RCMP to use the information contained in the September 26 communication in the INS proceeding, as written caveats would have required them to do. While I cannot be certain that they would have refrained from using the information without seeking consent in the face of written caveats, it is certainly more likely that they would have done so.

My third point concerns the fact that some Project A-O Canada members testified that, even though information had been included in the list of questions, there had been no need to attach written caveats because, from the beginning of their relationship with the American agencies, they had been instructed by their senior officers that "caveats were down," based on an understanding that information would be used for intelligence purposes only. They indicated that the Americans had been bound by the understanding that had existed from the outset.

As I have repeated several times, attaching written caveats to shared information is very important to prevent its use for unacceptable purposes. Sending the information about Mr. Arar on September 26 without caveats increased the risk that American authorities would use the information in proceedings affecting Mr. Arar without seeking the consent of the RCMP.

Finally, I note that senior officers at "A" Division and in the Criminal Intelligence Directorate (CID) were unaware that the communication was being sent and, thus, that it was being sent without caveats. However, in fairness to members of Project A-O Canada, I point out that officers from "A" Division and CID took the same position as Project A-O Canada members, namely, that attaching caveats to the questions would have defeated the purpose of sending them. They also seemed unable to grasp that there was a way around the perceived dilemma. The unacceptable result of this lack of vision was that information about Mr. Arar, some of which was inaccurate, was sent to the FBI without caveats, contrary to RCMP policy, at a time that was likely critically important to Mr. Arar's ultimate fate.

2.3
OCTOBER 4, 2002 FAX

On September 27, 2002, the day after Project A-O Canada had faxed questions for Mr. Arar to New York, the FBI informed Project A-O Canada that Mr. Arar

was still being held in New York and reiterated that he would be sent back to Zurich. When no further news was received from the FBI in the days that followed, Project members concluded, reasonably in my view, that Mr. Arar had been sent back to Zurich.

The RCMP did not hear directly from the Americans again until late afternoon on October 3, when [***] sent a fax to CID asking seven specific questions about Mr. Arar and his activities and associations. The U.S. official indicated two potential purposes for the information sought about Mr. Arar, whom it described as an al-Qaeda operative: removal from the United States pursuant to the Immigration and Nationalization Service (INS) process and law enforcement proceedings. The questions largely concerned Mr. Arar's contacts and possible connections with other individuals, sleeper cell members and known terrorists. The U.S. official asked that the response be sent to the FBI for evidentiary purposes.

The next morning, CID forwarded the U.S. official's fax to Project A-O Canada, which sent a response that same day, with a copy to CID.

The response included information obtained from Mr. Arar's secondary examination at the Canadian border on November 29, 2001 and the searches executed on January 22, 2002, as well as a reference to Mr. Arar's meeting with Mr. Almalki at Mango's Café. It also included information provided by CSIS,[8] which was subject to CSIS caveats.

Importantly, the reply made it clear that Project A-O Canada had yet to complete either a detailed investigation of Mr. Arar or a link analysis on him. The Project indicated that, while Mr. Arar had had contact with many individuals of interest, it was unable to indicate links to al-Qaeda.

The RCMP's response contained two caveats: one stating that the information was the property of the RCMP and could not be distributed or acted upon without the authorization of the RCMP, and the other, that the "third-party rule" might affect the disclosure of specified information in the response that had been obtained from CSIS.[9]

I am satisfied that it was appropriate for the RCMP to respond to [***] questions and that the manner in which it responded complied with RCMP policies respecting caveats and respecting relevance, reliability and personal information.

In the first place, the RCMP still had no idea that American authorities were considering sending Mr. Arar to Syria. While the communication requesting information referred to the possibility of removal or law enforcement proceedings, there was no hint of removal to Syria.

Further, the information requested met the "relevance" requirement for sharing information. The questions sought information about Mr. Arar's associations and activities with Mr. Almalki and others who were subjects of the Project A-O Canada investigation. Mr. Arar was properly a person of interest in the investigation, and his associations and activities were relevant in that respect. Project A-O Canada was aware that the Americans were interested in the investigation. It had been co-operating and sharing information with them over an extended period of time. [***] request was specific about the uses to which the information might be put, that is, removal or law enforcement, and the information sought was relevant to the purposes identified. Finally, the U.S. Agencies could be said to have had a "need to know" the information.

I see no problem with respect to the reliability of the information provided in this instance. It was accurate and precise. Moreover, while the assessment of reliability of some information was not worded as precisely as it might have been, I am satisfied that, when read as a whole, the response would not have misled the recipients.[10] Project A-O Canada properly pointed out that its investigation did not indicate links between Mr. Arar and al-Qaeda. Unfortunately, Project A-O Canada did not take this opportunity to set the record straight concerning the several inaccuracies concerning Mr. Arar contained in earlier disclosures to American authorities.[11]

Project A-O Canada's response did include some information that might be considered personal information about Mr. Arar, but none of it was core biographical data. In any event, the information was given to the FBI, a law enforcement agency [***] RCMP policy permits the disclosure of personal information to law enforcement agencies under the "consistent use" exception in the *Privacy Act*.[12] In my view, the RCMP did not improperly disclose personal information about Mr. Arar in the October 4 response to the [***] questions.

It is important to remember that the RCMP attached a caveat to its response, precluding the use of the information without its authorization. That was clearly the proper thing to do. Project A-O Canada had no reason to suspect that U.S. authorities would not respect the caveat. It was reasonable for it to assume that, if the information was to be used in any proceeding affecting Mr. Arar, American officials would seek the RCMP's consent, and the RCMP would have the option of refusing after considering the use to which the Americans intended to put this information and the consequences for Mr. Arar. Certainly, the thrust of the testimony of RCMP witnesses was that, had they been asked if the information could be used in a process that could result in Mr. Arar's removal to Syria, they would have said no. As it turned out, the American agencies did not seek the

RCMP's authorization to use the information contained in the response for purposes of the INS proceedings that led to Mr. Arar's removal.

The RCMP's response of October 4 is a good example of the way information should be shared. The information was accurate and precise, and fairly described the status of the Project A-O Canada investigation relating to Mr. Arar. A caveat was attached, as required by RCMP policy. That reply stands in contrast to the information-sharing practices that preceded it, when information was sometimes loosely or inaccurately presented and no caveats were attached. Indeed, this was the first time that Project A-O Canada attached a caveat to written information provided to the American agencies.

That said, I do not know if American authorities respected the caveat, or relied upon information in the October 4 reply to support the removal order. It is certainly possible that they relied solely on information previously supplied, to which no caveats had been attached.

Unfortunately, in responding to the questions on October 4, the RCMP did not seize the opportunity to spell out clearly and in writing that all previous disclosures of information were subject to the same caveat as that attached to the response. Clearly, this would have been an opportune time to do so. On October 4, 2002, Project members learned that the American authorities were considering some rather serious steps with respect to Mr. Arar, that is, removal or prosecution. They were also made aware that the Americans were asserting that Mr. Arar was connected to al-Qaeda.The first two questions in the October 3rd request specifically referred to information previously provided by the RCMP. It must have been obvious that information about Mr. Arar previously supplied to the American agencies, without caveats, was being considered in the American decision-making process.

It is worth noting that the fact of attaching a caveat for the first time could have sent an unintended signal to American officials that information provided previously without caveats was not subject to caveats. In any event, it appears that it did not occur to anyone in the RCMP, including those at CID who were involved in this exchange, to take this additional step in an attempt to ensure that American officials would not use any information originating with the RCMP in an unacceptable way.

It is somewhat ironic that, when the RCMP stated in writing that its investigation could not link Mr. Arar to al-Qaeda, it attached a caveat indicating that the information could not be disseminated without consent. Meanwhile, all the information about Mr. Arar previously provided by the RCMP, some of which was inaccurate and prejudicial, remained without caveats.

The final comment I have regarding the October 4, 2002 communication relates to the information that originated with CSIS. The RCMP's response did specify that the CSIS information might be subject to the third-party rule. However, the information in question had been provided to the RCMP with caveats, which the RCMP breached, as it did not obtain the consent of CSIS before disclosing the information to the Americans. I accept the evidence of CSIS witnesses that there had been no general agreement that the RCMP could provide CSIS information to the Americans without CSIS consent. The RCMP should not have shared the information without first seeking approval.

It is not clear whether CSIS would have given its consent to the provision of the information to the Americans. In any case, I was impressed with the way CSIS approaches information sharing generally. CSIS routinely ensures that caveats are attached to information being shared. When consent is sought to use its information, it considers the uses to which the information may be put and the potential consequences to individuals of the proposed use, among other things. Had the RCMP sought the consent of CSIS to forward its information on October 4, it seems likely that CSIS would have inquired into the uses being contemplated.[13] Although it is impossible to say whether that would have changed anything that occurred, such inquiries would have been a step in the right direction.

2.4
TELEPHONE CONVERSATIONS BETWEEN CID OFFICER AND FBI OFFICIAL

During the time Mr. Arar was detained in New York, Corporal Rick Flewelling, the officer at CID with responsibility for monitoring the Project A-O Canada investigation, had two telephone conversations about Mr. Arar with an FBI official with whom he had previously spoken about the Project investigation. The first took place in the early evening of Friday, October 4. It is not clear who placed the call. The second, initiated by the FBI official, was held at about 6:10 pm on Saturday, October 5.

By the time of the first telephone call, Mr. Arar and his brother had told DFAIT officials that Mr. Arar was concerned that he would be sent to Syria. I will come back to DFAIT's response on hearing of this concern. For present purposes, however, what is important is that, when Corporal Flewelling spoke with the FBI official on October 4 and 5, he was not aware of Mr. Arar's concerns about Syria.[14] It appears that this information was first passed on to the RCMP through Inspector Roy, the RCMP liaison officer at DFAIT, at a later date, likely October 7.

In the first telephone conversation, the FBI official indicated that Mr. Arar was scheduled to appear at an immigration hearing on October 9. He stated that Mr. Arar had never officially entered the United States and would be sent back to Switzerland. The two men also discussed Mr. Arar's dual nationality.

Corporal Flewelling suggested that Mr. Arar be sent to Canada, indicating that the RCMP would look into setting up surveillance. The corporal believed that the official had taken his suggestion seriously and that the October 9 hearing would determine whether Mr. Arar would be sent to Zurich or Canada.

During the evening of October 5, the FBI official called Corporal Flewelling at home and told him that the FBI was unable to read Project A-O Canada's October 4 fax responding to the seven questions from the Americans. He asked for another copy. The official then went on to say several things about Mr. Arar's situation that provided some insight into what the American authorities were considering. He indicated that they feared they did not have enough information to bring charges against Mr. Arar and therefore would be seeking to remove him from the United States. Significantly, he mentioned that Mr. Arar was a dual citizen and had asked to be sent to Canada. He also said that Washington wanted to know whether the RCMP could charge him and whether he could be refused entry to Canada.

Corporal Flewelling responded that there was insufficient evidence to charge Mr. Arar in Canada and that Mr. Arar probably could not be refused entry to Canada, since he was a Canadian citizen.

This was obviously a very important phone call, which took place at a critical point during Mr. Arar's detention in New York. One can deduce from the questions asked by the official that Mr. Arar's fate was still undecided. Canada was a possible, but by no means certain, destination. Although Syria was not specifically mentioned as an option, the FBI official did allude to Mr. Arar's dual citizenship. By then, everyone involved in the investigations knew that his second country of citizenship was Syria. Thus, indirectly at least, Syria was part of the discussion. Furthermore, Washington — presumably meaning senior officials — was involved. Clearly, the Arar case was not routine. It was being treated as a very serious matter.

The question arises as to what message Corporal Flewelling took from the conversation. He testified, and I accept his evidence, that it did not occur to him that one of the options being considered by the American authorities was removal to Syria. After the call, he continued to believe that Mr. Arar would be sent to either Zurich or Canada. It did not cross his mind that the answers he had given the agent, to the effect that Mr. Arar likely could not be refused entry to Canada and would not be charged in Canada, might lead the American

authorities to consider Syria as an option.[15] The reference to Mr. Arar's dual citizenship did not set off any warning bells, and Corporal Flewelling did not ask the FBI official if Syria was a possibility. Corporal Flewelling had no knowledge of an American practice of "rendering" people suspected of terrorist activities to countries such as Syria.[16]

It is possible that someone else in Corporal Flewelling's place would have caught on to the fact that Syria was being considered and asked specific questions about the American authorities' intentions. However, even assuming that Corporal Flewelling had asked questions about whether Syria was being considered, it is not possible at this point to gauge how the FBI official would have responded. Throughout Mr. Arar's detention in New York, American authorities were less than forthcoming with the RCMP and with Canadian consular officials about their plans for Mr. Arar. Indeed, some witnesses described them as having been duplicitous. Despite several Canadian inquiries and a number of conversations about Mr. Arar, there is no evidence that American officials ever indicated to a Canadian official that Syria was being considered. The American authorities appear to have intentionally kept Canadian officials in the dark about their plans to remove Mr. Arar to Syria.

Corporal Flewelling was not the only one not to read any warning signals into the October 5 telephone conversation. When he reported the phone call to Project A-O Canada and his superiors at CID, none of those informed interpreted it as signalling that Mr. Arar might be sent to Syria.

2.5
OCTOBER 7 AND 8 COMMUNICATIONS WITH U.S. AUTHORITIES

In its faxed response to the Americans questions on October 4, Project A-O Canada requested access to Mr. Arar for the purpose of conducting an interview in relation to its investigation. Throughout the day of October 7, Project A-O Canada members had a number of conversations internally and two with the FBI about the possibility of having Project members go to New York to interview Mr. Arar. In one conversation on October 7, an FBI official asked whether the Project could link Mr. Arar to al-Qaeda or any other terrorist group. The Project officer recorded his reply in his notebook, as follows: "I advised him that at this point, other than through Almalki, we could not link him." That same day, the Regional Director, Eastern Region, U.S. Immigration and Naturalization Service, Department of Justice, made an order finding Mr. Arar to be a member of al-Qaeda and refusing him entry to the United States. It was this order that led to Mr. Arar's removal to Syria.

The answer provided by the Project A-O Canada officer is somewhat equivocal. It accurately states that Project A-O Canada had no evidence independent of his connection to Mr. Almalki to link him to al-Qaeda, but seems to suggest that Mr. Arar's connections to Mr. Almalki might in fact link him to that organization. Such an interpretation of the officer's comment would be somewhat inconsistent with Project A-O Canada's statement in the October 4 fax to the FBI that the Project had yet to complete a link analysis and that, while Mr. Arar had contact with many individuals of interest, the Project was unable to indicate any links to al-Qaeda.

It is interesting that, as late as October 7, the very day the order finding Mr. Arar a member of al-Qaeda was made, the FBI was still looking for evidence to link him to a terrorist group. Further, despite Project A-O Canada's statement in the October 4 fax that it was unable to indicate links to al-Qaeda, the FBI was continuing to pursue the subject with the Project. There are a number of possible explanations for the question about Mr. Arar's links at that stage, including the possibility that the FBI official who asked it had not seen, or been informed of, Project A-O Canada's October 4 fax. In any event, without evidence from American authorities, I cannot go further than to point out that, on October 7, the question was asked and an answer given.

During the conversation in question on October 7, the FBI official indicated that Mr. Arar would be sent to Canada after a hearing scheduled for October 9. Later that same afternoon, Project A-O Canada informed the FBI that its officers would not be going to New York to interview Mr. Arar. The Project then started preparations to conduct surveillance of Mr. Arar, in anticipation of his possible return to Canada.

On October 8, at around 4 o'clock in the morning, Mr. Arar was served with an INS removal order, taken from the detention centre where he was being held in New York and put on a plane, the first leg of a journey that ended in a Syrian jail. The RCMP was not immediately informed of Mr. Arar's removal.

On the morning of October 8, the RCMP liaison officer at DFAIT showed members of Project A-O Canada consular reports relating to Mr. Arar which, for the first time, alerted them to the possibility that Mr. Arar would be sent to Syria.[17] Later that morning, the FBI official who had spoken to Corporal Flewelling on October 4 and 5 arrived at Project A-O Canada offices with information found in Mr. Arar's possession during his detention. The FBI official told Project members that Mr. Arar was still in New York (even though he was not). He indicated that the FBI did not have any information that would allow it to hold Mr. Arar, adding that it was an INS matter and that Mr. Arar "could well be sent to Canada or Syria." That was the first time an American official had

mentioned the possibility of Syria to the RCMP. He also said that the U.S. Department of Justice was still considering whether to permit Project A-O Canada to interview Mr. Arar.

In light of the information that Mr. Arar might be going to Syria rather than Canada, the Project team met to reconsider whether it should interview Mr. Arar in New York. However, Project members were concerned that, if Mr. Arar refused to co-operate, the United States could use his refusal as a reason to send him to Syria. They did not want to be seen as participating or acquiescing in a decision to send him to Syria. That perception, they reasoned, could be harmful to the RCMP. Because of that concern, the Project members decided that it would not be advisable to interview Mr. Arar unless they knew three things: why Mr. Arar was in U.S. custody, what Mr. Arar had said to the American authorities and, importantly, where he was going to be sent. Later in the day, Project A-O Canada put those questions to an American official, who responded that he did not have the answers and that Mr. Arar's case was now an INS matter.

Although Mr. Arar had already been removed from New York by this time, the Project's reaction to the prospect of Mr. Arar's removal to Syria is noteworthy. The officers did not want to do anything that could be seen as participating or acquiescing in the decision. They were obviously aware that, if nothing else, a decision to send Mr. Arar to Syria against his wishes would be problematic from a public perception standpoint, and they did not want to be associated with such a decision. Nonetheless, the officers did nothing to discourage the Americans from sending Mr. Arar to Syria once they learned of the possibility, even though they did not know he had already been removed from the United States.

Finally, on an unrelated matter, Mr. Arar's counsel has queried whether an RCMP officer or other Canadian official was present at any time when Mr. Arar was questioned by American authorities in New York. I have canvassed this issue and there is no evidence to suggest that any Canadian officials were present on any of the occasions when Mr. Arar was interviewed while detained in New York.

2.6
AMERICAN REMOVAL ORDER

The October 7, 2002 removal order for Mr. Arar indicated that, on October 1, the INS had instituted removal proceedings under section 235(*c*) of the U.S. *Immigration and Nationality Act*, charging Mr. Arar with being a member of a foreign terrorist organization. The Regional Director of the INS who signed the

order stated that, based on all the information, classified and unclassified, Mr. Arar was clearly and unequivocally inadmissible for entry into the United States, and that he was a member of a foreign terrorist organization, al-Qaeda.[18]

According to the order, the Commissioner of the INS had determined that Mr. Arar's removal to Syria would be consistent with the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, meaning that he was satisfied that Mr. Arar would not be tortured, apparently because of an assurance received from Syrian authorities.[19]

The unclassified information relied upon is described in the order. It pertains to interviews of Mr. Arar on September 26 and 27 at John F. Kennedy International Airport. During the interviews, Mr. Arar reportedly said that he was a citizen of Syria and Canada, and that he had lived in Tunisia for three months. While he denied any links to a terrorist organization, he did admit to an association with Abdullah Almalki, which included three business dealings with him. He also admitted having met Mr. Almalki at a restaurant (Mango's) in October 2001 and having talked in the rain with him. Finally, he admitted knowing "Ahman El-Maati." Clearly, the unclassified information falls well short of establishing that Mr. Arar is a member of al-Qaeda. If there is information supporting that conclusion, it must be classified.

The order states that a detailed discussion of the classified information relied upon is contained in a separate addendum. That addendum has not been disclosed and there is no way of knowing for certain what information it contains.

2.7
RCMP INVOLVEMENT IN REMOVAL ORDER

I have carefully reviewed all of the evidence relating to communications about Mr. Arar between the RCMP and American officials both before and during Mr. Arar's detention in New York. There is no evidence to suggest that any members of the RCMP participated or acquiesced in the American decision to remove Mr. Arar to Syria.[20] On the contrary, as I have indicated above, no members of the RCMP other than Inspector Roy even considered the possibility of Syria until October 8, after Mr. Arar had been removed from the United States. Inspector Roy testified that he had only learned of the "Syrian threat" on October 7, and had had no contact with American officials about that threat.

The question arises as to whether the American authorities relied upon information provided by the RCMP in making the removal order. Without the evidence of the American authorities or access to the classified addendum to the removal order, I cannot be sure what information they used. However, I do

conclude that it is very likely that they relied on information received from the RCMP in making the decision to remove Mr. Arar to Syria.

The rationale for my conclusion may be broken down into three parts:

- Over time, the RCMP provided the American agencies with information about Mr. Arar, including some inaccurate information, which would have been relevant to the American decision.
- The fact that the RCMP provided most of the information without written caveats increases the likelihood that American authorities relied on information received from the RCMP.
- There is nothing in the evidence to suggest that American authorities did not rely on information received from the RCMP. Indeed, the available information suggests the contrary.

In the 11 months preceding Mr. Arar's removal to Syria, the RCMP co-operated with the U.S. agencies in their investigation of a number of individuals and provided its American counterparts with information, including some about Mr. Arar, that was relevant to the American investigation into terrorist activities of al-Qaeda. The information about Mr. Arar included information pertaining to his associations with Messrs. Almalki and El Maati, who were suspected of being connected with al-Qaeda. The RCMP also provided what amounted to assessments of Mr. Arar's status, including a statement to the effect that he was an important associate of Mr. Almalki and also that he was an Islamic extremist. In addition, the RCMP shared information that seemingly showed occasional suspicious actions by Mr. Arar, such as his meeting and walk in the rain with Mr. Almalki in October 2001, and his "sudden" departure from Canada after declining to be interviewed.

The Government correctly pointed out that, prior to September 26, 2002, Project A-O Canada provided the U.S. agencies with over 25,000 documents, only 94 of which mentioned Mr. Arar, the implication being that it would have been apparent that Mr. Arar was a very small part of the investigation — a person of little consequence. One of the difficulties with that suggestion is that the interest in Mr. Arar resulted from his links to Mr. Almalki and others. Project A-O Canada described Mr. Arar as a "close associate" of Mr. Almalki and a person with an "important" connection to him. It also linked him to others being investigated. Thus, to the extent that the documentary record provided by the Project tended to establish suspicions about Mr. Almalki and others, it would have increased the level of interest in or suspicion about Mr. Arar. It would be a mistake to conclude that documents other than those with specific mentions of Mr. Arar would not be considered relevant to his situation. Moreover,

Project A-O Canada also provided information about Mr. Arar verbally, at meetings and in telephone conversations.

With the exception of the fax of October 4, 2002 discussed above, none of the information about Mr. Arar provided by the RCMP had written caveats attached. In Chapter III, I describe all of the information about Mr. Arar provided to the American agencies and how in my view the failure to attach caveats created unacceptable risks that they would use the information without first seeking the consent of the RCMP.

Some members of the RCMP testified that there had been an "implied understanding" that the information would not be used for anything other than intelligence purposes without consent. I discuss the circumstances of any such understanding or agreement in Chapter III. I will not repeat that discussion here, other than to say that any such understanding or arrangement was, at best, informal and loose, and fell short of providing the clarity and moral imperative that would accompany written caveats.

While I cannot be certain whether or not the American authorities honoured some informal "understanding" or "agreement," it seems unlikely, given their actions. What we do know is that, during the period when American authorities were deciding what to do with Mr. Arar, they were not forthcoming with Canadian officials. Despite having received co-operation from the RCMP for many months, they were not open about their intentions with regard to him. It seems that they believed — quite correctly — that, if informed, the Canadians would have serious concerns about the plan to remove Mr. Arar to Syria, particularly if they were viewed as having participated or acquiesced in the decision. Even after Mr. Arar was removed, they continued to obfuscate until Mr. Arar had arrived in Syria. Given that pattern of conduct, it is hard to imagine that the American authorities would have somehow felt morally bound by an informal or loosely worded understanding or agreement not to use Canadian-supplied information without first obtaining consent.

On the contrary, given their resolve to remove Mr. Arar to Syria irrespective of what Canadian officials might have thought, it appears more likely that the American authorities would have seized the opportunity presented by the Project's failure to follow normal practice or policy by attaching caveats in order to use the information supplied to support their decision to remove Mr. Arar to Syria. Certainly, they did not seek consent to use information originating with the RCMP in the INS proceeding prior to Mr. Arar's removal.

Moreover, there is a reference to Canadian information in the removal order itself. In referring to unclassified information on which the removal decision was based, the order describes answers provided by Mr. Arar during interviews

on September 26 and 27 at the airport in New York. While the information is derived from answers given by Mr. Arar, I note that those answers relate primarily to information that the RCMP had already given the FBI. For example, Mr. Arar indicated that he had three business dealings with Mr. Almalki and that he had met with Mr. Almalki and they had talked in the rain in October 2001; both these pieces of information had previously been provided to the Americans by the RCMP. Obviously, the information obtained during the RCMP investigation and later supplied to the American agencies played a role in the interrogation of Mr. Arar, and it would seem very likely that it was at least partly the basis for the removal order.

The conclusion that the American authorities very likely relied on information supplied by the RCMP is further supported by American actions during Mr. Arar's detention in New York, which show that "the case" the Americans were seeking to establish against Mr. Arar was linked to and based on matters that were the subjects of the RCMP investigation.

Clearly, when the FBI sought questions for Mr. Arar from Project A-O Canada on September 26, it knew the questions would be based on the Canadian investigation. Moreover, some of the information described in the unclassified portion of the American removal order relates directly to those questions.

Further, when the American authorities sent Project A-O Canada seven questions about Mr. Arar on October 3, some of the information sought related to information previously provided by Project A-O Canada. The Americans indicated that they were considering two types of proceedings: removal or law enforcement. Again, the inference is inescapable: the American investigation was closely linked and intertwined with the Canadian investigation. The American authorities considered information in the RCMP's holdings to be relevant to the decisions being considered and were seeking to expand upon information previously received from the RCMP.

The same comment applies to the query made by an FBI agent on October 7, concerning whether the Project had any information linking Mr. Arar to al-Qaeda. The American authorities considered the Canadian information relevant.

It was argued that the Americans had been conducting a separate, independent investigation into Mr. Arar and that there was no basis for concluding that anything other than the information from that investigation had been behind the removal decision. In particular, it was noted that the removal order had found that Mr. Arar was a member of al-Qaeda, whereas the information provided by the RCMP had fallen far short of establishing that conclusion. Indeed,

on October 4 and 7, Project A-O Canada had indicated that it did not have sufficient information to link Mr. Arar to al-Qaeda. Thus, it was contended, the American authorities must have had independent information to show that Mr. Arar was a member of al-Qaeda and, therefore, had had no need to rely on information received from the RCMP.

The evidence about the scope of the American investigation is not clear. However, accepting that there was a separate U.S. investigation and even that some information from that investigation was relied upon to support the removal order, that does not invalidate the otherwise logical conclusion that information received from Canada was also relied upon.

It is worth noting that the American agencies never provided their Canadian counterparts, [***] with any information about Mr. Arar emanating from the U.S. investigation that would come close to showing that Mr. Arar was linked to al-Qaeda. If they had such evidence, it is hard to fathom why they never shared it. That failure would be particularly surprising in the context of the co-operative investigation conducted during the months leading up to Mr. Arar's detention. Senior RCMP officers testified that, after 9/11, there had been an agreement with the American agencies that information would be exchanged freely, albeit in accordance with existing policy. I accept that evidence. One would expect that, if anything, the Americans would have had a greater incentive than the Canadians to share information in the circumstances.

The American authorities knew that Mr. Arar resided in Canada. They also knew that the RCMP had collected some information about him, in particular information relating to his associations with Mr. Almalki. In the post-9/11 world, the Americans were enormously concerned about terrorist threats, including any that might originate in Canada. If U.S. authorities had significant information about Mr. Arar showing links to al-Qaeda, one might reasonably ask why they would not have shared it with their Canadian counterparts. If they had information tending to link Mr. Arar, a Canadian, to al-Qaeda, why not provide that information to the Canadian investigators, so that the supposed threat posed by him could be dealt with? Why hoard the information? When, on October 5, they asked the RCMP whether Mr. Arar could be charged criminally if they sent him to Canada and the RCMP responded in the negative, why would they not have offered any information in their possession?

It is important to keep in mind that, when the American authorities were considering what to do with Mr. Arar after detaining him on September 26, they did not rely solely on their own, independently obtained information. Why would they ask the RCMP for questions to pose and for information about Mr. Arar, and why would they ask whether the RCMP had evidence linking

Mr. Arar to al-Qaeda if the American investigation had independently established a case? Clearly, in the days leading up to the making of the removal order, the American investigators were scrambling to put together a case. They were looking for whatever information they could get, including information from Canada.

I recognize that, on October 4 and 7, Project A-O Canada told the Americans that they could not link Mr. Arar to al-Qaeda. However, that does not mean that the American authorities did not use information about Mr. Arar provided by the RCMP to complete whatever picture was eventually relied upon. The evidence strikes me as very strong that they relied on whatever information about Mr. Arar was available, including information provided by the RCMP without caveats.

The evidence also indicates that, in the post-9/11 environment, American investigators tended to evaluate information about terrorist-related activities with a more suspicious eye than their Canadian counterparts. Thus, one should be careful about assuming that the American authorities had any information about Mr. Arar other than that provided by the RCMP. The finding that Mr. Arar was a member of al-Qaeda may have been based on very sparse evidence.

Also of significance is the fact that there is nothing in the evidence to suggest that the Americans did not use Canadian information in deciding to remove Mr. Arar to Syria.

In the time since Mr. Arar's removal to Syria, American officials have made a number of statements about the basis for the decision to remove him. A review of those statements shows that their position has evolved over time. Shortly after Mr. Arar's removal, they indicated that Canadian officials had been involved in the American decision to remove him. They gradually modified that position, eventually saying that the Canadians had not been involved. However, they have maintained consistently that they relied upon information received from Canada in making the decision. For example, in December 2003, Colin Powell, then Secretary of State, stated clearly that the United States had relied upon Canadian-supplied information. On one occasion, he said that the Arar affair had been triggered by enquiries made by Canadian sources and that Mr. Arar would not have been on the U.S. radar screen had he not been the subject of attention by Canadian agencies.

This latter position is consistent with the position taken by American authorities in two letters, one to Congressman Edward J. Markey and the other to the Inquiry. In each instance, in what appears to be "formal positions," American authorities state that Mr. Arar's name was placed on a terrorist watch list based on information received from Canada. The letter to the Inquiry indicated that the

information had been received "as part of an ongoing general sharing of information between the governments of the United States and Canada." Both letters indicate that the U.S. government decision was based on its own assessment of the security threat to the United States posed by Mr. Arar.[21]

Obviously, none of the American statements I refer to were made under oath or have been subjected to cross-examination. Thus, they are not evidence normally admissible in a court of law and must be approached with caution. I am satisfied, however, that nothing has come to the attention of Canadian officials or the Inquiry to suggest that the American authorities did not rely on Canadian information in deciding to remove Mr. Arar to Syria. On the contrary, the statements from the Americans have asserted the opposite, consistently and clearly.

Finally, I refer to a memorandum on FBI letterhead dated November 19, 2003, with the reference heading "Maher Arar," which was produced in evidence by the Canadian government. This memorandum is consistent with a conclusion that U.S. authorities relied upon RCMP-supplied information in removing Mr. Arar to Syria. The purpose of the memorandum is stated as follows: "Information contained in this memorandum was obtained from the Royal Canadian Mounted Police (RCMP) for the sole purpose of the Immigration and Naturalization Service (INS) administrative proceeding under Title 8 U.S.C. Section 1225(c)(l)."[22] Although some details are inaccurate, the extensive information about Mr. Arar in the memorandum is unquestionably information provided to the Americans by the RCMP.

During the Inquiry, the Government was unable to provide details about who had requested this memorandum, to whom it had been sent, or why it had been sought and sent in November 2003. However, on its face, the memorandum on FBI letterhead supports a conclusion that American authorities relied upon Canadian-supplied information.

3.
CSIS' RESPONSE TO DETENTION OF MR. ARAR

I am satisfied that CSIS did not participate or acquiesce in the American decisions to detain Mr. Arar and send him to Syria. Further, CSIS did not provide any information about Mr. Arar to the Americans either before or during Mr. Arar's detention in New York.[23]

I am also satisfied that CSIS responded appropriately when informed of Mr. Arar's detention in New York. CSIS was not aware in advance that the American authorities were considering sending Mr. Arar to Syria and had no discussions or contacts with them about the decision. In the confidential version

of the Factual Background, I describe the way in which CSIS responded to Mr. Arar's detention in New York. For reasons of national security confidentiality, I am unable to refer to some of that detail in the public version. As a result, my discussion here is briefer and my conclusions are not explained as fully as might otherwise have been the case.

CSIS was first informed of Mr. Arar's detention in New York by DFAIT on October 2. The following day, the RCMP delivered to it the Project A-O Canada situation reports for September 26 and 27, which indicated among other things that Project A-O Canada had sent the FBI questions for Mr. Arar on September 26.

When CSIS learned about Mr. Arar's detention, one of its officials in Ottawa sent two communications to the CSIS Washington office, in part to ask that inquiries be made about what was happening with respect to Mr. Arar. [***]. The communications were not viewed as urgent, however, as there had been nothing in the messages CSIS had received about Mr. Arar's circumstances in New York to indicate that there was any urgency.

It appears that the CSIS official in Washington did not contact the American authorities about Mr. Arar's situation until October 10, at least two days after Mr. Arar had been removed to Syria.

In my view, CSIS should not be faulted for not contacting U.S. authorities and making inquiries about Mr. Arar sooner. It was clear to CSIS that DFAIT and the RCMP were involved in the matter and were in contact with U.S. authorities. Moreover, as far as CSIS knew, there was no indication that any action was imminent or, in particular, that Mr. Arar was in danger of being sent to Syria. Given its lack of previous involvement with the Americans in connection with Mr. Arar, it did not make much sense for CSIS to insert itself into the situation.

On October 4, the RCMP provided the Americans with information about Mr. Arar that it had received from CSIS without first consulting CSIS or seeking its consent to transfer the information. I am satisfied that, had it been consulted, CSIS would have followed its usual practice and inquired into the use to which the information might be put. It is far from clear, however, whether this would have led the American authorities to disclose their intentions regarding Mr. Arar's removal to Syria.

4.
DFAIT'S ROLE

4.1
BACKGROUND

Mr. Arar was detained in New York from September 26 to October 8, 2002. DFAIT first became aware of the possibility that Mr. Arar was being detained on September 29 and was actually informed of his detention on October 1.

Maureen Girvan, the Canadian consul in New York, was the DFAIT official[24] with primary responsibility for handling Mr. Arar's case. She involved her superiors in the Consular Affairs Bureau in Ottawa, including Director General Gar Pardy, in all decisions on how to proceed in connection with Mr. Arar. Ms. Girvan visited Mr. Arar at the Metropolitan Detention Centre (MDC) in New York on October 3. In addition, Canadian consular officials, including Ms. Girvan, spoke to a number of American officials about Mr. Arar's case while he was being detained, had several phone conversations with Mr. Arar's family members, and also spoke to American lawyers who might represent Mr. Arar in whatever legal proceedings ensued.

The most significant DFAIT-related issue in regard to what occurred while Mr. Arar was in New York is whether Canadian consular officials paid sufficient attention to warning signs that the American authorities were contemplating sending Mr. Arar to Syria.

In closing submissions, Mr. Arar's counsel enumerated the warning signs that should have alerted consular officers to the possibility of Mr. Arar's removal to Syria and made them take more aggressive steps to address that concern. They may be summarized as follows:

- On October 1, Mr. Arar's brother informed DFAIT that Mr. Arar had indicated that he would be deported to Syria.
- Also on October 1, a senior officer with the U.S. INS advised that Mr. Arar's case was of such seriousness that it should be taken to the highest level and suggested that the Canadian ambassador in Washington contact the Department of Justice.
- By October 2, consular officials had learned that Mr. Arar was being held on the ninth floor of the MDC, a secure wing for terrorism suspects. Officials at MDC would not tell Ms. Girvan what charges Mr. Arar was facing or why he was being detained.

- On October 3, Mr. Arar told Ms. Girvan that, during the time he had been held at the airport in New York, two immigration officers had informed him that he would be sent to Syria.
- Also on October 3, during her visit with Mr. Arar, Ms. Girvan learned that Mr. Arar's case was considered an immigration matter and the American authorities were alleging that he was a member of al-Qaeda.
- DFAIT was aware of the American National Security Entry-Exit Registration System (NSEERS), aimed at persons born in certain Muslim countries, including Syria.
- DFAIT was aware of the Syrian practices of holding detainees incommunicado while interrogating and abusing them.

I have heard the testimony of all the DFAIT officials who were involved in assessing Mr. Arar's situation as it unfolded and in making decisions about what ought to be done. I am satisfied that DFAIT officials acted appropriately in the circumstances as they reasonably understood them. Based on their experience and the information they had received, they did not believe that there was an imminent risk that Mr. Arar would be sent to Syria. Their experience with individuals in "terrorism-related" cases was that they were held in American detention for months. Moreover, they had never known American authorities to remove a Canadian citizen to a country other than Canada when the individual had requested to be sent to Canada and was travelling on Canadian documents. They were caught completely off guard when they learned of Mr. Arar's fate.

American authorities were not forthcoming with Canadian consular officials about what was occurring. They did not inform them that Mr. Arar's case would be dealt with on October 7, and at no time did they give the consular officials any indication of their intention to send Mr. Arar to Syria.

I note that, beginning five days before Mr. Arar's removal, the consular officials took reasonable steps to assist Mr. Arar and his family in retaining counsel to represent his legal interests in any American proceedings.

Below I discuss the most important events relating to the threat of Mr. Arar's removal to Syria and the reasons for my conclusion that Canadian officials acted appropriately.

4.2
POSSIBILITY OF REMOVAL TO SYRIA

Between October 1 and October 3, DFAIT officials received several pieces of information that suggested the possibility that Mr. Arar would be sent to Syria. On October 1, consular officials learned that Mr. Arar was being detained at the

MDC. Despite making several inquiries, they were unable to determine what charges he was facing or even why he was being held. In fact, American officials appear to have been deliberately evasive about his situation.

On the same day, Mr. Arar's brother called DFAIT Headquarters in Ottawa to point out that Mr. Arar had told him in a telephone conversation that he would be sent to Syria, his country of birth. In response to that information, Lisiane Le Floc'h, with the Canadian Consulate in New York, called the INS office in New Jersey to find out if there was a deportation file on Mr. Arar, as would be expected if he was to be sent to Syria. She was told there was no file and, importantly, that it was unlikely that Mr. Arar was a deportation case, as the MDC did not handle such cases. Canadian consular officials had no reason not to accept this information.

Ms. Le Floc'h nonetheless pursued the matter further, entering into contact with the INS public affairs office, where she eventually spoke to a superior officer. Initially, the officer indicated that he was unaware of the case, but when he called her back, he indicated that the case was of such seriousness that it should be taken to the highest level. It is at this point that the suggestion was made that the Canadian ambassador in Washington contact the U.S. Department of Justice.

While this was obviously a very unusual and serious comment, the officer did not suggest that the information previously provided by the INS, to the effect that it was unlikely that Mr. Arar was a deportation case, was inaccurate, nor did he mention the possibility of Syria.

Ms. Girvan quite properly passed on the information about Mr. Arar's case to her supervisors in Ottawa, so that the best judgment of those in the Consular Affairs Bureau could be engaged. She continued to consult with her superiors, including Mr. Pardy, throughout the days that followed.

On the evening of October 1, Ms. Girvan sent a fax to the MDC asking about the charges on which Mr. Arar was being held. The MDC called the following day and informed Ms. Girvan that Mr. Arar was being held on the ninth floor, a special security unit used for terrorism suspects. This confirmed the seriousness of Mr. Arar's case, but it also tended to reinforce the perception that it was not immigration-related, but more likely involved a "criminal" investigation related to terrorism. Although the MDC advised that Mr. Arar was being held on an immigration violation, Ms. Girvan assumed that the description was a cover for a terrorism investigation. There was no mention of removal to Syria, and Ms. Girvan was able to arrange a consular visit for the next day.

On October 3, Ms. Girvan visited Mr. Arar at the MDC. Mr. Arar told her that, on September 27, while he was being held at the airport in New York, two immigration officers had spoken to him and told him he would be sent to

Syria. This was the second time that Ms. Girvan had heard about the possibility of Mr. Arar's being sent to Syria, the first being after the October 1 phone call from Mr. Arar's brother. However, both reports appear to have derived from the one incident at the airport.

During the consular visit, Mr. Arar showed Ms. Girvan what appeared to be an official document alleging that Mr. Arar was inadmissible to the United States under section 235 of the *Immigration and Nationalization Act*. The document referred to the fact that Mr. Arar was a native of Syria and a citizen of Syria and Canada, and stated that he was a member of a designated foreign terrorist organization, al-Qaeda.

Ms. Girvan, who had no training in legal matters, interpreted this document to mean that Mr. Arar would be held and investigated for terrorism by the FBI. Her experience told her these types of investigations took a considerable amount of time. When the information was passed on to Mr. Pardy, he made a similar assessment. It seems clear that Ms. Girvan's interpretation of the document was incorrect. The document in fact gave notice of an immigration proceeding.

What is very important to note about this document and its potential implications for Mr. Arar is that Ms. Girvan and other consular officials did not rely solely on their own interpretation of what was involved in Mr. Arar's situation. By October 3, they were arranging for Mr. Arar to be represented by legal counsel. Indeed, a lawyer visited Mr. Arar at the MDC on October 5, and it is reasonable to conclude that Mr. Arar showed her the document referring to section 235 of the *Immigration and Nationalization Act*.

A concern was raised that Ms. Girvan had not looked into the nature of a section 235 immigration hearing and ascertained the possible consequences for Mr. Arar. However, it must be remembered that Ms. Girvan is not a lawyer. She would have required the assistance of U.S. legal counsel to gain a proper understanding of U.S. immigration proceedings. Quite properly, her focus after the consular visit was on assisting Mr. Arar in retaining counsel.

4.3
LEGAL REPRESENTATION

I am satisfied that Canadian consular officials, particularly Ms. Girvan, did everything that could be expected to assist Mr. Arar in obtaining legal counsel.

After the consular visit on October 3, it was apparent that a legal process had either begun or was being planned. Consular officials do not provide legal representation for Canadians detained abroad. Many are not lawyers and, in any event, it is not part of the Consular Affairs Bureau's mandate to provide legal advice, nor should it be. When Canadians are detained in countries other than

Canada, the law of the country in which they are being held — in this case, the law of the United States — likely applies. The role of consular officials with respect to legal proceedings is to assist detainees and their families to obtain legal advice by facilitating the process for identifying and retaining competent counsel in the jurisdictions where the detainees are in custody. While consular officials may lend assistance, in the end, it is up to the detainees to select and retain their own counsel.

On October 2, a friend of Mr. Arar's family told Ms. Girvan that the family had found a lawyer, Amal Oummih, to act as Mr. Arar's counsel should the need arise. On October 3, Ms. Girvan sent the MDC a fax marked "urgent" to notify it that Ms. Oummih would be visiting Mr. Arar. DFAIT officials also spoke with Mr. Arar's brother and wife about the lawyer. After her consular visit on October 3, Ms. Girvan spoke to the family friend again and brought up the possibility of having someone from the Centre for Constitutional Rights (CCR) represent Mr. Arar, as she knew that the CCR had experience in similar cases. Ms. Girvan also left two messages for Ms. Oummih, as she wanted to tell her about her visit with Mr. Arar.

Ms. Oummih returned Ms. Girvan's calls late in the day on October 3 and, after hearing what Ms. Girvan had to say, indicated that she would visit Mr. Arar. The visit took place on Saturday, October 5. In the meantime, out of a desire to keep Mr. Arar's options open, Ms. Girvan also spoke to the CCR about Mr. Arar's case. When Ms. Girvan left her office at the end of the day on Friday, October 4, she was comfortable that legal counsel, Ms. Oummih, was involved and would take appropriate steps to represent Mr. Arar's interests. In my opinion, that was a reasonable understanding on Ms. Girvan's part.

On Monday, October 7, Ms. Girvan spoke to Ms. Oummih about her October 5 visit with Mr. Arar. Ms. Oummih told Ms. Girvan that she was not yet representing Mr. Arar, as she needed agreement from the family. She also said that the District Director of the INS had called to inform her that an INS interview would be held at seven o'clock that evening. She indicated that, if she was retained, she would attend. Ms. Girvan, quite reasonably, did not consider there to be any issues with the lawyer's retainer, as she had spoken to the Arar family friend, who had said that Ms. Oummih would be retained.

However, it seems that the INS interview with Mr. Arar had actually taken place on Sunday, October 6. Apparently, there was a miscommunication between the INS District Director and Ms. Oummih as a result of the fact that a voice mail message was left on October 6, but Ms. Oummih did not pick it up until October 7 and interpreted it as referring to an interview that day.

Although Mr. Arar appears to have attended the October 6 meeting without counsel, Ms. Oummih was not aware of that when she spoke to Ms. Girvan on October 7. She was still intending to go to the interview, which she believed was scheduled for that evening. October 7 was the day the INS ordered Mr. Arar removed from the United States.

On the basis of the foregoing, I am satisfied that consular officials acted appropriately in assisting Mr. Arar to retain counsel. It was reasonable for Ms. Girvan to conclude that Ms. Oummih, a lawyer selected by the family, had the matter in hand when she went to see Mr. Arar on October 5. Ms. Girvan believed that Ms. Oummih would be able to determine the nature of any proceedings affecting Mr. Arar and the need for action in regard to any proposed removal. Mr. Arar would tell his counsel everything he had related to Ms. Girvan, including the information about the threat of removal to Syria, and would show her the same document he had shown Ms. Girvan. If Ms. Oummih considered that consular officials should do something to assist with the legal proceedings then underway, she would advise Ms. Girvan.

When Ms. Oummih spoke to Ms. Girvan on October 7, she did not ask that Canadian consular officials take any steps to assist with the INS proceedings, nor did she mention that there was an imminent threat of removal to Syria. It was clear that Ms. Oummih had been talking to the INS and the INS was aware that she was involved, as the INS District Director had left her a voice mail message. It was reasonable for consular officials to conclude that, from a legal standpoint, Mr. Arar's case was being attended to.

4.4
DIPLOMATIC OPTIONS

In addition to assisting Mr. Arar with retaining legal counsel, Canadian consular officials also considered whether any diplomatic steps to address Mr. Arar's detention in New York were warranted. By way of background, it is important to look at the evidence relating to how consular officials assessed Mr. Arar's situation, and, in particular, the possibility that he might be sent to Syria.

Consular officials took the signals that Mr. Arar might be sent to Syria seriously, in the sense that they were concerned about such a possibility and gave it earnest consideration. However, they assessed that it was highly unlikely that Mr. Arar would be sent to Syria, particularly in the short term. Their assessment of Mr. Arar's situation was based on many factors. Ms. Girvan testified that she was not aware of any other case where the United States had removed a Canadian citizen to a country other than Canada when the citizen had been travelling with Canadian documents and had wanted to be sent to Canada. A

Canadian citizen such as Mr. Arar could be sent to a place other than Canada directly from the airport by means of an expedited removal process, but it seemed most unlikely that this would occur once the person had been taken to the MDC and held there. Further, in responding to an inquiry, an INS official had indicated that it was unlikely that Mr. Arar was a deportation case, as the MDC did not handle such cases and the INS did not have a file on him. In any event, Ms. Girvan's experience with deportation cases was that they generally took six to eight weeks to process and the Canadian consul would be notified and involved. Based on her experience, Ms. Girvan believed that, once Mr. Arar was taken to the MDC and was "in the system," he would not be precipitately removed. Therefore, what made sense was to ensure that Mr. Arar had counsel to assist him in whatever process was going to take place.

Most importantly, there was no precedent for the American government's action in regard to Mr. Arar: sending a Canadian from the United States to a country with a poor human rights record. It was completely unexpected by Canadian consular officials. U.S. authorities never even raised the possibility of Syria with them or, it appears, with Ms. Oummih. While a superior officer at INS did say on October 1 that the situation was "serious," he did not mention Syria. The only mention of Syria was to Mr. Arar, and even that was while he was still at the airport. I have not heard any evidence that the threat was repeated to him after he was taken to the MDC. And permitting Mr. Arar to see counsel was inconsistent with American practice in expedited removal cases. Moreover, by the time Ms. Girvan heard about the threat directly from Mr. Arar on October 3, Ms. Oummih was involved, and Ms. Girvan believed that Ms. Oummih would be able to assess the situation and determine whether there was a need for concern.

In his testimony, Mr. Pardy rejected the idea that the NSEERS program was an indication that Mr. Arar would be sent to Syria. The NSEERS program deals with foreigners upon arrival in the United States, not after they are detained. Mr. Pardy testified that there had been no evidence to suggest that, under the NSEERS program, American authorities would remove a Canadian citizen to a country other than Canada.

On balance, the Canadian consular officials considered Mr. Arar's circumstances with care and, based on their experience, did not judge that there was a realistic concern that Mr. Arar would be sent to Syria, particularly in the immediate future.

As mentioned above, on October 1, when the Consular Affairs Bureau was having difficulty determining why Mr. Arar was being held and what the American authorities were intending, a senior official at INS suggested the

Canadian ambassador in Washington contact the U.S. Department of Justice (DOJ). Consular officials had two thoughts about the suggested course of action. One was that it is usually better in matters of this sort to work through lower levels first, rather than immediately "go to the top." Bypassing normal channels has a way of freezing what are often more productive routes of communication. Experience told them that informal communication was much quicker and more effective in many situations. Second, it was felt that, if the best approach turned out to be to "go to the top," contact should be made with the State Department, not the DOJ. The State Department was considered the usual and more appropriate route to address a problem such as this.

After hearing about the threat of Syria and the statement of the INS official on October 1, consular officials did consider "going to the top" by sending a diplomatic note to the U.S. State Department. The purpose of the note would have been to seek more information about the reasons for Mr. Arar's detention. On October 1 and 2, consular officials were primarily concerned about finding out why Mr. Arar was being held.

A diplomatic note is a formal communication between two countries. Responses are often slow — a few days to a few months. Moreover, sending a diplomatic note stifles communication at lower levels, as all subsequent communications must go through the State Department. A diplomatic note is seen by DFAIT officials as a heavy weapon and, possibly, counterproductive.

On October 2, the diplomatic note option was set aside when the MDC responded with some information about Mr. Arar, to the effect that he was being held on the 9th floor, and agreed to a consular visit the following day. After the consular visit, a visit with the lawyer, Ms. Oummih, was planned for Mr. Arar. It appeared to consular officials that, with the lawyer's assistance, they would be able to find out what they needed to know about Mr. Arar's circumstances, including the nature and potential consequences of any legal proceedings, and could then determine whether any diplomatic action was required.

In my view, it was reasonable for the consular officials to await the outcome of Ms. Oummih's visit with Mr. Arar before deciding whether other steps might be necessary. As I have said, there was no basis for them to believe that the American authorities were about to send Mr. Arar to Syria without providing advance warning to either the Canadian Consulate or Mr. Arar's lawyer. Indeed, based on their experience, they had every reason to believe the opposite.

On hearing Ms. Oummih's report of her visit with Mr. Arar, consular officials still had no reason to be concerned about an imminent threat to Mr. Arar. There was nothing to alert them to an immediate need to implement diplomatic options or "go to the top." With the benefit of hindsight, one can say that other

action, including involving the Minister of Foreign Affairs or the Canadian ambassador, might have been advisable. However, at the time, that did not seem warranted.

Delivering consular services sometimes requires making judgment calls. That was certainly the situation in Mr. Arar's case. The Canadian consular officials did not carelessly disregard the concerns about Syria or the seriousness of Mr. Arar's circumstances. On the contrary, they took Mr. Arar's situation very seriously and devoted a good deal of thought and attention to how best to proceed.

The consular officials involved in Mr. Arar's case, in particular Ms. Girvan and Mr. Pardy, were experienced and dedicated professionals. They were very concerned about Mr. Arar's case and used their best judgment and their considerable experience in making decisions about what should be done. I am satisfied that their decisions were entirely reasonable in the circumstances. Clearly, the American action in removing Mr. Arar to Syria was an unfortunate and highly undesirable outcome; however, in the events leading up to that outcome, I do not find that there was anything that the consular officials did or did not do that warrants critical comment.

4.5
VIENNA CONVENTION

According to the Vienna Convention on Consular Relations, a contracting state has an obligation to inform a foreign national of his or her right to contact consular officials and to facilitate such contact without delay. On October 3, Mr. Arar told Ms. Girvan that, while in custody at the airport in New York, he had asked to see someone from the Canadian Consulate. The Consulate General in New York was never contacted concerning Mr. Arar's request. Moreover, Mr. Arar was held in American custody for four days without any access to a lawyer or his family. Essentially, no one knew where he was.

At one point, Canadian officials considered sending a diplomatic note to the United States to complain of its failure to notify the Canadian Consulate of Mr. Arar's detention on a timely basis, in breach of its obligations under the Vienna Convention. As I understand it, they have yet to do so.

If that is the case, I recommend that a diplomatic note to that effect be sent. Breaches of the Vienna Convention should not be allowed to go unchallenged.[25]

5.
LACK OF INTERAGENCY COMMUNICATIONS

The RCMP was notified of Mr. Arar's detention in New York on September 26, 2002. There was a period during which Project A-O Canada members believed that Mr. Arar might have been sent back to Zurich, Switzerland, but by October 2 at the latest, they knew that he was still in New York. Between then and October 8, when Mr. Arar was sent to Syria, members of the Project had several communications about Mr. Arar with their U.S. counterparts.

Meanwhile, on October 1, 2002, DFAIT was informed by Mr. Arar's brother that Mr. Arar had said the Americans were going to send him to Syria. Mr. Arar told Ms. Girvan the same thing during the consular visit on October 3. While DFAIT officials did not consider it likely that Mr. Arar would be sent to Syria, they nevertheless were aware of the concern.

The sole point of contact between DFAIT and the RCMP during Mr. Arar's detention was Inspector Roy, the RCMP liaison officer assigned to DFAIT. Inspector Roy testified that he had not been informed of the concerns about Syria expressed by Mr. Arar and his brother until October 7 or possibly October 8. He had passed on the information to Project A-O Canada officers on the morning of October 8. This was the first time members of Project A-O Canada heard of this concern.

After DFAIT became aware of Mr. Arar's concern about being sent to Syria, Project A-O Canada had several communications with the Americans, two of which are germane to this discussion. First, on October 4, in response to a request from [***] the Project sent the FBI answers to seven questions about its investigation as it related to Mr. Arar. The American request indicated that the information was required for one of two purposes: removal or law enforcement. There was no mention of Syria, and Project members assumed that the removal being referred to was a return to Zurich.

Second, on October 5, Corporal Flewelling of CID spoke with an FBI official about Mr. Arar and answered questions about what Canada might do if Mr. Arar was sent to Canada. There was no mention of possible removal to Syria during this conversation.

What is initially striking about these events is that two Canadian government agencies, DFAIT and the RCMP, were each dealing directly with American authorities in relation to Mr. Arar's situation without knowing what the other was doing and without having the benefit of information in the other's possession. DFAIT officials were not aware that the RCMP was providing information about Mr. Arar to the American investigators. The RCMP, on the other hand,

was not aware that Mr. Arar had been told that he would be sent to Syria at a point when it was providing information to the Americans. While this failure to connect may be viewed as unfortunate, I can understand why it occurred.

The RCMP does not have a policy requiring it to communicate with DFAIT when it learns that someone connected with one of its investigations has been detained abroad. Canadians detained outside Canada are entitled to consular services on request, and the RCMP's general approach is based on the notion that detainees will be able to contact a consular officer if they wish. The RCMP need not assume that task simply because it happens to be investigating a detainee.

There was no reason for the RCMP to believe that any request made by Mr. Arar for consular assistance in the United States would not be granted; indeed it was reasonable to assume the contrary. Thus, from the RCMP's standpoint, there was no need for it to notify DFAIT that Mr. Arar was being detained in New York when it learned that fact on September 26; Mr. Arar could seek consular assistance if he wished to do so.

Further, I do not believe that there was any requirement that the RCMP notify DFAIT that it was providing information about Mr. Arar to the U.S. authorities while he was being detained in New York. As I conclude above, it is appropriate for the RCMP to provide information to authorities in another country about a Canadian being detained there when the detainee is part of an investigation in both countries, provided, of course, that the RCMP complies with its policies concerning screening information and attaching caveats. Sharing information is part of the RCMP's normal operational practices and, barring anything unusual, there would be no need to inform DFAIT of what it was doing in this regard. Viewed from the RCMP's perspective, there was nothing respecting Mr. Arar's detention that required it to notify DFAIT of its communications with American authorities while Mr. Arar was in New York.

Similarly, there was no policy requiring DFAIT to notify the RCMP about what Mr. Arar had said about being sent to Syria. As I said above, DFAIT considered it very unlikely that Mr. Arar would be sent to Syria, and it undertook a reasonable course of action to try to sort out what was actually occurring and to involve legal counsel to act for Mr. Arar. I do not believe that, in the circumstances, DFAIT should be faulted for not having informed the RCMP about the threat of Syria, given its assessment of the threat at the time.

That said, I think that there is something to be learned from Mr. Arar's unfortunate saga. The international environment with respect to counter-terrorism is different from that for all other law enforcement activities. It is important that, when DFAIT or other Canadian officials become aware that a Canadian is

being detained in another country in connection with a terrorism investigation, they carefully consider all of the possibilities in regard to what may occur and, in particular, how that person's human rights or civil liberties may be affected. In assessing the situation, Canadian agencies in any way involved in the detainee's case should consult with one another and develop a coherent and consistent approach to the situation for all Canadian agencies. Experience tells us that terrorism investigations are unique in many respects. For one, agencies and officials in other countries may take what Canadians view as extraordinary steps in combating the threat of terrorism. Whether those steps are justified or not, they tend to impact individual liberties and human rights in ways that are different and often much more serious than what occurs in other types of investigations. That reality calls for extraordinary care by Canadian officials when a Canadian is caught up in a terrorism investigation in another country. In Chapter IX, I recommend a process for managing the situation when a Canadian is detained abroad in a terrorism-related investigation.

Notes

1 As I noted in Chapter I, the description of the events relating to Mr. Arar's detention and removal is based primarily on the evidence of Canadian officials. American officials did not testify at the Inquiry. Moreover, I have not heard evidence of Mr. Arar's description of those events. If Mr. Arar were to testify, it is possible that I would come to different conclusions about what in fact happened.

2 I use the word "removal" throughout in describing the process by which Mr. Arar was taken from the United States and turned over to Syria. While the Order in Council refers to "deportation," the American order refers to "removal," the more accurate term under American law. I do not think that, for the purpose of the Inquiry, anything turns on the use of the two terms.

3 I describe the nature of the lookout in Chapter III.

4 Exhibit C-30, Tab 44.

5 I note that Mr. Arar apparently entered the United States once without incident after Project A-O Canada requested the American lookout, possibly indicating that the Canadian lookout request was not the basis for detaining him at the border. However, it is worth noting that Mr. Arar's previous entries to the United States were prior to the end of January 2002, after which Project A-O Canada provided further information to authorities about him.

6 The U.S. Immigration and Naturalization Service's (INS) NAILS system is used by inspectors at ports of entry to check incoming travellers. It is also used by INS officers to make entries into TECS.

7 Exhibit C-30, Tab 221.

8 This information is subject to national security confidentiality and, in my opinion, should not be disclosed publicly.

9 While a reference to the third-party rule was not attached to each piece of information received from CSIS, I believe that, in the context, it was sufficiently clear that the CSIS caveats applied to all of the CSIS information.

[10] I am unable to discuss this issue more fully because of national security confidentiality concerns.

[11] I refer here to inaccuracies in the request for U.S. lookouts, including the misdescription of Mr. Arar as an Islamic extremist, as well as inaccurate information in some documents included on the three CDs given to U.S. authorities in April 2002, the May 31, 2002 presentation, and the September 26, 2002 response to the FBI's request for questions for Mr. Arar.

[12] R.S.C. 1985, c. P-21.

[13] CSIS might not have had any objection to information being shared for one purpose, such as intelligence, but might have been more concerned in the face of an indication that certain proceedings were being contemplated.

[14] There is some evidence that Corporal Flewelling went to the RCMP's Immigration and Passport Office to inquire about U.S. removal proceedings on October 4. However, the evidence is unclear about exactly what happened and what was said. In the end, I am unable to attach any significance to that visit.

[15] Indeed, Corporal Flewelling testified that he had thought his answers would actually help Mr. Arar, as the American authorities would be more inclined to release him and he could then come to Canada.

[16] At the time, Canadian officials were not aware of any instance where American authorities had removed someone from the United States to a country such as Syria.

[17] There was some evidence suggesting that Inspector Roy had been informed of the possibility that Mr. Arar would be sent to Syria as early as October 3 or 4. However, this evidence was not conclusive and Inspector Roy testified that he had not been aware of the possibility until October 7.

[18] Interestingly, the removal order states that "the most serious international terrorist threat to US interests today stems from Sunni Islamic extremists such as Osama bin Laden and individuals affiliated with his Al-Qaeda organization" (Exhibit P-20). This language suggests that the RCMP's October 2001 request for a U.S. border lookout, which referred to Mr. Arar and others as a "group of Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement" (Exhibit C-30, Tab 44), would have been taken very seriously by the Americans.

[19] At the Inquiry, I heard expert evidence from Julia Hall of Human Rights Watch, who testified that diplomatic assurances from totalitarian regimes that they will not torture detainees are of no value and should not be relied upon for the purposes of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The fact that Mr. Arar was tortured in Syria despite an assurance to the contrary is a concrete example of the problems to which Ms. Hall referred.

[20] Below I set out my conclusion that CSIS also did not participate or acquiesce in the American decision to remove Mr. Arar to Syria.

[21] Exhibits P-124 and P-125.

[22] Exhibit C-30, Tab 549.

[23] In April 2002, the RCMP included information received from CSIS on the three CDs given to the American agencies, without first seeking CSIS' consent. None of the CSIS information related to Mr. Arar. On October 4, the Project passed on CSIS information about Mr. Arar to the American authorities without CSIS' consent.

[24] In this section, I sometimes refer to DFAIT officials and at other times, to consular officials. Consular officials are part of DFAIT and were the ones primarily involved in Mr. Arar's case. However, other DFAIT officials had some involvement. I use the broader term as needed.

[25] In Chapter IX, I also recommend that the Canadian government send a diplomatic note or some other communication to the American government to officially complain about the much larger issue of the removal of Mr. Arar to Syria, an action the Canadian government considers unacceptable.

V

Imprisonment and Mistreatment in Syria

1. OVERVIEW

Maher Arar arrived in Syria on October 9, 2002 and was imprisoned there until his release on October 5, 2003. During the first two weeks of his imprisonment, the Syrians interrogated and tortured Mr. Arar and he provided them with a statement.

In this chapter, I review the actions of Canadian officials in connection with Mr. Arar's imprisonment in Syria. I examine the way in which they assessed his treatment at the hands of the Syrian authorities, the interactions between Canadian investigative agencies and the Syrian authorities, the Canadian efforts to have Mr. Arar released, and certain actions that may have sent the Syrians mixed signals about whether the Canadian investigative agencies wanted Mr. Arar released. I also review the role of the Consular Affairs Bureau in providing assistance to Mr. Arar throughout his imprisonment in Syria.

2. BACKGROUND INFORMATION ON SYRIA'S HUMAN RIGHTS REPUTATION

When Mr. Arar arrived in Syria in October 2002, Syria had a well-established reputation for committing serious human rights abuses. Canadian officials had easy access to information about Syria's record in the area of human rights. Two of the most authoritative sources about Syria's practices are the U.S. State Department's annual Country Reports on Human Rights Practices and Amnesty International's annual reports on human rights.

In its 2002 and 2003 reports, the U.S. State Department indicated that there was credible evidence that Syrian security forces continued to make use of

torture. Torture was most likely to occur while detainees were being held at one of the many detention centres run by the various security services throughout the country, especially when authorities were attempting to extract a confession or information. Reported methods of torture included administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim was suspended from the ceiling; hyper-extending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bent backwards to asphyxiate the victim or fracture the victim's spine.

The U.S. State Department also reported that prison conditions in Syria were poor and did not meet international standards for health and sanitation. Facilities for political or national security prisoners were generally worse than those for common criminals. In cases of political or national security offences, suspects might be detained incommunicado for long periods without charge or trial and without access to a lawyer. Security courts were subject to political influence and the Supreme State Security Court did not observe constitutional provisions safeguarding the rights of the accused.

Amnesty International's 2002 report was similar to the U.S. State Department's reports, indicating that torture and ill-treatment continued to be used routinely against political prisoners in Syria, especially during incommunicado detention at the Palestine Branch and Military Interrogation Branch detention centres. The Amnesty International report referred to several of the torture techniques described by the U.S. State Department, including the metal chair with moving parts and the use of electric shock. In addition, Amnesty International reported that procedures before the courts fell short of international fair trial standards.

In Canada, DFAIT prepares annual reports evaluating the state of human rights in most countries, including Syria. DFAIT's reports on Syria for 2001 and 2002 incorporate the State Department's review of Syria's human rights violations. While the 2001 DFAIT report quotes the State Department report verbatim with respect to "credible evidence of torture" and the use of torture to extract confessions, the 2002 report qualifies the use of torture as "allegations" and omits mention of the use of torture to extract confessions. However, the 2002 report does refer to some of the torture techniques alleged to be used, including sleep deprivation, beatings and electric shocks.

The DFAIT reports also incorporate Amnesty International's (AI's) annual country reports and specifically mention AI's findings of routine torture and ill-treatment of prisoners, especially during the initial stage of detention and interrogation in Tadmur Political Prison. Reference is also made to AI's reports of

secret arrests in cases involving political or national security offences and prolonged detentions without due process.

There are three points about the DFAIT reports that are relevant to the Inquiry. The first is that the Canadian ambassador to Syria, Franco Pillarella, approved both the 2001 and 2002 reports. Thus, the Ambassador would have specifically put his mind to the issue of the human rights practices in Syria when considering the contents of those reports.

Second, DFAIT's report for 2002 was released on January 9, 2003, approximately three months after Maher Arar arrived in Syria, yet there was no mention in that report of Mr. Arar, the circumstances relating to his removal and detention, the fact that he had been held incommunicado by the Syrian Military Intelligence (SMI) at its Palestine Branch for close to two weeks, or the consular visits he had received. Also missing from the 2002 report were the details surrounding the detention of Abdullah Almalki and the allegation made by Ahmad El Maati[1] that he had been tortured while in Syrian detention. This was information of which many Canadian officials were aware by the time the report was prepared, although how much Ambassador Pillarella knew is unclear.

Lastly, the DFAIT reports were not distributed to certain officials within the Canadian government who might have benefited from the information in them. The e-mail distribution list did not include anyone in DFAIT's Consular Affairs Bureau. Moreover, the reports apparently were not distributed to CSIS or the RCMP.

In Chapter IX, I make recommendations respecting the process that should be followed when Canadian officials deal with countries with questionable human rights practices. In some instances, several Canadian government departments or agencies may have dealings with a country such as Syria at the same time, as occurred in Mr. Arar's case. It is important that DFAIT share its reports on the human rights practices of the detaining country with the other government departments and agencies, in order that Canadian officials may proceed on a common understanding when such a situation arises.

For example, the DFAIT reports will be relevant to Canadian government decisions about what interaction, if any, should take place between Canadian investigative officials and the country with a poor human rights record when a Canadian is detained in that country. Further, should Canadian officials receive information from such a country, the DFAIT reports will be useful in assessing the reliability of such information. I discuss these issues more fully in Chapter IX.

By October 22, 2002, Canadian officials were aware of the circumstances relating to Mr Arar's imprisonment in Syria. They knew that the Syrians considered Mr. Arar to be a national security suspect. Certain Canadian officials also

knew that he had been held incommunicado for close to two weeks and that the SMI had obtained a statement from him. Those circumstances fell squarely within the pattern of interrogation and abuse described in the publicly available reports.

3.
INITIAL PERIOD

3.1
EFFORTS TO LOCATE MR. ARAR

During the period from October 8, 2002, when Mr. Arar was taken from the Metropolitan Detention Centre (MDC) in New York, to October 21, 2002, when the Syrian deputy foreign minister informed the Canadian ambassador that Mr. Arar was in Syria, Canadian officials were uncertain of Mr. Arar's whereabouts and took various steps to try to locate him.

On October 8, DFAIT officials learned that Mr. Arar had been moved from the MDC, where he had been held in New York. Canadian consular officials in New York made inquiries of Mr. Arar's lawyer, the MDC and the U.S. Immigration and Naturalization Service (INS) as to his whereabouts. Interestingly, the INS said that it had no record of Mr. Arar being moved. On October 10, an INS official called the Canadian consul in New York and told her that Mr. Arar had been removed from the country, but would not provide further details. At that point, because the INS official did not mention Canada, the working assumption within DFAIT was that Mr. Arar had been sent to Syria, the country of his birth.

Also on October 10, Canadian officials received an informal indication from an American official that Mr. Arar had been sent to Syria via Jordan. The same day, Scott Heatherington, the Director of DFAIT Foreign Intelligence Division (ISI) heard from the U.S. Embassy in Ottawa that Mr. Arar had been removed to Syria.

Daniel Livermore, Director General of DFAIT's Security and Intelligence Bureau (ISD), promptly sent a message to Ambassador Pillarella in Syria requesting that he ascertain Mr. Arar's location, status and condition, noting that "there are concerns that Arar may be aggressively questioned by Syrian security services."[2] The next day, Ambassador Pillarella raised the Arar matter with the Syrian deputy foreign minister, who advised that he would check and get back to him on whether Mr. Arar was in Syria.[3]

In addition, the Canadian ambassador to Jordan, Rod Bell, was asked to make inquiries about Mr. Arar, because of information DFAIT had received that

he had been "dumped" in Jordan. However, on October 12, Ambassador Bell was told there was no indication that Mr. Arar had entered Jordan.

Meanwhile, on October 10, DFAIT Headquarters asked Léo Martel, the Canadian consul in Damascus, to make a formal request to the Syrian Foreign Ministry for information about Mr. Arar's whereabouts. On October 14, the first business day after the Thanksgiving weekend, Mr. Martel sent a diplomatic note[4] to the Syrian Foreign Ministry seeking its assistance in locating Mr. Arar. The Canadian Embassy in Damascus never received a response to Mr. Martel's note.

The Syrian deputy foreign minister was out of Damascus for a few days. On October 17, Ambassador Pillarella followed up on his earlier enquiry and was able to schedule a meeting for October 20 to discuss whether Mr. Arar was in Syria. Also on October 17, a DFAIT official raised the matter with the Syrian ambassador to Canada, Ahmad Arnous, in Ottawa.

When Mr. Arar could not be located, Canada's Foreign Affairs Minister, Bill Graham, also became involved in the case. On October 15, the Minister met with the U.S. ambassador, Paul Cellucci. Ambassador Cellucci told Minister Graham that there was evidence Mr. Arar had contacts with people that made him a danger to the United States, and that some of his information came from Canadian sources. He also said that Mr. Arar's dual citizenship gave the Americans the right to deport him elsewhere. When interviewed by a Canadian journalist the next day, Mr. Cellucci reportedly said that the United States Immigration and Naturalization Service authorities had acted properly in deporting Mr. Arar to Syria and that the Canadian government should talk to its local people, who might know the reasons.

On October 18, Minister Graham raised the matter of Mr. Arar with Ambassador Arnous and asked for the co-operation of the Syrian authorities in locating him. The Ambassador replied that, according to his information, Mr. Arar was not in Syria, but he promised to check further with authorities in Damascus. Also on October 18, Prime Minister Jean Chrétien was provided with a written briefing on the Arar case.

On October 20, Ambassador Pillarella met with the Syrian deputy foreign minister. He briefed him on the Arar case, emphasizing that Mr. Arar was not the subject of any police inquiry in Canada, and discussed dual citizenship and bilateral relations in the context of Mr. Arar's situation. The Syrian deputy foreign minister stated that he was "99% certain" that Mr. Arar was not in Syria and agreed to confirm this information by October 21.[5]

On October 21, the Syrian deputy foreign minister contacted Ambassador Pillarella as promised and advised him that Mr. Arar had arrived in Syria from Jordan that very day. Ambassador Pillarella requested consular access to

Mr. Arar. The deputy minister said he could not grant access, as Mr. Arar was not in his custody, but arranged for the Canadian ambassador to meet with General Hassan Khalil, the head of the Syrian Military Intelligence, the next day.

Ambassador Pillarella passed on the news about Mr. Arar's presence in Syria to DFAIT Headquarters in Ottawa. During the evening of October 21, Gar Pardy, Director General of the Consular Affairs Bureau, sent Ambassador Pillarella a message outlining the representations that should be made to the Syrian authorities. Included was a statement that the Government of Canada would appreciate it if Syria would permit Mr. Arar to return to Canada, "a country that he can return to at any time."

I am satisfied that, from the time Mr. Arar left the MDC in New York on October 8 until he was finally located in Syria on October 21, Canadian officials took reasonable and appropriate steps to try to determine his whereabouts. They asked both the Americans and Syrians for information. They approached very senior officials in the Syrian government, including the deputy foreign minister, as well as the Syrian ambassador in Ottawa. They sent a diplomatic note to the Syrian Foreign Ministry. While they strongly suspected that Mr. Arar was in Syria, they were unable to confirm it until October 21.

The fact of the matter is that American and, later, Syrian officials were not forthcoming. For the reasons set out below, I find that, on October 8, 2002, Mr. Arar was taken from the United States to Jordan, where he remained for only a short period of time before being taken to Syria. He was likely in Syria by October 9 or October 10 at the latest. The Syrian authorities decided to hold him incommunicado and did not disclose his presence in Syria until October 21. Given the circumstances, there was nothing else Canadian officials could have done to determine Mr. Arar's whereabouts before the Syrians finally acknowledged they were holding him.

3.2
FIRST CONSULAR VISIT

On October 22, Ambassador Pillarella met with General Khalil and made arrangements for a consular visit the following day. In the Ambassador's experience, this was the first time that Syrian authorities had granted consular access to a detained individual like Mr. Arar, who held dual Canadian and Syrian citizenship. There had been no consular visits with Abdullah Almalki, another Canadian citizen who by then had been in Syrian custody for about five months. The Syrian government has never recognized second citizenships for Syrian citizens and thus does not grant consular privileges to officials from other countries.

During the October 22 meeting, General Khalil told the Ambassador that Mr. Arar had just arrived in Syria and had already admitted to connections with terrorist organizations. He promised to pass on any information the Syrian authorities might gather about Mr. Arar's involvement in terrorist activities.

On October 23, Mr. Martel, the Canadian consul, visited Mr. Arar. After being taken along a circuitous route, he arrived at what turned out to be the infamous Palestine Branch,[6] although he did not know it at the time. He only learned that later, upon making inquiries of his employees.

When Mr. Arar was brought into the room where Mr. Martel had been waiting, he walked normally, but appeared submissive and disoriented. Mr. Martel shook his hand — his handshake appeared normal — and Mr. Arar was then seated at a distance from him. Mr. Martel did not observe any physical signs of abuse on Mr. Arar. However, Mr. Arar wore long pants and possibly long sleeves. In his report of the visit, Mr. Martel indicated that Mr. Arar had appeared healthy, but added "this is difficult to assess."[7] When asked about this comment, Mr. Martel explained that he had no training in observing the signs of torture and was not a doctor.

There were, however, many indications that all was not well. The visit was very controlled. Mr. Martel was not allowed to meet with Mr. Arar alone. Syrian officials were present throughout and insisted that Mr. Arar speak Arabic, with a Syrian official serving as interpreter. They wrote down the whole conversation. Occasional exchanges bypassed the need for the interpreter, but when Mr. Martel began to question Mr. Arar about his circumstances, it was clear that Mr. Arar was not being permitted to answer all the questions. Mr. Arar gave Mr. Martel eye signals communicating that he could not speak freely.

Mr. Arar did say two things during the meeting that provided some indication of how he had been treated to that point. When Mr. Martel asked him how long he had stayed in Jordan, Mr. Arar answered "only a few hours" before he was cut off. This signified that Mr. Arar had been in Syria for nearly two weeks, a fact that directly contradicted General Khalil's statement of the day before that Mr. Arar had just arrived.

The second noteworthy thing that Mr. Arar said was prompted by the Syrian officials. Toward the end of the interview, Mr. Martel asked Mr. Arar if he would like the Embassy to provide him with anything. Mr. Arar's answer was obviously prompted or dictated by the Syrian officials. Mr. Martel recorded the answer:

> I am a Syrian and I obey the law of Syria. I am proud of my country of origin and I am also proud of Canada, my country of adoption. I have been respected by my

> Syrian brothers and I am happy to have come back to Syria. The authorities have not exercised pressure on me. You can see I feel well. Anything I ask for I receive.[8]

This answer is transparently artificial and obviously contrived. I cannot imagine that Mr. Arar would have voluntarily answered Mr. Martel's question in this fashion. By this point, Mr. Arar had been detained in New York for 12 days and then removed by force to Syria and imprisoned there. It would have been ridiculous in these circumstances for him to volunteer that "I am happy to come back to Syria." It is also revealing that he said "the authorities have not exercised pressure on me," when no one had suggested that they had.

Upon returning to the Embassy, Mr. Martel prepared his report of this first consular visit, reviewed it with Ambassador Pillarella, and sent it to the Consular Affairs Bureau in Ottawa.

3.3
DATE OF ARRIVAL IN SYRIA

The evidence is overwhelming that Mr. Arar arrived in Syria around October 9 and was held incommunicado until October 21, when Syrian officials informed the Canadian ambassador that he was in Syria.

As described above, during the first consular visit, Mr. Arar told Mr. Martel that he had been in Jordan for only a few hours. Since there is no doubt that Mr. Arar was removed from the United States on October 8, the only logical conclusion to be drawn from Mr. Arar's answer is that he had been in Syria for close to two weeks. Since the Syrian officials did not permit Mr. Martel to pursue this line of questioning about Mr. Arar's whereabouts, Mr. Arar was unable to provide further details at that time. However, there would have been no reason for Mr. Arar not to tell the truth about where he had been. Indeed, given the circumstances, it would have been foolhardy for him to suggest that he had been in Syria for longer than was actually the case. I cannot imagine that Mr. Arar would have risked provoking his jailers by lying about the matter in what must have been an already very tense and difficult situation for him.

Mr. Martel's observations during the consular visit also provide evidence to support the conclusion that Mr. Arar had been in Syria for nearly two weeks at that point. The controlled nature of the visit suggests that the Syrian authorities had something to hide; they did not want Mr. Arar speaking freely. If Mr. Arar had arrived only a day or two before and was being treated well, why would they take such care to prevent Mr. Martel from asking questions about Mr. Arar's circumstances and to have Mr. Arar say that he was happy to be in Syria and had not been pressured by the authorities?

Moreover, the scenario suggested by Mr. Arar's statement — that Mr. Arar had been held incommunicado at the Palestine Branch in Syria for close to two weeks — is entirely consistent with the Syrian human rights record, which reveals that Syria, in particular the Syrian Military Intelligence, has a practice of holding prisoners like Mr. Arar incommunicado for purposes of interrogation and torture when initially imprisoned. Unlike Mr. Arar, the Syrian authorities would have a motive for lying about when Mr. Arar had arrived in Syria. If they had held Mr. Arar incommunicado at the beginning of his imprisonment, one would not expect them to admit it.

Further, General Khalil's statement to Ambassador Pillarella on October 22, that Mr. Arar had just arrived in Syria and had already admitted to connections with terrorist organizations, is improbable on the face of it. It seems most unlikely that Mr. Arar would have made an admission of that significance within a few hours or at most a day of his arrival in Syria, particularly if any questioning had not involved mistreatment or torture.

I note that every time Mr. Arar has spoken about his ordeal since his release, his statements have been consistent with what he told Mr. Martel on October 23, 2002, that is, that he had been in Jordan for only a few hours. I am aware that these statements were not made under oath and were not subject to cross-examination. Nevertheless, I refer to them to call attention to the fact that nothing Mr. Arar has said since has in any way undermined or been inconsistent with what he told Mr. Martel at the very first opportunity, on October 23, 2002.

Accordingly, I conclude that Mr. Arar arrived in Syria around October 9 and was held incommunicado until October 21, when Syrian officials acknowledged his presence there.

3.4
TORTURE

Based on all the evidence and information available to me, I conclude that the SMI tortured Mr. Arar while interrogating him during the period he was held incommunicado.

In Chapter II, I set out the description of that torture, as given by Mr. Arar to Professor Toope, the fact-finder I appointed to investigate and report on what happened to Mr. Arar. I will not repeat it here other than to say that the physical abuse inflicted on Mr. Arar occurred largely in the first three days of his imprisonment. That physical abuse was accompanied by threats of continued abuse and Mr. Arar said that, in time, he had told his interrogators whatever they had wanted to hear.

Professor Toope concluded that Mr. Arar's description of what had happened to him, although not given under oath, was credible and that the events had occurred as Mr. Arar had described them.

I reach the same conclusion as Professor Toope, essentially for two reasons. First, I am impressed with and accept Professor Toope's report. Professor Toope has considerable experience in interviewing victims of torture and assessing their descriptions of what happened to them. His analysis of Mr. Arar's description of events is thorough and well reasoned. Significantly, Mr. Arar did not overstate what happened to him when it would have been easy to do so. Moreover, Mr. Arar's description had telling similarities to those of others who were also in Syrian custody around the same time. The fact-finder commented favourably on Mr. Arar's demeanour, personal characteristics and recounting of what had happened. In short, he believed him, and I attach great weight to Professor Toope's assessment.

I have also considered statements made by Mr. Arar shortly before and after his release from Syrian custody about the issue of torture. Here I refer to statements he made to Mr. Martel during the August 14 consular visit and on his way back to Canada. I discuss those statements later in this report, but for now, I simply make the point that, in my view, there is nothing in those statements that detracts from what Mr. Arar told Professor Toope.

My second reason for concluding that the SMI tortured Mr. Arar during the initial stage of his imprisonment is that all of the objective indicators point to that conclusion. Here I refer to the "facts" that were known to Canadian officials immediately after Mr. Martel visited Mr. Arar for the first time on October 23.

I am satisfied that, after the first consular visit, Canadian officials should have realized that Mr. Arar had likely been tortured as part of the Syrian interrogation during the time he had been held incommunicado. I reach this conclusion because Canadian officials either were or should have been aware of the following:

- The Syrian human rights record showed abuse of political prisoners during interrogation.
- Mr. Arar was a terrorism-related prisoner and, as such, a "political prisoner," and was being held by the SMI at its Palestine Branch, factors that commonly entered into the Syrian pattern of inflicting torture.
- Mr. Arar had been held incommunicado for close to two weeks at the beginning of his imprisonment. According to reports on Syria's human rights practices, the reason for holding detainees incommunicado was to conduct interrogations accompanied by torture.

- On October 22, 2002, General Khalil reported that Mr. Arar had already made a statement admitting connections to terrorist organizations, a most improbable development if interrogation had not been accompanied by abuse and/or torture.
- General Khalil falsely stated on October 22 that Mr. Arar had just arrived in Syria, thereby suggesting that he had something to conceal.
- The controlled nature of the first consular visit also suggested that the SMI had something to hide.
- The prompted statement by Mr. Arar that the authorities had not exercised pressure on him suggested the opposite.
- Mr. Arar's submissive demeanour during the October 23 consular visit was also telling.
- In August 2002, Canadian officials had been informed that Ahmad El Maati, another Canadian suspected of terrorism-related activities, had alleged that he had been tortured while in Syrian custody.
- DFAIT officials were alive to and had raised the prospect of physical abuse in Syrian prisons on a number of occasions before the first consular visit. For example, on October 10, when Canadian officials were attempting to locate Mr. Arar, Mr. Livermore, Director General of ISD, raised the concern that Mr. Arar could be the subject of "aggressive" questioning if he was in Syria.

When taken together, these factors paint a very strong, virtually overwhelming picture of interrogation and torture during the period prior to the first consular visit with Mr. Arar. The only evidence at variance with this picture is the fact that Mr. Martel did not see any physical signs of abuse during the October 23 consular visit. In his testimony, Mr. Martel said that Mr. Arar had walked normally and shaken hands normally, and he had not seen any burns, red marks, or other signs of abuse on Mr. Arar's face, hands or wrists. However, as mentioned earlier, Mr. Arar had been seated at a distance from him and had been wearing long pants and possibly a long-sleeved shirt.

In his testimony, Mr. Martel made the obvious point that the Syrian authorities would never have let him see an individual with visible signs of mistreatment or torture. I have had the benefit of reviewing Mr. Arar's description of what happened to him. I find the description he gave Professor Toope particularly helpful, in that it provides an example of the type of abuse that could occur without necessarily leaving any physical signs that Mr. Martel would have been able to observe. While I do not wish to minimize what Mr. Arar experienced, the physical abuse he described suffering is less serious than that described by

several others who have reported torture in Syria. Moreover, given their record for torture, one would expect that Syrian interrogators have considerable aptitude in inflicting torture in ways that result in few, if any, physical signs.

In my view, the indicators on October 23 that Mr. Arar had been tortured were very strong and the fact that Mr. Martel did not observe any actual signs of physical abuse was not a sufficient deterrent to what should have become the position of all Canadian officials dealing with Mr. Arar's case: that it was likely that Mr. Arar had been tortured while being questioned in Syria and, importantly, that any statement or confession he had made was the result of that torture.

Henry Hogger, a former British ambassador to Syria and expert witness on consular affairs, testified that this was the conclusion he would have reached. On being presented with the facts as they were known after the first consular visit, Mr. Hogger stated that they created a "strong suspicion" that torture had taken place, although he could not be certain. He believed that the likelihood of torture in Mr. Arar's case was greater than usual, given that Mr. Arar had been held by the SMI at its Palestine Branch in connection with a national security matter, that he had been held incommunicado for nearly two weeks, and that he had "confessed." Mr. Hogger astutely pointed out that torture can be inflicted without leaving any physical marks. Thus, the fact that a consular official such as Mr. Martel could not observe any actual physical signs of torture would not indicate that torture had not taken place.[9]

3.5
ASSESSMENTS BY OFFICIALS

On receiving the report of the October 23 consular visit, Gar Pardy, Director General of the Consular Affairs Bureau, correctly sized up the situation. He was quite rightly pleased that Mr. Martel had been able to visit Mr. Arar at all. This was unusual in Syria, and was seen as very good news. The promise of continued consular visits likely meant that Mr. Arar would not be subjected to physical abuse or torture in the future. In other words, the incommunicado period of detention during which physical abuse and torture were inflicted had ended. Another positive point was that the consular report gave Mr. Pardy and other consular officials a benchmark for monitoring Mr. Arar's condition in the future, which from a consular perspective would be helpful.

That said, Mr. Pardy was under no illusion as to what likely had occurred prior to October 23. On reviewing the consular report and assessing the available information, he accepted the statement made by Mr. Arar during the consular visit about having spent only a few hours in Jordan and reached what he

called "the working assumption" that Mr. Arar had been in Syria from about October 9, 2002, had been kept incommunicado and had likely been subjected to abusive interrogation and torture. Myra Pastyr-Lupul of the Consular Affairs Bureau had the same reaction. Obviously they could not conclude with certainty that Mr. Arar had been tortured, but they thought it likely and proceeded on that assumption. I commend Mr. Pardy and Ms. Pastyr-Lupul for the way they assessed the situation. In my opinion, their approach to the issue of the possibility of torture was the proper one.

Other Canadian officials were much more hesitant about reaching a conclusion of possible torture. Ambassador Pillarella, for instance, felt that Canada was fortunate to have been permitted a visit with Mr. Arar. He was ambivalent about when Mr. Arar had arrived in Syria, saying "maybe" to the suggestion that Mr. Arar had been held incommunicado. At one point, he testified that he had not known whether to believe Mr. Arar or the Syrian officials about the date of Mr. Arar's arrival in Syria.

I am of the view that the Ambassador took far too cautious an approach to the situation with which he was confronted. He was Canada's representative in Syria at the time and was ideally placed to assess all of the circumstances and draw reasonable conclusions about what likely had happened. Yet, in his testimony, the Ambassador seemed strangely reluctant to conclude that it was even likely that Mr. Arar had been abused or tortured. I had the impression that, for him, matters had to be more black and white than had been the case. He stated that he believed in facts, the implication being that there had been no facts to establish that Mr. Arar had been held incommunicado or physically abused. He pointed to the case of another individual who had been held by the SMI and had not been physically abused or tortured. Ambassador Pillarella obviously required more concrete evidence — such as actual physical signs of beatings — than had been available in Mr. Arar's case. Absent specific proof of abuse or torture, he had not been prepared to reach any conclusion or even adopt an "operating assumption" to that effect.

Other officials with DFAIT and, over time, in other agencies also formed opinions about what had occurred and the likelihood that Mr. Arar had been abused or tortured. I do not think that there is anything to be gained from reviewing all of those assessments here.[10] Suffice it to say that there was no consistent, clearly articulated government position about what had happened to Mr. Arar. Different officials had varying levels of certainty or doubt about how Mr. Arar had been treated or mistreated. Indeed, because of an unsatisfactory reporting process, Foreign Affairs Minister Bill Graham was not informed of Mr. Pardy's "working assumption" that Mr. Arar had likely been tortured when

interrogated during his initial period of detention. That led to an undesirable situation: the Canadian minister responsible for managing Mr. Arar's situation while he was detained in Syria was not properly informed of what should have been viewed as a critically important element of the case, the likelihood of torture.[11]

After the first consular visit, DFAIT was in the best position within the Canadian government to make an appropriate assessment of Mr. Arar's situation. However, at the time, DFAIT did not have any policies or guidelines to assist officials in detecting torture or responding to indications of possible torture. In Chapter IX, I make recommendations to address these issues in the future.

Before leaving the subject of the assessments made of Mr. Arar's treatment, I have one further comment about the reluctance of some officials to recognize what likely happened to this individual. Detecting torture in countries such as Syria will always be difficult. It is unrealistic to expect torturers to admit to their actions or allow outsiders to make observations that would prove conclusively that torture has occurred. Thus, an assessment that depends solely on "hard facts" is unlikely to ever uncover torture. Canadian officials must be more sophisticated in their assessments, taking into consideration all of the available information in order to draw reasonable inferences about what may have happened. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) provides that the human rights record of a country must be considered in assessing the risk of torture. Mr. Arar's case is an excellent example of a situation where it should not have been particularly difficult to arrive at a conclusion that Mr. Arar probably had been tortured during interrogation.

3.6
IMPLICATIONS OF FAILURE TO DEVELOP CLEAR STATEMENT

The failure to develop a clear statement about what had happened to Mr. Arar while in Syrian custody had two possible implications.

The first relates to Mr. Arar's alleged confession to the Syrian authorities. Shortly after the October 23 consular visit, General Khalil provided Ambassador Pillarella with a *bout de papier* [12] setting out in very summary form the results of the Syrian interrogation of Mr. Arar. According to the *bout de papier*, Mr. Arar had said that he had trained in Afghanistan in 1993. Although the *bout de papier* was circulated to DFAIT ISI, the RCMP and CSIS in relatively short order, no one attached a reliability assessment or cautionary note to it to point out that Mr. Arar had made the statement while held incommunicado and that at least some DFAIT officials had developed the "working or operating assumption" that

physical abuse or torture had been used to obtain it. Recipients were left to make of it what they would.

A considerable number of those who received the *bout de papier* had at least some awareness of the Syrian human rights record. However, many did not have the full range of facts that would be needed for a proper assessment of what had happened to Mr. Arar. Indeed, some, including most Project A-O Canada members, lacked the necessary experience and training to make such an assessment. Some indicated that they would look to DFAIT in matters such as this.

DFAIT officials had access to all of the facts and were ideally positioned to set out the circumstances under which Mr. Arar had been interrogated and provide an assessment that Mr. Arar's statement was likely the product of torture. They should have done so. Without such a cautionary statement, the danger was that Canadian officials, particularly those investigating Mr. Arar, would attach unwarranted weight to Mr. Arar's statement and draw conclusions that were unfounded and unfair to Mr. Arar. Giving credence to statements obtained through torture can be dangerous, as the reliability of such statements is at best uncertain. Professor Richard Ofshe, an expert witness at the Inquiry, explained how torture as a method of interrogation removes all choices but one: "If the individual has already been convinced that the interrogator is unmovable, then it makes no sense to resist the torture. The only thing in front of them is to minimize the amount of torture. That is the only choice they've got. And they can do that by complying."[13]

The conclusion that DFAIT should have attached a description of the circumstances under which Mr. Arar's statement had been taken and an assessment of the likelihood of torture should not be taken to suggest that CSIS and the RCMP should not have done their own reliability assessments. As Ward Elcock, Director of CSIS in the period immediately following 9/11, testified, reliability assessments are done whenever there is "suspicion of torture." Both CSIS and the RCMP knew of Mr. El Maati's allegations of torture and some of the facts surrounding Mr. Arar's detention. They should have done their own assessments.

Officials who received the *bout de papier* attached varying degrees of importance to it. However, it is clear that some Canadian investigators had an increased level of suspicion about Mr. Arar's possible links to terrorist activities as a result of the information derived from the Syrian interrogation of Mr. Arar.[14]

The second possible implication of the failure to develop a single clearly articulated government position about what likely had happened to Mr. Arar has to do with the diplomatic efforts to have Mr. Arar released. As I point out

above, Minister Graham was not given the full picture about the likelihood of torture. That was unfortunate, given that he was the senior Canadian official responsible for seeking Mr. Arar's release. In his testimony, he indicated that, if he had known of the concern about torture, he would have been more "energized" in his efforts to have Mr. Arar released. Although I am not sure exactly what he meant by this comment or what other steps he might have taken to try to obtain Mr. Arar's release at the time, the point remains that those responsible for making decisions about what should be done, such as Minister Graham, should be provided with all the relevant facts.

Other Canadian officials eventually became involved or were asked to assist with the efforts to obtain Mr. Arar's release. For example, in May and June 2003, Mr. Pardy developed a proposal for a letter to Syria seeking Mr. Arar's release, to be signed jointly by the Minister of Foreign Affairs and the Solicitor General. It was felt that having the Solicitor General, the minister responsible for the RCMP and CSIS, sign the letter might carry extra weight with Syrian authorities. A draft letter was prepared. However, after receiving advice from officials, including some within the RCMP and CSIS, the Solicitor General decided against signing the letter in the form proposed. Mr. Arar's "statement" to the Syrian authorities likely played a role in the assessment made by some officials of Mr. Arar's status in the ongoing investigation and the advice given to the Solicitor General. I discuss the proposed letter in detail below. However, I raise it here to highlight the importance of a coordinated approach to assessing the circumstances under which a statement such as Mr. Arar's may have been taken, in order that all officials who may be involved in ongoing diplomatic efforts operate on a consistent and informed basis — in this case, one alive to the risks of torture and an unreliable statement.

4.
CANADIAN INVESTIGATIONS

4.1
BOUT DE PAPIER

On November 3, 2002, Ambassador Pillarella met with General Khalil and discussed Mr. Arar's case. According to his testimony, the Ambassador indicated that Canada wanted Mr. Arar returned to Canada, as he had not been charged with anything, and General Khalil responded that he was certain Mr. Arar was a member of al-Qaeda, adding that Mr. Arar had admitted to taking *mujahedeen* training in Afghanistan in 1993 and having associations with others who were terrorists. The Ambassador asked if he could have a written résumé of the

information, thinking that it would be in the interest of both Canada and Mr. Arar to know what information the Syrian authorities had against Mr. Arar.

General Khalil arranged for the production of the *bout de papier* described above. Ambassador Pillarella delivered the document to DFAIT ISI when he travelled to Ottawa the next day. After having it translated, DFAIT distributed it to the DFAIT Consular Affairs Bureau, the RCMP and CSIS.

This series of events raises two very important issues. The first is whether the Ambassador should have asked for the *bout de papier* in the first place. By the time he met with General Khalil, the Ambassador should have been aware that the information in question was likely the product of torture. That being the case, there is a concern that requesting the *bout de papier* could have been viewed as condoning the use of torture and even encouraging it in other cases.

Decisions about how to interact with a country with a poor human rights record such as Syria, particularly when a Canadian is detained in that country, can be very difficult and do not lend themselves to simple or prescriptive rules. At the time that Ambassador Pillarella obtained the *bout de papier*, DFAIT had no policy spelling out the process or criteria for making decisions about receiving information from such a country. In effect, the decision was left to the Ambassador's judgment.

In my view, the Ambassador's action in obtaining the *bout de papier* was not unreasonable. The Ambassador did not ask for the information volunteered by General Khalil during the meeting of November 3. However, once the Ambassador was made aware of what Mr. Arar had allegedly confessed, he considered that it would be helpful to have "the allegations" set down in writing, for clarity if nothing else.

Moreover, in a situation such as Mr. Arar's, it could be advantageous for Canadian officials to know what Syria considered the case against him to be. Depending on the circumstances, Canadian officials might be able to assist by disproving the allegations. Indeed, in Mr. Arar's case, when it appeared some months later that the Syrian authorities were going to put Mr. Arar on trial, Mr. Pardy attempted to obtain information through Mr. Arar's family to disprove the statement that Mr. Arar had been in Afghanistan for *mujahedeen* training in 1993. Further, depending on what information was made available, there might also be an advantage in terms of diplomatic efforts. Canadian officials might be in a better position to seek access to or argue for a detainee's release if they had more information about the detainee's case.

Importantly as well, by November 3, the Syrian authorities were permitting consular visits of Mr. Arar. Two visits had taken place, on October 23 and 29, and the Syrians had indicated that more would follow. Thus, even if Mr. Arar had

been tortured previously, it appeared unlikely that there was any intention to subject him to physical torture in the future.

Given all these circumstances, I am satisfied that Ambassador Pillarella did not act unreasonably or improperly in obtaining the *bout de papier* and delivering it to Ottawa. That said, I am of the view that Canada needs a more structured and disciplined approach to interacting with and receiving information from countries with questionable human rights records. In Chapter IX, I recommend that decisions to receive information from a country such as Syria be made on a case-by-case basis, relying on all available information, in a manner that allows for accountability. It is important in these types of situations that Canadian officials exercise caution, to avoid taking any action that appears to condone or encourage human rights abuses.

The second issue that arises with respect to the *bout de papier* has to do with what happened after Ambassador Pillarella delivered it to DFAIT ISI. As I point out above, DFAIT did not carry out a formal assessment of whether the information reportedly obtained from Mr. Arar had been obtained through torture, even though it was in the best position of any Canadian agency to conduct such an assessment. Had it carried one out, it would have concluded that the information was likely a product of torture and, therefore, of questionable reliability. Not only did DFAIT fail to do an assessment, it passed the *bout de papier* on to the RCMP and CSIS without providing an appropriate warning about the likelihood of torture.

There was some evidence suggesting that a discussion about the possibility of torture had taken place at a meeting of DFAIT, RCMP and CSIS officials in Ottawa on November 6, 2002. However, if such a discussion was held, it was very casual at best, and the RCMP officers who should have been warned of the concern about torture and the reliability of the *bout de papier* received no such warning. Thus, the *bout de papier* was distributed to the RCMP and CSIS without adequately drawing attention to the extremely important concern about its questionable reliability. This was unfair to Mr. Arar and potentially misleading to those who received the information. Indeed, as I discuss below, it appears that the RCMP officers became more suspicious of Mr. Arar's connections to terrorist activities as a result of the *bout de papier*, and this heightened suspicion may have affected their willingness to support efforts to obtain Mr. Arar's release.

In Chapter IX, I recommend that, when a Canadian agency or department receives information from a country with a questionable human rights record, it conduct a proper reliability assessment and attach that assessment to the information if it is disseminated to others.

4.2
CSIS TRIP

4.2.1
CSIS Investigation into Mr. Arar

National security confidentiality concerns prevent me from disclosing publicly most of the investigative actions undertaken by CSIS after Mr. Arar's removal to Syria. However, I am able to discuss, in general terms at least, the trip that CSIS personnel took to Syria in November 2002.

On November 6, 2002, a meeting was held at DFAIT in Ottawa and a number of issues relating to Mr. Arar were discussed, including the *bout de papier* brought back by Ambassador Pillarella and the possibility of CSIS travelling to Syria to meet with the SMI. In attendance were CSIS, RCMP and DFAIT ISI representatives, as well as Ambassador Pillarella. No one from Consular Affairs was invited. Mr. Pardy did not become aware of the CSIS trip until after the fact.

Ambassador Pillarella briefed the attendees on the results of his meetings with Syrian authorities. At the Inquiry, he testified that the *bout de papier* had been received with some scepticism by everyone at the meeting, but that there had been no discussion about the risk or possibility of torture. Inspector Michel Cabana, the senior officer with Project A-O Canada, testified that it had been agreed at this meeting that information obtained to that point was not specific enough to determine its accuracy and that more detailed information was required. It had also been agreed that CSIS officials would travel to Syria to meet with SMI officials in order to obtain information about Mr. Arar and to discuss other matters. While DFAIT ISI officials were interested in having CSIS go to Syria, they were concerned that CSIS not take on any consular duties with respect to Mr. Arar. RCMP representatives indicated that they did not want CSIS to interview Mr. Arar for evidentiary reasons. CSIS agreed with the concerns expressed by DFAIT and the RCMP.

On November 19, 2002, CSIS officials travelled to Damascus, where they met with the SMI and obtained some information concerning Mr. Arar. The senior CSIS official present at the meeting testified that the officials had not given the Syrian authorities any information about Mr. Arar and that there had been no discussion about when Mr. Arar would be released or about CSIS' views regarding Mr. Arar's imprisonment. The official indicated that they had very purposefully not raised the subject of Mr. Arar's release, as it had been a consular matter. According to that official, no one from CSIS had suggested that CSIS did

not want Mr. Arar released and returned to Canada. I have no reason not to accept this evidence.

The CSIS officials did not see Mr. Arar, provide the SMI with questions to ask Mr. Arar, or encourage the SMI to interrogate Mr. Arar further. The exchange between the two agencies as it related to Mr. Arar was limited to the provision by the SMI of information it had reportedly obtained from him.

However, I note that CSIS did not do an adequate reliability assessment of the information provided by the SMI, particularly with respect to whether that information could be the product of torture. Moreover, CSIS shared this information with other agencies without giving a warning about the likelihood of torture. As a result, any reliance on this information by CSIS and others was misguided and misplaced.

CSIS relied on this information to the prejudice of Mr. Arar on at least two occasions in circumstances that I heard in camera. I repeat what I stated earlier in relation to DFAIT: if CSIS had done an adequate assessment, it would have concluded that the information was likely the result of torture and therefore of questionable reliability. Unfortunately, an assessment was done by a person with no expertise in torture and the conclusion was that there likely was no torture.

I am satisfied that it was appropriate for CSIS personnel to meet with the SMI in the circumstances that existed in November 2002. There was appropriate consultation among Canadian officials about the proposed trip beforehand, DFAIT was consulted and approved, and the Minister of Foreign Affairs was apprised of the trip in advance. Moreover, the CSIS officials who met with the SMI were careful not to encroach on matters that were more properly the domain of the DFAIT Consular Affairs Bureau. In particular, they did not discuss the question of Mr. Arar's release. Their role in relation to Mr. Arar was to receive information, and nothing else.

Furthermore, there was a legitimate investigative purpose in meeting with the SMI to receive information obtained from Mr. Arar. There was reason to believe that the SMI had information relevant to the Canadian investigation in which Mr. Arar was a person of interest.

There are occasions when it is necessary for Canadian investigative officials to interact with countries with poor human rights records, such as Syria. These interactions can be very important in countering the global threat of terrorism. However, there are significant risks attached, particularly when the country in question is detaining a Canadian. The officials of the detaining country may interpret communications with Canadian investigative officials as a sign of approval of their abusive tactics or, in a case where Canada is seeking the release

of the individual, as a signal that the investigators do not support the Canadian position. Moreover, when verbal communications take place, there is the risk that the officials of the detaining country may, intentionally or otherwise, put a different construction on something that is said to suit their own purposes. One should not expect that officials in countries of this sort will necessarily act in an honourable or straightforward manner.

Such risks were demonstrated in this case by what occurred in January 2003. Syrian officials indicated, on at least three occasions, that CSIS had said it did not want Mr. Arar released and returned to Canada. While the Syrian officials did not specifically link the alleged CSIS statement to the meeting in November 2002, that appears to have been the implication. In any event, the CSIS visit seems to have provided Syrian officials with a platform to take the position, even if concocted, that CSIS had said it did not want Mr. Arar returned.[15]

Clearly, great care must be taken when Canadian investigative agencies are proposing to interact with officials in a country with a poor human rights record, particularly when a Canadian is being detained in that country. Decisions in this respect must be made on a case-by-case basis, though in accordance with applicable policies. Moreover, it is essential that all Canadian agencies with an interest or expertise in the area be involved in the decision making and that those with ultimate responsibility be directly accountable for the decisions made. In addition, any interactions that do take place must be as controlled as possible, to safeguard against Canadian complicity in human rights abuses or the perception that Canada condones such abuses. If it is determined that there is a credible risk that the Canadian interactions would render Canada complicit in torture or create the perception that Canada condones the use of torture, then a decision should be made that no interaction is to take place.

Finally, I repeat what a number of RCMP and CSIS witnesses said about information from a country with a questionable human rights record. As Deputy Commissioner Garry Loeppky put it, the RCMP would have significant concerns about the validity or value of information received from a country where human rights abuses may occur. The reliability of such information is always in question. While it would be wrong to ignore such information or to automatically assume that abuse or torture was used to extract it, the possibility of torture is an important factor in assessing its reliability.

4.3
CONTINUING RCMP INVESTIGATION

After hearing about Mr. Arar's imprisonment in Syria on October 21, 2002, Project A-O Canada continued its investigation and took specific steps to gather as much information about Mr. Arar as it could. For reasons of national security confidentiality, I am unable to go into many of the specifics of the investigation.[16] However, I am able to say that the investigation as it related to Mr. Arar was comprehensive and thorough.

From October 2002, when it learned of Mr. Arar's imprisonment in Syria, until about March 2003, Project A-O Canada periodically considered taking three steps in connection with Mr. Arar: offering to share information from its investigation with the Syrian authorities, seeking an opportunity to interview Mr. Arar, and sending questions to Syria to be asked of Mr. Arar. In the end, it did none of these things.[17] The RCMP had no direct contact with the Syrians about Mr. Arar at any time during his detention. Thus, while I would be very concerned about the RCMP providing information or questions to authorities in a country such as Syria for purposes of interrogating a Canadian detainee, the RCMP took no such steps with respect to Mr. Arar. It is worth pointing out as well that the RCMP officers testified that they would not have taken any of those steps without involving DFAIT. That is an important point. In Chapter IX, I make recommendations to ensure that, in the future, no steps such as those mentioned above may be taken without following a coordinated and accountable process within the Canadian government.

Periodically during the time that Mr. Arar was imprisoned in Syria, Project A-O Canada provided senior officers at "A" Division and in the Criminal Intelligence Directorate (CID) at RCMP Headquarters with information emanating from its investigation. On occasion, the information that was passed up the chain of command was inaccurate or tended to overstate Mr. Arar's status in that investigation. For example, a briefing note to the RCMP Commissioner dated October 17, 2002 described Mr. Arar as a "target" of the investigation, rather than a "person of interest," and contained some inaccurate information about his activities. I discuss the implications of this reporting in my discussion about DFAIT's efforts, in May and June 2003, to obtain a letter seeking Mr. Arar's release signed by both the Minister of Foreign Affairs and the Solicitor General, the minister responsible for the RCMP.

It is important to bear in mind that, while the RCMP was investigating Mr. Arar, DFAIT provided it with copies of some consular reports and the *bout de papier* containing a summary of Mr. Arar's alleged confession to the SMI. As

stated earlier, there was no mention that the "confession" was probably the product of torture even though DFAIT should have been aware of the likelihood. Furthermore, the report of the first consular visit, which took place on October 23, 2002, was interpreted by some as indicating that Mr. Arar had not been tortured.

Leaving aside the question of whether DFAIT should have provided consular information obtained from Mr. Arar to the RCMP at all, it was important when it did so to make it clear that Mr. Arar had likely been tortured. Viewed in that light, the confession described in the *bout de papier* would have been subject to serious concern about its reliability. As it was, it increased the interest or suspicions of some investigators about Mr. Arar.

In the end, the RCMP's extensive investigation of Mr. Arar, which continued after Mr. Arar was imprisoned in Syria and, indeed, for months even after his return to Canada and involved co-operation with American agencies, did not turn up any evidence that he had committed a criminal offence. Throughout, Mr. Arar was a person of interest only. There is no evidence indicating that Mr. Arar constitutes a threat to the security of Canada.

5.
EFFORTS TO OBTAIN MR. ARAR'S RELEASE

5.1
MR. EDELSON'S LETTER

Shortly after learning that Mr. Arar had been imprisoned in Syria, Michael Edelson, an Ottawa lawyer who had previously acted for Mr. Arar, met with Mr. Pardy, Director General of Consular Affairs, to discuss steps to try to obtain Mr. Arar's release. They came up with the idea of asking the RCMP to provide a letter to aid their efforts to persuade the Syrian authorities to release Mr. Arar.

On October 31, 2002, Mr. Edelson wrote to tell Project A-O Canada that Mr. Pardy thought that a letter from the RCMP could be helpful. The lawyer asked that the RCMP letter confirm the following four points:

- the RCMP had not made any request to have Mr. Arar "deported" to Jordan or Syria;
- Mr. Arar did not have a criminal record;
- Mr. Arar was not wanted in Canada for any offence and there was no warrant for his arrest; and
- Mr. Arar was not a suspect with respect to any terrorism-related crime.

There was considerable discussion within the RCMP about how to respond to the letter. On November 16, 2002, Inspector Cabana wrote to Mr. Edelson and addressed the first two points, indicating that the RCMP had not played a role in the situation in which Mr. Arar found himself and that Mr. Arar had no criminal record. He went on to say that it would be improper to comment on Mr. Arar's situation in relation to the RCMP investigation. He did not confirm that Mr. Arar was not wanted for any offence and that there were no warrants for his arrest in Canada. He then referred Mr. Edelson back to DFAIT.

Not surprisingly, this letter was not useful to those attempting to obtain Mr. Arar's release and so was not given to the Syrian authorities. Nothing further was done to try to obtain the RCMP's assistance in the release efforts until the months of May and June 2003. I discuss those events below.

There are two aspects of Mr. Edelson's attempt to obtain a letter from the RCMP that deserve comment. First, this effort reveals a lack of a coordinated and cohesive approach by Canadian officials with respect to obtaining Mr. Arar's release. Mr. Pardy was supportive of Mr. Edelson's efforts. However, as RCMP officers testified, the RCMP considered Mr. Pardy's suggestion that Mr. Edelson seek a letter from the RCMP highly inappropriate. It viewed the matter of Mr. Arar's release as DFAIT's responsibility and did not consider that it should play a role.[18] As a result, there was resistance to providing the letter requested and little inclination to work constructively towards providing a letter that would be helpful.

There was no government policy or guideline to provide direction as to how decisions to respond to a request such as Mr. Edelson's should be made or what role the RCMP should play in seeking the release of a detainee such as Mr. Arar. DFAIT and the RCMP had potentially different interests in relation to what should be done. When Canadians are detained abroad in connection with terrorism-related investigations, it is very important that there be a coordinated and cohesive approach to the Canadian response, including efforts to obtain the release of an individual, if warranted. It is also important that decisions of this nature be made in a way that ensures accountability and, when differences of approach between departments or agencies arise, there be a process to resolve such differences. In Chapter IX, I make recommendations for such a process.

My second comment with respect to Mr. Edelson's request has to do with Mr. Arar's status in the Project A-O Canada investigation. As I mention several times in this report, Mr. Arar was a person of interest, not a suspect in that investigation. A number of reasons were given for the RCMP's disinclination to indicate in a letter that Mr. Arar was not a suspect with respect to a

terrorism-related offence. Among them was the fact that, as a matter of practice, the RCMP does not comment on the status of individuals in an investigation.

I leave it to those responsible for making decisions in the future to decide, on a case-by-case basis, whether such a practice is always the best course. However, I note that in Mr. Arar's case, at least one senior officer considered it problematic to indicate that Mr. Arar was not a suspect because of the *bout de papier* reporting Mr. Arar's alleged confession about attending a training camp in Afghanistan in 1993, which DFAIT shared with the RCMP around the same time. The problem, of course, was the likelihood that torture had been used, making the "confession" unreliable, and the lack of a cautionary note to that effect.

5.2
MINISTER'S INVOLVEMENT

5.2.1
Meetings With Secretary Powell

On November 14, 2002, Foreign Affairs Minister Bill Graham met with U.S. Secretary of State Colin Powell. In the course of their meeting, they discussed Mr. Arar's case and Minister Graham raised Canada's concerns about the American removal of Mr. Arar to Syria.

In response, Mr. Powell insisted that the United States was unfairly taking the blame for Mr. Arar's situation. He maintained that Canadian law enforcement officers had been aware of Mr. Arar's expulsion to Syria all along and suggested that, in some fashion, they had given their blessing. He also emphasized that the American decision to remove Mr. Arar had been based on information provided by Canada. Minister Graham replied that Canada did not countenance sending Mr. Arar to Syria.

When informed of Secretary Powell's statement, members of the RCMP objected strongly. They insisted, as they have to this day, that RCMP officers had not been involved in the decision to send Mr. Arar to Syria.

My conclusions in this respect are set out in Chapter IV. I have found no evidence to support a conclusion that RCMP officers participated or acquiesced in the American decision to send Mr. Arar to Syria. On the other hand, I find that it is very likely that the decision was based, at least in part, on evidence provided by the RCMP.

I have one observation about Minister Graham's meeting with Secretary Powell. The Minister was not briefed on the operational circumstances relating to Mr. Arar's case before the meeting. He knew very little about the actual

investigation. This was the result of a long-standing practice whereby operational details of law enforcement investigations were not provided to others, including politicians, to protect the independence of the investigations. In most circumstances, there is merit to this approach and I can understand why Minister Graham was not briefed more fully in this case.

That said, I think that there needs to be more flexibility in some cases, particularly where a minister becomes involved in a matter connected with a Canadian detained abroad in a terrorism-related investigation. In such a situation, it may be important to brief the minister about circumstances relating to the case and include operational information, in order for the minister to effectively carry out his role. The meeting of November 14, 2002 is a good example of a situation where there would have been benefit to providing the minister with more information. Unlike Minister Graham, Secretary Powell appeared to be well informed about the operational details of the case. Minister Graham was not able to effectively respond to the Secretary's assertions. That was unfortunate.

I can imagine situations where there may be a significant advantage to Canadian diplomatic efforts to brief a minister about the circumstances of a particular investigation, even a criminal investigation. Doing so need not compromise the investigation — or the autonomy of the investigation — and need not involve the minister in giving operational directions. However, when communications between a minister and a law enforcement agency are necessary, those communications should be clear and in writing so that there can be no misunderstanding about the role played by the minister. In Chapter IX, I set out recommendations for a consultative process to be used to address circumstances when a Canadian is detained abroad in connection with a terrorism-related matter. I envision the use of that process for decision making with respect to whether a minister needs to be briefed about an investigation.

Minister Graham raised the Arar case with Secretary Powell a second time during a NATO meeting in Prague on November 21 and 22, 2002. Secretary Powell essentially repeated the message conveyed during the meeting on November 14, 2002.

5.2.2
Minister Graham's Telephone Call to Syrian Foreign Minister

Following the November 14, 2002 meeting with Secretary Powell, Minister Graham decided to call the Syrian foreign minister, Farouk Shara'a, to discuss the Arar case. Initially, the telephone call was scheduled for November 19, 2002. However, the phone call did not proceed.

Although Minister Graham could not recall why the call had not taken place, I find that it was postponed pending receipt of a report on the visit to Syria by CSIS personnel scheduled for November 19 and the days following. I conclude that it was reasonable for Minister Graham to delay his phone call to Minister Shara'a until after he had a report of the CSIS visit, as he needed to have as much information as possible about what the Syrian authorities were thinking before making the call. Moreover, no matter how well Minister Graham's telephone call was received by Minister Shara'a, it was unlikely that Syria would respond very quickly. Therefore, the delay was not likely to be a matter of great consequence.

DFAIT officials next attempted to arrange a phone call between the two ministers for December 16, 2002. Again, the call did not take place, this time because of scheduling problems.

By the time Minister Graham did speak to Minister Shara'a by telephone on January 16, 2003, Syrian officials were alleging that CSIS had indicated it did not want Mr. Arar returned to Canada. Minister Graham communicated Canada's position as plainly as he could, spelling out clearly and forcefully that Canada wanted Mr. Arar returned. I will come back to the alleged CSIS statement and the content of Minister Graham's phone call in more detail below.

For present purposes, I note that almost two months elapsed between the time it was decided that Minister Graham should speak to Minister Shara'a and the time the call actually took place. Obviously, in cases such as Mr. Arar's, one should not unnecessarily delay entreaties seeking the detainee's release. However, in Mr. Arar's case, there was also merit in proceeding in an informed manner. It made sense for the Minister to await the report of the CSIS trip before placing the call, to learn the "lay of the land," as it were. All the same, one would have thought that the call could have been arranged sooner than January 16, 2003.

In any event, it does not appear to have really mattered when the phone call was placed, as it does not seem to have had any effect. Mr. Arar remained in a Syrian prison for another eight months.

5.3
MIXED SIGNALS

5.3.1
Questions for Mr. Almalki

5.3.1.1
Relevance

On January 15, 2003, the Canadian consul, Léo Martel, delivered a letter from the RCMP to General Khalil on the instructions of Ambassador Pillarella. Enclosed was a series of questions to be posed to Abdullah Almalki, a subject of Project A-O Canada's investigation who was incarcerated at the Palestine Branch at the time.

In the letter, the RCMP offered to share with the Syrian authorities "large volumes of highly sensitive documents and information, seized during investigative efforts or obtained from confidential informants associated to terrorist cells operating in Canada."[19]

Among the questions to be posed to Mr. Almalki were some about his relationships with a number of individuals, most of whom the SMI would have considered to be very heavily involved in terrorist activities. Although not a terrorist suspect or even the subject of a national security investigation, Mr. Arar was included with these individuals.

The Inquiry is directed at investigating or reporting on the actions of Canadian officials as they relate to Mr. Arar, not Mr. Almalki. Some have accordingly argued that addressing the matter of the questions for Mr. Almalki falls outside my mandate. I do not agree. At the time the questions were delivered, Mr. Arar was in the custody of the SMI. The covering letter referred to investigative efforts in regard to "terrorist cells operating in Canada," the implication being that Mr. Almalki was a member of a terrorist cell. Further, by this point, the SMI would have believed that Canadian investigators suspected Mr. Arar of being linked to Mr. Almalki. Indeed, Ambassador Pillarella, who had considerable contact with the SMI, testified that the cases of Messrs. Almalki and Arar had been connected in the Syrian authorities' minds. The message in the covering letter and the questions for Mr. Almalki had the potential to heighten the SMI's concern about the seriousness of Mr. Arar's involvement in terrorist activities.

The argument against my addressing this matter goes on to say that there is no evidence that the letter worsened Mr. Arar's position in the eyes of the SMI, and thus delayed his release. Indeed, there is no evidence that the SMI paid any

attention to the letter at all, as it never responded. Thus, the letter and questions cannot be said to have "caused" Mr. Arar any harm. They did not cause any of the matters enunciated in the Order in Council — in particular, his imprisonment and treatment in Syria.

In my opinion, that argument takes an unnecessarily narrow view of my mandate. As I state in Chapter I, I do not think that the mandate limits me to investigating and reporting only on actions of Canadian officials found "to have caused" one of the events listed in paragraphs i) to iv) of the Order in Council. The enumerated matters are illustrative, not restrictive. The mandate directs that I report on actions of Canadian officials *in relation to* Mr. Arar, including in regard to the matters enumerated. The action of sending Mr. Arar's Syrian custodians a letter and questions that could have been interpreted as suggesting that Mr. Arar had links to a terrorist cell in Canada is a matter "in relation to Mr. Arar."

Unlike criminal or civil trials, public inquiries are not focussed on whether actions have caused certain harms. They are concerned more generally with the propriety of actions, even when those actions merely increase the risk of harm, rather than "cause harm" in the legal sense.

Moreover, paragraph (v) of the list in the Order in Council specifically directs that I report on "any other circumstances directly related to Mr. Arar that [I consider] relevant to fulfilling [my] mandate."[20] I am satisfied that the "Almalki questions" fall within this part of my mandate. The questions and covering letter could have had the effect of raising the SMI's suspicions about Mr. Arar. That, in itself, is a circumstance directly related to Mr. Arar.

In addition, I believe that it is important that I report on the "Almalki questions" because they provide one of the clearest examples of a problem that needs to be addressed and avoided in the future. In Chapter IX, I make recommendations as to how Canadian officials should manage situations where Canadians are detained abroad in connection with terrorism-related allegations. The "Almalki questions" and the surrounding events present a compelling argument for taking steps to ensure that decisions about communications between Canadian investigators and regimes such as that in Syria that could affect Canadian detainees are appropriate, consistent with government policy and made by those who are politically accountable.

Thus, I am satisfied that addressing the questions sent to Syria for Mr. Almalki falls within my mandate. With that said, I will go back to the summer of 2002, when the series of events that led up to the provision of the questions began.

5.3.1.2

Background Events

By the summer of 2002, the RCMP was having internal discussions about sending questions to be posed to Abdullah Almalki, who was in Syrian custody. The Syrian authorities had offered to ask questions of Mr. Almalki. It was also considering sending questions for another subject of investigation, Ahmad El Maati, who by this time was in Egyptian custody.

In July 2002, Project A-O Canada had a number of meetings with representatives of CSIS and DFAIT ISI to discuss sharing information with Syrian authorities. Representatives of the Department of Justice were also involved, as were officers from CID at RCMP Headquarters.

On August 15, 2002, the RCMP officers were advised that Mr. El Maati had informed a Canadian consular official in Cairo that he had been interrogated and tortured while in Syrian custody from November 2001 to January 2002 and that the statement he had given Syrian authorities had been false. The information about Mr. El Maati's allegation of torture and recantation of his statement was made available to the RCMP, CSIS, DFAIT and Justice personnel involved with the investigations relating to Messrs. Almalki and El Maati.

On several occasions over the next five months, RCMP and DFAIT ISI officials debated the issue of the RCMP sending questions to the SMI for Mr. Almalki. Clearly, there was some discussion about whether Mr. Almalki might be tortured. However, there is serious conflict in the evidence as to whether or not DFAIT ISI ultimately approved the decision to send questions to the SMI. Project A-O Canada officers testified that the ISI officers had approved sending questions, whereas the ISI officers testified that they had advised against doing so.

The issue was discussed at a meeting on September 10, 2002, which was attended by officers from Project A-O Canada and CID, officials from DFAIT ISI and Ambassador Pillarella. Those present have varying recollections about what discussion took place concerning the issue of torture. Some testified that they did not recall a rather ominous comment made by Jonathan Solomon, a comparatively junior official with DFAIT, to the effect that "if you are going to send questions, would you ask them not to torture him?" Others indicated that they remembered hearing the comment, but had not considered it important at the time.

While I accept that the "torture" comment was made at the September 10 meeting, it appears to have been interpreted as more of a casual remark made in passing than a forceful statement or position. No one from DFAIT prepared a memorandum for the RCMP recording the concern about the possibility of

torture. I would have expected that, when dealing with a matter as serious as the risk of torture, DFAIT officials would have provided much clearer direction when the issue of sending questions to Syria was raised.

On October 10, Mr. Solomon wrote an internal memorandum that read in part:

> The RCMP are ready to send their Syrian counterparts a request that Al Malki be asked questions provided by the RCMP, questions relating to other members of his organization. Both ISI and DMSCUS/HOM [Ambassador Pillarella] have pointed out to the RCMP that such questioning may involve torture. The RCMP are aware of this but have nonetheless decided to send their request.[21]

Mr. Solomon testified that his statement about the RCMP being aware of the possibility of torture had been a reference to the discussion at the September 10 meeting, while his comment that the RCMP had "decided to send their request" might have been an assumption on his part.

Ambassador Pillarella testified that he had not been warned of the possibility of torture at the September 10 meeting.

What followed over the ensuing months was a disappointing and very unfortunate lack of communication between DFAIT officials and the RCMP.

Another meeting between the RCMP and DFAIT was held on October 25 to discuss the issue of providing Syrian authorities with information about Mr. Almalki. Mr. Solomon testified that the possibility of sending questions for Mr. Almalki and the issue of torture had been raised for a second time. He indicated that DFAIT officials had come out of the meeting displeased with the RCMP position and had decided to draft a memorandum to propose that the Deputy Minister of Foreign Affairs send a short letter to the RCMP recommending that questions not be sent. Mr. Solomon drafted a memorandum dated October 30 setting out what he thought might be stated in a letter to the RCMP. Included was a warning that, if the RCMP sent questions, "there [was] a credible risk that [questioning] would involve torture"[22] and it was therefore not appropriate to send questions. Other DFAIT ISI officials testified that they also had believed that there was a credible risk of torture if questions were sent.

In any event, ISI never forwarded the draft memorandum to senior officials within the department and, consequently, DFAIT did not send the proposed letter to the RCMP. The explanation given by ISI officials for this failure is that they had believed that the matter had been resolved within the RCMP and had understood that the RCMP was not going to send questions to Syria for Mr. Almalki. However, no one in DFAIT could point to a conversation or

exchange during which this understanding had been reached and there is no document or record setting out the basis for such an understanding.

For his part, Inspector Cabana testified that he had not been aware of DFAIT's understanding that the questions were not to be sent. He said that the "credible risk of torture" concern had never been communicated to the RCMP despite at least one more meeting with DFAIT officials in November 2002. According to the RCMP officers, when they had sent the questions to Syria for Mr. Almalki, they had been under the impression that DFAIT officials, who knew of their plans, had no objections. Indeed, this belief on their part had been reinforced when Ambassador Pillarella had agreed to have the questions delivered to General Khalil.

I find it most unfortunate that, in a matter as important as the questioning of a Canadian citizen in Syrian custody when the prospect of torture was very real, that there could have been such a total breakdown in communication between Canadian officials. DFAIT's concern about torture should have been communicated clearly and forcefully, if necessary, to the RCMP.

5.3.1.3
Delivery of Questions

By mid-December, Project A-O Canada had abandoned any idea of travelling to Syria to interview Mr. Almalki itself. Based on the advice of Ambassador Pillarella, it had determined that the SMI would be most unlikely to permit a direct interview and had decided to send the SMI questions to be posed to Mr. Almalki instead.

Project A-O Canada thus arranged to have a series of questions for Mr. Almalki translated into Arabic. The communication failure between the RCMP and DFAIT Headquarters in Ottawa persisted. The RCMP believed that DFAIT was aware of the translation process, while DFAIT officials other than Ambassador Pillarella, to whom I will come back, apparently had no idea that the RCMP had set in motion a process to send questions to Syria.

By December 20, both the English and Arabic versions of the questions had been prepared and approved by the "A" Division CROPS Officer and CID at RCMP Headquarters. Interestingly, there also appears to have been a miscommunication about the questions at RCMP Headquarters. Superintendent Wayne Pilgrim, the senior officer in the NSIB, approved the questions, but his superior, Assistant Commissioner Richard Proulx, was not involved in the approval process and even later was under the impression that questions had not been sent.

On January 7, 2003, Project A-O Canada sent the final version of the questions to the RCMP liaison officer (LO) in Rome, who had responsibility for Syria. The LO prepared a draft covering letter and sent it to the Project for approval.

It seems that no one within the RCMP was overly concerned about the possibility that torture might be used to obtain answers to the questions. Some never gave the matter any thought, while others believed the risk was warranted because of the "imminent" nature of the terrorism threat being addressed in the RCMP investigation. In any event, the RCMP officers reasoned that, if DFAIT had no objections, there was no problem. They were encouraged by the fact that the Canadian Ambassador had agreed to have the questions delivered to the SMI.

The questions for Mr. Almalki included a series on his relationships with a number of individuals, most of whom, by anyone's assessment, were serious terrorist threats. Mr. Arar was included in this list of individuals. There was no discussion within the RCMP or elsewhere about the potential impact on Mr. Arar of sending questions in which he was linked with individuals who were serious terrorist threats. According to Inspector Cabana, the inclusion of Mr. Arar's name did not imply that he was a terrorist.

As I mention above, the covering letter addressed directly to General Khalil offered to share information seized "during investigative efforts . . . associated to terrorist cells operating in Canada." The letter also offered to send a second series of questions, depending on how the RCMP assessed the quality and accuracy of the answers to the first. No second set of questions was ever sent.

On January 14, 2003, the RCMP LO met with Ambassador Pillarella in Damascus and gave him a sealed envelope containing the covering letter and questions. Although the Ambassador did not open the envelope, he knew it contained questions for Mr. Almalki. There was no discussion of the possibility of torture or of a mixed message to the Syrians concerning the Canadian position on Mr. Arar's release. In his testimony, the Ambassador stated that he recalled the LO saying something about having "authority from Ottawa." The Ambassador indicated that he had thought consultations had taken place between the RCMP and DFAIT ISI and that DFAIT had approved the decision to provide questions. Consequently, there had been no reason for him to verify DFAIT's approval. When the LO testified, he could not recollect the conversation about having "authority from Ottawa."

Ambassador Pillarella gave the sealed envelope to Mr. Martel and instructed him to deliver it to the SMI. The Ambassador said that his decision to deliver the envelope with the questions had been based on the "extraordinary unprecedented cooperation" displayed by the Syrian authorities with respect to Mr. Arar

and the unlikelihood that they would "turn around and mistreat another Canadian."[23] The Ambassador went on to say that, since there had been no indication from the consular visits that Mr. Arar had been mistreated, there had been no reason for the Ambassador to assume there would be mistreatment of Mr. Almalki if the questions were put to him. This reasoning was flawed. As I conclude above, the Ambassador should have appreciated that Mr. Arar had likely been tortured when questioned.

The Ambassador testified that he had been unaware that DFAIT ISI officials in Ottawa had concluded that there was "a credible risk of torture" if the questions were provided to the Syrian authorities. On January 15, 2003, Mr. Martel delivered the envelope to the SMI. He was not aware of the envelope's contents, as he had not been informed by the Ambassador. Canadian officials never received a reply to the letter, and there is no indication of whether or not the questions were posed to Mr. Almalki.

When the questions were submitted, no one from the Canadian Embassy had visited Mr. Almalki. Despite requests from consular officials, the Syrian authorities had consistently refused access.

5.3.1.4
Conclusions

I reach two conclusions about the questions for Mr. Almalki. First, the description of the various circumstances surrounding the questions presents a picture of an enormous failure of communication among Canadian officials.

DFAIT ISI was of the view that there was a "credible risk" of torture if the questions were delivered to the SMI. Officials with ISI testified that the RCMP had been informed of this and had agreed not to send the questions.

In contrast, officers with both Project A-O Canada and RCMP CID testified that they had had the exact opposite view of the situation. They had understood that ISI was not opposed to submitting the questions to Syria and had not raised any serious concerns about torture. Further, they pointed to the fact that Ambassador Pillarella, Canada's representative in Syria, had had the final say and had agreed to give the Syrians the questions.

Ambassador Pillarella is the final element in this sorry state of affairs. He testified that he had understood that ISI had authorized the delivery of the questions and had been unaware of ISI's concern about a risk of torture. Incredibly, there is virtually no written record of the communications among the various parties involved.

This startling breakdown in communication clearly attests to the need for a formalized, coherent process for addressing issues relating to Canadian citizens

detained abroad in connection with terrorism-related investigations. In Chapter IX, I recommend such a process. This situation should never be allowed to recur.

My second conclusion with respect to the questions for Mr. Almalki is that providing them to the SMI had the potential to create an impression in the Syrians' minds of mixed messages from Canada regarding what should happen with respect to Mr. Arar.

On the one hand, on January 16, 2003, Minister Graham clearly indicated in a telephone call to the Syrian foreign minister that Canada's position was that Mr. Arar should be released and returned to Canada. On the other, one day before that telephone call, the RCMP delivered to the SMI a letter and questions that could reasonably suggest that the RCMP was investigating terrorist cells in Canada, that Mr. Almalki was involved in those cells, and that there was a possible connection between Mr. Arar and Mr. Almalki. Ambassador Pillarella testified that he was convinced that the Syrian authorities had linked the cases of Messrs. Arar and Almalki when dealing with Canada. Given these circumstances, there was a risk that the SMI would conclude that, while the Canadian politicians wanted Mr. Arar returned to Canada, the RCMP considered him to be a serious terrorist threat. Given the SMI's propensity to do what it considered in its own best interests, it would not be surprising if it decided to hold Mr. Arar until all of its investigations, including those relating to Mr. Almalki, were complete.

All of that said, I have no way of knowing what effect, if any, the questions for Mr. Almalki had on the SMI's view of Mr. Arar and his imprisonment. It may be that there was no effect at all. The fact remains, however, that sending the questions in the particular circumstances was unwise and increased the risk that Syria would not respond favourably to Minister Graham's entreaties that it release Mr. Arar. In addition, sending the questions created an unacceptable risk that the Syrians would harm Mr. Almalki when asking the questions.

Finally, I note that one of the reasons given by Inspector Cabana for sending the questions was the continued existence of an "imminent threat" to the security of Canada. However, the questions were not sent until January 2003. By then, the threats being investigated by Project A-O Canada no longer fell within the "imminent" category. Sixteen months had passed since the attacks of 9/11 and the last specific threat — a threat to blow up a prominent building in the National Capital Region — was over a year old. Moreover, the two main targets of the Project A-O Canada investigation, Messrs. Almalki and El Maati, were in custody overseas. Without diminishing the importance of the Project's investigation, I think it fair to say that, by that time, the threats being investigated fell short of being "imminent."

I recognize that this may be another instance where lack of training and expertise in national security investigations on the part of Project investigators played a role. This deficiency is most unfortunate given Canada's obligation under article 10 of the Convention against Torture to ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel who may be involved in the interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. The point remains that it is essential that persons with the necessary expertise and experience be involved in making decisions about the "imminence" of threats.

I note also in regard to the issue of lack of training that the RCMP LO responsible for Syria had no training with respect to Syria's human rights record.

5.3.2
Alleged CSIS Statement

In January 2003, Syrian officials informed Ambassador Pillarella that CSIS had told the SMI that it did not want Mr. Arar returned to Canada. If true, this would have undermined Canadian efforts to have Mr. Arar released. CSIS denied making the statement.

The events involving the alleged statement began on January 15, 2003, when Ambassador Pillarella and Mr. Martel met with Deputy Foreign Minister Haddad to review Mr. Arar's case and discuss the possibility of a visit by his wife, Dr. Mazigh. At that meeting, Mr. Haddad said two rather curious things. First, he stated that Mr. Arar did not want to return to Canada. This was obviously false, as Mr. Arar clearly wanted to be released from Syrian custody and go back to Canada. He had given Mr. Martel a letter to his wife to that effect.

The second statement is the one that raises the issue of the CSIS position. In a note to DFAIT Headquarters, Ambassador Pillarella recorded what the Deputy Foreign Minister had said as follows: "CSIS would have indicated to military intelligence [SMI] that they have no wish to see Arar return to Canada and they were quite content with the way things were."[24] In their testimony, Ambassador Pillarella and Mr. Martel both suggested that Deputy Foreign Minister Haddad might not have mentioned "CSIS" specifically, but might in fact have said "your people" or "you," or something to that effect. I am satisfied, however, that the Ambassador correctly reported the conversation, including the reference to CSIS, in the note prepared shortly after the meeting.

Ambassador Pillarella was not provided with details as to what CSIS official had supposedly made the statement or in what circumstances. I note, however, that around the same time, he was told essentially the same thing by two other

Syrian officials, Deputy Minister Walid Mouallem and General Khalil. Ambassador Pillarella testified that, each time the alleged statement had been raised, he had assured the Syrian officials that Canada did want Mr. Arar back if the Syrian authorities had nothing against him.

Ambassador Pillarella quite properly reported the January 15 conversation with Deputy Foreign Minister Haddad to DFAIT Headquarters in Ottawa. On receiving the report, DFAIT contacted CSIS, and Jack Hooper, Assistant Director of Operations for CSIS, was informed. He in turn met with the CSIS personnel who had travelled to Syria in November 2002 on the assumption that, if anyone from CSIS had made the statement, it would have been during that trip. The individuals in question assured Mr. Hooper that they had not told the SMI that CSIS did not want Mr. Arar back in Canada, nor had they said anything to create that impression. Accordingly, Mr. Hooper informed DFAIT that no one from CSIS had made the alleged statement.

On January 16, the day after Deputy Minister Haddad had told Ambassador Pillarella about the "CSIS statement," Minister Graham called Foreign Minister Shara'a. Having been briefed about the Ambassador's conversation and the "CSIS statement" prior to this telephone call, Minister Graham specifically raised the issue of the suggestion that Canada did not want Mr. Arar to be returned and emphasized that "the Canadian government would like Mr. Arar to be returned to Canada."[25] This message was clear and direct.

At around the same time, a DFAIT official delivered a similar message directly to Ambassador Arnous in Ottawa. Interestingly, during their conversation, Ambassador Arnous mentioned that he, too, had heard about the "CSIS statement."

In addition, DFAIT Headquarters asked Ambassador Pillarella to inform General Khalil and Deputy Minister Haddad of the Minister's clear statement about the Canadian position. Ambassador Pillarella emphasized in his testimony that he had made it clear in all his contacts with Syrian officials that Canada's position was that Mr. Arar should be released and returned to Canada.

It appears that, after the Minister's phone call, the issue remained dormant for about two months, until March 21, 2003. On that date, the Syrian ambassador to Canada, Ahmad Arnous, met in Ottawa with two Canadian members of Parliament, Marlene Catterall and Sarkis Assadourian, who were intending to go to Syria to see Mr. Arar and plead for his release. At that meeting, Ambassador Arnous once again referred to the fact that CSIS did not want Mr. Arar returned to Canada. Mr. Assadourian responded that the Syrians had misunderstood what CSIS had said, and both Ms. Catterall and Mr. Assadourian indicated that this was

a serious misinterpretation and that Canada spoke with one voice in saying that it wanted Mr. Arar back.

Ms. Catterall reported the conversation to Myra Pastyr-Lupul of the Consular Affairs Bureau, who recognized the significance of this information and considered it imperative that CSIS rectify the situation. When Ms. Pastyr-Lupul raised the matter, she was advised to place a note in the file. She wrote:

> They [Ms. Catterall and Mr. Assadourian] learned that, initially during this case, CSIS officials told the Syrians that they "have no interest in Arar". The Syrians took this to mean that the CSIS have no interest in having Arar back. They [CSIS] may have meant that they have no security reasons to investigate Arar in Canada. Due to the miscommunication, the Syrians believed that CSIS did not want Arar back in Canada, and therefore decided to detain him/keep him in Syria.[26]

Ms. Pastyr-Lupul moreover indicated that she believed that CSIS should send a clear message that it had no information to lead it to believe Mr. Arar was a security threat.

Through no fault of Ms. Pastyr-Lupul, the matter apparently went no further. CSIS was never informed that the issue had resurfaced and was not asked to communicate directly with the SMI to clarify any misunderstanding.

Two questions arise with regard to the "CSIS statement." First, did someone from CSIS actually make the statement? Second, should more have been done to set the record straight with the Syrian authorities?

There is no evidence other than the statements of Syrian officials to Canadian officials that a CSIS employee actually made the statement. The senior official from CSIS who travelled to Syria in November testified at the Inquiry and was questioned closely on this matter. He denied having made the statement or any other statements likely to have been misconstrued by the Syrians to mean that CSIS did not want Mr. Arar back. I have no reason not to accept that evidence. Moreover, senior CSIS personnel testified that, before the trip, the participants had been instructed not to discuss the issue of Mr. Arar's release with the Syrians. They had been told that the issue was a consular matter and should be left to consular officials. Other CSIS officials who had dealt with Mr. Arar's case also testified at the Inquiry and also denied making the statement to the Syrians. It is possible that there were contacts between CSIS personnel and the SMI about which I have not heard — for example, contacts relating to Mr. Almalki, who was in SMI custody throughout the relevant period. If there were, it is possible that someone else made the statement. However, I have no evidence of that having occurred.

It does seem rather unusual that three Syrian officials would refer to a statement in early 2003 and then Ambassador Arnous would repeat it again some time later if the statement was never made. However, I recognize that Syrian officials were far from forthcoming and candid in their dealings with Canadian officials. They lied about Mr. Arar's whereabouts during his early days of imprisonment. Moreover, Deputy Minister Haddad's statement on January 15 that Mr. Arar did not want to return to Canada was obviously false. It is therefore certainly plausible that Syrian officials also lied about a statement by CSIS that it did not want Mr. Arar returned to Canada. They could have been using that as an excuse to mask their own wishes to continue holding Mr. Arar.

On the other hand, the evidence shows that CSIS did have some reasons for not wanting Mr. Arar to return to Canada. There was ongoing concern about embarrassment to the government if Mr. Arar was released and turned out to be involved in terrorist activities. There was also concern about the need for additional resources to monitor Mr. Arar's case if he was returned to Canada, as well as about the effect Mr. Arar's release could have on some pending security certificate cases.[27] CSIS also expressed concern that the U.S. government might question Canada's motives and resolve if Mr. Arar was released, as the American authorities had removed him because of his alleged terrorist connections. That said, there is no evidence that any of these concerns led anyone from CSIS to tell the Syrians that CSIS did not want Mr. Arar released.

Thus, while the possibility that someone from CSIS made the alleged statement is disturbing, I have no reason not to accept the evidence of the CSIS personnel who testified that the statement was not made by them.

With regard to the issue of whether DFAIT or CSIS should have done more to set the record straight with the Syrian authorities, I am satisfied that, when the concern first arose in mid-January 2003, DFAIT responded reasonably. Minister Graham used clear language in addressing the matter in his phone call to Minister Shara'a. DFAIT moreover took steps to inform Ambassador Arnous, Deputy Minister Haddad and General Khalil about the Canadian position.

It was reasonable, in my view, for Canadian officials to consider that the Syrian misperception about the "CSIS statement" had been cleared up. Those involved at DFAIT and CSIS did not consider it necessary to take the additional step of having CSIS convey directly to the SMI that Canada spoke with one voice in saying it wanted Mr. Arar back. While such a communication might have been prudent to ensure that all doubt was erased, I can understand why officials would have considered the minister-to-minister conversation sufficient. Further, there was nothing in the responses of the Syrian foreign minister, ambassador, deputy minister and general to indicate to Canadian officials that more needed

to be done. The matter appeared to have been resolved, at least until March 21, when Ambassador Arnous met with Ms. Catterall and Mr. Assadourian and raised the issue again.

The fact that the Syrian ambassador raised the issue again over two months after Minister Graham's phone call to the Syrian foreign minister is troubling. The assumption after that phone call had been that the Syrians understood that Canada had a single position. Indeed, the fact and content of the Minister's phone call had been recounted to Ambassador Arnous in January and he had appeared satisfied.

Thus, when he raised the issue again on March 21, there should have been concern that something had gone awry. Significantly, it was Ambassador Arnous who brought up the "CSIS statement" at that meeting. Moreover, he did not mention the Minister's phone call of January 16. It is possible that the Ambassador was still using the issue as a smokescreen to excuse the lack of action. However, the matter was murky at best. There was no way to be certain about what was really going on in the Syrian authorities' minds and whether they had made up the CSIS statement for their own purposes or really believed that CSIS did not want Mr. Arar returned. There was a reasonable concern that the Minister's phone call had failed to accomplish its purpose. Given the uncertainty, it seems to me that it would have been wise to pursue the matter further. It would not have been difficult for CSIS to clarify the matter, preferably in writing, with the SMI.

When assessing this situation, it is important to keep in mind the power structure in Syria. As pointed out by Daniel Livermore, Director General of ISD, the Syrian foreign minister wielded less influence than Syria's intelligence service, the SMI. Further, General Khalil, the head of the SMI, who was in charge of Mr. Arar's detention, preferred dealing with other intelligence agencies rather than with politicians or police forces. Thus, a view expressed to the SMI by Canada's intelligence agency, CSIS, might have carried more weight for the SMI than one expressed to the Foreign Ministry on the same subject. If CSIS said or was understood to have said that Canada did not want Mr. Arar back, that might have been accorded more importance than a statement by a foreign minister that the Canadian government wanted him back.

I recognize that it is by no means certain that a clarification by CSIS would have made any difference to the Syrian authorities. In situations such as this, it is difficult to know what may help and what may be to no avail. However, when a Canadian is being held in what could be expected to be unacceptable conditions, and the Canadian government has taken the position that it wants the person released, all Canadian agencies that have something to contribute should do

everything possible to support Canada's position. In many cases, the task of seeking release will fall solely to DFAIT. However, if, as in this case, circumstances are such that it would be helpful for other departments or agencies to assist and support release efforts, then those departments or agencies should become involved.

I would add that, even if the Syrian officials made up the "CSIS statement," there was still an advantage to setting the record straight, to prevent the fabricated excuse from confusing any future diplomatic entreaties for Mr. Arar's release. Furthermore, a false allegation should not be allowed to go unanswered. CSIS was in the best position to put this issue to rest.

In Chapter IX, I recommend the development of a process for addressing issues relating to Canadians detained abroad in terrorism-related cases. Part of that process calls for coordination of efforts among Canadian agencies and departments. Had there been a more formalized coordinated process in place in March of 2003, the issue of the "CSIS statement" could have been handled in a much more satisfactory way.

5.4
VISIT BY MEMBERS OF PARLIAMENT

On April 22, 2003, two Canadian members of Parliament, Marlene Catterall and Sarkis Assadourian, visited Mr. Arar while he was in custody in Syria.

The idea for the MPs' visit was conceived in late 2002 and travel plans were made for mid-March 2003. DFAIT briefed the two MPs about the case on March 11. However, approval from the Syrian government and the necessary visas were not received in time for the planned departure date and the trip had to be postponed until the April recess of Parliament.

DFAIT arranged for the MPs to deliver a letter from Minister Graham to the Syrian foreign minister expressing support for the visit and echoing the MPs' desire to see Mr. Arar released. In that letter, the Minister indicated that there was no Canadian government impediment to Mr. Arar's return.

Ms. Catterall also sought a letter from Solicitor General Wayne Easter stating that there was no evidence on which to charge Mr. Arar, as she was concerned about the possibility that the Syrian authorities understood that CSIS did not want Mr. Arar returned to Canada. The Solicitor General declined her request, stating that, in his view, his role was confined to law enforcement and national security and did not include representing Canada's interests abroad, a responsibility that fell to the Prime Minister and the Minister of Foreign Affairs. At the time, the government had no formal policy governing situations where investigative agencies were called on to assist in obtaining the release of a

Canadian detained abroad. In Chapter IX, I make recommendations for a process to address such situations.

Upon their arrival in Damascus, the two MPs were briefed by Ambassador Pillarella on the consular visits held up to that point, the fact that there had been no consular visits for over two months, and the conversations he had had with Syrian officials. He indicated that the Syrians had serious concerns that Mr. Arar might have been involved with al-Qaeda and might have attended a training camp in Afghanistan. Even though this latter information probably had its source in the Syrian interrogation of Mr. Arar, Ambassador Pillarella did not caution the MPs that the information was likely the product of torture.

On April 22, the two MPs, along with Ambassador Pillarella, met with Syrian officials. Ms. Catterall delivered Minister Graham's letter and made a plea for Mr. Arar's release. Deputy Foreign Minister Mouallem explained that the U.S. decision to remove Mr. Arar to Syria via Jordan had taken his government by surprise. The Syrian authorities had not asked for him; they had expected him to be sent to Canada. He indicated that, because of the international campaign against terrorism, Syria had had no choice but to take Mr. Arar and question him on his alleged affiliation with al-Qaeda. The MPs were advised that the Syrian authorities had finished their investigation and would be sending Mr. Arar to stand trial on charges of belonging to al-Qaeda and having received military training in al-Qaeda camps in Afghanistan.

The MPs and Ambassador Pillarella met with Mr. Arar for about fifteen or twenty minutes. The meeting was very controlled. Mr. Arar was permitted to speak in Arabic only and his responses were translated. The MPs were told to confine their questions to Mr. Arar's health and family matters. Mr. Arar appeared thin and somewhat disoriented. There was discussion about Mr. Arar's family, and the MPs told Mr. Arar that the Canadian government was doing everything possible to obtain his return to Canada.

After the meeting, Ambassador Pillarella had a debriefing session with the MPs and prepared a report of the day's events for Ottawa. In his report, he indicated that, had the MPs "been more fully briefed in Ottawa, they would have reconsidered undertaking their mission to Damascus."[28] This comment seems to suggest that, when the MPs learned that Syrian authorities considered Mr. Arar a threat, their faith in his case was shaken. In her testimony, Ms. Catterall denied that this had been said and stated that she did not know where the Ambassador had gained that impression. The Ambassador concluded his report by noting the remarkable level of co-operation by Syrian authorities, given that Mr. Arar was a Syrian citizen and the Syrians do not usually grant access in such cases.

This was not the only time that the Ambassador complimented the Syrians for allowing consular access to Mr. Arar.

The Ambassador's report on the MPs' visit was sent to DFAIT Headquarters and subsequently distributed to the RCMP and CSIS. Mr. Pardy gave authorization to distribute the report to the RCMP, but not to CSIS. I discuss the issue of the distribution of consular reports below. Here, I simply make the point that consular visits are intended to assist detainees, as was obviously the case on April 22, and it is the normal expectation that consular reports will be kept confidential. They are not intended to be used to investigate allegations against detainees. In Chapter IX, I recommend a process that uses a case-by-case approach to addressing the question of distributing consular reports to other agencies.

5.5
"ONE VOICE" LETTER

5.5.1
May 5 Memorandum

During the months of May and June 2003, DFAIT made a number of proposals for a letter from Canada to Syria seeking Mr. Arar's release. The thrust of those proposals was to send a message to Syria that Canada — including the RCMP and CSIS — spoke with one voice in seeking Mr. Arar's release and that there was no reason Mr. Arar could not be returned to Canada. In my view, the RCMP and CSIS should have been supportive of DFAIT's efforts to have Mr. Arar released from his illegal and inhumane detention in Syria. By that time, he had already been separated from his wife and two small children for over seven months.

By April 2003, Mr. Pardy's frustration about the lack of progress in obtaining Mr. Arar's release was growing. He expressed his disheartenment in an e-mail to Dr. Mazigh on April 12, 2003, indicating that not everyone in Canada agreed with what DFAIT was doing in support of Mr. Arar and that the Syrian authorities were aware of the fact. By then, the Syrians were not sending encouraging signals about Mr. Arar's situation. Consular access had become increasingly limited and, during the MPs' visit to Syria, Syrian officials indicated that Mr. Arar would be charged and tried shortly.

Mr. Pardy therefore prepared a draft action memorandum for the Minister of Foreign Affairs aimed at establishing a common understanding within the Government of Canada and producing a letter expressing a single point of view,

to be signed by the Solicitor General (the minister responsible for CSIS and the RCMP) and the Minister of Foreign Affairs, for use with the Syrian authorities.

The memorandum, dated May 5, 2003, was circulated to other agencies, including the RCMP and CSIS. It emphasized that Mr. Arar was not wanted in Canada for any criminal activity and provided some background on his case. It also outlined the two elements that Mr. Pardy believed were required if there was to be any hope of Mr. Arar's release: a clear statement, preferably signed by the Solicitor General and the Minister of Foreign Affairs, that Canada had "no evidence" that Mr. Arar was or had been a member of al-Qaeda, and a statement that the information used by the United States to remove Mr. Arar to Syria had not originated with Canadian authorities, since Canada did not have any information indicating that he belonged to al-Qaeda.

On May 8, a meeting of DFAIT, CSIS and RCMP officials was held to discuss Mr. Pardy's memorandum, but no agreement was reached. In a briefing note prepared after the meeting, CSIS advised the Solicitor General "very strongly" against signing a joint letter.[29] Among other things, CSIS was uncomfortable with a statement that there was "no evidence" linking Mr. Arar to al-Qaeda. Also, as I state earlier, there was concern that Mr. Arar's release might send the wrong message to the United States, the country that had rendered Mr. Arar to Syria, about Canada's motives and resolve in the fight against terrorism. CSIS wanted to make it clear to the Solicitor General that there was "political jeopardy" in signing a joint letter and that bringing Mr. Arar back to Canada was going to be a political "hot potato" with American authorities.[30] The briefing note failed to bring the following points to the Solicitor General's attention:

- Mr. Arar was imprisoned in a country where authorities had a propensity to torture people.
- [***].
- Mr. Arar, a Canadian citizen with a wife and two young children, had been in Syria for a long time.
- The United States had removed Mr. Arar to Syria in very questionable circumstances.

Jack Hooper testified he was certain DFAIT would have raised these matters with its Minister. DFAIT had expertise in consular issues, whereas CSIS had expertise in security intelligence. Its advice to the Solicitor General had been restricted to those matters that related to the duties of the Solicitor General.

A follow-up meeting involving the same agencies was held on May 12, but again, no agreement was reached. The RCMP and CSIS balked at a statement that

Canada had "no evidence" that Mr. Arar was a member of al-Qaeda. Mr. Pardy agreed to redraft the memorandum and supply a copy to all parties before submitting it to his Minister.

5.5.2
June 5 Memorandum

In a memorandum to his Minister dated June 5, Mr. Pardy abandoned the suggestion of a joint letter from the Solicitor General and the Minister of Foreign Affairs and recommended instead that Minister Graham send a letter to the Syrian foreign minister. The proposed draft letter contained a plea for Mr. Arar's return on humanitarian and compassionate grounds, as well as an assurance that there was no Canadian government impediment to Mr. Arar's return to Canada, but did not include the "no evidence" reference. The language used was virtually identical to that in the Minister's earlier letter to the Syrians delivered by the two MPs in April, a letter that had failed to draw a formal response from Syrian authorities or improve consular access to Mr. Arar.

5.5.3
June 17 Proposal

On June 12, Minister Graham met with Dr. Mazigh, who requested that the Government of Canada make a clear statement that it had no evidence linking Mr. Arar to terrorism and that it wanted him returned to Canada immediately. She indicated that she understood that not everyone in government wanted Mr. Arar returned, and that a letter from CSIS to the Syrian authorities would have more clout.

In response, the Minister's office revised the draft letter prepared by Mr. Pardy, adding, "I assure you that there is no evidence he is involved in terrorist activity"[31] to the statement concerning there being no impediment to Mr. Arar's return to Canada. It is understandable that the Minister was looking for more robust language in what would now be his second letter to the Syrian minister of foreign affairs, since the earlier "no impediment" language had seemed to have no effect.

Mr. Pardy was asked to seek concurrence from the Solicitor General, the RCMP and CSIS on the proposed language. On June 18, the RCMP responded, with CSIS approval, by suggesting the following new language for a letter to Syria:

> Mr. Arar is currently the subject of a national security investigation in Canada. Although there is not sufficient evidence at this time to warrant Criminal Code

> charges, he remains a subject of interest. There is no Canadian government impediment to Mr. Arar's return to Canada.[32]

The proposed language was not helpful. The problem, of course, was that Mr. Arar was not "the subject of a national security investigation." In fact, had such a message been sent to the Syrians, it might have actually made matters worse for Mr. Arar. Deputy Commissioner Loeppky himself described this language as counter-productive to efforts to seek Mr. Arar's return to Canada. Mr. Pardy testified that the position of the RCMP and CSIS seemed to have hardened over the months.

In the end, Minister Graham did not send another letter. Mr. Pardy shifted his focus away from front-line government personnel and appealed to the Prime Minister to become involved. As I describe below, he succeeded.

In reviewing the roles of the RCMP and CSIS in DFAIT's efforts to obtain a "one voice" letter, it is important to bear in mind Mr. Arar's status in the Canadian investigation. The RCMP was the lead investigative agency with respect to Mr. Arar. RCMP witnesses at the Inquiry testified that Mr. Arar had not been suspected of any criminal offence. He had not been the subject or target of the Project A-O Canada investigation, but a person of interest, whom the Project had wanted to interview as a witness because of his associations with certain individuals.

5.5.4 RCMP's Role

The RCMP should have been supportive of DFAIT's efforts to obtain a "one voice letter" seeking Mr. Arar's release. I recognize that the RCMP is a law enforcement agency and that, clearly, the primary responsibility for making efforts to obtain Mr. Arar's release fell to the Minister of Foreign Affairs and DFAIT. However, there were a number of circumstances in May and June 2003 that should have prompted the RCMP to support those efforts. To begin with, the RCMP knew that Mr. Arar was being held in Syria, a country known for its abusive treatment and beating of prisoners, as well as its harsh detention conditions. The RCMP also knew, or should have known, that the likelihood of a fair trial in Syria was remote, since Syria's reputation in this regard was widespread. It was reasonable to assume that Mr. Arar's human rights were being violated and would be further violated in the future. Certainly, DFAIT was very concerned.

The RCMP also knew, or should have known, that it had provided American agencies with a good deal of information about Mr. Arar (although it might not

have appreciated at this point just how inaccurate some of it was) and that it was possible that the information had been used to send Mr. Arar to Syria. Certainly, American officials referred on several occasions to having relied on Canadian information. By the time the "one voice" letter was being sought, the RCMP was aware that the American authorities had removed Mr. Arar to Syria using the questionable practice of extraordinary rendition, when they could have instead removed him to Canada, a few hundred miles away. Most importantly, the RCMP knew that Canada wanted Mr. Arar returned. The Minister of Foreign Affairs, who next to the Prime Minister was the most senior individual politically accountable for Mr. Arar's fate, had formally asked Syria for Mr. Arar's release. Canada's position unquestionably was that it wanted Mr. Arar returned.

In view of all these circumstances, the RCMP should have been as supportive as possible of the attempts to obtain Mr. Arar's release.

I can understand the RCMP's reluctance to sign an unequivocal statement directed at a foreign agency that there was "no evidence" that Mr. Arar was a member of al-Qaeda or connected to terrorist activities. In fairness, the RCMP must be very careful in making this kind of absolute statement. Moreover, it did have some information that raised its interest in Mr. Arar's associations, such as his meeting at Mango's Café with Mr. Almalki on October 12, 2002. That said, the RCMP did not suspect Mr. Arar of having committed any offence.

While the RCMP was invited to provide alternative language to the June 17 proposal, Deputy Commissioner Loeppky indicated that the RCMP "[did] not believe it would be advisable for Mr. Graham to send this letter to his Syrian counterpart"[33] and, as discussed, the language proposed was not helpful. There were surely ways the RCMP could have fairly stated its position, yet helped Mr. Arar. For example, the letter could have said that Mr. Arar was not the subject of a national security investigation in Canada. That would have been true. Moreover, it could have indicated that the RCMP, the lead investigative agency in Canada with regard to Mr. Arar, supported the government's request for his return. Having the Solicitor General sign the letter might have sent this latter message. In any event, given the SMI's negative attitude toward politicians, it would have been helpful for the RCMP, the lead Canadian investigator, to communicate its support for Minister Graham's position.

Before leaving the issue of the RCMP's role, there is one further point I wish to make. Unfortunately, some senior RCMP officers might have made decisions about how to respond to the DFAIT requests for assistance on the basis of inaccurate information about Mr. Arar.

A briefing note to the Commissioner dated April 30, 2003,[34] which provided a short description of Mr. Arar's status, contained some of the same inaccurate

information that the RCMP had provided to the American agencies about Mr. Arar. It stated that Mr. Arar had "refused" to be interviewed by the RCMP (referring to January 2002) and had left for Tunisia "shortly" after being approached for an interview. It also indicated that Mr. Arar was a "highly connected individual associated with several suspected criminal extremists." These statements are a good example of how inaccurate information can, over time, become the accepted truth and be passed on as such. Mr. Arar had not refused an interview or left "shortly" after being approached about one, and it was an overstatement to say that he was highly connected to several suspected criminal extremists. Moreover, the briefing note also said that Mr. Arar had "volunteered" that he had received training in a camp in Afghanistan, referring to his statement to Syrian interrogators. The note did not mention that this statement was likely the product of torture and therefore of dubious reliability, or that his attendance at a camp in 1993 carried a totally innocent connotation. Thus, senior officers in the RCMP might have had a more negative view of Mr. Arar's case than was warranted and been less supportive of DFAIT's release initiatives than would have been the case had they been supplied with accurate information.

5.5.5 CSIS' Role

CSIS should have been supportive of DFAIT's initiatives to obtain a letter that would assist in obtaining Mr. Arar's release from Syrian custody. I can understand that, like the RCMP, CSIS was concerned about approving a letter that would unequivocally assert to the Syrians that there was "no evidence" that Mr. Arar was linked to al-Qaeda or terrorist activities. However, in my view, it could have taken steps to assist the release efforts.

It was well known that the SMI, which was holding Mr. Arar, paid more heed to intelligence agencies than to politicians or even police officers. CSIS also knew that Canada's official position was that it wanted Mr. Arar returned. It was in a unique position among Canadian officials and agencies to send a message to the SMI that might have carried weight.

Although a letter signed by the Solicitor General, the minister responsible for CSIS, could have been very helpful in the endeavour to obtain Mr. Arar's release, CSIS advised the Solicitor General "very strongly" against signing a letter after the May 8, 2003 meeting to discuss Mr. Pardy's proposal. While CSIS was against the "no evidence" language in the proposed letter, a different letter, in which the disputed language was modified or even removed to take institutional concerns into account, could nonetheless have been drafted.

The Inquiry record reveals that CSIS, for reasons of its own, preferred that Mr. Arar not return to Canada. On June 5, at the time Mr. Pardy's latest draft letter was being forwarded to Foreign Affairs Minister Graham, Jack Hooper, Assistant Director of Operations for CSIS, called an assistant deputy minister at DFAIT to discuss DFAIT's efforts in general to obtain the release of terrorism-related detainees abroad. His conversation that day and other evidence indicate that CSIS was concerned that, if detainees such as Mr. Arar were returned to Canada, CSIS would require more resources to monitor individuals. Mr. Hooper also testified that, during the June 5 call, he had been thinking that, if Mr. Arar returned to Canada and made allegations of torture, CSIS could encounter difficulties in engaging the full process in security certificate cases. By this, he meant that efforts to deport individuals from Canada to Syria might be impaired because of an increased concern that Syria engaged in torture. Although this concern had been on his mind on June 5, Mr. Hooper said that he had not raised it in the telephone conversation.

The important point here is that, throughout the time DFAIT was trying to obtain a "one voice" letter, CSIS had reasons to prefer that Mr. Arar not return. While it did not have an "official" position opposing Mr. Arar's return, it did nothing to assist DFAIT. Indeed, it advised the Solicitor General not to sign a "one voice" letter. And although Jack Hooper apparently did not attempt to interfere with a proposed letter to be signed by the Foreign Affairs Minister, CSIS joined with the RCMP on June 18 in proposing inaccurate language for the letter, to the effect that Mr. Arar was the subject of a national security investigation. I find that CSIS should have offered support to DFAIT in its efforts to have Mr. Arar released. The institutional concerns it raised could not justify a failure to be supportive of the Canadian position that Mr. Arar be released forthwith.

5.5.6 Summary

I have discussed the series of events relating to the "one voice" letter in some detail because it is an excellent illustration of the reason Canada needs a protocol to coordinate the activities of all Canadian agencies that deal with individuals detained abroad in connection with terrorism-related matters. In Mr. Arar's case, Canada's official position was clear: Mr. Arar should be released and returned to Canada. The RCMP and CSIS could have been supportive of efforts to obtain his release without compromising the integrity of the Canadian investigation or saying anything inaccurate.

I note that there appears to be strong support for establishing a system under which all agencies involved in a case such as Mr. Arar's would consult and develop a coordinated course of action. Decisions would be made and any disagreements among agencies resolved in a politically accountable manner. Once a course of action was determined, all agencies would be fully supportive.

This proposed regime was set out in a presentation prepared by Mr. Pardy at the end of February 2003, and Mr. Hooper discussed its main features in his telephone call with DFAIT on June 5, 2003. In Chapter IX, I recommend that a protocol along the above lines be developed.

5.6
PRIME MINISTER'S LETTER

When, towards the end of June 2003, there was still no consensus for a letter from the Minister of Foreign Affairs to the Syrian foreign minister and it appeared unlikely that the Solicitor General would sign any letter, DFAIT officials put forward the idea of having the Prime Minister send a letter. It was felt that such a letter would send a strong message to the Syrians that all Canadian agencies, including the RCMP and CSIS, wanted Mr. Arar released.

At this same time, DFAIT was involved in preparations for the Prime Minister to send a special envoy, Senator Pierre De Bané, to Saudi Arabia in relation to another matter involving a Canadian citizen in detention, William Sampson. The senator was asked and agreed to deliver a letter from the Prime Minister of Canada to the President of Syria.

The Prime Minister's letter, dated July 11, 2003, asked that Mr. Arar be released and returned to Canada. In it, the Prime Minister stated: "I can assure you that there is no Canadian government impediment to his return."[35] This language was acceptable to the RCMP and CSIS. The letter did not say that Mr. Arar was the subject of a national security investigation in Canada.

The senator travelled to Saudi Arabia and then Syria. On July 22, he delivered the Prime Minister's letter to the Syrian deputy foreign minister and was assured that the letter would be brought directly to the attention of the President of Syria.

Thus, in the end, Canada did speak with "one voice." One would hope that the message the Syrians received was that all Canadian agencies supported the request for Mr. Arar's release.

I have no way of knowing for sure what impact the Prime Minister's letter had, or whether the three and a half months taken to obtain a "one voice" letter made any difference in terms of when Mr. Arar was released. In any event, the point I wish to make again is that, if Canada decides at the senior political

level that it wants a detainee released, Canadian agencies should be as supportive as possible of that decision.

6.
CONSULAR SERVICES

6.1
CONSULAR VISITS PRIOR TO AUGUST 2003

Mr. Arar was in Syrian custody from about October 9, 2002 to October 5, 2003. During that time, he had a total of nine consular visits. The Canadian consul, Léo Martel, was the only person permitted access to Mr. Arar, with the exception of the visit by the two MPs and Ambassador Pillarella on April 22, 2003. The last consular visit, on August 14, 2003, raises issues that are different from the others and I discuss it separately, in Section 6.3 below.

I am satisfied that Mr. Martel and Ambassador Pillarella did everything reasonably possible to obtain as much access to Mr. Arar as possible. The background relative to their requests for access to Mr. Arar is very important. Mr. Arar is a dual citizen of Canada and Syria. As a Canadian citizen, Canada quite properly asserted that Mr. Arar was entitled to consular services, including visits from Canadian consular officials, while in custody.

Syria, however, held a very different view of the matter. Syria takes the position that an individual born in Syria is a Syrian citizen only; it does not recognize any other citizenship. Thus, because Mr. Arar was born in Syria, the Syrian government did not recognize his Canadian citizenship and, consequently, did not accept that he had a right to Canadian consular services. As Syria would have it, Canadian consular officials had no right to any information about Mr. Arar, including the reasons for his detention, and no right of access to him. Leaving aside the legality of this position, the practical result was that Mr. Arar was in Syrian custody and Canadian officials trying to provide him with consular services were subject to the Syrian authorities' wishes or even whims. While some may suggest that pressure could have been brought by Canada in this respect, the fact remains that the Syrians controlled the situation and would decide what they would permit as they saw fit. All analysis of what Canadian consular officials did in respect of Mr. Arar must be viewed against this background.

The Syrian position with respect to dual nationals was not newly adopted for Mr. Arar. It is well known that Syria has taken this position for years. According to evidence I heard, records at the Canadian Embassy in Damascus

showed that Syrian authorities had not granted Canada consular access to a Canadian/Syrian dual national for at least 14 years.

In view of this practice, it was a welcome surprise when, on October 22, General Khalil indicated that a consular visit with Mr. Arar could take place the following day and that there could be regular consular visits.[36]

As it turned out, consular visits were permitted far less frequently than General Khalil had initially intimated. As mentioned, there were nine visits, spread over 10 months, as follows: October 23 and 29, November 12 and 26, December 10, 2002, January 7, February 18, April 22 (the MPs' visit) and August 14, 2003. As time passed, the Syrian authorities became much less responsive to Mr. Martel's requests for visits. Phone calls were not returned and Mr. Martel judged, reasonably I believe, that the Syrian authorities might refuse access completely if he pushed too hard for more visits. Mr. Martel had to walk a rather fine line in seeking access without unduly aggravating the Syrians, who were inconsistent and somewhat unpredictable in their responses to requests. It must be remembered that, in the first part of 2003, Syria was preoccupied with the situation in Iraq and responding to Canadian requests for visits with Mr. Arar might have fallen far down the list of priorities.

In March 2003, Mr. Martel was informed that, in future, requests for visits would be dealt with by the Ministry of Foreign Affairs rather than the Syrian Military Intelligence. No reason was given for the change. However, it was not an auspicious sign for Mr. Arar. Experience indicated that the Ministry was much more bureaucratic and very slow to respond to requests for visits. In point of fact, after this time, only two visits took place and both were the result of somewhat unusual circumstances. The first, on April 22, was the visit from the two MPs. Four months elapsed before the other, on August 14. That visit came shortly after a public outcry in response to a report issued by the Syrian Human Rights Committee, a human rights organization based in London, United Kingdom, that Mr. Arar had been tortured. I come back to the August 14 visit below.

I will not go through the steps Mr. Martel took to obtain consular access to Mr. Arar for each of the visits. Suffice it to say that I believe he acted reasonably in the circumstances and, in the end, was able to visit Mr. Arar far more often than one would have expected, based on previous experience with Syrian authorities.

Mr. Arar's counsel raised concerns regarding the way in which Mr. Martel and his superior, Ambassador Pillarella, had reported on the substance of the consular visits. It was suggested that the reports of the visits had not always been accurate or complete, that they had brought "optimism rather than

scepticism" to the evaluation of Mr. Arar's position, and that they had failed to describe the obvious limitations about what could be learned in the controlled atmosphere of the visits. The most obvious example of these failures, it was suggested, was the report on the first consular visit.

In my view, the reports, when reviewed as a whole, were satisfactory. It is true that, in certain instances, they could have contained more detail or different insights, but they were reasonably accurate. They revealed that the visits were very controlled and that what Mr. Arar said had to be taken with a "grain of salt." While the first report did not include all of the details about Mr. Arar's condition, it adequately painted a picture of someone who was frightened and submissive and who was being forced to say things he did not believe. In fact, properly interpreted, that report supported the conclusion that Mr. Arar had likely been tortured during the preceding period. It provided sufficient detail to assist a reader in making a proper assessment of Mr. Arar's circumstances and the likelihood that he had been tortured. As I discuss above, however, it would have been helpful if DFAIT officials had specifically spelled out that assessment, either in this report or elsewhere, to avoid any misunderstanding among Canadian officials on this issue.

Obviously, when a Canadian is detained in a country with a questionable human rights record, such as Syria, it is important that consular officers be properly trained to recognize and report on indications of abuse and torture. Mr. Martel testified that he had no training in this respect and that DFAIT did not offer consular officers training in observing the signs of torture. Since the culmination of the Arar matter, DFAIT has implemented a training program to address this situation. In Chapter IX, I recommend that consular officials posted to countries where there is a serious possibility of torture receive training on how to conduct interviews in prison settings in order to determine as effectively as possible whether torture has occurred.

It was also pointed out that Mr. Martel's reports had not described the inhumane conditions in which Mr. Arar had been held. It must be borne in mind that Mr. Martel was prohibited by the Syrian authorities from exploring issues such as Mr. Arar's detention conditions during his consular visits. Mr. Martel was operating under significant limitations, and I do not believe that there was much more he could have done to elicit further information from Mr. Arar. Mr. Martel's main goal was to procure as many consular visits as possible. Asking questions of which the Syrian authorities clearly did not approve could have jeopardized that goal.

Mr. Arar's counsel also raised a concern that neither Mr. Martel nor the Ambassador had sought a confidential or private meeting with Mr. Arar. In

making this point, they recognized that such a request might well have been refused. However, they suggested that the request should have been made and objection taken to a refusal. I note that Mr. Martel's judgment was that such a request would certainly be refused and it was therefore better not to run the risk of aggravating the Syrians by asking.

I think that was a reasonable judgment. In most cases, it probably makes sense for Canadian officials to make objections if a country fails to provide visits, in order that Canadians not be seen as condoning improper actions without at least voicing a protest. However, protesting may not always be the wisest approach. Clearly, in situations such as these, there are judgment calls to be made about what to do or not do. Ambassador Pillarella and Mr. Martel were in Syria — on the ground, so to speak. Their judgment, based on experience, was that it was best not to push a point they saw as hopeless. I can see the sense in that. In circumstances such as these, discretion must be exercised in deciding whether to assert a position for the purpose of maintaining a principle, or follow an approach that, in the short run, may be in the best interests of a particular detainee.

6.2
DISTRIBUTION OF CONSULAR REPORTS

After each visit with Mr. Arar, Mr. Martel prepared a consular report describing the visit, how Mr. Arar had appeared, and what Mr. Arar had said. Many of the conversations related to Mr. Arar's family and Mr. Martel sometimes recorded messages for Dr. Mazigh and the children.

As a general rule, the reports were reviewed by Ambassador Pillarella and then forwarded to the Consular Affairs Bureau in Ottawa. Once in Ottawa, they were made available to DFAIT ISI. It was understood by everyone involved that the reports were not to be distributed outside of DFAIT without the approval of the Director General of Consular Affairs, Gar Pardy.

ISI provided the RCMP with consular reports relating to three consular visits with Mr. Arar, on October 23, 2002 and April 22 and August 14, 2003. It also appears that it provided the RCMP with the report of Canadian consul Maureen Girvan's consular visit with Mr. Arar at the MDC in New York on October 3, 2002. In addition, it seems likely that ISI provided reports of the consular visits of January 7 and April 22, 2003 to CSIS. Mr. Pardy accepted responsibility for the distribution of all of these consular reports to the RCMP, but not to CSIS.

DFAIT publishes a booklet, *A Guide for Canadians Imprisoned Abroad*. Under the heading "Protection, Advice and Assistance," the Guide as it existed during the relevant period assured detainees that if they chose to talk to

Canadian officials, any information given would remain completely confidential and would be protected under Canada's *Privacy Act*. It went on to say that the information would not be passed on to anyone, other than consular officials concerned with the detainee's case, without the detainee's permission.

The Government and some of those who sought to explain the disclosure of consular information to those outside the Consular Affairs Bureau cited section 8 of the *Privacy Act*[37] as providing the necessary authority. Subsection 8(1) of that Act prohibits the disclosure of personal information under the control of government without consent, except as authorized in the section. Subsection 8(2) sets out exceptions to the non-disclosure, three of which, it has been argued, are relevant to the disclosures in this case: paragraphs 8(2)(a), (e) and (m) permit disclosure for purposes consistent with the use for which information was obtained, for purposes of enforcing a law, and for purposes that are in the public interest.

When asked why he had authorized DFAIT to share information from Mr. Arar's consular visits, Mr. Pardy gave two, interrelated reasons. The first was consent. He suggested that, during Ms. Girvan's consular visit at the MDC in New York on October 3, 2002, Mr. Arar had consented to disclosure of any information for purposes that would assist him. The second was the "consistent use" exception provided for in paragraph 8(2)(a) of the *Privacy Act*. Mr. Pardy said that the purpose behind providing the information to the RCMP had been to hopefully dissuade officers from visiting Mr. Arar in Syria, his thought being that Mr. Arar would be better off if the RCMP did not visit. According to that reasoning, it might be said that the information had been provided for "a use" consistent with the purpose for which the information had been obtained in the first place: to assist Mr. Arar.

I am satisfied that Mr. Pardy was acting in good faith in authorizing the provision of the consular reports to the RCMP and that he believed he had the necessary authority to do so. However, there are problems with both of the bases on which he proceeded.

In regard to consent, I think it is a stretch to conclude that, during the consular visit in New York, Mr. Arar consented to the release of all future consular reports, particularly to investigative agencies such as the RCMP. In my view, his conversation with Ms. Girvan, in which he asked for her assistance in addressing his particular circumstances at the time, that is, his detention in the MDC, cannot fairly be interpreted to have had the reach suggested by Mr. Pardy. Certainly, Ms. Girvan did not interpret it that way.

The second reason given by Mr. Pardy for sharing the reports was to assist Mr. Arar by dissuading the RCMP from going to Syria to interview him. The

problem is that the people who received the reports, such as Inspector Cabana of Project A-O Canada, did not understand that to be the reason they were being provided. The investigators viewed the reports as providing information relevant to their investigations rather than a basis for "assisting" Mr. Arar. Mr. Pardy's reasoning does not appear to have been communicated to the recipients and there was no effort to ensure that the reports were used only to assist Mr. Arar.

It was argued before me that the statutory authority to share the consular reports found in the exemptions in subsection 8(2) of the *Privacy Act* trumps the assurance of confidentiality to detainees found in the consular guide as it was worded then. From a technical legal standpoint, that argument may be right. However, I must say the result is rather distasteful. The guide stated that anything said during a consular visit would not be shared without the detainee's permission. I expect that most detainees would have understood "sharing" to include providing the information to agencies investigating them. I note that the guide has since been revised to state that the information "will not *normally* be passed on to anyone" (my emphasis). If it is the intention that discussions during consular visits may be shared in some circumstances, then the guide should set out that intention in very clear language and should specify the circumstances in which information will be shared and with whom.[38] Moreover, in some cases, such as Mr. Arar's, the detainee may not see the guide or be told about its contents. If it is contemplated that information obtained during a consular visit may be disseminated outside the Consular Affairs Bureau, consular officials should clearly inform detainees of the uses that may be made of information given during a visit.

In Chapter IX, I make recommendations relating to the provision of consular services for Canadians detained abroad in connection with a terrorism-related investigation. A key element of those recommendations is directed at coordinating the actions of all Canadian government departments and agencies involved in responding to detentions of this sort. Included is a recommendation that consular officials make clear to detainees the circumstances, if any, in which information obtained during a consular visit may be provided to others outside Consular Services.

6.3
AUGUST 14 CONSULAR VISIT

6.3.1
Background

During June, July and early August 2003, Ambassador Pillarella made repeated requests for the resumption of consular access to Mr. Arar. He sent a diplomatic note and met with high-ranking Syrian officials, to no avail.

Also in the summer of 2003, the London-based Syrian Human Rights Committee (SHRC) issued its 2003 annual report on the human rights situation in Syria. In the chapter dealing with unlawful detentions, the report stated that the SHRC had received confirmed reports that "Mr. Arar [had] been subject to severe torture and intensive interrogation and charged with cooperating with Al-Qaeda."[39]

Moreover, on July 29, 2003, the SHRC wrote Dr. Mazigh with details about Mr. Arar's detention. It indicated that Mr. Arar had suffered heavy and severe torture in the initial stage of interrogation and added: "At present, he receives torture and abuse from time to time as a daily routine of the Syrian prison practices against political detainees."[40] Dr. Mazigh forwarded the letter to DFAIT. The details in that letter prompted DFAIT to continue to push for immediate consular access. The last consular visit had been the visit by the two MPs on April 22, and the last time Mr. Martel had seen Mr. Arar had been over five months earlier, on February 18.

The SHRC's letter led to a flurry of events that eventually resulted in a consular visit on August 14. On August 7, Dr. Mazigh, accompanied by Alex Neve from Amnesty International, held a press conference at which she outlined the allegations of torture contained in the letter. That same day, Minister Graham's office contacted Ambassador Pillarella, directing that he try again to get consular access to Mr. Arar. Also on the same day, John McNee, Assistant Deputy Minister for the Middle East, registered DFAIT's concerns about the new allegations with the Syrian ambassador to Canada. Mr. McNee also requested that consular access be provided and that Mr. Arar be returned to Canada. In the meantime, DFAIT tried to arrange a call between Minister Graham and his Syrian counterpart in regard to the torture allegations.

On August 12, Ambassador Pillarella was told that the Canadian consul would be allowed to meet with Mr. Arar. The details would be sorted out at a meeting the Ambassador was to have with General Khalil on the morning of August 14.

In an e-mail message to Ottawa reporting on the proposed meeting with Mr. Arar, Ambassador Pillarella made the troubling comment that the meeting "should help us to rebut the recent charges of torture,"[41] referring to the SHRC report. I describe this as a "troubling" comment because, on its face, it reveals an interest in disproving the allegations of torture, hardly the attitude one would expect from the Canadian ambassador with respect to allegations of torture against a Canadian citizen. In his testimony, Ambassador Pillarella denied that this was what he had intended. He said that his choice of words had been unfortunate and that he had actually meant that the allegations of torture in the SHRC letter had been inconsistent with observations made during the eight consular visits made to that point. Mr. Arar had not presented visible signs of torture during those visits. Ambassador Pillarella testified that, while there might be general allegations of torture, that did not mean that torture occurred in every case. Mr. Martel, who conducted the August 14 visit, testified that he had not been instructed to try to "rebut charges of torture." Rather, his role had been to visit detainees, observe what he could, including signs of mistreatment, and report back.

As planned, Ambassador Pillarella met with General Khalil on August 14. During their two-hour meeting,[42] the Ambassador obtained the general's agreement for a consular visit that day. Without the evidence of the Syrian authorities, it is impossible to be sure why consular access was granted at this point. What is clear is that Ambassador Pillarella had been attempting to obtain access to Mr. Arar for months, without success. Two things may have entered into the Syrian authorities' decision to grant access on August 14. First, the Prime Minister's letter seeking Mr. Arar's release had been delivered on July 22. While that letter might have played some role in the decision to grant access, it seems unlikely that it was the trigger, as the Syrians had had the Prime Minister's letter for over two weeks by then and had not responded.

Interestingly, however, permission for access followed almost immediately on the heels of the publicity concerning the SHRC report and letter to Dr. Mazigh. It appears more likely that the general permitted access to Mr. Arar because of the spotlight on the allegations of torture and the resulting public pressure. Since the SHRC letter had said that Mr. Arar was receiving torture and abuse "as a daily routine," the general might have allowed access with a view to showing that Mr. Arar did not exhibit any signs of physical beatings and thereby "rebutting" the allegations of torture. Whatever the reason, on August 14, the Syrian authorities permitted access to Mr. Arar for the first time in close to four months.

6.3.2 Visit

There are three sources of information about the consular meeting of August 14: Mr. Martel's testimony, the notes he made during the meeting, and the typed consular report. Mr. Arar has not testified. His version of what transpired may differ from the evidence at the Inquiry. Indeed, in statements made since his return to Canada, Mr. Arar has disputed some of the details in Mr. Martel's account. However, Mr. Arar's statements are not evidence and, therefore, the discussion that follows is based solely on the evidence heard at the Inquiry. If Mr. Arar were to testify, my analysis of what occurred might change accordingly.

Mr. Martel met with Mr. Arar for about thirty minutes in the presence of General Khalil, two aides and an interpreter. In his report, Mr. Martel indicated that he had questioned Mr. Arar as much as possible about his detention conditions. Mr. Arar had been able to express himself freely at times; however, at some points, Mr. Martel had had difficulty determining whether Mr. Arar's statements had been made freely or prompted. As to his treatment, Mr. Arar had said that conditions had been more difficult in the past and that he did not want adverse media coverage, as he felt this would harm his case. Mr. Martel's report went on to say that Mr. Arar had indicated that "the Press will know the truth when I return home,"[43] suggesting, of course, that he did not consider it wise to provide details while still in Syrian custody. The report also stated that Mr. Arar had said that he had not been beaten or tortured or paralyzed, but that his long detention had destroyed him mentally. Mr. Arar had indicated that, as far as he knew, he was not receiving worse treatment than other prisoners.

During the visit, General Khalil indicated that Mr. Arar's case would be going to civilian court in a week and Mr. Arar could choose his own lawyer. Mr. Arar asked the general what law he had broken and reaffirmed that he did not belong to any terrorist organizations. When asked about future visits, the general said he would have to seek higher authority. Shortly after the August 14 consular visit, Mr. Arar was moved from the Palestine Branch to Sednaya, a facility where, by all reports, the conditions of imprisonment were much less severe. Mr. Arar remained at Sednaya until his release on October 5, 2003.

There are two concerns that arise in connection with the August 14 consular visit. The first relates to the adequacy and accuracy of the report that Mr. Martel prepared after the visit. That report, of course, became the official record of what had been said during the visit, yet it lacked some of the detail relating to Mr. Arar's treatment that was included in the handwritten notes taken during the consular visit.

Two omissions are noteworthy. In his notes, Mr. Martel indicated that Mr. Arar had said that the size of his cell was three by six by seven feet and that he slept on the ground. Mr. Martel did not include this information in his report. The failure to note the cell size, in particular, was unfortunate. The fact that Mr. Arar had been kept in a cell that size for close to a year should have been very alarming to consular officials. The cell size lends added significance to Mr. Arar's statement that he had been "mentally destroyed," particularly as the statement was made in a situation in which he obviously did not feel free to make too many negative comments about his treatment. In order to present a full and accurate picture of how serious Mr. Arar's circumstances were, it would have been very helpful for Mr. Martel to have included the details concerning the cell size in his report. According to expert witness Henry Hogger, when he was an ambassador, he would have been surprised to have not been informed of such circumstances if the information had been relayed to his consul. He would have wanted to inform his foreign ministry that a citizen was being held in a cell that size. He indicated that it was the type of information that should be included in a consular report and that, as an ambassador, he would have wanted it conveyed to him.

In his handwritten notes on the consular visit, Mr. Martel also recorded the words "very beginning very little" after the words "I have not been paralyzed — not beaten — not tortured."[44] Mr. Martel stated that the note "very beginning very little" pertained to Mr. Arar's response to a question about whether his Syrian jailers were causing problems for him or making life difficult, and not to the statement that he had not been beaten or tortured. In any event, Mr. Martel did not include the words "very beginning very little" in his report. He merely recorded that Mr. Arar had said he had not been paralyzed, beaten or tortured.

The second concern regarding the August 14 consular visit is that DFAIT distributed the report on the visit to the RCMP. In section 6.2 above, I discuss the authority relied upon for doing this. Accepting for the moment that distributing the report was authorized, the problem is that there was no accompanying assessment warning of the difficulties in relying upon Mr. Arar's statement, as reported, that he had not been tortured. One would expect that, in distributing the report, particularly to those investigating Mr. Arar, DFAIT would have pointed out the constraining circumstances of the visit and the need for great caution in relying upon what Mr. Arar had said.

It must be borne in mind that, in November 2002, DFAIT had provided the RCMP with the *bout de papier* containing Mr. Arar's allegedly incriminating statement to Syrian authorities. Although there had been a serious concern at that time that the statement had been the product of torture, DFAIT had failed to

bring that concern to the attention of the RCMP. That unfortunate problem, on which I have already commented, was compounded by the distribution of the report on the August 14 consular visit. That report indicated that Mr. Arar had said that he had been mentally destroyed; however, it also quoted him as saying he had not been beaten or tortured. Although Mr. Martel testified that he had approached this statement with scepticism, he made no note of his scepticism in his report. Moreover, when DFAIT[45] provided the report to the RCMP, there was no mention made of the circumstances under which the consular visit had taken place and the need for great care in attaching weight to Mr. Arar's statement. Thus, leaving aside the question of whether the report should have been distributed in the first place, distributing it to the RCMP might well have added to a false perception that Mr. Arar's statement referred to in the *bout de papier* had not been obtained by torture.

I repeat here what I have said several times throughout this Report. It is essential that officials take great care to be accurate and precise when they provide information to others about an individual or an investigation in relation to national security matters. They must be thorough and endeavour to ensure that they do not create unintended perceptions on the part of the recipients. Mr. Arar's alleged statement to the SMI, a summary of which was given to Ambassador Pillarella in November 2002, might have been interpreted by some officials, particularly investigators, as an indication that Mr. Arar had been involved with terrorist organizations. If the statement was the product of torture, there would obviously be a serious concern about reliability. Distributing a consular report that could be interpreted as indicating that Mr. Arar had said that the alleged statement had not been obtained by torture could be very prejudicial to Mr. Arar and could create a false sense of reliability in the minds of investigators. Those who might otherwise have considered that there was no evidence that Mr. Arar had been involved in any terrorist activity might have a new basis for suspicion — suspicion derived from information of dubious reliability that, in the circumstances, could be inaccurate and unfair to Mr. Arar.

I recognize that Mr. Arar was released about six weeks after the August 14 visit and that he has never been charged with any offence. In that sense, some may say that no harm came from the failure to provide any warning about the potential unreliability of Mr. Arar's statement that he had not been tortured, as recorded in the August 14 report. I do not accept this. Creating inaccurate and unfair perceptions is harmful and should always be avoided. Moreover, in my view, the prejudice arising from inaccurate and unfair information is particularly great in terrorism-related investigations which, understandably, evoke strong emotional responses.

6.3.3
Minister's Statement

On August 14, the same day as the consular visit, Minister Graham was asked in a press scrum about the SHRC allegations that Mr. Arar had been tortured. He replied that he had spoken to officials in his department, that Mr. Arar had been interviewed independently by consular officials that day, and that he was in good condition and rejected all allegations of torture.

Some of the Minister's statements were inaccurate. Mr. Arar had not been interviewed independently. Syrian officials, including General Khalil, had been present throughout. Further, while Mr. Arar might have rejected allegations of torture in some of what he had said, stating that "he rejects all allegations of torture" was going too far in view of the context in which the consular visit had taken place. Mr. Martel was sceptical about Mr. Arar's disavowal of torture. Moreover, torture may be physical or mental, and Mr. Arar had said he had been mentally destroyed. That statement in itself was inconsistent with a rejection of "all allegations of torture." A fair reading of the consular report shows that Mr. Arar was being very careful in what he said. His objective at that point was to be released. Telling his full story could wait until he returned to Canada.

The Minister's inaccurate statements, which appear to have resulted largely from some inaccurate information he was given about the consular visit, were very unfortunate. While there might have been no immediate consequence, statements like the Minister's create perceptions in the public mind, particularly in newsworthy cases such as Mr. Arar's. The perception that Mr. Arar had not been tortured was wrong and, no doubt, the Minister's statements planted the seeds of that misperception in the minds of some. Tellingly, even during the early stages of the Inquiry, some government officials still believed that Mr. Arar had not been tortured. In all likelihood, those officials and probably some members of the public were influenced by the inaccurate message taken from the August 14 consular visit. It is ironic and disappointing that the consular visit of August 14, which was meant to help Mr. Arar, ended up being turned against him in this way.

6.4
ARRANGING LEGAL ASSISTANCE

6.4.1
Prior to August 14, 2003

Prior to August 14, 2003, consular officials did not take any steps to obtain a lawyer for Mr. Arar. Some internal discussions took place in November 2002 about asking the Syrian authorities to allow a lawyer to see Mr. Arar during a consular visit. Anwar Arar, a member of Mr. Arar's extended family and a lawyer in Syria who had sought assistance from the Canadian Embassy to locate Mr. Arar early in his detention, indicated that he wanted to meet with Mr. Arar at an upcoming consular visit. However, consular officers did not take any steps to facilitate Anwar Arar's access, nor did they tell Maher Arar of Anwar Arar's involvement.

Shortly after the April 22, 2003 visit by the Canadian members of Parliament, consular officials had further discussions about legal representation in the event that Mr. Arar was charged. However, they did not take any steps to arrange representation until after August 14, 2003. In particular, they never asked Syrian officials if a lawyer would be permitted to visit Mr. Arar and they did not provide Mr. Arar with a list of lawyers.

Mr. Martel testified that there had been no point in taking steps with respect to legal representation prior to August 14, 2003. He was certain that Syrian officials would not have permitted Mr. Arar to contact a lawyer, nor would they have permitted a lawyer to visit him. The Syrian record in this regard was clear. Moreover, during this period, there was no legal proceeding pending and the charges Mr. Arar might eventually face were not known.

6.4.2
After August 14, 2003

On August 14, 2003, General Khalil told Ambassador Pillarella that Mr. Arar would be put on trial within a week and indicated that Mr. Arar could have a lawyer. Although the general implied that Mr. Arar would be found guilty and the sentence would not be lenient, he said that Mr. Arar would be tried in a civil court, where there was no death penalty, rather than a military court.

The Consular Affairs Bureau reported the news to Dr. Mazigh and informed her that Mr. Arar could have a lawyer of his choice. The next day, Dr. Mazigh suggested the names of two lawyers and indicated that her preference was Haytham Al Maleh, a human rights lawyer.

In the days that followed, consular officials took a number of steps with respect to the anticipated trial. They sent a diplomatic note to the Syrian foreign minister seeking further consular access to Mr. Arar and permission to have an observer at the trial (they had in mind James Lockyer, a noted Canadian criminal lawyer). They met with Mr. Arar's family and supporters to discuss the legal process, the retention of a lawyer and the observer's role, and advised that the lawyers suggested by Dr. Mazigh might not be the best choice because of "political" concerns (one had been imprisoned in Syria). They discussed the best strategy for obtaining Mr. Arar's release.

In addition to contacting the two lawyers suggested by Dr. Mazigh, Mr. Martel attempted to contact other lawyers, in particular Jacques El-Hakim, a lawyer who did not regularly do criminal work, but was apparently viewed as being "influential" by Syrian authorities.

On August 20, a Syrian contact told Canadian officials that Mr. Arar's file might have been transferred to the Supreme State Security Court. If true, this would have been bad news. Security courts in Syria are secretive and accord little, if any, due process to accused persons.

On August 25, Mr. Pardy met with members of Mr. Arar's family and raised the issue of the allegation that Mr. Arar had been in Pakistan and Afghanistan for over seven months in 1993. Mr. Pardy expected that the allegation, derived from Mr. Arar's alleged statement to the Syrian authorities during the initial stages of his detention, would be part of the case against Mr. Arar. He asked the family to look for documentary records that could be used to disprove it.

By September 2, there was still no indication of what the charges against Mr. Arar would be and no information about the process or timing of a trial. Canadian officials continued to consider Mr. El-Hakim the best choice for a lawyer, although they recognized that the decision should rest with the client's family. In the meantime, Mr. Martel obtained some legal advice from Mr. El-Hakim's firm about Mr. Arar's case.

By September 3, however, Dr. Mazigh had decided that Mr. Al Maleh should represent her husband. The lawyer had quoted a fee of $10,000. Dr. Mazigh asked if the Government of Canada could contribute and was told that it could not. On September 9, Mr. Martel learned that Mr. Arar's family had retained Mr. Al Maleh. The lawyer met with the prosecutor for the Supreme State Security Court on September 11, but was unable to obtain any information about the case. He told Mr. Martel that the trial was not expected for a week or two. On September 22, Canadian officials were told the same thing.

In the meantime, on September 10, the Canadian Embassy in Damascus sent a diplomatic note to the Syrian Ministry of Foreign Affairs requesting that

Canadian officials be permitted to be present during Mr. Arar's trial. On September 22, Mr. Al Maleh offered the opinion that consular officials would not be allowed to attend the trial.

On October 1, Mr. Al Maleh met with a judge, presumably of the Supreme State Security Court, who advised that the Arar file was still incomplete. Mr. Al Maleh was not given access to Mr. Arar. On October 5, Mr. Arar was released without a formal trial having taken place.

6.4.3
Issues

Two questions arise about the Consular Affairs Bureau's actions in assisting Mr. Arar to obtain counsel. The first is whether consular officials should have assisted Mr. Arar to retain a lawyer before August 14, 2003. The second relates to the adequacy of their efforts after August 14, 2003 to assist Mr. Arar in retaining a lawyer and to provide Mr. Arar's lawyer of choice with the information they had regarding Mr. Arar's case.

By way of background, when a Canadian detained abroad is going to trial, consular officials have the general responsibility to assist by providing the names of lawyers and helping the detainee to retain counsel. They should also help to obtain information about the reason for detention and the charges. However, consular officials do not pay legal expenses, provide legal advice or interpret local laws, and they usually attend trials only when there is a need. Consular officials do not get involved in matters of substance between lawyers and clients.

Consular officials did not take any steps to assist Mr. Arar in retaining a lawyer prior to August 14, 2003. Mr. Martel considered that any such steps very likely would be fruitless. The Syrian authorities were apparently still investigating Mr. Arar's case, no charges had been identified or laid, and there was no immediate prospect of a trial. Although it appeared in December 2002 that the Syrian authorities were investigating whether Mr. Arar was connected to the Muslim Brotherhood, nothing concrete was alleged. Later, in April 2003, the Syrian authorities indicated that they were investigating links with al-Qaeda. That same month, they said that their investigation was complete and charges would be laid shortly. However, they did nothing.

The SMI was permitting consular access (sporadically, as time went on), but the experience with Syrian authorities was that they would not permit a lawyer to see a detainee in Mr. Arar's circumstances. That proved to be the case later in September, when Mr. Arar's family did retain a lawyer. Mr. Al Maleh was unable to obtain information about charges or the proposed date for Mr. Arar's trial and, significantly, he was not permitted to see his "client." In this instance,

the SMI did not permit legal counsel access to Mr. Arar even in the face of a pending trial.

Obviously, during the period prior to August 14, 2003, it would have been possible for consular officials to put Mr. Arar's family in touch with a lawyer or at least raise the subject with the family and have a discussion about the possible advantages of seeking legal assistance. Retaining a lawyer even before charges are laid can, in some situations, cause detaining authorities to think twice about inflicting or continuing abusive treatment. However, it is worth noting that consular officials were in frequent contact with Dr. Mazigh throughout the period prior to August 14, 2003 and she had the active support of people familiar with issues relating to detainees in countries such as Syria. This was not a case where the detainee's family would not have considered the need for a lawyer or pursued the matter if it had thought it helpful to do so. While there was some discussion about Anwar Arar, a lawyer, visiting Maher Arar in the early stages of his imprisonment in Syria, consular officials did not pursue the matter, and neither Dr. Mazigh nor any of the supporters pressed the issue of the need for Mr. Arar to have a lawyer during this period.

I understand why consular officials did not take steps prior to August 14, 2003 to help Mr. Arar or his family to obtain a lawyer. In view of what occurred when Mr. Arar did retain counsel in September 2003, it appears that Mr. Martel's assessment that the Syrian authorities would not have permitted a lawyer to see Mr. Arar was correct.

I am also satisfied that the steps that consular officials took after August 14 were reasonable and appropriate. The possible concerns are that consular officials failed to immediately respect the Arar family's choice of lawyer, and once counsel had been retained, did not provide him with information they possessed that could have aided in his defence, such as the *bout de papier* that Ambassador Pillarella received in November 2002.

While it is true that consular officials demonstrated a perhaps marked preference for retaining Mr. El-Hakim as counsel for Mr. Arar, that preference was motivated entirely by Mr. Arar's best interests and was based on their assessment of the circumstances in Syria. In any event, in relatively short order, before any legal steps were necessary, the Arar family retained counsel of its own choice.

Further, I do not think that there was anything untoward in the consular officials' failure to provide Mr. Arar's lawyer with material they had about his case. Certainly, I do not attribute any improper motive to the officials in this regard. It must be remembered that, during the period between August 14 and Mr. Arar's release, Syrian authorities repeatedly refused to indicate the nature of the charges against Mr. Arar. Consular officials were operating in something of

an information vacuum. Even Mr. Al Maleh had no success in obtaining information. I have no doubt that, if the case had crystallized, consular officials would have been fully supportive of Mr. Arar and would have provided whatever assistance they could, including supplying his counsel with any relevant information in their possession.

Moreover, it is not as though consular officials did nothing in this respect. Mr. Pardy did speak to Mr. Arar's family about the importance of finding information to disprove a possible allegation that Mr. Arar had been in Pakistan and Afghanistan in 1993. While consular officials were not certain that this allegation would be part of "the case" against Mr. Arar, this was a prudent initiative.

The fact that I am not critical of the way Canadian officials acted in this case should not be seen as an indication that consular officials should not generally disclose information to defence counsel when Canadians are detained abroad. On the contrary, consular officials should provide information to defence counsel, to the extent they are able, to help counsel make full answer and defence. I discuss this role for consular officials in Chapter IX.

6.5
CALL FOR FAIR AND OPEN TRIAL

By September 24, 2003, Canadian officials still did not know the charges against Mr. Arar. They had been told that his trial would take place within a week or so, but had been told the same thing previously and nothing had happened. By this time, they had also been led to believe that the trial might take place in the Supreme State Security Court.

On September 24, Minister Graham commented to the media that he was pleased the trial was going forward and that Mr. Arar would have an opportunity to defend himself, adding that Mr. Arar could get a "fair and open trial." This comment caused concern for Dr. Mazigh and some officials within Consular Affairs, who felt that the comment could be interpreted as approving a trial that in fact was going to be closed, in circumstances where the charges and the evidence remained unknown.

It was entirely appropriate for Minister Graham to involve himself in this case. In Chapter IX, I recommend that decisions relating to Canadians detained abroad in relation to terrorism offences be made in a way that will ensure political accountability, and that the Minister of Foreign Affairs be informed and involved in cases where there is credible evidence that a Canadian has been or is being tortured.

Apparently, the strategy behind the comment to the media was the following. The Minister's first choice was that Mr. Arar be released. He had

communicated that position to the Syrian foreign minister in January 2003 and the Prime Minister's letter to the President of Syria requesting Mr. Arar's release had also made this position clear. However, if Syria would not release Mr. Arar, the next best option was for Mr. Arar to be tried so that he could defend himself, instead of remaining in detention, without trial, indefinitely. In other words, the fallback strategy was to bring the matter to a head.

The next day, the Minister made another public comment to the effect that Mr. Arar, who had been held in a Syrian prison for a year, could get a fair and open trial. He went on to say that he had been assured that Mr. Arar would be facing a civil process, not a military one, and that this process would be open.

By this point, consular officials had been told that the case might be dealt with in the Supreme State Security Court, which likely meant a closed process. Apparently, Mr. Graham had not been given this new information. In any event, it is by no means clear that a trial in a civil court would be fair and open.

While the comment about a fair and open trial might have been an indirect way of attempting to pressure Syria into providing such a trial for Mr. Arar, it would have been better not to endorse the Syrian system in advance. Instead, I think a comment such as "we trust the Syrians will provide Mr. Arar with a fair and open trial and we will monitor the situation closely" would have struck a better note.

I note that, on September 25, Minister Graham met with the Syrian foreign minister at the United Nations in New York and made it clear that Canada wanted Mr. Arar returned to Canada. Thus, he emphasized the first option of his strategy for the Arar case.

Although some may question the strategy of pressing for a trial while at the same time taking the position that Mr. Arar should be released, the decision to do so was a matter of judgment. Mr. Pardy, Canada's most experienced consular official, who was familiar with Mr. Arar's case, believed that the best course of action was to call for Mr. Arar's release. However, he could see the merit in calling for a fair and open trial as an alternative, something that might at least bring Mr. Arar's case out of darkness and into the public eye. The difficulty, of course, is that trials in the Syrian security court are unlikely to be either fair or open.

When an individual is caught in a situation such as Mr. Arar's, deciding what may assist and what may not is always a difficult matter of judgment. Clearly, care must be taken not to appear to support countries such as Syria in using their legal processes if it is likely that those processes will violate principles of fairness and due process. However, one must be careful about

second-guessing judgments made in good faith or attempting to lay down in advance inflexible rules about how these types of situations should be managed.

This was the second time in two months that the Minister had spoken publicly on the Arar case based, in part at least, on inaccurate information. The other occasion was after the August 14 consular visit, which I describe above. In Chapter IX, I make recommendations relating to the way DFAIT should respond to situations where Canadians associated with terrorism-related allegations are detained abroad. I emphasize the importance of a press strategy as part of a coordinated government response to the plight of Canadians detained abroad. Great care must be taken to communicate information to the public that is accurate and fair to all those involved. It is equally important not to appear to condone practices by other countries that contravene the principles of fairness and due process that characterize the Canadian approach to the administration of justice.

6.6
MAHER ARAR'S RELEASE

Maher Arar was released from Syrian custody on October 5, 2003. That day, Mr. Martel and another DFAIT official were summoned to the Palestine Branch. General Khalil told them that Mr. Arar had been acquitted by the judge and was free to go. Syrian officials also told the Canadian officials that they would release documents relating to Mr. Arar and criminal matters at a later date. This was never done.

As they were driving away from the Palestine Branch, Mr. Arar told Mr. Martel that he had been transferred to a better prison (Sednaya) 45 days previously and that he had been well treated.

Mr. Arar later told others that, on the day of his release, he had been taken to court and ordered released. There had been no trial. Canadian officials were never advised of the charges, if any, against Mr. Arar.

Several witnesses offered opinions about the reasons for Mr. Arar's release. However, without hearing from the Syrian authorities, we are left to speculate. I have set out the various opinions in the Factual Background. They need not be repeated here.

Notes

1 Messrs. Almalki and El Maati were both the subjects of a terrorism-related investigation in Canada and were both detained in Syria. Mr. Almalki was still in Syrian detention when Mr. Arar was taken to Syria.

2 Exhibit C-206, Tab 61.

3 Other efforts to locate Mr. Arar were undertaken, but they are subject to a claim of national security confidentiality.

4 A diplomatic note is a means by which one country formally communicates with another country.

5 [P] Pillarella testimony (June 14, 2005), p. 6769.

6 In published reports on the Syrian human rights record, the Palestine Branch is described as a place where the SMI holds prisoners incommunicado during early periods of detention and inflicts torture while interrogating them.

7 Exhibit C-206, Tab 130.

8 Ibid.

9 [P] Hogger testimony (November 10, 2005), pp. 12551-12552 and 12606-12611.

10 The evidence in this respect is described in some detail in the Factual Background.

11 Minister Graham was also not informed that, in August 2002, Canadian officials had learned that Ahmad El Maati, who had been in Syrian custody from November 2001 to January 2002, had alleged that he had been tortured during interrogation by Syrian authorities.

12 "*Bout de papier*" (literally, "scrap of paper") is a term used in diplomacy to describe a relatively informal communication or record of a meeting.

13 [P] Ofshe testimony (June 8, 2005), p. 5983.

14 The different assessments of the *bout de papier* are described in Chapter III of the Factual Background.

15 I discuss the January 2003 Syrian statements below in Section 5.3.2.

16 Some aspects of the Project A-O Canada investigation after Mr. Arar's imprisonment are described in Chapter IV of the Factual Background.

17 As I discuss later in this chapter, it did provide the Syrians with questions for Mr. Almalki, who was being held by the SMI at the same time as Mr. Arar, and also offered to provide the Syrians with information about Mr. Almalki from its investigation. That information would have included some about Mr. Arar.

18 I note, however, that Deputy Commissioner Loeppky testified that the RCMP should co-operate in efforts to get a Canadian released, at least to the extent of providing information, if it knows that the United States relied upon information supplied by the RCMP to illegally deport the Canadian. [P] Loeppky testimony (July 6, 2004), pp. 1428-1433.

19 Exhibit C-359, Tab 10.

20 Order in Council P.C. 2004–48, Appendix 1(A).

21 Exhibit C-30, Tab 290.

22 Exhibit C-206, Tab 159.

23 [IC] Pillarella testimony (March 30, 2005), p. 13409.

24 Exhibit C-206, Tab 285.

25 Exhibit C-206, Tab. 288; [P] Graham testimony (May 30, 2005), p. 4184.

26 Exhibit P-99.

27 Security certificates under the *Immigration and Refugee Protection Act* are used by the Government of Canada to remove persons who pose a danger to national security.

28 Exhibit C-206, Tab 395.

29 Exhibit C-28, Tab 4.

30 [P] Hooper testimony (August 25, 2005), pp. 10670-10672.
31 Exhibit P-19, p. 41.
32 [P] Hooper testimony (August 25, 2005), pp. 10717-10718.
33 Exhibit C-28, Tab 10.
34 Exhibit C-30, Tab 451.
35 Exhibit P-132, Tab 18, pp. 3–4.
36 There is no evidence about what prompted General Khalil, the head of the SMI, to permit access to Mr. Arar. One factor was likely that Mr. Arar had already given a statement to the Syrians. Another may have been that the Syrians were holding Mr. Arar at the request of American authorities and did not have the same concerns or suspicions about him as they did in other cases. There is no way of knowing for certain.
37 R.S.C. 1985, c. P-21.
38 I also note that the word "normally" does not appear in the French-language version of the guide, which is thus more restrictive.
39 Exhibit P-42, Tab 478.
40 Exhibit C-206, Tab 573.11.
41 Exhibit C-206, Tab 502.
42 Most of the discussions at the meeting are subject to a claim of national security confidentiality.
43 Exhibit P-134, Tab 24.
44 Exhibit P-42, Tab 508.
45 It was not Mr. Martel who provided the report to the RCMP.

VI
Return to Canada

1.
OVERVIEW

In this chapter I describe and comment on a number of significant events that occurred after Maher Arar's release from prison in Syria.

When Mr. Arar returned home, he described his ordeal privately to Canadian officials and publicly to the media in a press conference. Canadian consul Léo Martel subsequently prepared written communications that inaccurately recorded Mr. Arar's statements on his trip home. Other unknown officials clearly did not believe his statements that he had been beaten and tortured, and decided to leak information to the media, much of which was damaging to his reputation. The RCMP also prepared a briefing for senior officials about their investigation of Mr. Arar that omitted information that reflected badly on the force.

2.
TRIP HOME

After Mr. Arar was released from Syrian custody on October 5, 2003, Canadian consul Léo Martel accompanied him back to Canada. During the trip home, Mr. Arar revealed bits and pieces of his time in Syrian detention to Mr. Martel. It was obvious to Mr. Martel that Mr. Arar, who had been through a great deal, did not want to go into the details of his experiences at that time. In the course of their conversation, Mr. Martel mentioned that there were press reports that Mr. Arar had been stuffed into a tire and subjected to electric shock. Mr. Arar responded that those suggestions were unfounded, adding, "they have other means." While he did not elaborate at the time, he indicated that he had had a "difficult time" during the first two weeks of detention and that his Syrian jailers

had hit him from time to time, but nothing really serious. He said that, after the initial interrogation, they had had what they wanted and had left him alone. Mr. Arar also described the dark cell, measuring three by six by seven feet, in which he had been held, and the other degrading conditions to which he had been subjected. Mr. Martel believed that Mr. Arar was telling the truth.

It is worth noting that the description Mr. Arar gave Mr. Martel of his treatment in Syria on the plane trip home is essentially the same as the one he subsequently gave during a press conference on November 4, 2003 and the one he gave Professor Stephen Toope, the fact-finder I appointed for this Inquiry. While the later descriptions contained more detail, the main elements were consistent: Mr. Arar had been beaten on occasion during the early days of his imprisonment and not afterwards; he had not been subjected to the tire treatment or electric shock (although, in his later descriptions, he indicated that he had been threatened with both); and he had been held in degrading and inhumane conditions, which had had a terrible impact on his mental well-being.

I note as well that Professor Toope, who had available to him the evidence of what Mr. Arar had told Mr. Martel on his trip home, as well as what he had said in the November 4, 2003 press conference, concluded that the description that Mr. Arar had given him was credible.

On October 7, 2003, Mr. Martel briefed officials from DFAIT Headquarters on Mr. Arar and his treatment in Syria. In essence, Mr. Martel repeated what Mr. Arar had told him on the trip home. He indicated that Mr. Arar had been "beaten" occasionally during the first two weeks in Syrian detention, had not been subjected to the tire treatment or electric shock, and had suffered mentally. He also said that Mr. Arar had been held in a small, dark cell, which had had serious effects on his physical health and mental well-being.

3.
MR. ARAR'S PRESS CONFERENCE

Mr. Arar spoke about his experiences publicly for the first time at a press conference on November 4, 2003. Reading from a prepared statement, he described what he had lived through from September 26, 2002 to October 5, 2003.

I will not repeat what Mr. Arar said here. A detailed description of what he experienced is provided in Chapter II. As I have said, the description Mr. Arar gave at the press conference was more detailed than the one he had given Mr. Martel, but was nevertheless consistent with it. Moreover, Foreign Affairs Minister Bill Graham and Senior Policy Advisor Robert Fry, who had met privately with Mr. Arar on October 24, 2003, testified that what Mr. Arar had said

at his press conference had been fairly consistent with what he had told them in private.

After the press conference, Canadian officials took a number of steps to register Canada's objections with the Syrian government concerning the abuse Mr. Arar had suffered. On November 4, Minister Graham met with the Syrian ambassador to make a formal protest. After the meeting, the Minister issued a press release calling on the Syrian government to take the allegations of torture seriously and to quickly investigate all the details of the detention of Mr. Arar and others in Syria.

Subsequently, Canada sent a diplomatic note to the Syrian Ministry of Foreign Affairs, referring to Mr. Arar's allegations of torture and mistreatment and requesting that Syria conduct a formal investigation into the allegations. It does not appear that the Syrians ever responded to this diplomatic note.

4.
MR. MARTEL'S RECOLLECTIONS

Beginning in early November 2003, Mr. Martel prepared a number of written communications in which he indicated that Mr. Arar had told him on the trip home that he had not been beaten while in Syrian detention. They were incorrect.

In a memorandum dated November 3, 2003 prepared for the Minister's office in anticipation of Mr. Arar's press conference, Mr. Martel stated that, after Mr. Arar had been released, he (Mr. Martel) had pressed him for answers regarding the question of torture and Mr. Arar had confirmed that he had not been beaten. Otherwise, the memorandum was basically consistent with what Mr. Arar had said. Toward the end of the memorandum, Mr. Martel indicated that the Canadian Embassy shared Headquarters' concern about the possibility that Mr. Arar would "go public" and claim he had been tortured.

Mr. Martel explained the discrepancy between what he had reported in this memorandum and what he had stated at the October 7 DFAIT meeting by pointing out that the November 3 memorandum had been prepared quickly, from memory, and he had forgotten that Mr. Arar had told him he had been beaten occasionally. He added that Mr. Arar had told him that the beatings had not been serious.

This issue of Mr. Martel's recollection of what Mr. Arar had told him arose again on November 17 and 18, 2003 when, in a series of e-mails between him and Headquarters in Ottawa, Mr. Martel repeated that, during the trip back to Canada, Mr. Arar had never mentioned being beaten during the first two weeks of his detention in Syria. Again, in testimony, he explained that this was a

memory lapse and repeated that Mr. Arar had told him the beatings had not been serious.

The issue came up again on February 8, 2004, when a Canadian official had a discussion with Mr. Martel and prepared a report of that discussion. According to the report, Mr. Martel had said that the information Mr. Arar was giving the media contradicted what Mr. Arar had told him in interviews just prior to his release (probably a reference to the August 14, 2003 consular visit during which Mr. Arar, in the presence of his Syrian jailers, had said he had not been tortured). The report indicated that Mr. Martel had said that the information Mr. Arar had given him was likely more accurate, being more candid and not tainted by the spectre of big money and lawsuits. Mr. Martel had allegedly called Mr. Arar a liar.

Mr. Martel disputed this portion of the report, saying that it did not accurately capture what he had been trying to communicate to the official. He explained that, at the time of the conversation, he had had a civil lawsuit instituted by Mr. Arar on his desk — one in which he had been named as a defendant. He stated that he had been trying to point out that what was alleged in the lawsuit was inconsistent with what Mr. Arar had said.

Mr. Martel testified that he had never called Mr. Arar a liar and that he wanted to set the record straight by saying that he did not believe that Mr. Arar had ever lied to him. There is a problem with the lawsuit explanation. Mr. Arar's lawsuits against the Canadian government (including Mr. Martel) were not filed until April 2004, two months after the reported conversation. Mr. Martel may have confused the conversation of February 8, 2004 with one that took place after the litigation was commenced.

I describe this series of events relating to Mr. Martel's recollections in considerable detail for only one reason. It provides a good example of how inaccurately reported information can result in unfortunate consequences. When Mr. Arar returned to Canada, there was enormous public and political interest in what had happened to him. Those who had been involved in his case — and could potentially be the subject of criticism if the matter touched off a firestorm — would arguably be in a better position if it turned out that Mr. Arar had not been tortured. At least, they might have perceived that to be the case. Moreover, a comment made by Mr. Arar during the August 14, 2003 consular visit, in the presence of his Syrian jailers and obviously under pressure, led to public reports that Mr. Arar had said he had not been tortured. The difficulty with Mr. Martel's memorandum of November 3, 2003, his e-mails of November 17 and 18, 2003 and his conversation of February 8, 2004 is that they tended to reinforce the notion that Mr. Arar had not been tortured and that what

he was saying publicly was self-serving and for the purpose of possibly enhancing a damage claim in a lawsuit.

However, the fact of the matter is that Mr. Arar was tortured when interrogated at the beginning of his imprisonment, as he has described on several occasions. The problem with people concluding that Mr. Arar was not tortured was very evident to me during the early stages of this Inquiry. Several witnesses, either directly or through counsel, made it clear that they were not prepared to accept that Mr. Arar had been tortured. They had serious doubts about the truth of what he had said publicly and thus were suspicious about him generally. In fairness, over time, as the facts emerged, those views softened and I think it is fair to say that, in the end, there was widespread acceptance of the fact that Mr. Arar had been tortured. Certainly, Government counsel, who acted for all of the government agencies and departments involved, did not suggest otherwise. The point I wish to make, however, is that reporting facts incorrectly, as Mr. Martel did, even unintentionally, can create a false perception that becomes difficult to dispel. In this case, the truth has emerged, but only through the elaborate process of a public inquiry.

What is most troubling is that, had a public inquiry not been held in this case, some of the written record within government and, certainly, the views of many government officials, would have been incorrect. There would have been a widespread perception that Mr. Arar had not been tortured and that he had lied when describing what had happened to him after returning to Canada. Unquestionably, that perception would have spread to the public domain. That would have been most unfair to Mr. Arar.

Thus, I come back to what I say repeatedly throughout this report: it is critically important that care and precision be used when reporting or describing facts, particularly in relation to terrorism-related matters, which tend to engender strong emotions and positions. Small inaccuracies have a way of becoming large misperceptions.

5.
LEAKS

5.1
INTRODUCTION

The evidence presented at the Inquiry leads me to conclude that, over time, Government of Canada officials intentionally released selected classified information about Mr. Arar or his case to the media. The leaks extended over the

period from July 2003, before Mr. Arar returned to Canada, to July 2005, during the course of this Inquiry.

I am satisfied that the issue of leaks falls within my mandate, as it relates directly to Mr. Arar and to the conduct of Canadian officials. While it is not my role to draw legal conclusions about possible breaches of Canada's *Privacy Act*, *Security of Information Act* or *Criminal Code*, I am satisfied that I should report on the nature and purpose of the leaks and the impact they had on Mr. Arar.

Perhaps not surprisingly, the identity of the Canadian officials responsible for the leaks remains unknown despite the fact that several administrative investigations have been conducted by the relevant government departments or agencies into the sources of the leaks. There is also an ongoing criminal investigation into a leak of information to Juliet O'Neill, a reporter for the *Ottawa Citizen*. Although there appears to be little cause for optimism that investigations will ultimately determine the source of any of the leaks, I do not consider that my mandate directs me to pursue such investigations. To do so as part of a public inquiry would be a huge endeavour and determining the source of the leaks is not sufficiently linked to my mandate to be warranted. That said, I do not consider myself constrained in reporting on the leaks by the fact that the specific sources are unknown. The evidence at the Inquiry is more than sufficient to enable me to comment on the origins of the leaks in general terms, their purpose and the impact they had on Mr. Arar and his family.

Criminal investigations are generally kept confidential in order to ensure fairness to individuals subject to investigation, who may never be charged, and to protect the ongoing effectiveness of the investigations. There is an additional rationale for confidentiality in the case of national security investigations: the need to protect classified information.

Nonetheless, the fact that an investigation is being conducted may sometimes become known, generating interest on the part of the media and the public. In those instances, government authorities with access to classified or confidential information are in a position to sway public opinion by selectively divulging information to the media. Because the public cannot know the full picture, leaks of selected information can be misleading and unfair to individuals who may be subjects of the investigation or persons of interest to the investigation. This is especially so when the leakor adds a spin to the leaked information to get his or her message out.

Leaking classified information is clearly wrong and a serious abuse of trust. It can also be a dangerous practice if the information is subject to a legitimate national security confidentiality claim. Leaking classified information may harm national security, international relations or national defence.

This case is an example of how some government officials, over an extended period of time, used the media to put a spin on an affair and unfairly damage a person's reputation. Given the content of the released information, only individuals with access to classified information could have been responsible for the leaks. The obvious inference is that this was done to paint a picture they considered favourable either to the Canadian government or to themselves.

It is worth bearing in mind that leaks of government information can have different aims. In some cases, the leakor is seeking to disclose what he or she perceives to be government wrongdoing that would not otherwise come to light.

Other leaks, however, seek to advance the interests of the Canadian government or of government officials, in some cases by disparaging the reputation of another. This was the case with some of the leaks concerning Mr. Arar, which were aimed at tarnishing Mr. Arar's reputation and undermining his credibility. Some were likely intended to persuade the Government of Canada not to call a public inquiry.

While most leaks likely involve a breach of some form of confidentiality, using confidential information to manipulate public opinion in favour of the Canadian government's interests or the interests of the leakor of the information is obviously more egregious. This is particularly so when third parties are targeted in a way that is unfairly prejudicial to them.

Because it can be so difficult to counter this type of leak, one can only hope that some of the public and the media are sophisticated enough to perceive the reality of what is occurring and to reserve judgment until there is a fair and transparent disclosure of all of the relevant facts.

5.2
NATURE AND CONTEXT OF LEAKS[1]

This Inquiry heard evidence of at least eight media stories containing leaked information about Mr. Arar and/or the investigation that involved him.[2] Some of the leaks sought to portray Mr. Arar as an individual who had been involved in terrorist activities such as training in Afghanistan, had named other "terrorists" while imprisoned in Syria, and was "a very bad guy"[3] and "not a virgin."[4] The sources of the leaked information were both human (unnamed government officials) and documentary (classified or confidential documents).

The first leak occurred in the summer of 2003, before Mr. Arar's return to Canada, at a time when the public campaign to obtain his release from Syrian custody had intensified. An unidentified official was quoted as saying that Mr. Arar was a "very bad guy" who had received military training at an al-Qaeda

base. The article also noted that the unnamed government official had refused to provide further details, attributing the need for secrecy to ongoing intelligence operations. The apparent purpose behind this leak is not attractive: to attempt to influence public opinion against Mr. Arar at a time when his release from imprisonment in Syria was being sought by the Government of Canada, including the Prime Minister.

Around the time of Mr. Arar's return to Canada in October 2003, four more leaks were reported. On October 9, 2003, the *Toronto Star* quoted "an official closely involved in the case" [5] as saying that American officials had contacted their Canadian counterparts when Mr. Arar's name had been noted on a passenger flight list (referring to Mr. Arar's arrival in New York on September 26, 2002). According to the unnamed source, conversations had then taken place between American and Canadian officials about Mr. Arar, in particular about whether he had travelled to Afghanistan and whether he could be charged if returned to Canada. The next day, October 10, 2003, an article in the *Globe and Mail* cited unnamed Canadian government sources as saying that Mr. Arar had been "roughed up," but not tortured, while in detention in Syria.[6]

This latter comment that Mr. Arar had not been tortured is consistent with the reaction of several Canadian officials on Mr. Arar's return to Canada: they attempted to downplay the seriousness of the ordeal he had endured in Syria. The implication in this regard is that, if Canadian officials were in any way involved in what happened to Mr. Arar, it would be better from their standpoint if he had not been seriously mistreated.

On October 23, 2003, the CTV 11 o'clock news broadcast a segment quoting "senior government officials in various departments" as saying that Mr. Arar had provided information to the Syrians about al-Qaeda, the Muslim Brotherhood, and cells operating in Canada.[7] Mr. Arar was alleged to have implicated other Canadians in extremist activities.[8] Again, the indirect suggestion was that Mr. Arar himself had been involved in extremist terrorist activities.

As noted in an *Ottawa Citizen* article published on October 25, 2003,[9] the leaks about what Mr. Arar might or might not have said to his Syrian interrogators were "particularly worrisome" and potentially very dangerous, not only for the Arar family, but also for the individuals allegedly named by Mr. Arar and still in detention abroad in countries known to practice torture. The allegation that he had denounced others would also have been harmful for Mr. Arar psychologically. As noted by Dr. Donald Payne, a member of the Board of Directors of the Canadian Centre for Victims of Torture, "it would be difficult for anyone to be pointed out as a betrayer of people, to be falsely pointed out as a betrayer of people."[10]

Even Mr. Arar's first meeting with DFAIT officials in Ottawa on October 29, 2003 did not remain confidential despite an understanding before the meeting that what Mr. Arar said would not be disclosed until he chose to divulge it. On October 30, *CBC Newsworld* reported that Mr. Arar had met with Minister Graham and had told DFAIT officials that he had been tortured while detained in Syria.[11] Although this disclosure appears to have breached a confidence, it obviously did not discredit Mr. Arar, as several others did.

In the press conference held in Ottawa on November 4, 2003, Mr. Arar told his story at length and described the torture he had suffered in Syria. He strenuously denied all allegations that he was implicated in terrorism or associated with people involved in terrorist activities. He also called for a public inquiry into his case.

Four days after the press conference, on November 8, 2003, the most notorious of the Arar leaks occurred. Information from classified documents was published in the *Ottawa Citizen*, in a lengthy article by Juliet O'Neill entitled "Canada's dossier on Maher Arar: The existence of a group of Ottawa men with alleged ties to al-Qaeda is at the root of why the government opposes an inquiry into this case."[12]

The front-page article contained an unprecedented amount of previously confidential information, including a detailed description of the RCMP Integrated National Security Enforcement Team (INSET) office in Ottawa, a place not accessible to the public, and specific reference to the "main target" of investigation, Abdullah Almalki. It indicated that "one of the leaked documents" contained information about what Mr. Arar had allegedly told the Syrian Military Intelligence during the first few weeks of his incarceration and then went on to describe this information in detail.

The article moreover referred to some aspects of the RCMP's investigation of Mr. Arar and cited a "security source" for the proposition that a suspected Ottawa-based al-Qaeda cell was at the root of opposition by the Canadian government to a full public inquiry into Mr. Arar's case. Ms. O'Neill reported that the RCMP had "caught Mr. Arar in their sights" while investigating members of an alleged al-Qaeda logistical support group in Ottawa.

The article shed light on the motivation behind the leaks by security officials:

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

This implies that leaking classified information is justified if it suits the interests of the investigators. Based on this reasoning, since the public does not have access to classified information, leakors can pick and choose what is released to suit their purposes.

During the Inquiry, government officials frequently made the point that unauthorized release of information received from foreign governments would be injurious to Canada's national security interests. Suffice it to say that, if the information in the O'Neill article was in fact received from Syrian officials, such information would be subject to a claim by the government that it could not be released because of national security confidentiality concerns.

A few more leaks followed, including a December 30, 2003 article, the headline of which provocatively proclaimed, "U.S., Canada '100% sure' Arar trained with al-Qaeda." The article quoted a "senior Canadian intelligence source" as saying, with regard to Mr. Arar, "this guy is not a virgin….There is more than meets the eye here."[13] The source said that the United States had made an error in deporting Mr. Arar instead of allowing the RCMP to monitor his activities upon his return from Tunisia. The source added that the United States had an extensive dossier on Mr. Arar and that "if the Americans were ever to declassify the stuff, there would be some hair standing on end." By the time this leak occurred, the public pressure to call a public inquiry was intensifying. The headline was clearly wrong. The comments attributed to the "senior Canadian intelligence source" were obviously intended to sway public opinion against Mr. Arar.

On January 28, 2004, the Deputy Prime Minister announced the Government of Canada's decision to call a public inquiry into the actions of Canadian officials in relation to Mr. Arar.

There was at least one further leak during the course of the Inquiry. On June 9, 2005, previously unpublished material was reported in an article in the *Toronto Star*.[14] The article indicated that the Canadian Security Intelligence Agency (CSIS) had travelled to Syria to sign an information-sharing agreement between Canada and Syria. The article also referred to positions taken during the *in camera* hearings for the Inquiry. There was nothing in this disclosure that harmed Mr. Arar's reputation or affected the Inquiry process. What is interesting about it, however, is that one or more government officials with access to the *in camera* evidence did not feel bound to keep the information confidential.

5.3
SOURCES

To date, none of the sources of any of the leaks has been identified. Government agencies including the RCMP, CSIS, the Privy Council Office and Foreign Affairs have carried out investigations into some of them, to no avail.[15] The only investigation not yet completed is the ongoing criminal investigation into the Juliet O'Neill article, which has been delayed because of litigation. That investigation is now close to two years old.

During the Inquiry, witnesses involved in the Arar file and who had access to classified information were asked if they knew of anyone responsible for any of the leaks. All those asked responded, under oath, that they knew nothing and could not shed any light on who might have been involved. The sources of the leaks are a complete mystery to everyone.

As I indicate above, a full factual investigation into the sources of the leaks would be a monumental task for the Inquiry and it is not sufficiently connected to my mandate to be warranted. The prospects of determining who was responsible for the leaks about Mr. Arar are very uncertain at best. This is a disheartening state of affairs. Given that the leakors are likely officials within agencies that boast highly skilled investigators, one would have hoped that those investigating the leaks would have had more success in finding the perpetrators. Everyone asked about the leaks decried the fact that government officials would leak classified or confidential information to the media, but no one seems able to do anything about it.

The obvious implication of the failure to identify the source of leaks is that there is no deterrent to others who may be inclined to leak classified or confidential information in the future. If no one ever gets caught, those who are prepared to leak this type of protected information for purposes that suit their own interests will probably continue to do so.

Finally, I observe that, over time, leaks could also have an adverse effect on the willingness of our allies to share vital information with Canada. As the Supreme Court of Canada has noted, Canada is a net importer of intelligence and, for that reason, national security confidentiality must be protected.[16] If some Canadian officials cannot be trusted to protect classified or confidential information, those providing the information may be more circumspect about what they provide.

5.4
EFFECTS ON MR. ARAR

Quite predictably, the leaks had deleterious effects on Mr. Arar's reputation, psychological state, and ability to find employment. The impact on an individual's reputation of being called a terrorist in the national media is obviously severe. As I have said elsewhere in this report, labels, even inaccurate ones, have an unfortunate tendency to stick.

While the Inquiry did not hear from Mr. Arar directly about the personal impact of the leaks, Dr. Donald Payne testified that, generally, such leaks would have a traumatic psychological effect on someone in Mr. Arar's position and would carry a likelihood of re-traumatization.[17]

In addition, Professor Toope, the fact-finder I appointed to report on Mr. Arar's treatment in Syria, made specific findings on the impact of the leaks. Professor Toope reported that the leaks had caused further psychological damage to Mr. Arar:

> [Mr. Arar] was particularly disturbed by certain "leaks" from sources allegedly inside the Canadian Government that cast him in a negative light. These events compounded his sense of injustice dating from his detention and torture in Syria. All his advisers that I interviewed emphasised that Mr Arar was "devastated" by these leaks. Some described him as "hysterical." He simply could not control his emotions, and it took many hours of constant conversation to calm him down each time new information surfaced in the press that he thought to be misleading and unfair.[18]

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

> [Mr. Arar] told me that he is disappointed with the reaction of many Muslims to him and his story. Whereas other Canadians sometimes come up to him on the street to share a sense of solidarity, most Muslims stay far away from him. Mr. Arar thought that this distancing was exacerbated after the press "leaks" mentioned previously.[19]

Finally, Professor Toope described the economic effect of Mr. Arar's ordeal on the Arar family as "close to catastrophic."[20] Inasmuch as the leaks have painted Mr. Arar as a terrorist, it is reasonable to infer that they have contributed to his ongoing difficulty in finding gainful employment in his field.

Lastly, I note that Mr. Arar's time in Syria deprived him of something most Canadians take for granted: "control over the truth about oneself."[21] The fact

that this deprivation continued after Mr. Arar's return to Canada — this time because of leaks of confidential information by government officials — is both unfortunate and deeply unfair.

5.5
FINAL COMMENT

Unlike many other actions of Canadian officials that I describe in this report, leaking information is a deliberate act. Moreover, some of the leaks relating to Mr. Arar were purposefully misleading in a way that was intended to do him harm.

It is disturbing that there are officials in the Canadian public service who see fit to breach the public trust for their own purposes in this way. It is disappointing that, to date, no one has been held accountable.

6.
INCOMPLETE BRIEFING

When briefing the Privy Council Office and senior government officials about the investigation relating to Mr. Arar, the RCMP omitted certain key facts that could have reflected adversely on the RCMP.

On November 5, 2003, the day after Mr. Arar's press conference, RCMP Deputy Commissioner Garry Loeppky had a meeting at the Privy Council Office to discuss Mr. Arar's case. The attendees were very senior officials, including the National Security Advisor, Rob Wright, the Director of CSIS, Ward Elcock, the Deputy Minister of Foreign Affairs, Peter Harder, and the Deputy Solicitor General, Nicole Jauvin. They discussed the review process then underway and the desirability of calling a public inquiry.

In order to assist decision making regarding the best way to proceed, Mr. Wright asked that each department involved in the Arar case prepare a detailed timeline including, among other things, a description of all interactions with U.S. authorities concerning Mr. Arar, what information had been shared and by whom, and any other issues that related to Mr. Arar and the U.S. The purpose of the request was obviously to obtain a complete briefing on what had occurred, including any problems that had arisen, in order to assist the Government of Canada in deciding how to proceed.[22]

On November 14, 2003, the RCMP forwarded a timeline, as requested.[23] Unfortunately, that timeline omitted several very important facts that might have supported an argument in favour of calling a public inquiry. The timeline failed to mention that, in April 2002, the RCMP had taken the unprecedented step of supplying its entire Supertext database relating to the relevant investigation to

the American agencies, and that it had done so without complying with RCMP policy requiring the screening of information and use of caveats. It also omitted the fact that, each time the RCMP had supplied information related to the pertinent investigation to American agencies prior to Mr. Arar's detention in New York, it had done so without attaching caveats as required by RCMP policy. While the timeline specifically mentioned that the RCMP had asked U.S. Customs to check if it had any information on a group of individuals that included Mr. Arar and his wife, Monia Mazigh, it did not reveal that the RCMP had requested border lookouts for each of them or that, in doing so, the RCMP had described them as Islamic extremists suspected of having ties to al-Qaeda.

The timeline also failed to describe the close contact between the RCMP's Project A-O Canada and the American agencies in regard to the relevant investigation. In particular, it did not mention the fact that, in February 2002, the FBI had visited the RCMP's office to review its investigative file.

During the time Mr. Arar was detained in New York, the RCMP had a number of contacts with American authorities that were relevant to the issues covered in the timeline. The timeline failed to mention two conversations that Corporal Flewelling of the RCMP's CID had had with an American agent on October 4 and 5, 2002, the second one being unusual in that the American agent had called the corporal at home on a Saturday night. Given the purpose of the timeline, these omissions were serious. Those who were involved in deciding how the Canadian government should proceed had asked for a complete briefing on matters relevant to the decision. They should have received one.

In his testimony, Deputy Commissioner Loeppky acknowledged that there were gaps in the timeline, but said that it had been put together under significant time pressure and that both the RCMP's "A" Division and Headquarters had been involved.

It was very important that the RCMP accurately brief the government about what had occurred so that the government could make an informed decision on how to proceed. The omission of information in the RCMP's timeline had the effect of minimizing potential problems with the RCMP investigation. That was clearly wrong. Given that the RCMP had, in effect, been asked to report on itself, there was a heightened obligation to be complete and forthcoming. I would expect that, in future, briefings such as that provided through the timeline would be accurate and balanced.

7.
RCMP REVIEW OF PROJECT A-O CANADA INVESTIGATION

After Mr. Arar's release, there were at least two reviews of the Project's investigation as it related to Mr. Arar. From October to December 2003, Chief Superintendent Dan Killam from RCMP Headquarters conducted a review and prepared a report. In essence, he concluded that Project A-O Canada had acted appropriately throughout.

In the latter half of October 2003, the Commission for Public Complaints Against the RCMP (CPC) launched an investigation into the Arar matter. The initial investigation in this process was conducted by Superintendent Brian Garvie of the RCMP. I have set out the conclusions of the Garvie Report in Chapter V of the Factual Background.

Notes

1 The full details of the leaks are set out in Chapter IV of the *Factual Background*.

2 I discuss only those media stories presented in evidence before me.

3 Exhibit P-80, pp. 1–2. Robert Fife, "Terror threats in Ottawa: Two kinds of fear: Report says Syrian intelligence helped U.S. to foil al-Qaeda plot on target in Ottawa," *Ottawa Citizen* (July 24, 2003), A1.

4 Ibid., pp. 7–8. Robert Fife, "U.S., Canada '100% sure' Arar trained with al-Qaeda: Family spokeswoman accuses intelligence officers of anonymous smear campaign," *Ottawa Citizen* (December 30, 2003), A1.

5 Exhibit P-116, Graham Fraser, "U.S. urged Canada to hold Arar; Canada refused to make arrest – Americans sent him to Syria," *Toronto Star* (October 9, 2003), A1.

6 Exhibit P-247, Jeff Sallot, "Arar was not tortured, officials say; Engineer held in 'very bad' conditions in Syria, suffered psychological stress," *Globe and Mail* (October 10, 2003), A4.

7 Exhibit P-39, "The case of Maher Arar takes more twists and turns," *CTV* (October 23, 2003); Exhibit C-29, *CTV Newsnet Morning* (October 24, 2003). See also Exhibit P-117, Tab 47, p. 2, Daniel Leblanc, "Officials allege Arar gave data on al-Qaeda, report says," *Globe and Mail* (October 24, 2003), A4.

8 The report was detailed, saying that Mr. Arar had provided information to the Syrians about four other Canadians: "Arwad al Bushi, Abdullah al Malki, Ahmed Abu al Maati and Mohamed Harkat."

9 Exhibit P-80, p. 4, Norma Greenaway, "Supporters say Arar target of smear campaign," *Ottawa Citizen* (October 25, 2003), A3.

10 [P] Payne testimony (June 8, 2005), pp. 6102–6103.

11 See [P] Fry testimony (June 13, 2005), p. 6559.

12 Exhibit P-80, pp. 5–6.

13 Exhibit P-80, pp. 7–8.

14 See motion by Lorne Waldman, June 13, 2005, pp. 6363–6366. The article was by James Travers.

15 See Factual Background, Chapter IV, Section 9.4, "Government of Canada Investigations of the Leaks."

16 *Ruby v. Canada*, [2002] 4 S.C.R. 3, 2002 SCC 75.
17 [P] Payne testimony (June 8, 2005), pp. 6103–6106.
18 Report of Professor Stephen J. Toope, Fact Finder (Appendix 7), p. 816.
19 Ibid., p. 818.
20 Ibid.
21 Ibid., p. 809.
22 [P] Loeppky testimony (July 27, 2005), pp.8645-8646.
23 Exhibit P-85, Vol. 5, Tab 9.

VII
Abdullah Almalki and Ahmad El Maati

1.
INTRODUCTION

Abdullah Almalki and Ahmad El Maati are Muslim Canadians who were targets of the Project A-O Canada investigation in which Mr. Arar was a "person of interest." Indeed, the Project's interest in Maher Arar stemmed from his association with Mr. Almalki and, to a lesser extent, Mr. El Maati. Both of these men were imprisoned and interrogated in the Middle East in approximately the same time period as Mr. Arar — Mr. Almalki in Syria from May 2002 to March 2004, and Mr. El Maati in Syria and Egypt from November 2001 to January 2004.

All of the intervenors at the Inquiry made a joint closing submission raising the question of "whether what happened to Mr. Maher Arar can in any way be linked to a pre-existing policy, practice, or established investigative procedure[1] that led to the detention and interrogation by Syrian and Egyptian intelligence agencies of other Canadian Muslim men."[2] The other men in question are Messrs. Almalki and El Maati and one other person, Muayyed Nureddin.[3] My analysis of this pre-existing policy issue, solely as it relates to what happened to Mr. Arar, follows in this chapter.

2.
BACKGROUND

Since the investigation of Mr. Arar was connected with his associations with these two men, it was necessary to hear evidence during the Inquiry that described the basis of the Project A-O Canada investigation as it related to those associations. I discuss some of that evidence at different points in the Report. Inevitably, I also heard evidence about some of the information collected and investigative steps taken with regard to Messrs. Almalki and El Maati. However,

the mandate for the Factual Inquiry directs me to investigate and report on the actions of Canadian officials in respect of Mr. Arar and no one else. Accordingly, I did not conduct a full review of all of the information that pertained to Messrs. Almalki and El Maati or of the actions of Canadian officials that might have affected them. In fact, the evidence I did hear about each of their cases was restricted to what I considered would be helpful in determining what actions had been taken in respect of Mr. Arar. To have investigated the Almalki and El Maati cases more fully would have been an enormously time-consuming task and beyond my mandate.

Nonetheless, there is one issue pertaining to the evidence relating to Messrs. Almalki and El Maati that warrants further comment. In their closing submission, the intervenors at the Inquiry argued that, given the many similarities in what happened to Mr. Arar and what happened to the others — a repeating pattern, so to speak — there is reason to believe that Canadian officials had a pre-existing policy governing some of their actions and that policy played a part in Mr. Arar's removal from the United States and his imprisonment and torture in Syria.

Before addressing the submission of the intervenors, I wish to make four points by way of introduction.

- Although Messrs. Almalki and El Maati were targets of the Project A-O Canada investigation, they have never been charged with any offence in Canada. Moreover, despite their lengthy imprisonment, in Syria in the case of Mr. Almalki, and in Syria and Egypt in the case of Mr. El Maati, neither man was ever convicted of any offence there. Thus, they are presumed to be innocent of any offence and what I say about their cases should not be interpreted as indicating otherwise.
- In accordance with my mandate, I examined all of the actions of Canadian officials as they related to Mr. Arar. In this connection, I reviewed literally thousands of documents and heard from over 80 witnesses. I am satisfied that I have received all of the relevant information about what Canadian officials did as it related to him.
- In reaching conclusions about what happened in relation to Mr. Arar, I also considered information pertaining to the cases of Messrs. Almalki and El Maati in order to determine whether what had happened to them provided any additional insight into the actions taken in regard to Mr. Arar. In this respect, I focussed on the intervenors' question as to whether, based on the information before me concerning the Almalki and El Maati cases, there was reason to believe that there was

a pre-existing policy pursuant to which Canadian officials had acted in relation to Mr. Arar.

- The fourth preliminary matter has to do with the sources of information about the Almalki and El Maati cases. As I said above, I did not conduct anything even approaching a full review of those cases. I heard evidence concerning the basic facts about when they had been detained in Syria and Egypt and when they had been released. I also heard evidence about some investigative steps taken with respect to each of them. However, my review of their files was far from comprehensive.

In addition to the evidence I heard from Canadian officials about the Almalki and El Maati cases, chronologies of the more significant events were filed by Messrs. Almalki and El Maati, who suggested they would be relevant to examining Mr. Arar's case. Since those chronologies were not entered into evidence through sworn testimony or subjected to cross-examination, they cannot be used as a basis for any findings of misconduct against Canadian officials. Nevertheless, they are of some assistance to me in addressing the question raised by the intervenors. I approach the intervenors' question by assuming that the facts set out in the chronologies are true. In addition, I had the benefit of information contained in both men's applications for standing and the information about their cases contained in the report of Professor Toope, the fact-finder for the Inquiry. Like the information in the chronologies, however, this information is not evidence and cannot be used as a basis for any findings of misconduct.

There are a number of similarities in the cases of Messrs. Arar, Almalki and El Maati. All three are Muslim Canadian men and all were linked in some way with the Project A-O Canada investigation. All three ended up being imprisoned in Syria by the Syrian Military Intelligence (SMI) at its Palestine Branch at a time when they were being investigated by Project A-O Canada. Professor Toope concluded that all three had been interrogated and tortured while in Syria and that the interrogations had been based on information that had originated in Canada. In each case, it was contended that the RCMP and CSIS had sought to advance their investigations through communication with the SMI. All three men said that the RCMP and CSIS had impeded efforts to obtain their release. Finally, each of them maintained that he had been the subject of improper leaks of information to the media.

The question, then, becomes whether the evidence relating to the Almalki and El Maati cases and the other information I received about their cases cause me to reach my different conclusions about the actions of Canadian officials in

relation to Mr. Arar. In particular, do they lead me to conclude that actions by Canadian officials in relation to Mr. Arar were taken pursuant to a pre-existing policy?

I have organized my analysis of the intervenors' question into four subject areas, each of which the intervenors have suggested may have been the result of a pre-existing policy:

- Mr. Arar's removal to Syria;
- cooperation between Canadian investigators and the SMI;
- efforts to obtain Mr. Arar's release; and
- leaks.

3.
MR. ARAR'S REMOVAL TO SYRIA

In Chapter IV of this report, I conclude that Canadian officials did not participate or acquiesce in the American decision to remove Mr. Arar to Syria. However, I do find that it is very likely that the American authorities relied upon information provided by the RCMP in making the decision to remove Mr. Arar. In chapters III and IV, I review the circumstances under which the RCMP provided the information about Mr. Arar to American agencies. While I have found that there were several problems, some of them serious, with the way the information was provided, I am satisfied that the RCMP did not provide any of it with the intent that Mr. Arar would be sent to Syria or even with the knowledge that that would be the case. There is nothing in the evidence to suggest that the American actions in sending Mr. Arar to Syria were connected with a pre-existing Canadian policy directed at achieving that result.

I have considered the circumstances surrounding what happened in relation to Messrs. Almalki and El Maati, including what is set out in their chronologies, with a view to determining whether those circumstances would affect a conclusion based on the evidence with respect to Mr. Arar's removal to Syria. Even assuming that everything in the chronologies is factually accurate, my conclusions would be the same. I say that for two reasons.

First, I have thoroughly considered all of the evidence of those involved in Mr. Arar's case. There is nothing in either the public or *in camera* evidence to support a conclusion that Canadian officials participated or acquiesced in the American decision to send Mr. Arar in Syria. There is evidence that some officials were aware that Mr. Arar had been told he would be sent to Syria before he was removed from the United States. However, those officials, reasonably I conclude, did not consider the threat of Syria to be imminent or even likely.

The decision was made by the American authorities alone. Indeed, the actions of American authorities in removing a Canadian from the United States to Syria, a country with a questionable human rights record, came as a complete surprise to Canadian officials. They were not aware that the United States had taken similar steps previously. Indeed, some officials testified that, while American authorities had "rendered" individuals to countries such as Syria on occasion in the past, such renderings had always been from other countries, not the United States. Thus, there is no evidence that there was a Canadian policy that would have supported the removal of Mr. Arar from the United States to Syria.

The second reason the circumstances surrounding the Almalki and El Maati cases would not affect my decision in this regard is that the facts in those two cases differ from those in Mr. Arar's. Unlike Mr. Arar, both Messrs. Almalki and El Maati were arrested while in Syria. Both travelled to Syria voluntarily and were arrested at the Damascus airport on arrival. Even if one were to accept that Canadian officials were somehow complicit in those arrests, that would not change my conclusion, based on the evidence at the Inquiry, that Canadian officials did not participate or acquiesce in the American decision to send Mr. Arar to Syria from the United States.

Thus, while I have concluded that there were several problems with what Canadian officials did in relation to Mr. Arar, I do not find that the actions of Canadian officials prior to Mr. Arar's removal to Syria were the result of a pre-existing policy,[4] that is, an institutionally authorized course of action, rather than a series of unacceptable practices by officials. I discuss the subject of operational or investigative practices below.

4.
CO-OPERATION BETWEEN CANADIAN INVESTIGATORS AND THE SMI

In general terms, co-operation between Canadian investigators and the SMI might take two forms: the Canadians might provide information or questions to the Syrians in connection with a detainee, or they might receive information from the Syrians about a detainee. I am satisfied that Canadian officials did not provide any information about Mr. Arar to the Syrian authorities or give them questions to be posed to him.

There is evidence that, after Project A-O Canada learned that Mr. Arar was in Syria, the Project asked DFAIT to advise the Syrians that it was prepared to share information about Mr. Arar with the Syrian authorities. However, that never happened.

Mr. Arar arrived in Syria around October 9, 2002. He was held incommunicado for about 12 days. During that period, he was interrogated and tortured. For purposes of this discussion, I accept that he was questioned on the basis of information that originated in Canada. In both his public statements and his statement to Professor Toope, Mr. Arar indicated that he had not been questioned or beaten after the initial 12-day period.

The evidence is clear that Canadian officials were unable to confirm that Mr. Arar was in Syria until October 21, after the period of interrogation. Prior to that time, Syrian officials denied that he was in Syria. There is nothing in the evidence to suggest that any Canadian officials discussed Mr. Arar's case with the SMI, which was interrogating Mr. Arar, until after the interrogation was complete. I am therefore satisfied that Canadian officials did not provide the SMI with information to be used to question Mr. Arar. While Syrian authorities might have used information that originated in Canada to question him, that information must have been supplied by the American authorities, who were responsible for sending Mr. Arar to Syria. The American authorities had a great deal of information derived from the Canadian investigation, which they had received from the RCMP over the course of the preceding year without caveats restricting dissemination to third parties, such as the Syrians. However, none of that information had been provided with the thought that it would eventually find its way to Syria. Moreover, there is no evidence to suggest that the Canadians authorized American authorities to provide the Syrians with the "Canadian information."

Even if, as they allege, Messrs. Almalki and El Maati were interrogated by Syrian authorities based on information that originated in Canada, that fact would not alter my conclusion, based on the evidence in Mr. Arar's case, that Canadian officials did not supply the SMI with information for use in Mr. Arar's interrogation.

I do note that the RCMP provided the SMI with questions for Mr. Almalki on January 15, 2003, and that one of the questions referred to Mr. Arar. Moreover, the covering letter enclosing the questions mentioned the RCMP's investigation of terrorist cells in Canada. It is possible that the SMI would have interpreted this correspondence as indicating that Mr. Arar was suspected of being a member of a terrorist cell. In that sense, this correspondence would have provided information about him to the SMI. I discuss the possible impact of this communication on Mr. Arar's release in Chapter V.

With regard to the issue of receiving information from the SMI, in Chapter V I discuss the fact that, on November 3, 2002, General Khalil of the SMI provided the Canadian ambassador, Franco Pillarella, with a *bout de papier*, or

informal written communication, containing a summary of Mr. Arar's alleged confession. The *bout de papier* was distributed to Canadian investigators. I also describe a visit to Syria by CSIS officials in late November 2002, during which the officials met with SMI officials and received "some information" about Mr. Arar. I am satisfied that, other than in these two instances, Canadian investigators did not receive anything more than negligible information about Mr. Arar from the Syrians. Indeed, after the CSIS visit, the Syrian authorities became increasingly less forthcoming about Mr. Arar's circumstances. They would not disclose any of the details of their case against him. At one stage, they alleged he was a member of the Muslim Brotherhood; on another occasion, they said he was a member of al-Qaeda. However, they gave no details and provided no information to support the allegations. In the end, they released Mr. Arar without disclosing what charges, if any, he had faced.

Thus, even if it were shown that the Syrian authorities provided information about the Almalki and El Maati cases to Canadian officials, my conclusion about what information they gave Canadian officials with respect to Mr. Arar would not change.

In summary, on the basis of the evidence I have heard about Mr. Arar's case, I do not believe that information about co-operation between Canadian officials and the SMI in the Almalki and El Maati cases would alter my conclusions concerning what occurred in Mr. Arar's case. That said, I wish to make it clear that I am not suggesting that what occurred in those other cases was acceptable. Indeed, there are significant indications to the contrary, such as the fact that the RCMP provided the SMI with questions to be posed to Mr. Almalki in January 2003. In Chapter IX, I recommend a process to manage these types of issues when Canadians are detained abroad in terrorism-related cases.

5.
EFFORTS TO OBTAIN MR. ARAR'S RELEASE

I analyze the evidence relating to Canada's efforts to obtain Mr. Arar's release in Chapter V. In brief, I conclude that the RCMP and CSIS did not support the release efforts, but that, in the end, I am unable to say whether their failure to cooperate made any difference in terms of when Mr. Arar was released.

I do not have sufficient information about Canadian efforts to obtain the release of Messrs. Almalki and El Maati to comment on whether what happened in their cases would shed any additional light on what Canadian officials did in regard to Mr. Arar's release. Had I explored the evidence about the actions of Canadian officials in regard to the release of Messrs. Almalki or El Maati, it is possible that I would have reached a different conclusion. However, I have no

way of knowing that and, given the complexity that would have been involved in examining those issues and the tangential relevancy to the Inquiry, I did not investigate these areas of evidence. It strikes me, however, that the institutional concerns expressed by CSIS concerning the release of Mr. Arar would apply equally, if not more so, to Messrs. El Maati and Almalki.

6.
LEAKS

In Chapter VI, I discuss the leaks of information about Mr. Arar to the media. Unquestionably, the leaks came from government sources with access to classified information. According to the information in the chronologies supplied by Messrs. Almalki and El Maati, both of them were also subjected to leaks from time to time.

The practice of leaking confidential information is wrong and inexcusable. Unfortunately, leakors never seem to get caught. Administrative and internal investigations into the leaks relating to Mr. Arar have not determined who is responsible. While there is an ongoing criminal investigation into one of the leaks, none of the sources of the leaks in this case has so far been identified. I have not heard that any of the sources of leaks relating to Messrs. Almalki and El Maati have been identified either.

Without knowing who is responsible for the leaks, it is not possible to say at what level they originated or to what extent they were authorized, either formally or informally. The fact that there have been leaks in other cases, such as those of Messrs. Almalki and El Maati, suggests at least a "practice." Whether it is a practice that has tacit approval within the leaking organizations, I am unable to say. However, it is unlikely that additional evidence about the leaks in the Almalki and El Maati cases would have shed more light on who was responsible for the leaks relating to Mr. Arar or whether they were the result of an institutional practice.

7.
PATTERN OF INVESTIGATIVE PRACTICES

In reaching my conclusions about the relevance of the Almalki and El Maati cases, I am not suggesting that there was not a pattern of operational or investigative practices common to some or all of the investigations. In fact, although I have not reviewed all of the files of Messrs. Almalki and El Maati, I note that there appears to have been a pattern of investigative practices whereby Canadian agencies interacted with foreign agencies in respect of Canadians held abroad in connection with suspected terrorist activities.

I am unable to disclose much of the evidence I heard relating to Messrs. Almalki and El Maati for reasons of national security confidentiality and relevance to my mandate. As a result, I can only describe the pattern of investigative practices in general terms. It is nonetheless important to disclose them, even if only in general terms, as they point to systemic problems that go beyond Mr. Arar's case — problems that should be addressed by the relevant agencies through policies or guidelines.

The first investigative practice is that of sharing with foreign agencies information that may be used by a foreign agency to detain or arrest a Canadian. As I repeat several times in this report, sharing information is important and should be encouraged. However, it must be done properly, in accordance with established policies or protocols. This systemic issue is discussed in Chapter IX, in the context of protocols for the sharing of information with foreign agencies and that of arrangements or relationships with nations with poor human rights records.

Another practice involves sharing with a foreign agency information concerning Canadians being detained by the foreign agency. This information may be used in the interrogation of a Canadian or in legal proceedings brought against a Canadian. This issue is also discussed in Chapter IX, in the contexts referred to in the preceding paragraph.

A common issue in all investigations involves Canadian investigative agencies' pursuit of their investigative interests in Canadians being detained abroad, sometimes in conflict with or to the prejudice of diplomatic efforts to have those Canadians released to Canada. Practices include submitting questions to be asked of a Canadian by the foreign agency, conducting interviews abroad, or sharing information that could be used as the basis of questioning by the foreign agency. In Chapter IX, I discuss the need for the Government of Canada to follow a more coordinated approach in attempting to obtain the release of Canadians detained abroad.

A practice by Canadian agencies seen in all the investigations was that of accepting and relying upon information that might be the product of torture without conducting an adequate reliability assessment to determine whether or not torture had been involved. Canadian officials appeared to be dismissive of allegations of torture (or did not take them seriously). In Chapter IX, I make recommendations concerning how such information should be processed, used and distributed by Canadian agencies.

Finally, a common investigative practice involved notification of American agencies whenever a Canadian suspected of terrorism-related activities departed Canada for any reason, as well as provision of the Canadian's intended destination. In light of American practice at the time, it is reasonable to assume

that the country of destination was informed by the American authorities of the Canadian's travel to that country.

In one internal communication, an RCMP official stated that his agency would have notified the Middle Eastern country of destination of the departure from Canada of a Canadian suspected of terrorist activity if he had not been confident that the Americans would notify that country of the departure. The RCMP had given the American authorities the information concerning the departure of the Canadian.

The justification given for this information sharing was that Canada has international obligations in relation to the movement of known terrorists. Upon his arrival in the Middle Eastern country, the Canadian was detained and tortured.

While these investigative practices may not have been the result of specific pre-existing policies, they were nonetheless practices that were common to all investigations and, as a result, show that Canadian officials' treatment of Mr. Arar was not unique. They are indicative of systemic problems that should be addressed by the relevant agencies. In Chapter IX, I provide suggestions in this regard.

8.
MUAYYED NUREDDIN

Muayyed Nureddin is another Muslim Canadian who was imprisoned in Syria. Professor Toope concluded that he, too, had been tortured. However, his case has significantly fewer links to Mr. Arar's than those of Messrs. Almalki and El Maati. The information gathered by Project A-O Canada did not link Mr. Arar with Mr. Nureddin. Moreover, Mr. Nureddin was not imprisoned in Syria until December 2003, two months after Mr. Arar was released from Syrian custody, and he was held for only about one month. Thus, drawing parallels between what happened to Mr. Arar and Mr. Nureddin is more difficult.

In any event, I have reviewed the circumstances surrounding Mr. Nureddin's case to the extent that I have them, and those circumstances do not add to what I have already said about the Almalki and El Maati cases.

9.
RECOMMENDATIONS

I accept the premise underlying the intervenors' submission. The cases of each of the other three men — Messrs. Almalki, El Maati and Nureddin — raise troubling questions about what role Canadian officials may have played in the events that befell them.

Although the intervenors could file complaints with the appropriate review bodies, that is, the Commission for Public Complaints (CPC) in the case of the RCMP and the Security Intelligence Review Committee (SIRC) in the case of CSIS, there is a concern that those review bodies would not be able to adequately carry out a review of the three cases because of the need to review the activities of more than one agency at a time. There might have been involvement by both the RCMP and CSIS, as well as officials from DFAIT and perhaps other government departments or agencies. The CPC and SIRC, however, have jurisdiction only with respect to their underlying agencies. Currently, there is no provision for integrated review of operations by the RCMP and CSIS. Moreover, there may be concerns about the sufficiency of the investigative powers of the CPC.

I note that, prior to the establishment of the Inquiry, reviews in the Arar case were conducted by the SIRC and also by the RCMP under the CPC legislation. In its report, the SIRC observed that its mandate did not extend beyond CSIS and it was therefore limited in the review it could conduct. Similarly, the CPC cannot investigate CSIS, and it may not have the power to compel production of all of the documents it considers relevant. The creation of the Inquiry solved the integration problem in the Arar case. I was directed to investigate and report on the actions of Canadian officials generally, without concern for which department or agency employed them.

In the Policy Review report, I make recommendations for an independent arm's-length review mechanism for RCMP national security activities. I also make recommendations for addressing review problems arising from integrated operations.

That said, I do not know whether the Canadian government will implement the recommendations set out in the Policy Review and, if so, how long it will take to do so. I can understand a concern that the practical result of awaiting implementation of those recommendations may leave the complaints unaddressed.

One of the options put forward by the intervenors was that the three cases be considered through a public inquiry — possibly a second stage of this Inquiry. I would not recommend adopting that approach. My experience in this Inquiry indicates that conducting a public inquiry in cases such as these can be a tortuous, time-consuming and expensive exercise. Quite properly, the public inquiry process brings with it many procedural requirements for openness and fairness. In Chapter VIII, I describe some of the difficulties encountered in this Inquiry and how I addressed them. Rather than repeat those descriptions here, I will simply say that there are more appropriate ways than a full-scale public

inquiry to investigate and report on cases where national security confidentiality must play such a prominent role. These types of cases are likely to occur from time to time, and it is not practical or realistic to respond by calling a public inquiry each time.

That said, I have heard enough evidence about the cases of Messrs. Almalki, El Maati and Nureddin to observe that these cases should be reviewed and that the reviews should be done through an independent and credible process that is able to address the integrated nature of the underlying investigations. The process that will result from my Policy Review recommendations, if implemented, is one approach that, in my view, would be acceptable. However, there may be delays. Another possibility would be the type of process recommended by Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness on questions relating to the bombing of Air India Flight 182, for reviewing the investigations in the Air India case. Whatever process is adopted, it should be one that is able to investigate the matters fully and, in the end, inspire public confidence in the outcome.

I hasten to add that, in making these comments, I am not suggesting that this Inquiry was not worthwhile. On the contrary, I think that it has turned out to be beneficial for a number of reasons. In the end, it has shone light on investigations and practices about which there was a great deal of public concern. The Inquiry has also provided the platform for making many operational recommendations about the conduct of national security investigations and the treatment of Canadians detained abroad in connection with terrorism-related matters, as well as providing very useful information for making recommendations in the Policy Review.

Notes

1 For ease of reference, I will refer to this as a "pre-existing policy."

2 Closing submissions – Joint Intervenors' Submission to the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (September 10, 2005), p. 1.

3 I deal with Mr. Nureddin's case separately from the other two.

4 In reaching this conclusion, I cannot exclude entirely the possibility that, were I to hear all of the evidence about the actions of Canadian officials in relation to Mr. Almalki or Mr. El Maati, there might not be some evidence to show a pre-existing policy. However, given the evidence I heard, I think that it is most unlikely.

VIII
Factual Inquiry Process

1.
INTRODUCTION

The process for a public inquiry needs to be flexible so that it can be adjusted as circumstances require. This was certainly the case with the Factual Inquiry, which presented a unique and difficult challenge: conducting a public inquiry involving a significant amount of information that could not be disclosed publicly because of national security confidentiality (NSC) concerns.[1]

This chapter outlines the process for the Factual Inquiry and discusses a number of special features arising from NSC considerations.

When the Inquiry began, Commission counsel and I had little appreciation of how much information would be subject to NSC claims or how the Government[2] would respond to my decisions about what could be disclosed publicly. We learned as we went. The process developed at the outset evolved and at one point, in April 2005, it became necessary for me to direct major changes in the way the Inquiry would proceed.

Numerous procedural challenges arose from the tension among three different, sometimes competing requirements: making as much information as possible public, protecting legitimate claims of NSC, and ensuring procedural fairness to institutions and individuals who might be affected by the proceedings.

These procedural challenges greatly extended the time and resources needed to complete the Inquiry. The extra work included reviewing and processing thousands of documents that were subject to NSC claims, ensuring that NSC information was handled in the appropriate manner, addressing what seemed like a constant stream of procedural issues relating to NSC claims, hearing evidence *in camera* and then some of it again in public, and attempting to provide a public summary of *in camera* evidence. Although it is impossible to

be precise, I venture that dealing with NSC issues made the Inquiry process 50 percent longer.

Despite the fact that procedural issues were difficult and time consuming, I believe that, by and large, the process we followed worked well. Interestingly, while the challenges underlying this process were unique for a public inquiry, an increasing number of judicial and administrative proceedings have had to address the same or similar issues in recent years. I refer to proceedings in which the decisions are based, in whole or in part, on evidence that cannot be disclosed publicly or to the parties who will be affected by them.[3] As a result, the parties cannot participate fully in the proceedings. In this chapter, I describe how we addressed these types of issues.

Over the course of the Inquiry, I made a number of rulings pertaining to the process. These rulings set out my reasons for adopting various process features. I review the more significant aspects of those rulings in this chapter as well.

2.
MANDATE

By Order in Council dated February 5, 2004,[4] I was appointed Commissioner to conduct an inquiry under Part I of the *Inquiries Act*.[5] There are two parts to my mandate. The first is referred to as the "Factual Inquiry," in which I am directed:

> (a) to investigate and report on the actions of Canadian officials in relation to Maher Arar, including with regard to
> (i) the detention of Mr. Arar in the United States,
> (ii) the deportation of Mr. Arar to Syria via Jordan,
> (iii) the imprisonment and treatment of Mr. Arar in Syria,
> (iv) the return of Mr. Arar to Canada, and
> (v) any other circumstance directly related to Mr. Arar that the Commissioner considers relevant to fulfilling this mandate.

The second part of the mandate, referred to as the "Policy Review," instructs me as follows:

> (b) to make any recommendations that he considers advisable on an independent, arm's length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security based on
> (i) an examination of models, both domestic and international, for that review mechanism, and

(ii) an assessment of how the review mechanism would interact with existing review mechanisms.

The two parts of the mandate are very different. As the name suggests, the Factual Inquiry involves adjudicative fact-finding — determining what Canadian officials did with respect to Mr. Arar. The Policy Review, on the other hand, requires examination of a wide range of policy-related issues, practices and experiences, both domestic and international, in relation to the review of national security investigations. While the Factual Inquiry would serve as one example of a national security investigation, the Policy Review's mandate extends far beyond what Canadian officials did or did not do with respect to Mr. Arar and others involved in that investigation. Fulfilling the two parts of the mandate therefore required two different procedural models.

The Factual Inquiry was conducted by way of evidentiary hearings, some held *in camera* and others, in public. The proceedings had many trial-like features. For example, lawyers played an important role, and witnesses were examined and cross-examined under oath or affirmation. In contrast, the Policy Review process was a research-based consultative study of issues relating to a review mechanism for a law enforcement agency's national security activities. I describe the latter process in more detail in a separate report for the Policy Review.

Some intervenors suggested that I should not complete the Policy Review until after the Government of Canada had released my report on the Factual Inquiry to the public. Their argument was that those making submissions to the Policy Review would benefit from having my conclusions on what Canadian officials did with respect to Mr. Arar. I decided against this approach and proceeded with both parts of the mandate simultaneously. However, I considered the facts relating to Mr. Arar's case when deliberating about the Policy Review and I received helpful submissions from Mr. Arar relating the facts of his case to the Policy Review. I shall be submitting the Policy Review report to the government shortly after I submit this report.

There were two reasons I adopted this simultaneous approach. First, the parties making submissions within the framework of the Policy Review had the benefit of the public evidence in the Factual Inquiry, and I did not consider that my conclusions or any additional information made public in my report would further assist them in making submissions. Second, there is a public interest in having the issues in the Policy Review process addressed in an expeditious manner. Since it seemed possible that the public release of the Factual Inquiry report

would be delayed because of NSC issues, I decided it was best to proceed with the Policy Review process, so as not to delay the delivery of that report.

3.
FACTUAL INQUIRY PROCESS

3.1
PRINCIPLES

In Part I of my report relating to the Walkerton water tragedy, I set out the four principles that guided the conduct of that Inquiry: thoroughness, expeditiousness, openness to the public, and fairness. The process for the Factual Inquiry here was designed with these same principles in mind. I adopt here what I said about the importance of each of these principles in the Walkerton report.[6]

In view of the purpose of an inquiry, "[i]t is crucial," as Mr. Justice Cory has said, "that an inquiry…be and appear to be independent and impartial in order to satisfy the public desire to learn the truth."[7] To realize this duty of independence and impartiality, an inquiry must be *thorough* and examine all relevant issues with care and exactitude, to leave no doubt that all questions raised by its mandate were answered and explored. In order to be effective, a public inquiry must also be *expeditious*. Expeditiousness in the conduct of a public inquiry makes it more likely that members of the public will be engaged by the process and will feel confident that the issues are being appropriately addressed.

This is a public inquiry. It was therefore essential that the proceedings be as transparent, accessible and *open to the public* as possible. The principles discussed above all stem from the public's interest in an inquiry. It is important to remember, however, that inquiries can have a serious impact on those implicated in the process. Thus, an inquiry must balance the interests of the public in finding out what happened with the rights of those involved to be treated with *fairness*.

As I indicate above, two additional factors came into play in this iinquiry, namely, the need to protect NSC and the resulting concern for fairness to individuals and institutions potentially affected by my findings.

3.2
NSC MANDATE

The Order in Council establishing the Inquiry set out directions for dealing with information that was subject to NSC. It provided that:

> (k) the Commissioner be directed, in conducting the inquiry, to take all steps necessary to prevent disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security and, where applicable, to conduct the proceedings in accordance with the following procedures, namely,
>
> (i) on the request of the Attorney General of Canada, the Commissioner shall receive information *in camera* and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information would be injurious to international relations, national defence or national-security,
>
> (ii) in order to maximize disclosure to the public of relevant information, the Commissioner may release a part or a summary of the information received *in camera* and shall provide the Attorney General of Canada with an opportunity to comment prior to its release, and
>
> (iii) if the Commissioner is of the opinion that the release of a part or a summary of the information received *in camera* would provide insufficient disclosure to the public, he may advise the Attorney General of Canada, which advice shall constitute notice under section 38.01 of the *Canada Evidence Act*.

Further, paragraph (m) of the Order in Council provided that nothing in the order was to be construed as limiting the application of the provisions of the *Canada Evidence Act*.[8]

The language in the mandate directing that I prevent disclosure of information that, if disclosed, would "be injurious to international relations, national defence or national security" is similar to language in section 38 of the *Canada Evidence Act*, which prohibits disclosure of this type of information. There are many types of information that fall within this prohibition. For example, confidential sources of information (informers) and details of ongoing national security investigations that might compromise those investigations may not be disclosed publicly. Similarly, information received from foreign governments,

particularly when provided in confidence, often may not be revealed. Information sharing among governments is crucial to conducting national security investigations,[9] and respecting the confidence of those who provide information is essential.

On the other hand, a good deal of information relating to national security investigations may be disclosed without causing injury. For example, there will often be no harm in divulging information about a completed investigation, particularly if the fact of and circumstances relating to it are already in the public domain. Moreover, many of the investigative steps taken by a law enforcement agency such as the RCMP in a national security investigation may safely be revealed. Unquestionably, there are borderline areas where judgments must be made. It is important to note that both the *Canada Evidence Act* and the Order in Council establishing the Inquiry provide for a means whereby information that may potentially be injurious to NSC may be disclosed if the public interest in disclosure outweighs the potential injury.

The scheme for addressing NSC claims set out in the Order in Council is complicated, and I do not discuss it in detail here. I reviewed a number of aspects of the process in rulings, which are appended to Volume II of the *Factual Background*. However, when the NSC mandate is stripped to the essentials, there are two points that are critical: on the one hand, the mandate required me to form opinions about what information could or should be disclosed to the public; on the other hand, my decisions in this respect were subject to challenge by the Attorney General of Canada in the Federal Court, under the legislative scheme in section 38.01 of the *Canada Evidence Act*. Thus, my authority with respect to NSC was seriously attenuated.

It is not my intention to criticize the mandate. Indeed, while there were a number of possible approaches to addressing NSC issues, the one taken in the Order in Council was, in my view, reasonable. I draw attention to these points solely to make it clear that my role in deciding what could be made public was limited, and my decisions were always subject to review and challenge by the Government. Indeed, as I describe below, that reality led me to significantly alter the process for the Inquiry after the Government instituted a court challenge to my ruling about the disclosure of information in a summary of *in camera* evidence.

3.3
RULES OF PROCEDURE AND PRACTICE

In April 2004, the Inquiry developed and published a set of draft Rules, which were to some extent modeled on those of other inquiries, but tailored to the

particular circumstances of this inquiry as I viewed them at the time. Once parties were granted standing, they were given an opportunity to comment on them. I subsequently incorporated the substance of some of their comments into the Rules.[10]

As described above, the Inquiry was divided into two parts. The Rules for the Factual Inquiry outlined the basis on which parties would be granted standing, their rights during the hearings, and the rights of witnesses. They also set out the role of Commission counsel, the manner in which evidence would be called, and the order in which witnesses would be examined.

Further, the Rules addressed in detail the process for receiving evidence subject to NSC claims.[11] They provided that I would convene *in camera* hearings to hear evidence over which the Government asserted an NSC claim. They recognized that some parties with standing would not have a security clearance giving them access to information subject to NSC claims and would therefore not be able to participate in the *in camera* hearings. The Rules also stated that, after hearing evidence *in camera*, I would periodically make rulings on the validity of the NSC claims asserted by the Government.

In addition, the Rules specified that, from time to time, I would prepare summaries of *in camera* evidence that, in my opinion, could be disclosed publicly. The intent behind this was to keep the public informed to some extent and in a timely way of what was being heard *in camera*. Further, it was anticipated that these summaries of *in camera* evidence would be useful to parties who would be participating only in the public hearings that were scheduled to follow the *in camera* hearings, in particular Mr. Arar.

3.4
STANDING AND FUNDING

The Commission[12] published a Notice of Hearing inviting persons interested in the Factual Inquiry to apply for standing and funding. I received 24 applications, some involving several individuals and organizations. I heard the applications on April 29 and 30, 2004 and granted standing to a number of individuals and organizations.[13]

In my ruling, I created three separate categories through which persons or groups could participate in the Factual Inquiry: a) party standing, for those with a substantial and direct interest in all or part of the subject matter of the Factual Inquiry; b) intervenor standing, for those who did not have a substantial and direct interest, but had a demonstrated concern in the issues raised in the mandate and a perspective and/or expertise that I considered would be of assistance

to me in carrying out the mandate; and c) witnesses, for those who would be entitled to representation by counsel when giving evidence.[14]

The primary difference between party and intervenor standing was that those with party standing could be involved in all aspects of the hearings, including development of the evidence and examination of the witnesses. Those with intervenor standing had opportunities to participate by making opening and closing submissions and submissions on specific issues, such as the principles relating to NSC and the rules of process and procedure. However, they did not have the right to examine witnesses unless leave was granted to do so. In passing, I note that intervenors also had the opportunity to participate in the Policy Review process.

The Attorney General of Canada was granted full standing for all parts of the Inquiry. The Office of the Attorney General represented all government departments and agencies connected with the issues, as well as many of the government officials who testified at the Inquiry.

Maher Arar was granted standing to participate throughout the Inquiry except, significantly, in the *in camera* hearings. Mr. Arar did not have the security clearance required for access to the information over which the Government claimed NSC, and it was not reasonable, in the circumstances, to expect the Canadian government to provide such clearance. Mr. Arar's counsel did not seek clearance to allow their participation in the *in camera* hearings, and I think this was a reasonable decision. Had they obtained clearance, they would not have been able to discuss information that was subject to NSC claims with their client and would not have been able to obtain informed instructions on how to proceed on many issues. In this regard, I agree with the comments of Iacobucci and Arbour J.J. in the *Vancouver Sun* case, where they expressed concern about counsel's role in a similar situation, noting that it was "difficult…to understand how the public good is better served by the qualified participation of professionals who cannot discharge fully their publicly entrusted mandate. In any event, these issues can be left for another day, and should be debated amongst the professional bodies involved so that court-imposed conditions can properly consider ethical standards and best practices in the professions involved."[15]

The Ontario Provincial Police (OPP) and Ottawa Police Service (OPS) were granted standing limited to the areas of the evidence that directly engaged their interests.

I granted intervenor standing to 16 organizations. In general terms, these organizations could be divided into three groups, representing the following interests: Arab and Muslim/Islamic interests, civil liberty and Canadian democracy/sovereignty interests, and international human rights interests.

For the reasons set out in my ruling, I declined to grant standing to Ahmad El Maati, Abdullah Almalki and Muayyed Nureddin, three other Canadians who had been detained by Syrian authorities. That said, I heard some evidence relating to Messrs. El Maati and Almalki, and their counsel appeared periodically at the public hearings and were granted limited standing to address evidence affecting their clients' reputational interests.

With regard to funding, the Order in Council provided that:

(h) the Commissioner be authorized to recommend funding, in accordance with approved guidelines respecting rates of remuneration and reimbursement and the assessment of accounts, to a party who has been granted standing at the factual inquiry, to the extent of the party's interest, where in the Commissioner's view the party would not otherwise be able to participate in that inquiry.

In my ruling, I recommended funding for Mr. Arar to obtain the services of two senior and two junior counsel, to be paid in accordance with Government of Canada guidelines. Counsel undertook that they would do their best to avoid duplication and overlap, and I observe here that they were faithful to their undertaking. From time to time during the Inquiry, Mr. Arar's counsel requested funding for additional matters not specifically covered by the guidelines or contemplated in my initial ruling. I accordingly made some supplementary funding recommendations to the Government of Canada for Mr. Arar's counsel.

In my ruling, I also made recommendations for limited funding for those organizations granted intervenor standing. In January 2005, the intervenor groups formed what was, in effect, a single coalition to monitor the progress of the Inquiry. This was a sensible and positive step, and I subsequently recommended some additional funding to assist with this coordinated approach.

I am pleased to note that the Canadian government accepted all of my recommendations with respect to funding.

3.5
THE ISSUE OF CAUSATION

In Chapter I, I described the argument of Government counsel and counsel for certain RCMP officers that I should not make any negative or critical findings with respect to their clients unless I am able to find as a fact that the actions of their clients "caused or contributed to" what happened to Mr. Arar. In support of this argument, they have referred to the decision of the Supreme Court of Canada in the Blood Inquiry case.[16]

As I noted earlier, I do not accept this reasoning. The "causation argument" in my view depends on an unduly narrow reading of what the Supreme Court said about the scope of public inquiries in the Blood Inquiry case. In that case, the Supreme Court made it clear that a public inquiry commissioner could make evaluative comments, even if critical of individuals, if they were necessary to fully report on the matters raised by the mandate or if they were helpful in making recommendations.

For example, in this Report I have pointed out that some information provided to American agencies by the RCMP was inaccurate and unfair to Mr. Arar and that the RCMP did not follow its established information-sharing policies. In order to properly report on these actions, I have set out how and why they took place and, importantly, why they were unacceptable, creating unfair risks for Mr. Arar. It is important, in my view, to report fully on these actions and the problems that could arise if similar actions are taken in the future.

In addition, Chapter IX contains recommendations that stem directly from the actions of Canadian officials in relation to Mr. Arar. As I point out in that chapter, I have limited my recommendations to matters that flowed from the evidence in the Factual Inquiry. In many instances, the discussion that follows a particular recommendation relies specifically on findings in the Report. No doubt some of those findings could be viewed as being critical or negative. However, they were necessary in order to formulate the recommendations and develop the reasons for them. I think Mr. Justice Cory put it aptly in the Blood Inquiry case when he said ". . . it is clear that commissioners must have the authority to make those findings of fact which are relevant to explain and support the recommendations even though they reflect adversely upon individuals."[17]

I have two further remarks about the "causation argument." First, as I have already stated, I do not read into the mandate the requirement that I report only on actions that caused Mr. Arar's fate. In several places in the Report, I comment on the actions of Canadian officials that created or increased a risk that Mr. Arar would be subjected to unacceptable treatment. While creating or increasing an unacceptable risk may sometimes fall short of establishing causation as that term is used in a strictly legal sense, creating an unacceptable risk is still something that should be avoided. In my view, reporting on the creation of unacceptable risks falls within the mandate set out in the Order in Council and is something that the Canadian public would expect me to do. It is worth repeating that I am not making any findings of civil or criminal liability that might require the proof of causation. Rather, I am reporting on "the actions of Canadian officials in relation to Maher Arar," and nothing more.

Finally, I must point out that much of the "causation argument" was directed at the American decisions to detain Mr. Arar in New York and remove him to Syria. Those making this argument contended that I should not comment critically on the actions of Canadian officials unless it can be shown that the actions of their clients "caused or contributed to" the American decisions. In this report, I have concluded that information supplied by the RCMP very likely played a role in the American decisions to detain and remove Mr. Arar to Syria. In that sense, those actions did "cause or contribute to" Mr. Arar's fate. That conclusion, it seems to me, provides another answer to the "causation argument," at least as it applies to the American decisions.

3.6
SECTION 13 NOTICES

The *Inquiries Act* provides special protection to persons who may be found by an inquiry to have engaged in misconduct. Specifically, section 13 of the Act provides:

> No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.[18]

The Commission issued notices of alleged misconduct pursuant to section 13, also known as "Section 13 notices,"[19] to a number of persons and institutions. Recipients of such notices were provided procedural rights to ensure that they would be made aware of, and could respond to, any allegation of misconduct. They had the right to be represented by counsel and were entitled to receive all documents relating to issues affecting their interests.

All of the individuals who received Section 13 notices were officials with federal government departments or agencies. Obviously, Mr. Arar was not issued a Section 13 notice. The purpose of the Inquiry was to examine the actions of Canadian officials in relation to Maher Arar, not to consider the conduct of Mr. Arar.

All recipients of Section 13 notices and counsel representing them had existing security clearances or were able to obtain them. As a result, they were able to participate in the *in camera* hearings. It was therefore not necessary to address the issue of whether the "reasonable notice" required by section 13 of the *Inquiries Act* would have been provided if, for security reasons, one of the recipients of a Section 13 notice had been unable to access information affecting his or her interest.

In addition, recipients of the Section 13 notices were entitled to participate in the hearings to the extent necessary to respond to allegations of misconduct, and to call evidence and cross-examine witnesses on relevant issues. They were also entitled to make closing submissions.

A number of individuals who received Section 13 notices moved to quash them. Because the arguments in support of those motions relied in part on information over which the Government claimed NSC, the motions were heard *in camera*. The grounds put forward in support of the motions included: late delivery of the notice; lack of detail or of standards in the notice; the potential that I would make findings of criminal or civil liability; and an assertion that matters in the notice exceeded the mandate. In a ruling dated August 17, 2005, I dismissed all of the motions[20].

3.7
COLLECTION OF DOCUMENTS

In March 2004, the Commission issued the first of what would be numerous requests for documents from the various government departments and agencies connected with the Inquiry's mandate.[21] Over time, the government responded to all of the Commission's requests and produced the documents that Commission counsel and I considered to be relevant to the mandate.[22] In total, the Commission received more than 21,500 government documents, some of which were lengthy.

The Government and Commission set up a secure network that included an electronic document management system called Ringtail. As the documents were received, they were electronically uploaded to this system, allowing the Commission to efficiently and effectively review and organize them. The Commission also created a secure document management facility, approved according to federal government security standards, for storing and managing hard copies of government documents.

The Commission received the full text of all government documents, before any redaction[23] was done to take account of the Government's NSC claims (subject in a few cases to claims of solicitor-client privilege or cabinet confidence). Government counsel indicated which documents or parts of documents were subject to its NSC claims through a colour coding system, in which the parts of the documents in question were highlighted in different colours, each colour representing the type of claim being asserted.

All Commission counsel and staff with access to government information were cleared for handling top-secret information. In preparation for the *in camera* and public hearings, Commission counsel reviewed the documents to

determine which should be entered into evidence. In total, over 6,500 government documents were entered as exhibits during the Inquiry. In advance of each hearing, Commission staff prepared binders containing hard copies of the documents that would become exhibits. These binders were made available to parties and witnesses who would be appearing at the hearings.

Commission counsel and staff did a remarkable job of managing the huge amount of material received, as well as organizing, preparing and distributing the documents to be entered into evidence.

3.8
COMMISSION COUNSEL

Commission counsel played a critically important role throughout the Inquiry. While I had overall responsibility for what areas of evidence should be explored, Commission counsel reviewed the thousands of government documents received, interviewed potential witnesses, and called the evidence at the hearings.

The Factual Inquiry presented an unusual challenge for Commission counsel in calling evidence. A good deal of the evidence, all from Government witnesses, was heard *in camera*. The only parties other than the Government who participated in the *in camera* hearings were persons who had received Section 13 notices and, occasionally, the OPP and OPS. For the most part, everyone appearing had interests that were identical or similar to the Government's. Indeed, it was obvious to me that counsel for recipients of Section 13 notices often coordinated their approach to the evidence with Government counsel.

This situation was exacerbated by the fact that the Government chose to have one set of counsel represent all the government departments and agencies with a connection to the Arar matter. As a result, when departments or agencies had differences in position, those differences were not explored by Government counsel.

Given these circumstances, I instructed Commission counsel to test the *in camera* evidence by means of cross-examination, when necessary. Thus, as one of the steps in preparing to examine witnesses *in camera*, Commission counsel met periodically with counsel for Mr. Arar and for the intervenors to receive suggestions about areas for cross-examination. In the *in camera hearings*, if Commission counsel thought it necessary, witnesses called by the Commission were cross-examined, whether the Government agreed or not. Commission counsel cross-examined many of the witnesses, sometimes vigorously, and did so with considerable effectiveness.

In my view, it was appropriate and necessary for them to perform this function. Frequently in public inquiries, the Commissioner is assisted by counsel for the parties who are granted standing, who represent different interests and perspectives. Although the public inquiry is not, strictly speaking, an adversarial process, the Commission has the advantage of hearing evidence tested through cross-examination by those with competing points of view. However, when parties affected by the proceedings are not present to perform the cross-examination role, it is extremely helpful and even essential that there be an independent person able to do so. Having Commission counsel incorporate into witness examinations the perspectives of those who had an interest, but could not take part in the proceedings, helped to address the substantial shortcoming in the process resulting from the exclusion of those parties.

When I reflect on the nature of the issues raised by the mandate for the Inquiry and the type of evidence I heard, I recognize that I could not have reported with confidence if the witnesses heard *in camera* had not been cross-examined. I think Professor Wigmore's comments about the value of cross-examination are particularly apt:

> For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience….
>
> …Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience…. The fact of this unique and irresistible power remains, and is the reason for our faith in its merits. If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.[24]

It is often said that Commission counsel's role in a public inquiry is to lead the evidence in an independent and fair manner, and that Commission counsel should neither advocate a particular position nor set out to "prove a case." I agree with this description. The fact that Commission counsel may, in some circumstances, be required to cross-examine witnesses need not compromise the independence or fairness of their position. Cross-examinations, even challenging

ones, can be carried out fairly and even-handedly, and need not result in Commission counsel adopting an adversarial or prosecutorial role.

Having independent counsel assist when a tribunal hears evidence in the absence of those affected by the proceedings may also assist in addressing understandable concerns about the *in camera* decision-making process among affected parties and members of the public. Use of independent counsel thus makes a good deal of sense when all or a portion of proceedings are conducted *in camera*.

I would add that, if independent counsel, such as the Commission counsel in the Inquiry, are to effectively test evidence and cross-examine witnesses, they must have the resources to do so properly. They must also have access to all relevant documents and must be given the time and facilities to properly prepare.

3.9
AMICI CURIAE

The Rules of Practice and Procedure provided for the appointment of an independent legal counsel to act as *amicus curiae* to test the Government's NSC claims.[25] The idea was to appoint a person, independent of the Government, with extensive expertise in national security matters, to assist me in ensuring that the Government's claims were subjected to rigorous examination. I appointed Ron Atkey, P.C., Q.C., to be *amicus curiae*. Mr. Atkey has a distinguished background and is recognized as having significant expertise in the area. In addition to having served as federal Minister of Employment and Immigration, he served for five years as the first Chair of the Security Intelligence Review Committee (SIRC), where he was exposed to issues relating to NSC.

In December 2004, Mr. Atkey appointed Gordon Cameron to assist him in his role as *amicus curiae*. Mr. Cameron also has considerable experience in matters involving NSC, having served for ten years as outside counsel for the SIRC.

Messrs. Atkey and Cameron both made significant and valuable contributions when issues arose with respect to NSC. They had access to all of the documents received by the Commission, as well as to the transcripts of the entire *in camera* evidence. In some instances, they made submissions about the substance of the Government's NSC claims. When appropriate, they also commented on the process for receiving evidence subject to NSC claims.

In a ruling dated May 9, 2005,[26] I elaborated on the role of the *amicus curiae*. At the request of Mr. Arar, and with Mr. Atkey's concurrence, I asked that either Mr. Atkey or Mr. Cameron attend the public hearing held from May through August 2005. At the time of closing submissions, they outlined the issues

they thought should be addressed in the Commission's report, without taking any positions themselves. Finally, I asked Messrs. Atkey and Cameron to make submissions regarding which parts of this report could be disclosed to the public. I describe the process relating to the publication of this report in section 3.16 below.

I wish to thank Messrs. Atkey and Cameron for the exemplary manner in which they fulfilled their duties. Throughout, they were responsible, careful and very thorough, bringing their obvious expertise to bear on difficult issues. The process for the Inquiry was enhanced by their involvement, and I am indebted to them for their assistance.

3.10
HEARINGS

In late June 2004, I held five days of public hearings to receive background and contextual evidence. Witnesses from CSIS, the RCMP and DFAIT described how these institutions are organized and how they function in areas relevant to the Inquiry.

The question arose as to the order in which the *in camera* and public hearings should be held in order to receive the factual evidence. After hearing submissions from the parties, I ruled that I would begin by hearing all of the CSIS and RCMP factual evidence *in camera*.[27] At the time, the Government was claiming NSC over much of this evidence and I thought it important to hear it in its entirety in one uninterrupted sequence, rather than shifting back and forth between *in camera* and public hearings.

In making this ruling, I provided for two procedural steps, which eventually had to be abandoned. First, after hearing all the *in camera* evidence, I would make an *omnibus* ruling with respect to the Government's NSC claims, thereby providing a means for disclosing, in advance of the public hearings, the part of the evidence that I considered could be made public.

Second, I indicated my intention to produce a summary of the *in camera* evidence, indicating what evidence the Government claimed was subject to NSC. I left open the possibility of NSC rulings and summaries of the *in camera* evidence prior to completion of the *in camera* hearings.

The Inquiry heard *in camera* evidence between September 13, 2004 and April 27, 2005. Forty-nine witnesses testified, primarily officials from CSIS, the RCMP and Canada Customs. I heard an additional seven days of *in camera* evidence in August 2005, and a further two days in November 2005.

The public hearings began on May 11, 2005 and were completed on August 31, 2005. In October and November 2005, I heard an additional three days of public evidence.

In total, I heard from 83 witnesses[28] over the course of 75 days of *in camera* and 45 days of public testimony.

3.11
CSIS SUMMARY

Nine witnesses from CSIS testified from September 13 to September 29, 2004. Their testimony made up the greater part of the evidence relating to the involvement of CSIS in the events covered by the mandate. By the time this evidence was complete, it was apparent that the *in camera* hearings, particularly the RCMP evidence, would be lengthy. Since I considered it important to make available to the public as much information as possible about the proceedings in a timely manner, I decided to prepare a summary of the *in camera* evidence from CSIS that, in my view, could be disclosed publicly. Over the next month, Commission counsel met often with Government counsel to try and reach agreement on the content of that summary. The Government took a more restrictive view of what could be disclosed than did Commission counsel. Mr. Atkey was involved in this process in the role of *amicus curiae* and agreed with Commission counsel's position.

On October 29, 2004, I held an *in camera* hearing on the Government's evidence and submissions regarding its NSC claims over the disputed material in the summary. On December 20, 2004, I released a ruling[29] concerning what portions of the summary could be disclosed and giving my reasons, including my reasons for rejecting certain of the Government's NSC claims.

The Government responded by instituting proceedings in the Federal Court challenging the disclosure of some information that I considered could be made public under section 38 of the *Canada Evidence Act*.

3.12
REVISED PROCESS

The Government's challenge to my ruling on the summary of *in camera* evidence from CSIS caused me to re-think parts of the process I had established for the Factual Inquiry. The nature of the disagreements over what could be disclosed was such that I believed that trying to resolve them, most likely through litigation, would result in considerable delay and might seriously impair the Inquiry's work, if not bring it to a complete halt. With this in mind, I called for submissions from the parties about how I should proceed.

In a ruling dated April 7, 2005,[30] I amended the process for the Factual Inquiry, discontinuing the approach of producing summaries of the *in camera* evidence. I also decided to defer further rulings on the Government's NSC claims until I had finished hearing both the *in camera* and public portions of the evidence. After hearing the evidence, I would issue a report with my conclusions, indicating what parts of the Report I considered could be made public. If there were to be disagreements with the Government about its NSC claims, I thought it best to address these in the context of a report, rather than in a series of protracted and costly interlocutory proceedings. This new approach meant that the public hearings would proceed on the basis that there would be no public disclosure of any information over which the Government claimed NSC, even when I disagreed with the claims.

I also indicated that I would no longer be seeking to publish the summary of *in camera* evidence from CSIS that I considered could be disclosed publicly, even though I continued to believe its disclosure was appropriate. The Government withdrew its litigation and the Inquiry proceeded.

3.13
TRANSITION TO PUBLIC HEARINGS

Moving from *in camera* proceedings to public hearings raised a number of process issues, some of which I addressed in rulings released on May 9 and 12, 2005.[31] I discuss three of the more important issues below.

3.13.1
Mr. Arar's Testimony

The question arose as to whether or not Mr. Arar should testify at the Inquiry. My mandate directs me to examine the actions of Canadian officials in relation to Mr. Arar. Having examined all of the evidence, I am satisfied that it was not necessary for Mr. Arar to testify in order for me to answer the questions raised by the mandate. That said, Mr. Arar has a strong reputational interest that is affected by the Inquiry. However, he has not had access to many of the documents or to a good deal of the *in camera* evidence relating to matters about which he could testify. Consequently, I have directed that Mr. Arar's decision as to whether or not he wishes to testify be deferred until after public disclosure of this report, the idea being that he will then likely have as much information as he is ever going to have about the matters on which he might testify. If Mr. Arar wishes to testify, he may bring a motion and, if I consider it appropriate, I will hear his evidence.

3.13.2
Fact-Finder

Having deferred the point in time at which Mr. Arar would decide if he wished to testify, I was still interested in knowing about Mr. Arar's treatment in Jordan and Syria. I heard a considerable amount of evidence about how he had been mistreated. While there was little, if any, dispute about the mistreatment suffered by Mr. Arar, I considered that the record of the Inquiry would benefit from having an account of those experiences directly from Mr. Arar. Accordingly, I appointed a fact-finder.

I asked Professor Stephen Toope, who has international experience in investigating claims of torture, to look into Mr. Arar's allegations of mistreatment and issue a report that would become part of the record. I also asked Professor Toope to interview three other Canadians, Messrs. Almalki, El Maati and Nureddin, who alleged mistreatment in Syrian custody at around the same time as Mr. Arar. I made it clear that the fact-finder's report would be used for the sole purpose of describing Mr. Arar's mistreatment in Jordan and Syria. In particular, I directed that it would not form the basis for factual findings about the actions of Canadian officials. It would not be fair to use Professor Toope's report as the basis for such findings since the Canadian officials would not have an opportunity to cross-examine Professor Toope or Messrs. Arar, Almalki, El Maati and Nureddin.

Professor Toope delivered his report on October 27, 2005. I found it comprehensive and highly informative. I summarize its findings in Chapter II. I wish to thank Professor Toope for the thorough and expeditious manner in which he completed this sensitive and difficult task.

3.13.3
RCMP Evidence

Both the Government and Superintendent Michel Cabana, the senior officer with the RCMP's Project A-O Canada, submitted that no RCMP evidence should be called during the public hearings because of concerns about fairness to the RCMP and RCMP officers. They argued that the Government's NSC claims would prevent witnesses from telling the full story and the public evidence would therefore be incomplete. They also suggested that the evidence of RCMP witnesses could be misleading to the public.

I did not accept these arguments. The RCMP played a critical role in the events giving rise to the Inquiry, and witnesses from the RCMP were essential if the public hearings were to be meaningful. There was a substantial amount

of RCMP evidence that could be called, even accepting the Government's NSC claims. I ruled that, if a particular line of questioning could not be answered fairly because of the NSC claims, then that line of questioning would not be pursued.

Five RCMP witnesses testified over the course of 10 days of public hearings. While some areas could not be examined because of the Government's NSC claims, I believe the process generally worked well. The potential for unfairness to witnesses or misleading of the public did not materialize.

3.14
PUBLIC HEARINGS

As I indicate above, public hearings were held from May 11, 2005 to August 31, 2005, with a few additional days of testimony in October and November 2005.

Mr. Arar, with the assistance of counsel, participated throughout. Periodically, some of the intervenor groups attended; although they did not examine witnesses, they made suggestions to counsel for Mr. Arar and Commission counsel regarding potential questions. They also made submissions on a number of procedural issues. As I indicate above, Government counsel represented all of the government departments and agencies affected by the proceedings, as well as many of the government officials who were called to testify. Some of the witnesses retained their own counsel, who attended the hearings and were given the opportunity to examine witnesses when the testimony affected their clients' interests. Counsel for Messrs. Almalki and El Maati applied for and received limited standing that entitled them to participate in the evidentiary process for the purpose of protecting their client's reputational interests.

Commission staff prepared binders of all the documents, redacted to take account of the Government's NSC claims, that would be entered into evidence. Copies of the binders were made available, as appropriate, to the parties, intervenors and counsel for individuals. All those who reviewed documents gave signed undertakings regarding confidentiality.[32] Commission counsel also prepared and distributed witness statements in advance of witnesses' testimony.

I have a number of observations to make about the public hearings. First, this was a process that had the potential to go badly awry. Holding public hearings about matters that cannot be fully disclosed can be problematic in terms of both presenting a coherent picture and ensuring fairness to those affected by the evidence. There was also the prospect of endless objections and arguments about what could and could not be referred to and about the fairness of questioning. I am pleased to say that counsel for all the parties cooperated to make the public hearing process as useful as it could be in the circumstances. The

proceedings were not disrupted by objections or posturing. Counsel acted in a professional manner, to the benefit of the Inquiry and the public.

It is important to note that, over the course of the public hearings, the Government gradually relaxed its position over many of its NSC claims. As I point out above, the Government and I disagreed about what information could or should be disclosed publicly. Before the public hearings began, the Government submitted thousands of documents to the Commission. Although the Commission saw the full text of each, subject to legal privilege and cabinet confidence claims, the Government redacted those portions of the documents over which it claimed NSC. Only the redacted documents could be made public and entered into evidence in the public hearings.

In June 2005, after the public hearings had begun, the Government began to re-redact many of the documents, in some cases significantly reducing matters over which it claimed NSC. As a result, the public hearing process was improved.

That is not to suggest that the Government's more liberal approach to NSC claims went far enough. The Government continued to assert NSC claims over some areas of evidence that, in my view, could be disclosed publicly. Below, I discuss the process I followed to address the areas that remained in dispute after the public hearings were over.

Finally, I note that, during the public hearings, I heard evidence from a number of expert witnesses, including specialists in the areas of dual nationality, U.S. immigration law, the practices of rendition and extraordinary rendition, Canada's obligations under international legal instruments, the effects of torture on victims, and false confessions. I also heard about the impact of the events of September 11, 2001 and their aftermath on Canada's Muslim and Arab communities, and how those events were perceived by members of those communities. Internationally and nationally recognized in their fields, these experts provided the Inquiry with a great deal of useful information.

3.15
CERTIFICATES OF PRODUCTION

Commission counsel were thorough and persistent in seeking to ensure that all relevant documents were obtained from the different government departments and agencies connected with the Factual Inquiry. Ultimately, however, the Inquiry had to accept the assurances of those departments and agencies that all of the relevant documents had been produced. In this regard, the Commission obtained a certificate of production from the Attorney General of Canada on

behalf of each department or agency stating, among other things, that all documents relevant to the subject matter of the Inquiry had been produced.

3.16
CLOSING SUBMISSIONS

I heard oral closing submissions in public on September 12 and 13, 2005 and *in camera* on September 14, 2005.[33] During the public hearings, counsel for Mr. Arar, the Government, the *amici curiae*, six of the intervenors, and the OPS made submissions. Only the Government also made closing submissions *in camera*.

The recipients of Section 13 notices chose to make written, rather than oral, submissions. Once they had been redacted by the Government for NSC claims, the portions of these submissions based on public evidence were published on the Commission's website. Counsel for recipients of the Section 13 notices and for Mr. Arar were given the opportunity to comment on fairness concerns relating to the publication of these submissions. All parties were given an opportunity to respond in writing to the closing submissions made by the others.

Towards the end of the evidentiary hearings, counsel for Ambassador Franco Pillarella, who was retained after his client had given evidence in the public hearings, requested an opportunity to cross-examine one witness who had testified previously and to call two witnesses to address issues that had arisen during his client's testimony. At the time this request was received, the schedule for closing arguments had been set. However, since I believed the request to be reasonable, I reserved October 24 and November 8 and 9, 2005 to deal with the additional evidence. After this evidence was heard, Ambassador Pillarella was given the opportunity to make closing submissions, and others were given the opportunity to respond to those submissions.

3.17
REPORTS

As I indicate above, I am in the process of preparing a separate report for the Policy Review part of my mandate.

With respect to the Factual Inquiry, I have prepared a comprehensive report summarizing all the facts, without regard to NSC concerns, as well as a separate, shorter factual summary (the *Factual Background*) based on the comprehensive report, but omitting information that, in my opinion, may not be disclosed publicly, in accordance with paragraph (k) of the terms of reference. I have also prepared this separate volume containing my analysis of the issues, my conclusions and my recommendations arising from the Factual Inquiry. I have taken care to

avoid any reference to information subject to NSC in this volume. Thus, in my view, this volume should be disclosed to the public in its entirety.

I relied on a variety of factors in deciding what information could be disclosed publicly in my report. First, I took into consideration all of the evidence called by the Government to address the basis on which it asserted NSC claims. In this regard, I heard from a number of witnesses *in camera* about the reasons for claims of NSC over specific pieces of information. In addition, I benefited from the assistance provided by the *amici curiae* throughout the Inquiry.

Further, I retained Reid Morden as an expert advisor and witness to assist me with the disclosure decisions. Mr. Morden has extensive experience relating to issues of NSC as the former Director of CSIS and Deputy Minister of the Department of Foreign Affairs.

Mr. Morden reviewed the information over which the Government claimed NSC, as well as its reasons. Extensive discussions between Commission counsel and the Government took place regarding NSC issues. During these discussions, Commission counsel was advised by Mr. Morden. Drafts of some sections of the Report were provided to Government counsel for the sole purpose of addressing and resolving NSC issues. During the discussions, Commission counsel did not press for disclosure of certain information over which there remained a dispute about the government's NSC claims. This occurred when the information was considered not to be significant to the public and was not necessary for a fair recitation of the facts in my report.

After discussions between counsel, I then convened two *in camera* hearings to deal with issues that had not been resolved. Mr. Morden gave expert evidence about the areas of potential disagreement, and was cross-examined by Government counsel. In addition, the Government called evidence regarding some of the issues. The *amici curiae* also made submissions at the hearings about what information, in their view, could be disclosed.

Following the *in camera* hearings, I formed my opinion as to what information could be disclosed and included in my public report. I have issued two rulings setting out my reasons. Mr. Morden's evidence at the *in camera* hearing supported the disclosure of the information set out in my public report, as did the submissions of Messrs. Atkey and Cameron as *amici curiae*.[34]

3.18
CONCLUDING OBSERVATIONS

As I look back at the Inquiry process, I am satisfied that it worked as well as could be expected, given the extent and nature of the NSC claims asserted by the Government. However, the public hearing part of the Inquiry could have

been more comprehensive than it turned out to be, if the Government had not, for over a year, asserted NSC claims over a good deal of information that eventually was made public, either as a result of the Government's decision to re-redact certain documents beginning in June 2005, or through this report. Throughout the *in camera* hearings that ended in April 2005 and during the first month of the public hearings in May 2005, the Government continued to claim NSC over information that it has since recognized may be disclosed publicly. This "overclaiming" occurred despite the Government's assurance at the outset of the Inquiry that its initial NSC claims would reflect its "considered" position and would be directed at maximizing public disclosure. The Government's initial NSC claims were not supposed to be an opening bargaining position.

In fairness to the government officials involved, the process required for the Inquiry presented a daunting task. Many thousands of documents had to be reviewed and screened. Moreover, there was no precedent for screening documents in the context of a public inquiry. It is perhaps understandable that, initially, officials chose to err on the side of caution in making NSC claims. However, in time, the implications of that overclaiming for the Inquiry became clear. I raise this issue to highlight the fact that overclaiming exacerbates the transparency and procedural fairness problems that inevitably accompany any proceeding that can not be fully open because of NSC concerns. It also promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality. It is very important that, at the outset of proceedings of this kind, every possible effort be made to avoid overclaiming.

As I discuss above, the Government instituted a court challenge to my first ruling on information I considered should be disclosed publicly as part of the ongoing inquiry process. The prospect of litigation at that point in the Inquiry was very troubling. It seemed evident that litigating the Government's NSC claims on a piecemeal basis, ruling by ruling, was a course that would at best lead to enormous delays and could actually bring the Inquiry to a complete and final halt. It would not have been in the public interest for an inquiry into the government's national security activities to be derailed because of disputes about national security confidentiality.

I consequently made changes to the Inquiry process, the practical result of which was that the public hearings dealt only with evidence over which the Government did not assert an NSC claim. However, I indicated that, after the hearings were completed, I would prepare a report containing the information I considered could be released to the public. Disagreements about what could

be made public would be resolved in the context of a report instead of a series of interlocutory rulings.

The Government has relaxed its NSC claims to a significant degree since June 2005, when it began re-redacting documents.[35] I think two examples will serve to illustrate.

The first involves the Government's position that information relating to Project A-O Canada's request for border lookouts for Mr. Arar and Dr. Mazigh in Canada and the United States could not be disclosed publicly. The information in question included the request letters that contained the highly inflammatory and unfounded description of Mr. Arar and his wife as Islamic extremists. The Government did not withdraw its claim in this respect until the public hearings were virtually complete.[36]

The second example relates to the fact that the RCMP, through the Canadian ambassador to Syria, sent a letter to the Syrian Military Intelligence (SMI) offering to share information about its investigation, which obviously involved Mr. Arar. The letter enclosed questions to be asked of Mr. Almalki, who, like Mr. Arar, was in the custody of the SMI at the time. This information was relevant for understanding the relationship between Canadian officials and Syrian authorities at a critical point when Canada was seeking Mr. Arar's release. Given the Syrian record for torturing detainees being interrogated, these events are very troubling. The Government only withdrew its position that this information was subject to a claim of NSC after the hearings were completed.[37]

I cite these examples to make the point that the public hearing process should have covered these and other areas over which the Government no longer claims NSC. I recognize that some claims of NSC were withdrawn in the course of the public hearings and, when that occurred, the information in question was dealt with in public testimony. However, several important areas that have now been disclosed in this report, without Government challenge, were not addressed during the public hearings.

I commend the Government for its efforts in reconsidering its positions over time, however, it would have been preferable if all of the information that is now being made public had been disclosed prior to the public hearings. To the extent that this did not happen, the public hearing process suffered. While I am satisfied the undisclosed areas were properly canvassed by Commission counsel during the *in camera* hearings, one of the purposes of a public inquiry is to air evidence publicly. Moreover, it was important that Mr. Arar, as a person affected by the Inquiry, be able to participate as fully as possible. That could only happen in the public hearings.

The Inquiry is now complete and I am comfortable that, in the end, I was able to get to the bottom of the issues raised by the mandate, as I had access to all of the relevant material, regardless of any NSC claims. In this report I have disclosed additional information that was not available for the public hearings. However, it is not practical at this point to go back and re-open the hearings. The Inquiry has already taken longer than it need have.

I am raising the issue of the Government's overly broad NSC claims in the hope that the experience in this inquiry may provide some guidance for other proceedings. In legal and administrative proceedings where the Government makes NSC claims over some information, the single most important factor in trying to ensure public accountability and fairness is for the Government to limit, from the outset, the breadth of those claims to what is truly necessary. Litigating questionable NSC claims is in nobody's interest. Although government agencies may be tempted to make NSC claims to shield certain information from public scrutiny and avoid potential embarrassment, that temptation should always be resisted.[38]

In this chapter, I have described a number of steps taken in the Inquiry to address difficulties arising from a process in which some information could not be made public, the most important being the use of independent counsel during the *in camera* hearings. However, I do not suggest that steps such as these are an adequate substitute for public hearings, in which the public can scrutinize the evidence first-hand and affected parties are able to participate. If it is possible to hold a public hearing, this should always be the first option.

Openness and transparency are hallmarks of legal proceedings in our system of justice. Exposure to public scrutiny is unquestionably the most effective tool in achieving accountability for those whose actions are being examined and in building public confidence in the process and resulting decision. As Fish J. aptly put it in the *Toronto Star* case, "In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy." [39]

4.
PROCESS AHEAD

In the past, I have on occasion referred to this Report as an "interim report." I have done so for two reasons.

First, as mentioned above, I have left open the possibility that Mr. Arar may wish to testify in the Inquiry. I repeat that I do not think it is necessary that he do so in order for me to fulfill my mandate, as I have been able to reach conclusions on the actions of government officials without his testimony. In

addition, I have Professor Toope's report about Mr. Arar's mistreatment while in Jordan and Syria. However, as I said above, if Mr. Arar wishes to testify, he may bring a motion and, if I consider it appropriate, I will hear his evidence and issue a supplementary report dealing with that evidence.

The second reason I have referred to this as an interim report relates to the Government's NSC claims. This Report can only be released by the Government, which has asserted NSC claims over some parts of this public version. In this regard, the Government directed that those parts of this public Report over which it claims NSC be deleted and that they be replaced by asterisks. I arranged that this Report to be released to the public be printed as directed. There is a possibility that litigation may ensue over the outstanding NSC issues. That being the case, the report that will finally be released could be different, to some extent, from this public Report as I have prepared it.

5.
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6.
ACKNOWLEDGMENTS

The Factual Inquiry turned out to be very difficult for everyone involved. It was far more complicated and demanded much more work that anyone had anticipated at the outset. It presented challenges, particularly procedural ones, that had not been encountered in other public inquiries. As a result, it took much longer to complete than would normally have been the case.

The Inquiry owes its completion to the concerted efforts of a very dedicated group of people, some of whom devoted more than two years to the process.

I owe an enormous debt of gratitude to everyone who was involved in helping to bring the Inquiry to this stage. Here, I want to formally recognize those who were most deeply involved in the hearings and the preparation of this report.[40] I start with Commission counsel: Paul J.J. Cavalluzzo, Marc David (now Mr. Justice Marc David), Danielle Barot, Brian Gover, Veena Verma, Adela Mall and Lara Tessaro. They were outstanding. They performed their duties with great skill, professionalism and, importantly, the balance that is essential to the role of Commission counsel in a public inquiry. They worked long hours and made great personal sacrifices. I am deeply grateful.

In addition, I want to thank a talented team of lawyers who worked closely with me in addressing legal issues that arose during the Inquiry and/or in preparing the Report: Gus Van Harten, Tanya Bowes, Nigel Marshman and Alexandra Dosman. They showed great commitment and dedication.

I am also grateful to those who were involved in the administration of the Inquiry. Nicole Viau-Cheney, Director, Finance and Administration, did an outstanding job in managing the complexities of the organization and proved to be a cheerful and wise advisor. She was ably assisted by Céline Lalonde, Deputy Director, Finance and Administration. My thanks also to the office staff who, among other things, had to manage an enormous number of top-secret documents. I would like to acknowledge the exceptional support of Isabelle Dumas, Gisèle Malette, Gilles Desjardins and Daniel Carroll. They did a wonderful job, often under considerable pressure. Mary O'Farrell was my personal assistant and a great help in the preparation of my report. The quality of her work and her cheerful patience were an enormous help to me.

I must recognize the Privy Council Office for its advice and support on security, information technology, administration and finance matters, as well as the Department of Justice for its assistance in the use of a specialized electronic database system.

The Inquiry presented special challenges for media relations. Francine Bastien, the communications consultant, was invaluable in arranging the public hearings and facilitating media involvement. Gilles Brisson, the Inquiry registrar, performed his duties carefully and efficiently, keeping track of hundreds of exhibits and ensuring that the "train ran on time."

I wish to thank Ron Atkey and Gordon Cameron, *amici curiae*, who performed their roles with skill and balance. I also wish to recognize the contribution of the fact-finder for the Inquiry, Professor Stephen Toope, who delivered an excellent report. My thanks also to Harry Swain, who, in the later stages of the Inquiry, provided wise counsel based on his considerable experience.

I was assisted in shaping the final version of this Report by a skilled group of editors led by Brian Cameron (English), and Alphonse Morissette and Danielle Bérubé (French). A dedicated team of translators completed the French translation under tight deadlines. I extend my sincere thanks to all of the editors and translators, who are named in Appendix 8.

I would also like to extend my appreciation to the various experts who testified on behalf of the Commission during the Factual Inquiry: Reid Morden, Craig Forcese, Maurice Copithorne, Stephen Yale-Loehr, Julia Hall, Peter Burns, Dr. Donald Payne, Richard Ofshe, Dr. Sheema Khan, Rachad Antonius and Reem Bahdi.

I also wish to thank the staff at the law firm of Cavalluzzo Hayes Shilton McIntyre and Cornish LLP for the help they provided in Toronto when I was working on the Report.

Finally, I wish to thank all the lawyers who appeared throughout the Inquiry, whose names are listed above. I single out two groups. The Government lawyers led by Barbara McIsaac and Simon Fothergill worked long hours and did a very thorough and competent job. Theirs was a difficult brief and, although certain problematic issues arose between the Government and the Inquiry, in the end matters were resolved and the Inquiry was completed.

Mr. Arar's lawyers, led by Marlys Edwardh and Lorne Waldman, also had a difficult brief, and they represented Mr. Arar's interest and the public interest with skill and dedication. I appreciate the assistance they gave me and the professional and responsible way in which they fulfilled their role throughout the Inquiry. The work of the Commission was enhanced by their involvement.

Notes

1 Information could not be disclosed publicly if the injury it would do to international relations, national defence or national security outweighed the public interest in its disclosure.

2 I use the terms "Government" and "Attorney General" interchangeably.

3 The best known of such proceedings are the security certificate proceedings under the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27), but other proceedings in which evidence may not be disclosed to the affected parties include those addressing the listing of terrorist groups and the deprivation of charitable status under the *Anti-terrorism Act* (S.C. 2001, c. 41).

4 Order in Council P.C. 2004–48, Appendix 1(A).

5 R.S.C. 1985, c. I-11.

6 Ontario, *Report of the Walkerton Inquiry, Part One* (Toronto: Queen's Printer for Ontario, 2002), pp. 472–474 (Commissioner: The Honourable Dennis R. O'Connor).

7 *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 175.

8 R.S.C. 1985, c. C-5.

9 See, for example, *United Nations. Security Council Resolution 1373 1373*, UN SCOR, 56th Sess., 4385th mtg., UN Doc. S/RES/1373 (2001), [online]. http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement.

10 The Rules in their final form were published in June 2004. See Appendix 2(A) in Volume II of the *Factual Background*.

11 See paragraphs 43 to 56 of the Rules.

12 In this report, I have used the terms "Inquiry" and "Commission" interchangeably.

13 The Notice of Hearing, my Rulings on Standing and Funding, and a list of the parties and intervenors granted standing are included in Appendix 3 in Volume II of the *Factual Background*.

14 In addition, individuals or institutions given notices under section 13 of the *Inquiries Act* were entitled to participate in the Inquiry inasmuch as the evidence might affect their interests.

15 *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43 at para. 49.

16 *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440.

17 Ibid.

18 R.S.C., c. I-11, s. 13.

19 See Appendix 5(A) for a sample Section 13 notice.

20 See Appendices 5(B) and 5(C) for this ruling.

21 See Appendix 6(A) for the initial document request directed to the government.

22 The government did not produce some documents I considered to be relevant until after the completion of the scheduled hearings. This late production necessitated holding additional *in camera* hearings in November 2005.

23 "Redaction" in the current context refers to the process of removing information subject to NSC claims prior to public disclosure of a document.

24 John Henry Wigmore, *Evidence in Trials at Common Law,* vol. 5, James H. Chadbourn rev. (Boston: Little, Brown and Co., 1974), 1367 at 32.

25 I use the term *amicus curiae* to describe the independent legal counsel's role. However, given that this Inquiry was not a court, and that the role of the *amicus curiae* was not only to make submissions, but also to incorporate his expertise in national security matters into those submissions, a better appellation might be "independent counsel with respect to national security confidentiality."

[26] See Appendix 6(I).

[27] See Appendix 6(D) for the ruling.

[28] See Appendix 4 for a list of the witnesses at the public hearings.

[29] See Appendix 6(F).

[30] See Appendix 6(H).

[31] The rulings are attached as appendices 6(I) and 6(J) respectively.

[32] See Appendix 6(B) for sample undertakings regarding confidentiality.

[33] See Appendix 6(L) for my directions regarding closing submissions.

[34] Other rulings not specifically cited in this chapter, but made during the course of the Inquiry, are also attached to this Report as appendices.

[35] Some redactions resulted from the inadvertent disclosure of a document over which the Government claimed NSC. However, many others resulted from the Government's reassessment of its original positions.

[36] I should point out that the reason that the border lookout requests were not disclosed at the time the Government withdrew its NSC claim in September 2005 was primarily because of concerns about procedural fairness to an RCMP witness who had testified *in camera* and was to testify in the public hearings. However, the fact remains that the Government asserted an NSC claim over these vitally important and potentially embarrassing documents for a year. Had the government not asserted that claim, which it eventually withdrew, the issue of procedural fairness could have been considered and likely addressed at an earlier stage of the Inquiry.

[37] The Government argued throughout that the issues relating to questions for Mr. Almalki were not relevant to my mandate. For the reasons set out above, I disagree. What is significant, however, is that the reason the information about the Almalki questions was not disclosed publicly was not because of the argument about relevance but because of the Government's claim of NSC – a claim it eventually withdrew.

[38] The RCMP's *Administration Manual*, Chapter XI.I, Organizational and Administrative Security (Exhibit P-12, Tab 26, J.5), specifically provides that "a security classification/designation may not be used to . . . prevent embarrassment to a person, department, agency or organization . . . ."

[39] *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41, at para. 1.

[40] A list of Commission staff and advisors is included in Appendix 8.

IX
Recommendations

This chapter contains my recommendations arising from the evidence I heard during the Factual Inquiry. The recommendations are operational in nature and are intended to complement those made in the Policy Review report, which are directed at providing a robust independent, arm's-length mechanism for the review of the RCMP's national security activities. Such a mechanism is essential for ensuring that those activities remain consistent with Canadian values and principles.[1] The Factual Inquiry recommendations will, if adopted, provide standards against which the RCMP's national security activities may be measured by the independent review body.

In this report, I make 23 recommendations, grouped by subject matter:

I. the RCMP's national security activities (recommendations 1 through 10);
II. information-sharing practices of other agencies (11);
III. breach of caveats (12);
IV. investigative interaction with countries with questionable human rights records (13 through 15);
V. Canadians detained in other countries (16 through 18);
VI. profiling (19 and 20);
VII. the use of border lookouts (21); and
VIII. Maher Arar (22 and 23).

The reader will note that the majority of my recommendations are focused on the RCMP. That is because the evidence in the Factual Inquiry related to a very large extent to an RCMP investigation, and the recommendations flow from that evidence.

I.
THE RCMP'S NATIONAL SECURITY ACTIVITIES

Recommendation 1

The RCMP should ensure that its activities in matters relating to national security are properly within its mandate as a law enforcement agency.

A) RCMP MANDATE

The RCMP should take active steps to ensure that it stays within its mandate as a police force to perform the duties of peace officers in preventing and prosecuting crime. It should ensure that it respects the distinct role of CSIS in collecting and analyzing information and intelligence relating to threats to the security of Canada.

This recommendation is aimed at reinforcing the division of functions between the RCMP and CSIS set out in the second report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Commission report).[2] The basic principles that underlay that report continue to apply today, even though the need for co-operation and information sharing between the two agencies has increased since the events of September 11, 2001.

Some have suggested that Canada's response to the events of September 11, 2001, including the enactment of the *Anti-terrorism Act* and implementation of new forms of intelligence-led and integrated policing, has blurred the distinction between the roles of the RCMP and CSIS. If so, it is my firm view that the distinction between policing and security intelligence should be restored, respected and preserved. I am convinced that Canadians will be best served if the RCMP and CSIS both operate within their distinct mandates and expertise, while sharing information when appropriate and working together in a co-operative and integrated manner.

In his John Tait Memorial Lecture in 2003, Ward Elcock, then Director of CSIS, reflected on the differences between law enforcement and security intelligence:

> Law enforcement is generally reactive; it essentially takes place after the commission of a distinct criminal offence. Police officers are results-oriented, in the sense that they seek prosecution of wrong doers. They work on a "closed" system of limits defined by the Criminal Code, other statutes and the courts. Within that framework, they often tend to operate in a highly decentralized mode. Police construct a chain of evidence that is gathered and used to support criminal convictions in trials

where witnesses are legally obliged to testify. Trials are public events that receive considerable publicity.

> Security intelligence work is, by contrast, preventive and information-oriented. At its best, it occurs before violent events occur, in order to equip police and other authorities to deal with them. Information is gathered from people who are not compelled by law to divulge it. Intelligence officers have a much less clearly defined role, which works best in a highly centralized management structure. They are interested in the linkages and associations of people who may never commit a criminal act – people who consort with others who may be a direct threat to the interests of the state . . . .[3]

I agree with Mr. Elcock's analysis, although I would add that the RCMP also has a prevention mandate, which I discuss below.

The mandate of the RCMP under section 18 of the *Royal Canadian Mounted Police Act* (*RCMP Act*) is to preserve the peace, prevent crimes and offences under the laws of Canada, and perform the duties of peace officers.[4] In fulfilling its law enforcement mandate, the RCMP collects evidence and exercises special powers, many of which are intrusive, such as powers of search and arrest. It is because of those intrusive powers, which are necessary for a law enforcement agency, that it is important that the RCMP confine its activities to those that warrant their use. The trigger for many law enforcement powers is the actual or anticipated breach of a law. Thus, the RCMP's mandate is directed at the prevention and prosecution of criminal or other offences, including the many new crimes created by the *Anti-terrorism Act*. Unless there is a link to illegal or criminal activity, a law enforcement agency such as the RCMP should not become involved in an investigation.

It would be wrong, however, to conclude that respecting its institutional mandate requires the RCMP to wait until an act of terrorism has occurred before taking action. The RCMP's mandate includes preventing crime, not just investigating it after the fact. Moreover, many crimes related to terrorism are committed long before a terrorist act causes actual harm. The RCMP's mandate has always involved investigating conspiracies, attempts and counselling of serious crimes. Since the enactment of the *Anti-terrorism Act*, it has also entailed investigating a broad range of acts related to potential terrorist activities, such as the financing and counselling of terrorism, participation in terrorist groups, and related attempts, conspiracies, and threats.

The mandate of the RCMP can be better understood by comparing it to that of CSIS. CSIS is an intelligence agency. It is directed to collect and analyze information and report to government, in order to assist government in developing

policy relating to Canada's national security. CSIS may be asked by the Minister of National Defence and the Minister of Foreign Affairs to collect information and intelligence in relation to national defence and the conduct of Canada's international affairs,[5] and it is subject to the special requirement that its director and an inspector general regularly report to the responsible minister on the "operational activities of the Service."[6] Thus, Parliament intended that CSIS provide services to government that are essentially directed at gathering and analyzing information. Unlike RCMP officers, CSIS personnel are not peace officers and do not exercise law enforcement powers to collect evidence and make arrests. Moreover, the relationship between the responsible minister and CSIS is not coloured by special concerns about protecting police independence, as is the case with the RCMP.[7]

Some might argue that having to ensure that the RCMP's national security activities, including the gathering of information and intelligence, always relate to its policing and crime-based mandate might place national security at risk. Given the magnitude of the harms of terrorism, as reflected in tragedies such as the bombing of Air India Flight 182 and the 9/11 attacks, they may say that the RCMP can no longer restrict itself to law enforcement concerns. I reject this argument, both on principle and for practical reasons.

At stake are the principle of respect for the rule of law and lengthy democratic tradition. All agencies of government must act within their statutory mandates. The current statutory framework appropriately confers on the RCMP the powers associated with and necessary for the enforcement of laws. While the *Anti-terrorism Act* has expanded both offences and the powers available to the RCMP, it also imposes a variety of special safeguards, such as prior approvals by attorneys general and the courts. And the fact remains that, as has long been the tradition, police in a democracy should be concerned primarily with law enforcement, even in the national security context. They should respect these constraints on their powers and expect that the legality of their actions will be reviewed.

Legal obligations aside, adherence by the RCMP and CSIS to their distinct mandates also makes practical sense. CSIS has special expertise and capacity to collect information and to apply analytical skills to that information to produce the intelligence necessary to inform government about threats to Canada's national security. This involves a very different expertise and a different relationship with government than that required by the RCMP for its law enforcement activities. Although both investigate and collect information, the context within which they do so, the purpose for collecting the information and the use to which the information is put are very different.

If the RCMP is not receiving adequate intelligence about threats to the security of Canada from CSIS, the answer lies in improving relations between the RCMP and CSIS, not in reformulating their respective mandates or going back to the days before CSIS was created and developing an intelligence capacity within the RCMP that is not related to its crime-based mandate and expertise.

B) INTELLIGENCE-LED POLICING

The RCMP should continue to develop its capacity for intelligence-led policing while ensuring that it remains within its law enforcement mandate.

In recent years, the RCMP has increased its capacity for and use of intelligence-led policing significantly. This has been an important and valuable response to the increasingly complex and sophisticated criminal activities that it is required to investigate. Ensuring that the RCMP remains within its law enforcement mandate need not interfere with the use of intelligence-led policing.

From the RCMP's standpoint, intelligence can be understood as information developed to direct police action. In this sense, it is not the same as the work product of CSIS or other intelligence collectors. Rather, it is the strategic, tactical and background information that any large organization requires in order to direct its actions and limited resources in an intelligent and focussed manner.

The *Criminal Intelligence Program Implementation Guide* issued by the RCMP in June 1991 recognized that "the failure to develop a sophisticated strategic as well as tactical intelligence capability within the RCMP has seriously hindered the Force's ability to accurately measure and prevent crime having an organized, serious or national security dimension in Canada, or internationally as it affects Canada."[8] At the same time, the Guide appropriately warned, "it is important that any information collected by the RCMP . . . be pursuant to its law enforcement mandate."[9]

The RCMP's *Criminal Intelligence Program Guide* issued in May 2001 contemplates collection of criminal intelligence in relation to threat assessment, target selection and target tracking. The focus with respect to individual targets is on investigation "to the point of either confirming or disproving the involvement of criminal activity."[10] This focus on criminal activity properly reflects the RCMP's crime-based mandate.

The RCMP's new orientation to "intelligence-led policing" does not mean that the Force's functions extend or should extend beyond its law enforcement mandate. Any information collected by the RCMP should be used to direct legitimate police action related to preservation of the peace, prevention of crime, and investigation and prosecution of crime.

C) INTERNAL CONTROLS

The RCMP should establish internal controls for all national security investigations to ensure that, when commencing and carrying out investigations and collecting information, it is properly within its law enforcement mandate to prevent, investigate and prosecute crimes.

The following internal controls will help to ensure the RCMP stays within its mandate during national security investigations.

To begin with, the RCMP should take steps to ensure that information about persons that is received from CSIS and other sources falls within its law enforcement mandate and is properly classified.

Further, the RCMP should ensure that individuals being investigated come within its crime-based mandate. In the early stages of a national security investigation, it is sometimes difficult to determine if an individual's activities are criminal in nature, but the RCMP must reach a conclusion nonetheless. If it concludes that a crime-based mandate is lacking, but has concerns about a connection between the person and threats to the security of Canada, the RCMP should provide CSIS with the relevant information so that CSIS may carry out its own investigation. The RCMP should not be reluctant to transfer or return investigations not within its crime-based mandate to CSIS.[11]

The RCMP should also review investigations periodically to be certain that both the investigation and the targets of the investigation remain within its crime-based mandate. Controls designed to ensure that RCMP activities are properly within its law enforcement mandate are necessary to guarantee respect for the rule of law and the proper institutional division of functions between the RCMP and intelligence agencies such as CSIS. In the Policy Review report, I recommend that the review body responsible for reviewing RCMP national security activities specifically focus on ensuring that those activities come within the Force's mandate as a law enforcement agency.

Recommendation 2

The RCMP should continue to engage in integrated and co-operative operations in national security investigations, but agreements or arrangements in this respect should be reduced to writing.

A) CO-OPERATION WITH OTHER CANADIAN POLICE FORCES

The RCMP's integrated policing initiatives with other Canadian police forces are necessary and beneficial and should continue.

Integrated policing[12] is a legitimate and understandable response to the complexity of crime today. In its Factual Inquiry submissions, the Ottawa Police Service rightly stressed the dangers of "investigative 'silos'"[13] that can be created when police forces operate independently. It noted that both Justice Fred Kaufman's report on the Guy Paul Morin case and Justice Archie Campbell's review of the Bernardo investigations revealed the dangers inherent in police forces not working together or sharing information. Paul Kennedy, Chair of the Commission for Public Complaints Against the RCMP, also commented in the Policy Review hearings that there is "an obvious need for police to combine resources, both human and financial, and to maximize unique skillsets."[14] I agree and have designed my recommendations both in this chapter and in the Policy Review report with a view to enabling the RCMP to respect and maintain its healthy degree of integration with other Canadian police forces.

Although integrated policing is an important component of all Canadian policing, it is particularly important in the context of national security. While the *Security Offences Act* gives the RCMP primary responsibility for investigating and preventing offences that constitute a threat to the security of Canada, other police forces also have a role to play in national security investigations.

One example of the important contribution other forces can make is in the area of knowledge of the local community. As the Ottawa Police Service has stated, "no one knows its community like the police of local jurisdiction. . . . This day-to-day working relationship builds the mutual trust and confidence, drawn upon by both the police and the community in circumstances such as a national security investigation."[15] This view is also reflected in the testimony of former RCMP Deputy Commissioner Garry Loeppky, who commented that "municipal and provincial police . . . have touch-points . . . within the communities that we certainly don't have here because we are not the front-line police service."[16]

Through its Integrated National Security Enforcement Teams (INSETs) in Vancouver, Toronto, Ottawa and Montreal, the RCMP conducts national security investigations in an integrated fashion by involving police forces from those four cities, the Ontario and Quebec provincial police forces, CSIS and other federal agencies. This type of integration is sensible. Although it does present certain challenges for review purposes, they are not insurmountable. I explore them in my Policy Review report.

B) CO-OPERATION BETWEEN RCMP AND CSIS

While respecting their different mandates, the RCMP and CSIS should continue to co-operate with one another and expand upon the ways in which they do so.

When CSIS was created in 1984 and given a mandate to collect and analyze information respecting threats to the security of Canada, the RCMP was given primary responsibility for investigating criminal offences relating to conduct that fell within the definition of such threats.[17] From the start, it was expected that CSIS and the RCMP would work co-operatively on national security matters. The two agencies entered into a memorandum of understanding (MOU) to provide the framework for a co-operative approach to fulfilling their respective mandates. In the post-9/11 era, co-operation between the two agencies is of even greater importance.

The *Canadian Security Intelligence Service Act* (*CSIS Act*) does not contemplate a wall or watertight compartments to separate CSIS and the RCMP. CSIS may disclose to the RCMP and other police forces information that "may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province."[18] This would include information about possible conspiracies, counselling and attempts to commit acts of terrorism and violations of other laws relating to national security, such as violations of the *Security of Information Act*. Today, it would also include information about a broad range of terrorist crimes relating to the preparation and financing of terrorism, under the *Anti-terrorism Act*. The expansion of criminal law in relation to terrorism, combined with the urgency of the police's preventive mandate with respect to terrorism may actually require CSIS to provide more information to the RCMP than was the case in the past.

In his recent report, Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness on questions relating to the terrorist bombing of Air India Flight 182, noted that, at the time of the bombing in 1985, an MOU between the RCMP and CSIS provided that the agencies would "consult and co-operate with each other with respect to the conduct of security investigations" and that, in 1984, Solicitor General Robert Kaplan had informed both the Commissioner of the RCMP and the Director of CSIS that "neither organization can fully, or effectively, achieve its national security related goals without the co-operation and assistance of the other."[19] Areas that Mr. Rae suggested for further review included whether there had been problems in the relationship between CSIS and the RCMP that had played a role in the failure to prevent the Air India bombing and whether "further changes in practice and/or legislation

[were] required to ensure an effective co-operation"[20] between the RCMP and CSIS.

The events of 9/11 further underlined the need for information sharing and integration between the RCMP and CSIS. The RCMP's institutional response to that development was to take the very important step of setting up Integrated National Security Enforcement Teams (INSETs), with CSIS representation. The RCMP and CSIS should explore other ways to increase the level of co-operation between them. The difference in mandates and, indeed, cultures, need not be a barrier to integrated operations. The report of the U.S. National Commission on Terrorist Attacks upon the United States (9/11 Commission) and the events of the Air India tragedy highlight the importance of institutional co-operation between intelligence and law enforcement investigators. The lessons learned from those experiences must be taken to heart.

During the Inquiry, I had the advantage of hearing testimony from a variety of RCMP and CSIS witnesses, a good deal of which related to the interaction between the two agencies. Although valuable steps have been and continue to be taken, especially at the leadership level, to ensure greater co-operation and understanding between the two agencies, integration is made difficult by the different organizational cultures. Those differences are largely a legitimate, understandable reflection of the different mandates of the two institutions. However, it is imperative that a special effort be made by all personnel in each institution to develop a better understanding and appreciation of the mandate and role of the other. The MOU between the RCMP and CSIS is currently under review. Secondments and joint training and information programs would be ways of promoting better understanding and co-operation.

The framework ultimately developed for the relationship between the two agencies should clearly set out their different mandates and provide for specific ways to promote co-operation. The two agencies should then conduct periodic reviews, to ensure that the objectives of the MOU are being achieved.

C) CO-OPERATION WITH OTHER GOVERNMENT AGENCIES AND DEPARTMENTS

The RCMP should continue to adhere to and refine its policy of co-operating with other federal agencies or departments involved in national security investigations.

Since 9/11, there has been increasing integration of different parts of government involved in national security affairs, both in Canada and elsewhere. The RCMP's integration initiatives with respect to national security matters are not limited to

other police forces, but extend to a wide range of other federal departments and agencies. For example, INSETs include representatives of agencies such as the Canada Border Services Agency (CBSA), CSIS, Citizenship and Immigration Canada (CIC) and the Canada Revenue Agency. Moreover, there has been an increased amount of information sharing among a broad range of federal departments and agencies in relation to these types of investigations. Such integration makes sense given the complexity of national security activities and the involvement of many parts of government in the national security mandate. Agencies such as CSIS and the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) have explicit statutory mandates to provide the RCMP with information that is relevant to its crime prevention and investigation mandate.

The increased level of integrated activity makes it essential that there be a clearly articulated framework within which the activity is carried out. I have not heard enough evidence to consider the details of such a framework. However, it is clear that RCMP officers and officials in other agencies should have specific direction about each aspect of their interaction. There should be clear procedures in regard to the sharing of information and the creation of a paper trail to document interaction.[21] In that way, integrated activity can be monitored and reviewed against pre-established norms. The paper trail need not be overly elaborate or legalistic. In some cases, exchanges of letters may suffice, but the ground rules for necessary integration should be clear.

D) CO-OPERATION WITH FOREIGN AGENCIES

The RCMP should continue to work co-operatively with foreign agencies in pursuing its law enforcement mandate in national security investigations.

Co-operation with foreign agencies is essential in the post-9/11 environment. Quite properly, there has been a significant increase in the interaction between the RCMP's national security investigators and their counterparts in other countries. For example, Integrated Border Enforcement Teams (IBETs) have been established to enable officials from the RCMP, Canada Border Services, and Citizenship and Immigration Canada, as well as U.S. Customs and Border Protection, the U.S. Coast Guard and U.S. Immigration and Customs Enforcement to work together. Another example is the investigation discussed in this report. Much of the evidence heard in the Factual Inquiry concerned a joint investigation between the RCMP and American agencies.

Co-operative investigations between domestic and foreign agencies are an understandable response to international terrorism and other transnational crime.

At the same time, it is even more important than in the purely domestic context that the ground rules for co-operation with foreign agencies in national security investigations be made as clear as possible beforehand and, where practical, reduced to writing. Once information is in foreign hands, it will be used in accordance with the laws of the foreign jurisdiction, which may not be the same as Canadian law.[22] Reducing arrangements to writing, even if only in an exchange of letters, greatly assists in ensuring accountability in decision making and in reviewing integrated activities, including information sharing.

Arrangements with foreign agencies should also be subject to periodic review. Co-operative arrangements may have to be re-visited and clarified in the event of problems, such as those examined in the Inquiry.

As I make clear in my analysis of the RCMP's Project A-O Canada investigation and the Project's sharing of information with American agencies, it can be dangerous to rely on implicit or verbal understandings when dealing with foreign agencies because there is often more unpredictability and a lesser degree of accountability in such circumstances than when interacting with domestic agencies. As I discuss below, respect for human rights cannot always be taken for granted. Caveats are thus particularly important to limit the use and dissemination of information shared with foreign agencies.

E) WRITTEN AGREEMENTS

The RCMP's agreements or arrangements with other entities in regard to integrated national security operations should be reduced to writing.

On April 5, 2002, the Solicitor General issued a ministerial directive with respect to agreements entered into by the RCMP to provide information and assistance to, or receive them from, "other departments, agencies and institutions," whether domestic or foreign.[23] The directive appropriately recognized the increase in the RCMP's integration with other federal, domestic and foreign agencies in the post-9/11 environment and attempted to provide some policy guidance and procedures to govern such agreements.

The directive provided that all agreements were to be in written form and supported by legal and, in the case of agreements with foreign entities, foreign affairs advice. Each agreement was to contain a statement of its objectives and the obligations of each party to the agreement, and was to identify the individuals or positions responsible for the discharge of those obligations. Agreements were defined broadly in the directive "to include the terms 'arrangement', 'understanding', or any other similar term, and to exclude commercial or other contracts . . . ."[24] The directive also recognized the dynamic

nature of such agreements by providing for their review, audit, evaluation, modification and cancellation. It required that the RCMP keep an inventory of the agreements, including correspondence, audit reports and amendments. Further, it provided that the Commissioner of the RCMP was to consult with the Minister with respect to some agreements, including when there was a possibility that an agreement might receive attention in Parliament or from the media. I share the view that all agreements or arrangements regarding integrated operations should be reduced to writing.

In his public testimony, RCMP Deputy Commissioner Loeppky stated that the above directive did not apply to "day-to-day information, case-by-case police exchanges of criminal law enforcement information," but "focused on entering into agreements that would bind the Government of Canada to an obligation, thus the need for legal advice and those types of things."[25] He was of the opinion that the reference to exchanges of information referred "to databanks, to information exchanges that are outside of the day-to-day operational police contacts that take place on a daily basis along the 5,000 mile border."[26]

In my view, a broader reading of the directive is preferable, especially given its definition of agreements as extending to arrangements and understandings and the need to establish clear ground rules for information sharing and other forms of integration. If the 2002 directive had been applied to Project A-O Canada's arrangements and understandings with foreign agencies, legal and foreign affairs advice would have been obtained and that advice might well have had a beneficial effect.[27] The overarching agreement or understanding could have been set down in writing and the obligations of each party articulated. Such a process might well have increased sensitivity to obligations such as respecting caveats and to the human rights implications of information sharing. That said, I do not think that the approach to written agreements contemplated in the April 2002 ministerial directive need be unduly formal or lengthy, or apply to each exchange of information. Rather, written agreements should set out a general approach within which "day-to-day" exchanges may take place. The underlying rationale is that there is an advantage to reducing understandings to writing. I agree. This is exactly the type of instruction that is properly the subject of a ministerial directive. Indeed, the April 2002 directive contemplates that agreements "may take any written form, including an exchange of letters."[28]

Recommendation 3

The RCMP should ensure that those involved in national security investigations are properly trained in the particular features of such investigations.

A) NEED FOR ADDITIONAL TRAINING

Investigators in the national security field require all of the skills and expertise of investigators in other criminal investigations, but they should also be given training relating specifically to national security aspects.

National security investigations involve subject matter not within the expertise or experience of normal criminal investigators. Officers must not only be familiar with the complex body of law regarding national security, including the *Security Offences Act*, *Anti-terrorism Act* and *Security of Information Act*, but also understand the broader national security context both in Canada and abroad. This context includes individuals, organizations and nations that present a threat to the security of Canada, the history of different countries, regions and political movements that may produce threats to the security of Canada and Canadians abroad, and the approaches used by other countries with respect to national security matters. National security investigators must also understand the subject matter of global terrorism, the nature of and distinctions between tactical and strategic intelligence, the processes for information sharing and the need to be alive to human rights concerns when dealing with governments with questionable human rights records. CSIS may have relevant expertise and a particular role to play in helping those RCMP officers involved in national security matters to develop an awareness of the broader context of national security investigations both in Canada and abroad.

As I point out in Chapter III, some of the problems with the Project A-O Canada investigation resulted from a lack of expertise and training in national security investigations on the part of the investigators in the field. I recognize that significant pressures were placed on the RCMP in the immediate aftermath of 9/11. It would have been difficult to engage in intensive training in the highly volatile legal, political and policy environment that existed at the time. All the same, training should not be put off indefinitely. Time and resources devoted to proper training can yield many dividends in preventing problems before they arise and producing skilled and expert investigators. Since fewer than 300 officers in the RCMP are currently assigned on a full-time basis to national security investigations, it should be possible to ensure that every investigator has adequate training at an early stage.

As I discuss in greater depth in the Policy Review report, national security investigations can threaten individual liberties and human rights in ways that most other criminal investigations do not. For example, such investigations may involve the collection of larger amounts of personal information in connection with possible threats and the RCMP's mandate to prevent crime. This may affect privacy and other values in a manner that will not ordinarily be subject to adversarial challenge or independent adjudication in court because of the secrecy of national security activities and the fact that prosecutions are relatively rare in this area.

Given the tendency thus far of focusing national security investigations on members of the Arab and Muslim communities, the potential for infringement on the human rights of innocent Canadians within these groups is higher. An expert investigator must therefore also be sensitive to these human rights concerns.

B) ANALYSIS OF INFORMATION

The RCMP should ensure that the specific types of information at the basis of national security investigations are analyzed with accuracy, precision and a sophisticated understanding of the context from which the information originates, with a view to developing intelligence that can lead to successful prevention and prosecution of a crime.

Although the RCMP can rely on information and analysis provided by CSIS and other intelligence agencies, it should also ensure that members involved in national security investigations have the training and expertise to conduct their own analysis of information in light of the RCMP's law enforcement mandate.

The RCMP's 2001 *Criminal Intelligence Program Guide* appropriately stresses that "information must be accurate, have integrity, be complete and be up-to-date" and that "information/ intelligence must undergo a review for relevance and an evaluation for source reliability and information validity prior to filing"[29] in data banks such as the Secure Criminal Information System (SCIS), a central RCMP data bank for national security intelligence. To this end, there is a requirement in the Guide that both sources and information be graded according to the following categories: reliable, believed reliable, unknown reliability or doubtful reliability. National security investigators therefore must be able to assess the accuracy and reliability of information, including information from foreign sources, in the national security context.

In Chapter III, I call attention to several instances where RCMP investigators provided inaccurate information about Maher Arar to American agencies

and senior RCMP officers. It is important that RCMP training enable officers to understand the need for accuracy and appreciate the potential consequences of analyzing and presenting information in a way that paints a misleading picture.

Inaccurate analysis of information and unwarranted assumptions must be avoided, as they may trigger unforeseen chains of events and cause grave damage. Incorrectly analyzing information may lead someone to overlook information that, if properly analyzed, could help prevent crimes that would threaten national security.

An important distinction is appropriately drawn in the RCMP's *Criminal Intelligence Program Guide* between information, described as unprocessed data of every description, and intelligence, defined as the end product of information. Intelligence is further subdivided into tactical intelligence, an "investigative tool" that can be applied to active operations to produce "better prioritization of cases for maximum enforcement effectiveness against criminal activities as well as the most efficient utilization of investigative resources," and strategic intelligence, "largely a management tool" that complements tactical intelligence by taking "a longer, broader view" of matters.[30] RCMP officers involved in national security investigations should be trained and become highly skilled in applying these important distinctions. For example, the fact that an investigation is guided by strategic intelligence about al-Qaeda or another threat to national security does not necessarily mean that every person of interest to that investigation must be associated with al-Qaeda or terrorism.

C) CURRICULUM AND REVIEW

The RCMP's National Security Enforcement Course curriculum should be reviewed in the light of the findings and recommendations of the Inquiry. In future, training curricula should be reviewed periodically by the RCMP and by the proposed independent review body.

I have considered material submitted by the RCMP about the National Security Enforcement Course, designed to be a 10-day course involving both direct instruction and problem-based learning in groups.[31] Although the course does appear to review the basics of criminal intelligence, including the distinctions between information and intelligence and between tactical and strategic intelligence, I note that it does not contain sections on important topics such as information sharing with domestic and foreign agencies, including the use of caveats, and the need for great care when providing or receiving information from foreign sources. It also does not appear to include training on human rights or on interaction with foreign countries with poor human rights records in the

context of terrorism investigations. Training in human rights issues both at home and abroad is particularly important in view of the fact that so many of the RCMP's national security activities are conducted in secret and not subject to judicial review.

I also recommend that the course curriculum be periodically reviewed by the RCMP, perhaps in consultation with CSIS and other national security partners and interested community groups. In particular, the material that is taught in this and related courses about specific ethno-cultural groups should be open to review by interested community groups and by the RCMP's ethno-cultural advisory group. In this sensitive area, there is always a risk that some forms of training may do more harm than good.[32] Periodic review and evaluation of the training curriculum may be helpful in this regard.

Although some case studies in the national security curriculum may be classified, the RCMP should generally be open about the training it provides to its national security investigators. When appropriate, it should involve individuals with expertise from outside the RCMP in the review and delivery of the training.

I also recommend that the independent review body recommended in my Policy Review report periodically assess the adequacy of the training of RCMP national security investigators in the light of the reviews and complaints it has considered. In doing so, it should focus not only on the content of the training, but also on its delivery.

Independent review of the RCMP's national security activities can play an important role in identifying potential problems, but proper training of national security investigators in the first place should head off most problems before they occur.

D) TRAINING ON INFORMATION SHARING

Training for national security investigators should include a specific focus on practices for information sharing with the wide range of agencies and countries that may become involved in national security investigations.

As I discuss under Recommendation 2, a particular feature of national security investigations is the large amount of information that is received from and given to other agencies, whether they be domestic, foreign or international. It is important that RCMP officers involved in national security investigations be familiar with best practices for assessing the reliability and relevance of information they receive. This is key for determining what information may be received and shared and what forms of restrictions and caveats apply. I discuss the substance of these issues in recommendations 6 through 10.

E) SOCIAL CONTEXT

The RCMP should continue and expand upon its social context training, which is necessary to be able to conduct efficient investigations while ensuring fairness to individuals and communities.

In the post-9/11 environment, much of the strategic focus has been on suspected terrorist threats that could come from within Canada's large and diverse Muslim community and from Canadians and others with connections to Arab and Muslim countries. It is important that national security investigators be provided with social context training in respect of the communities that receive attention as a result of suspected threats. Enhanced understanding of the community will allow investigators to more effectively evaluate information and determine what is important and what is not, as well as the significance of actions and associations. Investigators will be better placed to avoid relying on stereotypes about race, religion or ethnicity in investigations. As a result, they will be able to distinguish between those who pose a threat in terms of committing crimes and those who are merely sympathetic to political or religious views or ideological goals. In this way, resources can be focused on real threats to the security of Canada.

One practical example involves distinguishing between someone having spent time in Afghanistan in the early 1990s, when many young Muslims from around the world travelled to that country because of the fallout from the conflict with the Soviet Union, and someone having spent time in Afghanistan later in the decade, after al-Qaeda had returned there.

Social context education can also have the practical advantage of making it easier for investigators to conduct interviews, gain information within various minority communities and obtain co-operation and support. Engaging in a more effective dialogue with those in the community who can assist the RCMP in its investigations can facilitate efforts in fulfilling its national security mandate.

I discuss why social context training is also important as a way to ensure fairness to individuals and communities in recommendation 20.

Recommendation 4

The RCMP should maintain its current approach to centralized oversight of national security investigations.

As I describe in the Policy Review report, important steps have been taken in recent years by both the RCMP and the Solicitor General, the minister responsible for the RCMP, to provide for greater centralization and oversight of RCMP

national security investigations. I use the term oversight here deliberately because it denotes involvement in investigations as they are being conducted, as opposed to the independent review that is the subject of the Policy Review report.

Oversight implies being informed and having powers of co-ordination and, where appropriate, control and direction that a review body will not have. Those with the power of oversight also become accountable for the decisions made by the people they oversee. Indeed, centralized oversight of national security investigations is designed in large part to heighten the responsibility and accountability of the Commissioner and the Minister for national security investigations.

The foundations for centralized oversight of national security investigations are found in ministerial directions issued in November 2003. One of those directions provides that it is the responsibility of the Commissioner to ensure that all national security investigations are centrally coordinated at RCMP Headquarters in order to "enhance the Commissioner's operational accountability" and in turn "enhance ministerial accountability, by facilitating the Commissioner's reporting to the Minister," especially with respect to "high profile RCMP investigations or those that give rise to controversy."[33] Another ministerial direction requires the person at the apex of RCMP national security investigations, the Assistant Commissioner of the Criminal Intelligence Directorate at RCMP Headquarters, to approve all RCMP investigations of sensitive sectors such as academia, politics, religion, the media and trade unions.[34]

The latter direction appropriately recognizes that, in a large organization such as the RCMP or Department of Public Safety and Emergency Preparedness, centralization is key to ensuring effective accountability.

Although much of the investigative work on national security matters is done at the divisional level through the National Security Investigation Sections (NSISs) or through the Integrated National Security Enforcement Teams (INSETs) in Montreal, Ottawa, Toronto and Vancouver, all of this work is coordinated at RCMP Headquarters as a result of requirements to report to the National Security Operations Branch (NSOB) and National Security Intelligence Branch (NSIB). As discussed in greater detail in the Policy Review report, the NSOB is responsible for providing Headquarters approval of all national security investigations undertaken at the divisional level by the INSETs or NSISs. The NSOB also has the vital function of ensuring that investigations are consistent with the RCMP's crime-based mandate. In the event that a case does not fall within that mandate, it has the power to refer the case to CSIS. In addition, the NSOB oversees the exchange of information with other police forces, while the NSIB approves infor-

mation exchanges with foreign intelligence agencies. The power of oversight with respect to information sharing should also include authority to ensure information is exchanged properly, in accordance with RCMP policy, and to take corrective action should improper exchanges of information occur.

Since 2003, all of these Headquarters operations have been overseen by the Director General, National Security, who reports to the Assistant Commissioner of the Criminal Intelligence Directorate. I note that it will assist the work of the independent review body discussed in the Policy Review report for it to be able to interact with someone at the level of director general who has overall responsibility for the RCMP's national security activities. As mentioned above, centralization should facilitate effective independent review. And the combination of centralization within the RCMP and independent review should help to improve national security policing.

The type of centralized oversight contemplated here is valuable in ensuring both the effectiveness and the propriety of national security investigations. In terms of effectiveness, centralized oversight allows Headquarters to co-ordinate investigations, ensure that relevant information is shared internally, discern trends and, as provided for in the November 2003 ministerial direction discussed above, inform the responsible minister of high profile investigations or those that give rise to controversy. As regards propriety, centralized oversight allows Headquarters to ensure that investigations do not stray from the RCMP's crime-based mandate, threats to individual liberties are monitored, information is always shared in an appropriate manner and RCMP policies are followed. Centralization should also facilitate the task of independent review of the propriety of investigative actions.

Recommendation 5

The minister responsible for the RCMP should continue to issue ministerial directives to provide policy guidance to the RCMP in national security investigations, given the potential implications of such investigations.

Ministerial directives and directions (hereinafter referred to collectively as "directives") are written policies issued to the RCMP by the Solicitor General, the minister responsible for the Force. A 1984 document on the directive system accurately notes that "the Directive procedure is one of the most important means by which the Minister exercises his responsibility over the Royal Canadian Mounted Police"[35] pursuant to section 5 of the *RCMP Act*, which provides that the Commissioner of the RCMP is subject to the direction of the Minister.

As I state above, national security investigations have several features that are different from other criminal investigations. There is a greater need for integration with other agencies, both domestic and foreign; there is more information sharing, often involving sensitive material; there is a greater need for centralized oversight with the RCMP; and there are increased concerns about individual liberties. Ministerial directives are a useful tool in ensuring that the way the RCMP manages its national security investigations is consistent with ministerial accountability.

Since 2002, the Minister has issued directives relevant to the RCMP's national security activities, a positive sign of increasing ministerial responsibility for such activities. Transparency and accountability can be improved by more frequent issuance and review of such directives.

Appropriate use of such directives does not interfere with the independence of the RCMP as a law enforcement agency, as the purpose of the directives is solely to provide policy guidance with respect to the overall operation of the RCMP. There is no attempt to encroach on the making of law enforcement decisions in individual cases, which comes within the legitimate ambit of police independence.

I also believe that ministerial directives should be readily accessible to the public, subject to valid national security confidentiality concerns. For example, the November 2003 ministerial direction concerning the need for care and prior high-level approval before investigations may be conducted in regard to sensitive sectors such as academia, religion, politics or trade unions is a matter of public interest. In fact, public awareness about this ministerial direction could inspire greater public confidence in RCMP investigations potentially involving these sensitive areas.

In view of the important role of ministerial directives with respect to national security investigations and the need for agreements to govern how the RCMP relates with foreign and domestic agencies dealing with national security matters, I expect that monitoring compliance with such directives and, when appropriate, recommending improvements and updates will be an important task for the independent review body recommended in the Policy Review report.

Recommendation 6

The RCMP should maintain its policy of sharing information obtained in the course of national security investigations with other agencies and police departments, both domestic and foreign, in accordance with the principles discussed in these recommendations.

It is clear that information about threats to national security must be shared with other agencies and police departments, both domestic and foreign.

I agree with the Ottawa Police Service which, in its submission to the Inquiry, stated that "information sharing amongst police is *critical* to the success of any major police investigation, including a national security investigation" and, "in order to provide prevention and protection to their communities, law enforcement agencies must *communicate, cooperate and collaborate, including [by]* exchang[ing] and sharing information."[36]

Two recent reports have stressed the importance of information sharing. Bob Rae's report on the terrorist bombing of Air India Flight 182 and the U.S. 9/11 Commission's report both speak of the need for all agencies involved in national security investigations to co-operate and share information with one another.

Information sharing is vital, but it must take place in a reliable and responsible fashion. The need for information sharing does not mean that information should be shared without controls, particularly without the use of caveats. Nor does it mean exchanging information without regard to its relevance, reliability or accuracy, or without regard to laws protecting personal information or human rights. I say more about the need for certain controls farther on, but I note here that controls are meant to facilitate and promote the orderly flow of information, not impede or stop it.

As I discuss below, the RCMP's current policies with respect to information sharing are essentially sound. It is important, however, that those policies be followed and that officers involved in information sharing understand not only the policies, but also the reasons behind them. An understanding of the rationale behind policies is the best assurance that officers will comply with them.

I note and welcome the fact that the RCMP is preparing a template for sharing criminal information. I recommend that the template be specifically adapted to some of the circumstances unique to national security investigations. For instance, national security investigations can involve sharing information with agencies that are not law enforcement agencies and, in some cases, with countries with poor human rights records. They may also entail sharing information that requires an evaluation of an individual's level of involvement or association

with others, or an assessment of the seriousness or imminence of a threat. Security intelligence not consistent with the law enforcement mandate of the RCMP may be received or, conversely, information may be passed on to security intelligence agencies that have a different and, in some respects, broader mandate than the RCMP. The RCMP should identify the unique aspects of national security investigations and incorporate them into the template.

An RCMP information-sharing template should also affirm the importance of using caveats when sharing information with other agencies and address concerns about the reliability, relevance and accuracy of information and the relevance of laws affecting personal information and human rights.

Recommendation 7

The RCMP's Criminal Intelligence Directorate (CID) or another centralized unit with expertise in national security investigations should have responsibility for oversight of information sharing related to national security with other domestic and foreign departments and agencies.

An important part of centralized oversight of RCMP national security investigations will be oversight of practices pertaining to information sharing, including both the provision and receipt of information. As I set out in Chapter III, Project A-O Canada shared information with American agencies without adequate oversight or control by Headquarters.

In my Policy Review report, I discuss administrative steps taken by the RCMP to ensure greater oversight by CID over information sharing in relation to national security investigations, especially the provision of information by the RCMP to other agencies. The NSOB in CID is responsible for oversight of information sharing with domestic police agencies, while the NSIB is responsible for responding to inquiries from other domestic and foreign agencies. The integrated nature of policing means that some information exchanges take place at the field level. When this happens, RCMP practice is for the NSOB to be informed of such exchanges.

In this age of instantaneous electronic communication, centralization need not restrict or slow information sharing or compromise operational independence. It does, however, require that the appropriate unit at Headquarters be informed of the information that is to be shared. I was impressed by evidence that CSIS National Headquarters exercises close control over information sharing. Centralized control over information sharing can help ensure that RCMP policies respecting screening and the use of caveats are followed and provide an appropriate level of accountability, thereby facilitating review. In addition,

centralization of information-sharing decisions should assist in addressing subsequent requests from recipients of information for amendments to caveats.

In the Policy Review report, I note that information sharing between the RCMP and other domestic and foreign agencies is often governed by informal arrangements that are not reduced to writing. This is somewhat surprising, given that the RCMP has over a thousand MOUs with other agencies respecting various matters. Moreover, an April 2002 ministerial directive discussed earlier appears to require that agreements and arrangements with other agencies for integrated activities be reduced to writing. Written agreements, even relatively simple framework agreements, or an exchange of letters can facilitate best practices in information sharing.

Centralized oversight of information sharing within CID can also serve as a useful management tool, allowing for co-ordination of investigations and ensuring consistency in the information to be shared. It obviously makes sense to share information with other agencies and departments in a principled and consistent manner. This does not mean that the same information must be given to all agencies, but rather that the principles applicable to information sharing should be consistent from one investigation to the next. Centralization can smooth out potential differences in practice from one division to another or even within a given division.

Centralized oversight of information sharing can also ensure valuable screening of information relating to national security investigations received from foreign agencies. Acquiring information from foreign agencies is a vital part of national security investigations, but information sharing is of necessity done in secret and may compromise the rights and freedoms of individuals. For this reason, it is important that CID or some other central unit within the RCMP be aware of what information is received from foreign agencies and ensure that it is properly assessed for reliability and that concerns about the manner in which it was obtained are duly considered.

Centralized control over information sharing should also increase accountability within the RCMP for information-sharing practices. The independent review body I recommend in the Policy Review report will be greatly assisted in fulfilling its role if it is able to examine information sharing through the responsible branch at Headquarters rather than investigating practices on a project-by-project basis.

Centralization of the information-sharing aspect of national security investigations will only be effective if the RCMP has adequate resources to properly staff and carry out this responsibility. In national security investigations, prompt provision of information to other agencies is often essential. The additional step

of flowing information through Headquarters should not be permitted to stand in the way of timely information sharing. If more resources are required to exercise this important function, those resources should be made available.

Recommendation 8

The RCMP should ensure that, whenever it provides information to other departments and agencies, whether foreign and domestic, it does so in accordance with clearly established policies respecting screening for relevance, reliability and accuracy and with relevant laws respecting personal information and human rights.

A) SCREENING FOR RELEVANCE

The RCMP should maintain its policy of screening information for relevance before sharing it.

Screening can take place at either the operational or the central level, depending on the information that is being shared. The screening process should be coordinated so that information can be screened efficiently and without duplication.

The 9/11 Commission in the United States concluded that, after 9/11, the largest impediment to "a greater likelihood of connecting the dots . . . is the human or systemic resistance to sharing information" and criticized the "need-to-know" principle on the basis that it

> assumes it is possible to know, in advance, who will need to use the information. Such a system implicitly assumes that the risk of inadvertent disclosure outweighs the benefits of wider sharing. Those Cold War assumptions are no longer appropriate. . . . Agencies uphold a 'need-to-know' culture of information protection rather than promoting a 'need-to-share' culture of integration.[37]

In his recent report on the bombing of Air India Flight 182, Bob Rae also commented on the dangers of using Cold War assumptions about the "need-to-know" principle.[38] I agree that the "need-to-know" principle can be abused. I also note that, in 1981, the McDonald Commission effectively criticized the dangers of overly broad applications of the principle with regard to both integration and review of national security activities.[39]

Since the Inquiry has focused on one case only, I have not heard sufficient evidence about whether the "need-to-share" concept should replace the "need-to-know" concept to come to a definitive conclusion in this regard. I note, however, that sound solutions to difficult issues that arise with respect to information

sharing are not likely to be found by mechanically invoking either. Indeed, there could be a tendency to use the latter as a conclusion for denying access to information and the former, as a conclusion for automatically sharing all information, irrespective of its relevance. What is required is one clear policy about appropriate information sharing and application of that policy on a case-by-case basis. The emphasis should be on the reasons for sharing or not sharing information, rather than on conclusions.

I will say that files should not simply be opened wholesale to other agencies, as occurred in the Project A-O Canada investigation. There must be an examination to determine "need." The current RCMP policy sets out a standard of relevance that, in my view, is the proper criterion. "Relevance" in this context is not used in the evidentiary sense, to indicate what may be admissible in a legal proceeding. Rather, it means that there must be some connection between the information being provided and an ongoing investigation. Those screening information should be satisfied that the information to be provided has some connection to the investigation of the recipient agency and to the use to which the information will be put. In addition, in some instances, information may be considered relevant if it is to be provided to another agency to seek assistance from that agency with an RCMP investigation.

That said, I do not think that the relevance criteria need establish a high threshold, provided the other guidelines I recommend concerning reliability, accuracy, privacy, human rights and appropriate use of caveats are followed.

I suggest that the current RCMP policy with respect to screening for relevance be elaborated upon in the light of these recommendations, to provide greater guidance to those called upon to implement it.

B) SCREENING FOR RELIABILITY AND ACCURACY

The RCMP should ensure that information provided to other countries is reliable and accurate and should amend its operational manual accordingly.

Sharing unreliable or inaccurate information does not provide a sound foundation for identifying and thwarting real and dangerous threats to national security and can cause irreparable harm to individuals.

Reliability relates primarily to the source of the information. As I discuss earlier, the RCMP's 2001 *Criminal Intelligence Program Guide* provides that sources and information must be graded as reliable, believed reliable, of unknown reliability or of doubtful reliability. The Guide, appropriately in my view, leans toward classifying material as of doubtful reliability. It states that the highest category should be assigned only if every effort has been made to validate the

information and there "is a combination of proven accuracy of information and proven dependability as a person," while the lowest category applies "if there is a doubt about the source or the information."[40]

The RCMP, like all agencies involved in sharing information, must be vigilant about accuracy and precision when sharing information that describes facts or events or that contains an assessment or evaluation of an individual or the individual's status in an investigation.

In Chapter III, I discuss how the RCMP provided U.S. agencies with inaccurate information about Mr. Arar on several occasions. For example, it did not always carefully observe the distinction between a "suspect" and a "person of interest" in its descriptions of Mr. Arar. As a result of this lack of precision, it sometimes overstated Mr. Arar's status in the investigation, which was unfortunate. Although the requirement for accuracy and precision is obvious, it is not set out in existing policy relating to information sharing. The *Criminal Intelligence Program Guide* indicates that information entered into RCMP data banks must be accurate, have integrity, be complete and be up-to-date. The relevant RCMP operational manual dealing with information sharing should be amended to specify that accuracy and precision are essential when classifying information and individuals in an investigation. To promote precision in language used, I also suggest that the revised manual provide definitions of at least two terms commonly used in national security investigations: "suspect" and "person of interest."

References to a "suspect" should be to a person who is a "target" or "a subject of a national security investigation." This would normally be a person who is suspected of involvement in terrorist offences or offences that would constitute threats to the security of Canada, as defined in section 2 of the *CSIS Act*.[41]

Suspects should always be distinguished from "persons of interest," who may have information relevant to an investigation or may be associates of suspects. Available information relating to "persons of interest" falls short of creating a suspicion that the individual has committed an offence or constitutes a threat in terms of doing so. Associates of suspects should not automatically become suspects themselves. The danger of guilt by association is particularly great in national security investigations, as the police often have a legitimate interest in collecting information about anyone associating with a suspect.

The determination of whether or not a person is a suspect must be made by relating the person's conduct to an offence under Canada's laws, not on the basis of potentially innocuous associations. There should be careful thought before a person is elevated from the "person of interest" category to the "suspect" category.

Caution is also necessary with respect to the use of potentially emotive or inflammatory phrases. To say that someone is an "Islamic extremist" or a "*jihadist*" can open the door to a slipshod and casual process in which guilt is assigned by association. Such emotive labels can also blur the distinction between a suspect and a person of interest. Investigators must make every effort to be precise and accurate at all times. The use of loose or imprecise language about an individual or an event can have serious and unintended consequences. Labels, even inaccurate ones, have a way of sticking.

The importance of using accurate and precise labels is magnified when information is shared outside the RCMP. In such cases, it is essential not only that information be screened for accuracy and precision, but also that consideration be given to how the recipient agency may interpret the assessment or label attached by the RCMP. Even a "person of interest" classification may have a more serious connotation in the eyes of others than intended. For example, the United States adopted the labels "high interest," "of interest" or "of undetermined interest" to identify aliens who could be arrested on immigration charges in connection with the U.S. government's investigation of the 9/11 attacks.[42] In April 2003, the Office of the Inspector General of the U.S. Department of Justice concluded that there was little consistency or precision to the classification process and that the FBI should have exercised more care in the process, given the significant ramifications on detainees' freedom of movement and rights.[43] As one knowledgeable commentator recently stated:

> An inordinately high price is paid when less than accurate intelligence is relied upon by state agencies, whether the field in question is that of security intelligence or law enforcement. Lives and security may be unreasonably or negligently placed at risk and, equally, lives may be ruined and reputations decimated by the ill-advised disclosure of or reliance upon erroneous or misleading personal information.[44]

C) SCREENING FOR PRIVACY CONCERNS

Information should also be screened by the RCMP for compliance with the applicable law concerning personal information before it is shared.

Current RCMP policy provides that the disclosure of personal information must be made in accordance with the *Privacy Act*, which forbids disclosure of personal information without the consent of the person to whom the information relates, subject to certain exceptions. The different exceptions to this rule include consistent use disclosure, disclosure for law enforcement purposes, and public interest disclosure.[45]

The consistent use exception set out in paragraph 8(2)(a) of the *Privacy Act* provides for disclosure of personal information "for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose."[46] Although this is one of the more frequently relied upon exceptions in the *Privacy Act*,

> the *Privacy Act* does not define the term "consistent use" nor does the case law. For guidance, government institutions have regard to the *Treasury Board Manual on Privacy and Data Protection* [*sic*] which states that a "consistent use must have a reasonable and direct connection to the original purposes for which the information was obtained or compiled."[47]

Jurisprudence under section 8 of the Charter may also provide guidance regarding the scope of the consistent use policy.[48]

Paragraph 8(2)(e) of the *Privacy Act* sets out the law enforcement exception. It provides for disclosure "to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed."[49] The fact that this exception requires a written request should promote accountability.[50] In addition, the fact that the request must describe the information to be disclosed should help to ensure that only relevant information is released and that due regard is paid to privacy and other human rights considerations.

Finally, for our purposes, there is an exception relating to public interest disclosure in paragraph 8(2)(m) of the Act. Under the RCMP policy, public interest disclosure requires prior approval by the commanding officer and notification of the Privacy Commissioner. Members of the Force are also directed in appropriate detail to consider a long list of factors, including various negative impacts on the individual of the release of personal information, and to minimize the detail being disclosed.

The RCMP policy also warns that "it is not an obligation to release personal information under this provision: disclosures should be restricted to only that part of a record actually required, and the information condensed to a synopsis whenever possible."[51] This policy makes it clear that release of information under this section is discretionary and should be informed by concerns about relevance and minimizing invasions of privacy and human rights. I repeat that any synopsis should also be accurate and precise.

There are a number of human rights implications other than privacy that must be considered when releasing information. I discuss them in recommendations 12 to 14 below.

Recommendation 9

The RCMP should never share information in a national security investigation without attaching written caveats in accordance with existing policy. The RCMP should review existing caveats to ensure that each precisely states which institutions are entitled to have access to the information subject to the caveat and what use the institution may make of that information. Caveats should also generally set out an efficient procedure for recipients to seek any changes to the permitted distribution and use of the information.

A) IMPORTANCE OF CAVEATS

The RCMP's current policy of requiring caveats on all documents being provided to other agencies is sound and should be strictly followed.

One of the significant flaws in Project A-O Canada's investigation was the Project's failure to place caveats on information that it shared with American agencies. Failure to attach caveats is unacceptable because it increases the risk that information will be distributed by the recipient to unanticipated institutions and that it will be used for unintended and possibly unacceptable purposes. Attaching proper caveats is a routine administrative matter that is vital for ensuring that, when information is shared in national security investigations, it is for specific purposes and with specific institutions. Caveats ensure responsible and accountable information sharing.

It is wrong to think that caveats must "be down," to use the expression of several witnesses at the Inquiry, in order for information to be shared effectively and efficiently. Caveats should not be seen as a barrier to information sharing, especially information sharing beyond that contemplated on their face. They can easily provide a clear procedure for seeking amendments or the relaxation of restrictions on the use and further dissemination of information in appropriate cases. This procedure need not be time-consuming or complicated. With the benefit of modern communications and centralized oversight of information sharing within the RCMP, requests from recipients should be able to be addressed in an expeditious and efficient manner.

Existing RCMP policy on caveats does not allow for exceptions or deviations to the policy in either routine or national security investigations. In my view, the absolute nature of the RCMP's caveat policy is appropriate. Caveats should be used in all cases. While attaching them does not guarantee that a recipient will not use the information for unauthorized purposes, it reduces the risk. Caveats may not be legally binding in most cases, but setting out restrictions on use in writing certainly increases the moral obligation, if nothing else, to respect those

restrictions. Moreover, as I discuss under Recommendation 12, breaches of caveats require prompt remedial action.

B) WORDING OF EXISTING CAVEATS

The RCMP should review the language of its existing caveats to ensure that it clearly communicates the desired restrictions on the use of information being shared. Caveats should clearly state who may use the information, what restrictions apply to that use, and whom to contact should the recipient party wish to modify those terms.

Although existing RCMP policy appropriately requires the use of caveats in all cases where information is shared, I have some concerns about the clarity, scope and precision of the standard caveats contained in existing RCMP policy guidelines. In general, caveats should be as clear as possible about what institutions may access information provided by the RCMP and to what purposes. The need for clarity has grown since 9/11, as a result of the expansion of institutions concerned with national security and the increased uses to which information is being put, including uses inconsistent with human rights considerations.

The standard caveat for the exchange of designated information[52] by the RCMP provides:

> This document is the property of the Government of Canada. It is loaned to your agency on the understanding that it is not to be further disseminated without the consent of the originator. Distribution within your agency is to be done on a need-to-know basis. The document is to be protected in accordance with normal safeguards for law enforcement information.[53]

The RCMP policy respecting the provision of classified information[54] to domestic and foreign law enforcement agencies/departments provides for the following caveats:

> This document is the property of the RCMP. It is loaned to your agency/department in confidence and it is not to be reclassified or further disseminated without the consent of the originator.

> This document is the property of the Government of Canada. It is provided on condition that it is for use solely by the intelligence community of the receiving government and that it not be declassified without the express permission of the Government of Canada.[55]

The RCMP policy for national security investigations also requires caveats with identical wording to the above for information being sent to domestic and foreign law enforcement agencies/departments.[56]

I heard evidence that there is general consensus among police and security intelligence agencies as to the meaning of caveats: without authority from the provider, the recipient agency will not disseminate the information to any other agency and the information will not be used in any legal proceedings. Although there is some comfort in the suggestion that the purpose and meaning of caveats are well understood by both Canadian and foreign agencies, it is very important, in my view, that caveats clearly spell out the understanding that most witnesses at the Inquiry seemed to have.

Thus, I make three specific recommendations concerning the wording of caveats.

First, caveats should be as clear as possible about which institutions are entitled to access the information. References to a recipient government's "intelligence community" are vague. Within the framework of the Policy Review process, the Government of Canada has indicated that more than 20 different agencies or departments in Canada are involved with national security. The expansion of the intelligence community both in Canada and elsewhere reflects changes in security and intelligence in many countries since 9/11. Reference in a Canadian caveat to the sharing of information with a foreign government's "intelligence community" could be interpreted as permitting dissemination of the information to agencies beyond those intended by the RCMP when providing the information. In general, a caveat should restrict the use of the information to the particular agency that receives the information. If further distribution is warranted in specific cases, broader wording may be used or the caveat may be amended.

Second, caveats should be equally clear about the use to which the information may be put. In general, information that is shared should be used for intelligence purposes only, and caveats should contain specific restrictions on the use of information in any legal proceedings. Traditionally, the concern was to restrict the use of information in subsequent criminal proceedings. Before information could be used in criminal proceedings, it was necessary to go through the Mutual Legal Assistance Treaty (MLAT) process, if applicable. However, increased emphasis on international terrorism since 9/11 makes it necessary for caveats to clearly prohibit the use of information without consent in other legal proceedings, such as immigration or extradition proceedings. The Supreme Court of Canada noted the practical importance of these alternative proceedings when it ruled that restrictions on the use of information compelled

in investigative hearings should be extended to subsequent immigration and extradition proceedings.[57] RCMP caveats should clearly prohibit the use of information in all legal proceedings without the consent of the RCMP. In that way, the RCMP can exercise control over the information it provides to ensure it is not used for purposes of which it does not approve.

Mr. Arar's case highlights the importance of restricting the use of information in all types of legal proceedings. As I discuss in Chapter IV, it is likely that information provided by the RCMP was used in the U.S. immigration proceedings against Mr. Arar that led to his removal to Syria. Much of the information had been provided without caveats. Caveats should have been used, and those caveats should have clearly specified that the information was not to be used in any legal proceedings. If such caveats had been attached to the information, the American agencies would have had to contact the RCMP for permission to use the information in immigration proceedings. I assume that, if asked for permission to use its information in proceedings that might have sent Mr. Arar to Syria, the RCMP would have refused on the basis of Syria's human rights record, as well as the summary nature of expedited removal proceedings under American immigration law.[58] Caveats are not a guarantee that a recipient will not use the information without first seeking approval, but they are the best means available to reduce the risk of misuse.

Third, caveats should indicate whom the information recipient should contact to request consent to further disseminate the information or to use it for purposes other than those permitted by the caveat. A caveat can serve to establish proper channels for clear communication about the use and distribution of the information subject to the caveat. To this end, it should generally specify who or what position has authority to modify it. General references to the Government of Canada are not particularly helpful in allowing another agency to request an amendment of a caveat or in ensuring accountability for any decision to amend a caveat.

Recommendation 10

The RCMP's information-sharing practices and arrangements should be subject to review by an independent, arms-length review body.

I make this same recommendation in the Policy Review report.

The McDonald Commission recommended that the security intelligence agency's relationship with foreign agencies "be subject to continuing review by the independent review body."[59] It also stated that the agency should "review intelligence sharing activities with foreign agencies to ensure that they satisfy the

standards set out in guidelines established by the government."[60] The *CSIS Act* implemented its recommendation, giving the Security Intelligence Review Board (SIRC) broad powers of review, with a specific provision that SIRC be provided with copies of various arrangements between CSIS and foreign governments and international organizations.[61] The reasoning that led the McDonald Commission to make its recommendation still applies today in respect of the RCMP's national security activities.

Both the April 2002 ministerial directive and November 2003 ministerial directions provide important guidelines with respect to agreements about information sharing and other services between the RCMP and other entities, including domestic and foreign police forces. One of the November 2003 directions[62] gives special attention to written and oral arrangements with foreign security and intelligence agencies. An important function of an independent review body will be to report to the Minister and, through the Minister, to Parliament and the Canadian public on problems with the RCMP's information sharing, particularly in regard to the interpretation of and compliance with ministerial directives and directions.

II.
INFORMATION-SHARING PRACTICES OF OTHER AGENCIES

Recommendation 11

Canadian agencies other than the RCMP that share information relating to national security should review recommendations 6 to 10 above to ensure that their information-sharing policies conform, to the appropriate extent, with the approaches I am recommending for the RCMP.

I did not hear sufficient evidence in the Factual Inquiry to make specific recommendations about the information-sharing policies and practices of other Canadian agencies involved in national security activities. However, in most cases, the reasoning behind recommendations 6 to 10 pertaining to the RCMP is applicable to other agencies.

Thus, I recommend that those agencies review their policies to ensure conformity with the rationale underlying the above recommendations.

III.
BREACH OF CAVEATS

Recommendation 12

Where Canadian agencies become aware that foreign agencies have made improper use of information provided by a Canadian agency, a formal objection should be made to the foreign agency and the foreign minister of the recipient country.

Although there is no guarantee that caveats will be respected or that Canadian agencies will even know about breaches of caveats by foreign agencies, it is very important that Canadian agencies raise an objection when they do learn of a breach of a Canadian caveat. Where appropriate, objections should be sent not only to the foreign agency, but to the foreign minister responsible for that agency. Such objections are necessary to prevail upon foreign agencies to comply with caveats.

Objections to breaches of caveats also provide Canadian agencies with an opportunity to inquire about the use made of information by foreign agencies and to correct any misunderstandings about the relevance, reliability, and accuracy of information provided by Canada. There may also be occasion to object to uses of information that would violate human rights.

Objections to breaches of caveats may prompt productive discussions about misunderstandings concerning information-sharing agreements with foreign agencies and the scope of caveats. They may lead to constructive remedial measures to make caveats and information-sharing agreements clearer and more effective.

IV.
INVESTIGATIVE INTERACTION WITH COUNTRIES WITH QUESTIONABLE HUMAN RIGHTS RECORDS

Recommendation 13

The Department of Foreign Affairs and International Trade (DFAIT) should provide its annual reports assessing the human rights records of various countries to the RCMP, CSIS and other Canadian government departments or agencies that may interact with such countries in connection with investigations.

Each year, DFAIT prepares an assessment of the human rights records of countries with which the RCMP, CSIS and possibly other investigative agencies of the Canadian government may interact. Some of those countries may have poor or questionable human rights records. Unlike the U.S. State Department, DFAIT treats its reports as confidential and, in the past, has not even made them available to other agencies of the Canadian government.

Leaving aside the issue of whether the reports should be made public, it is important, as a minimum, that DFAIT provide Canadian investigative agencies with the reports, in order to establish a common and hopefully accurate basis upon which those agencies may make decisions about the types of relationships, if any, to be developed with these countries.

If there is a need for such reports to be kept confidential, appropriate measures can be taken to maintain secrecy.

I understand that, on occasion, CSIS now produces similar assessments, at least for some countries. To the extent that this is the case, there should be coordination between DFAIT and CSIS so that, in the end, there is a single authoritative Canadian assessment of the human rights record of countries with which Canadian investigative agencies may interact.

Recommendation 14

The RCMP and CSIS should review their policies governing the circumstances in which they supply information to foreign governments with questionable human rights records. Information should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture. Policies should include specific directions aimed at eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.

The current RCMP policy is inadequate. A policy entitled "Enquiries from Foreign Governments that Violate Human Rights"[63] appears to set out two bases for determining when information may be shared. It provides that the RCMP will not become involved or appear to become involved in any activity that might be considered a violation of the rights of an individual unless there is a need to comply with one of five specified international conventions that Canada has signed in relation to various forms of terrorism. In addition, the policy states:

> The disclosure of information to an agency of a foreign government that does not share Canada's respect for democratic or human rights may be considered if it:
>
> 1. is justified because of Canadian security or law-enforcement interests,
> 2. can be controlled by specific terms and conditions, and
> 3. does not have a negative human rights connotation.[64]

This policy appropriately signals that caution is required in disclosing information to countries with poor human rights records and states that information should not be exchanged if it will have a "negative human rights connotation." Nevertheless, I have serious reservations about its adequacy, especially since it seems to suggest that the need to comply with certain international terrorism conventions is in itself sufficient reason for the RCMP to participate in activities that violate individual rights.

The need to investigate terrorism and the need to comply with international conventions relating to terrorism do not in themselves justify the violation of human rights. The international conventions cited in the RCMP policy, which I note has only a partial, out-of-date listing of conventions Canada has signed, do not authorize departures from human rights standards protected under various other international instruments Canada has agreed to abide by, such as the International Covenant on Civil and Political Rights and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture).

Article 2, paragraph (2) of the Convention against Torture[65] provides that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Article 4, paragraph (1) moreover requires that a state party to the Convention "ensure that all acts of torture are offences under its criminal law" and that the same apply to any "attempt to commit torture" or any "act by any person which constitutes complicity or participation in torture." Finally, under Article 3, paragraph (1), no state party shall send a person to a country where there are "substantial grounds for believing that he would be in danger of being subjected to torture." Clearly, the prohibition against torture in the Convention against Torture is absolute. Canada should not inflict torture, nor should it be complicit in the infliction of torture by others.

The existing RCMP policy applies only to requests from "foreign governments that violate human rights,"[66] seeming to require actual knowledge of human rights violations.

Most governments that violate human rights by, for example, engaging in torture, do not admit to such practices. Further, not all RCMP officers may have access to classified sources of information that reveal human rights violations, although, as I recommend above, the annual assessments produced by DFAIT should be made available to the RCMP. In any event, the application of guidelines should not depend on whether officers have actual knowledge of human rights abuses in a particular country. Whenever there is a reasonable basis for questioning a country's human rights record, officers should err on the side of

caution. According to Article 3, paragraph (2) of the Convention against Torture, relevant considerations for determining whether there are grounds for believing in a danger of torture include the existence of a "pattern of gross, flagrant or mass violations of human rights."[67] Reliable public reports of patterns of human rights violations in a country must be considered when assessing whether there is or was a credible risk of torture. Canadian officials should not wait for "verification" or unequivocal evidence of torture in a specific case before arriving at a conclusion of a likelihood of torture.

When providing information to a country with a questionable human rights record, Canadian officials should always consider whether co-operation is truly justified on the basis of Canada's law enforcement and security interests.

In every case, including those involving terrorism-related investigations, Canadian authorities should consider the justifications for and proportionality of any potential involvement with foreign governments that may result in human rights violations. There should be no blanket exception for terrorism-related investigations.

Even where it is decided that co-operation with a country with a questionable human rights record is justified, Canadian officials should weigh the risk of violations of human rights and consider ways of mitigating such risk, including placing conditions on the provision of information to the other country. They should also strive to monitor the use made of such information.

Any decision to share information with a country with a questionable human rights record should be made in a way that is fully accountable within the Canadian agency providing the information, and should be supported by a written record setting out the basis of the decision. Moreover, the minister responsible for the agency should be informed when appropriate. Centralization of the decision-making process within Canadian agencies providing information should provide the appropriate mechanism for accountability.

I note that the current RCMP policy appears to apply to "enquiries" only. This is too restrictive. It should apply to any and all dealings with such governments.

I did not hear enough evidence about CSIS policies and practices in the Factual Inquiry to determine whether improvements are needed in this area. However, CSIS should review its policies and practices to ensure they conform to the approach suggested herein. It is important that the practices of the RCMP and CSIS in this respect be based on the same fundamental principles. Moreover, as I suggest above, they should be guided by the same assessment of a country's human rights record.

Recommendation 15

Canadian agencies should accept information from countries with questionable human rights records only after proper consideration of human rights implications. Information received from countries with questionable human rights records should be identified as such and proper steps should be taken to assess its reliability.

Canadian agencies must exercise care in agreeing to receive information from countries with questionable human rights records. It is important that, in doing so, they not appear to encourage or in any way condone abuse of human rights or the use of torture.

There are cases where it is necessary and helpful to receive information from countries with questionable human rights records, in the interest of national security. An assessment must therefore be made of the importance of receiving such information and the implications of doing so for Canada's human rights obligations. Such assessments will, in practice, be made on a case-by-case basis, but should always be made in an informed, principled and accountable manner.

In terms of accountability, it is important that the decision-making process be clearly described in writing and that those responsible for making the decisions be identified. Furthermore, decisions to receive information from countries with questionable human rights records should be reviewed by the appropriate review body — SIRC for CSIS and the review body I am proposing for the RCMP.

It is essential that there be a proper and professional assessment of the reliability of information relating to national security received by Canadian agencies from countries with questionable human rights records.

All Canadian agencies must develop a policy governing the receipt of information from countries with questionable human rights records, with a special focus on the reliability and accuracy of such information. It will be necessary to assess this type of information against all that is known within government about the human rights record of the country in question, the conditions of confinement and interrogation of detainees, if appropriate, and the risk that the country may provide misinformation or false confessions induced by torture, violence or threats thereof. Based on the test set out in the Convention against Torture, the assessment should include consideration of the general patterns of conduct of the country and not be limited to first-hand evidence of torture in specific instances. Maher Arar's case underlines the need to ensure a proper and professional assessment of the reliability of such information.

Consultation among government entities with relevant information, including the RCMP, CSIS and DFAIT, will also help ensure a consistent reliability

assessment of the information for all Canadian agencies. The requirement that Canadian agencies involved in national security activities share information to properly address terrorist threats speaks to the importance of consistent analysis and assessment. It makes no sense to have different agencies operating on different assessments of information received from a foreign government. Moreover, once information has been assessed, new information may become available and may alter or upgrade the existing assessment. Updated assessments should be shared in a timely manner.

If information received from a foreign government is shared with agencies in other countries, it is important that Canadian agencies share the information in an appropriate manner. Obviously, the caveats of the country that provided the information must be respected and, when a foreign government agrees to further dissemination of its information, the Canadian agency should attach its own evaluation of the reliability and accuracy of the information and point out any concerns about human rights abuses that could affect the reliability of the shared information.

Finally, I note that the fact that Canadian agencies receive information from other countries for intelligence purposes does not necessarily mean that the information will be admissible in legal proceedings for evidentiary purposes.

V.
CANADIANS DETAINED IN OTHER COUNTRIES

Recommendation 16

The Government of Canada should develop a protocol to provide for coordination and coherence across government in addressing issues that arise when a Canadian is detained in another country in connection with terrorism-related activity. Essential features of this protocol should include consultation among relevant Canadian agencies, a coherent and unified approach in addressing the issues, and political accountability for the course of action adopted.

The case of Maher Arar is an excellent example of why a coordinated and coherent approach by Canadian officials is required when Canadians are detained in other countries in connection with terrorism-related activities. Consular officials point out that "terrorism" cases often involve special challenges. Depending on the country involved, detainees in such cases are more likely to be subjected to different and harsher treatment. Intrusions on individual liberties and human rights are more frequent when Canadians are detained

abroad in connection with a terrorism-related investigation, as opposed to most other criminal investigations.

In such instances, particularly when the country detaining them has a poor human rights record, there is a potential for disagreement among Canadian agencies about what steps should or even may be taken. Investigative agencies may wish to follow one course of action and consular officials, another. For example, investigative agencies may want to forward information about a detainee or questions for that person to the country in question, or may want to question the detainee or learn the results of interrogations by officials in the detaining country. In countries where mistreatment or torture is a real possibility, contacts between Canadian investigators and officials in the detaining country may hamper efforts by consular officials to obtain access to the detainee, ensure the individual is receiving proper treatment, or obtain the person's release.

Apart from the rule against contributing to or condoning torture, it is not possible to formulate absolute rules about what should or should not be permitted. Situations will vary widely, depending on the practices of the detaining country, its relationship with Canada, the nature of the investigation, and the detainee's circumstances.

Nevertheless, there are three essentials to the way Canada should respond to the detention of a Canadian abroad in connection with a terrorism-related investigation: 1) timely and open consultation among Canadian agencies that have any involvement in the matter; 2) a coherent and unified approach in addressing the matter, with DFAIT acting as the lead agency; and 3) accountability for the course of action adopted, with any disagreements between the Minister of Foreign Affairs and the Minister of Public Safety ultimately being resolved by the Prime Minister.

When a Canadian agency determines that a Canadian is being detained in another country in connection with a terrorism-related investigation, it should immediately notify DFAIT, which should take the lead in ascertaining what other Canadian agencies, including investigative agencies, are or have been involved in the case. The agencies involved should then share, on a confidential basis, the information necessary to ensure that there is a co-ordinated approach to all Canadian activities in relation to the detainee throughout the period of detention. Information should be shared in a manner that recognizes the different mandates and responsibilities of the agencies contributing information, particularly the distinctions between law enforcement and security intelligence mandates discussed earlier in this chapter.

Designating DFAIT as the lead agency for cases involving Canadians detained abroad in connection with terrorism-related activities should also

help ensure that Canada's obligations to provide consular services and defend the human rights of such persons are given due attention and are not eclipsed by the investigative mandates of either security intelligence or law enforcement agencies. That said, both security intelligence and law enforcement agencies have independent obligations to take care when dealing with countries with questionable human rights records, as discussed in recommendations 13 and 14.

As I envision it, this process would address the types of concerns I raise with respect to the manner in which Canadian officials responded to Mr. Arar's situation while he was imprisoned in Syria. For example, a decision to send questions for a detainee such as Abdullah Almalki or to share consular reports with investigative agencies would be made only after appropriate consultation carried out in a politically accountable manner, as would decisions about contacts between investigative agencies and government authorities in the detaining country and about media strategies.

Conflicts between the investigative interests of Canada and the need to respect the consular and human rights of Canadians held abroad must be resolved on a case-by-case basis, but I would think that officials would strive to ensure the greatest possible respect for human rights and that they would bear in mind the doubtful reliability of any statements made by a Canadian held in a country with a record of human rights abuses and torture.

In Mr. Arar's case, a process similar to that envisioned in this recommendation was engaged when Mr. Pardy attempted to obtain a joint statement from the Minister of Foreign Affairs and the Solicitor General. The dispute about the language to be included in a letter was ultimately resolved with the Prime Minister's intervention. However, when the RCMP and CSIS informed their minister of the inadvisability of signing a joint letter, these agencies did not raise with him the doubtful reliability of information received from Syria about Mr. Arar or the human rights violations Mr. Arar was facing or at risk of facing.

It will be necessary to properly brief those responsible for decisions on the investigative and diplomatic aspects of cases involving Canadians detained abroad in connection with terrorism-related activity. Such briefings should obviously be accurate and balanced. Further, to ensure an approach that is coherent and promotes accountability, it should always be clear which officials are responsible.

Given the importance of such matters, senior officials and, if necessary, responsible ministers should be involved. Such high-level involvement should promote coherence, coordination and accountability. As discussed above, a November 2003 ministerial direction indicates that the minister responsible for the RCMP should be informed of high-profile national security investigations.

Similar principles should be applied in other agencies with respect to any Canadians detained outside Canada in connection with terrorism-related activity. If there are disagreements that cannot be resolved at the ministerial level, it may be necessary for the Prime Minister to make the ultimate decision about what is and is not permitted.

I heard evidence that the Canadian ambassador to a country detaining a Canadian is the representative of all Canadian departments and agencies in relation to that country. That role may well put the ambassador in a difficult position of conflict. I recommend that, when a Canadian is detained in a terrorism-related matter, the ambassador refer any questions about what should be done with respect to the detainee to the consultation process described in this section. In that way, decisions can be made after receiving the views of all interested departments and agencies, in a manner that provides for accountability at an appropriate level. At the same time, the fact of having DFAIT take the lead in such circumstances should facilitate prompt communications between DFAIT and the ambassador and lessen any conflicts the ambassador may face. It should also ensure that the ambassador and his or her staff can promptly and adequately represent the interests of Canada and of Canadians held abroad.

As I note above, a process similar to that described here was more or less engaged in the case of Mr. Arar. The purpose of this recommendation is to ensure that the process is formalized and becomes systematic in all cases involving Canadians detained abroad for alleged terrorism-related activities.

Recommendation 17

The Canadian government should develop specific policies and training to address the situation of Canadians detained in countries where there is a credible risk of torture or harsh treatment.

A) TRAINING

Consular officials posted to countries that have a reputation for abusing human rights should receive training on conducting interviews in prison settings in order to be able to make the best possible determination of whether torture or harsh treatment has occurred.

In some countries, consular officials are not permitted private visits with Canadian detainees. That was the case with Mr. Arar when he was imprisoned in Syria. The fact that a detaining country permits consular officials to visit a detainee only in the presence of its officials in itself raises concerns about the

treatment to which the detainee may have been subjected. Because the detainee may not be able to speak freely, it is important that consular officials responsible for managing a detainee's case know how to detect signs of abuse or torture, to the extent possible.

Even when torture or harsh treatment has occurred, there may not be any physical signs. I heard evidence that countries such as Syria have ways of inflicting serious pain without leaving any physical marks, or at least none that are visible when the detainee is clothed. Indeed, it is unlikely that a country that inflicts torture or harsh treatment would permit consular access when physical signs of abuse could be observed.

In Mr. Arar's case, the Canadian consul did not have any training in detecting the signs of torture or abuse. I understand that DFAIT has implemented or is considering implementing a training program. I think that is an important initiative.

Moreover, once it is determined that there is a credible risk that torture is being or has been inflicted on a Canadian detainee, it is essential that Canadian investigators be alerted and that they be properly directed as to what interaction, if any, may take place with the detaining country. Information about a credible risk of torture should also be considered by law enforcement or security intelligence agencies when assessing the reliability of statements made or purported to have been made by the detainee. The threshold for determining a credible risk of torture is discussed under recommendations 14 and 15.

B) MINISTER OF FOREIGN AFFAIRS

If there is credible information that a Canadian detained abroad is being or has been tortured, the Minister of Foreign Affairs should be informed and involved in decisions relating to the Canadian response.

Torture is a grave abuse of human rights. Decisions on how to address serious concerns about a Canadian being tortured must be made in a manner that will ensure as much transparency and political accountability as possible. The Minister of Foreign Affairs is, in my view, the appropriate person to inform in all cases where there is credible information that a Canadian detained abroad is being or has been tortured.

I note that, after the first consular visit with Mr. Arar in Syria, DFAIT officials did not inform Minister Graham that it was likely that Mr. Arar had been tortured. Nor did they inform him in August 2002 that Ahmad El Maati had alleged that he had been tortured while in Syrian custody. Once it has been determined that torture has likely occurred, a number of decisions must be

made. To begin with, it must be decided whether to raise concerns with the detaining country. To my mind, barring any exceptional circumstances, the Minister should register Canada's concerns about the possible mistreatment of the detainee and violations of internationally protected human rights. I accept that there are considerations both for and against such action and that each case must be decided on its own merits. However, in most cases, when there is serious concern that torture or other grave abuse has occurred, such conduct should not be allowed to go unchallenged.

C) CONSULAR RIGHTS

Canadian officials should normally insist on respect of all of a detainee's consular rights.

Consular officials should request private visits with detainees in foreign countries and should be directed to insist on respect of detainees' full range of rights, including access to medical care and legal counsel.

There is an advantage to making such requests and demands even if they are likely to be denied, as they generally send a signal that Canada disapproves of any failure to fully respect detainees' rights. While judgment always comes into play and there may be exceptional cases where doing so would actually be detrimental to the detainee, those cases are likely to be few and far between.

Recommendation 18

Consular officials should clearly advise detainees in foreign countries of the circumstances under which information obtained from the detainees may be shared with others outside the Consular Affairs Bureau, before any such information is obtained.

DFAIT publishes a booklet entitled *A Guide for Canadians Imprisoned Abroad*. Under the heading "Protection, Advice and Assistance," the Guide assures detainees that if they choose to talk to Canadian officials, any information given will remain confidential, subject to the provisions of Canada's *Privacy Act*. The *Privacy Act* prohibits the disclosure without consent of personal information under the control of government, except as authorized in specified circumstances. The exceptions permit disclosure for purposes consistent with the use for which the information was being held, law enforcement purposes, and purposes that are in the public interest.

In Mr. Arar's case, consular officials disclosed information obtained from Mr. Arar to the RCMP and CSIS based in part on perceived consent and in part on one of the exceptions to the prohibition against disclosure in the *Privacy*

Act. I discuss the disclosures in Chapter V. The point for present purposes is that Mr. Arar's personal information was disclosed without his consent or even his knowledge that disclosure would take place. That is obviously an unacceptable situation.

If consular officials are contemplating disclosing information to others with the detainee's consent, the detainee should be fully informed of exactly what is going to occur. Moreover, if it is contemplated that information may be disclosed under exceptions in the *Privacy Act*, those exceptions should be explained to the detainee. While the current Guide does make reference to the *Privacy Act*, that reference is somewhat oblique and few detainees will have any idea that the reference is intended to permit the disclosure of information rather than to protect its confidentiality. However, I note that, if the detainee is being detained in circumstances that violate his or her human rights, it may be difficult to conclude that there has been voluntary consent to the release to investigative agencies of information obtained by consular officials.

Moreover, I recommend that, when consular officials have information that may assist a detainee with a defence or response in legal proceedings being taken in the detaining country, they discuss that information with the detainee, if possible, and, if directed, provide it to counsel for the detainee. If it is not possible to discuss the information with the detainee because of the circumstances of detention, consular officials should consider whether there is any reason such information should not be made available to counsel for the detainee. In making this recommendation, I appreciate that it is possible, although not probable, that consular officials will have information that cannot be disclosed because of the need to safeguard national security or international relations.

VI.
PROFILING

Recommendation 19

Canadian agencies conducting national security investigations, including CSIS, the RCMP and the CBSA, should have clear written policies stating that such investigations must not be based on racial, religious or ethnic profiling.

Although the RCMP has a policy of bias-free policing, concerns about racial profiling were raised by many of the intervenors in the Inquiry. Several senior officers of the RCMP who testified at the Inquiry made it clear that racial, ethnic or religious profiling is not permitted. This recommendation adopts that approach.

In material submitted to the Inquiry, the RCMP outlined a comprehensive approach to bias-free policing, which is defined in different ways. One definition is "any police action that is not based on race, nationality or ethnic origin, colour, religion, sex or sexual orientation, marital status, age, mental or physical disability. Rather, the police action is based on behaviour or information that leads the police to a conclusion that a particular individual, group or organization is, has been or may be engaged in unlawful activity."[68] Another, referred to in the material as a "possible definition" for bias-free policing, is "a commitment to provide quality policing services to all people in a respectful, professional, fair and impartial manner without discrimination based on race, national or ethnic origin, socio-economic status, colour, religion, sex, age, or mental or physical disability."[69]

There is much of value in the RCMP's policy regarding bias-free policing and I accept that the RCMP has an unwritten policy against racial, religious or ethnic profiling. However, there is an advantage to clearly spelling out what constitutes racial, religious and ethnic profiling and affirming that it is prohibited. Certainly, the existence of a written policy that defines and prohibits such profiling should go some distance in alleviating the concerns of those who, rightly or wrongly, perceive that discriminatory profiling has occurred in some instances. A clearly articulated policy is more likely to be respected than an unwritten understanding. Working in consultation with others, including those in Canada's Muslim and Arab communities, the RCMP should develop a precise definition of the racial, religious and ethnic profiling that it prohibits. Moreover, its policy in this regard should be widely distributed within the Force, as well as to the independent review body and the public.

I did not hear sufficient evidence in the Inquiry about the policies of other agencies in regard to profiling to make specific recommendations. Nevertheless, I recommend that all agencies involved in national security investigations review their existing policies to ensure conformity with this recommendation.

Although this may change in the future, anti-terrorism investigations at present focus largely on members of the Muslim and Arab communities. There is therefore an increased risk of racial, religious or ethnic profiling, in the sense that the race, religion or ethnicity of individuals may expose them to investigation. Profiling in this sense would be at odds with the need for equal application of the law without discrimination and with Canada's embrace of multiculturalism. Profiling that relies on stereotypes is also contrary to the need discussed above for relevant, reliable, accurate and precise information in national security investigations. Profiling based on race, religion or ethnicity is the antithesis of good policing or security intelligence work.

Because terrorism investigations today are focused on specific communities, there is an understandable concern that individuals and groups as a whole may feel unfairly targeted. Perceptions are important. Indeed, experience tells us that perceptions of unfair treatment, whether founded or not, can have a serious impact on the level of co-operation members of communities give investigators. Obviously, co-operation from those with knowledge of individuals or activities being investigated is important. Clear written policies against racial, religious and ethnic profiling that are made publicly available could correct any misperceptions and perhaps enhance co-operation between the RCMP and specific communities.

Recommendation 20

Canadian agencies involved in anti-terrorism investigations, particularly the RCMP, CSIS and the CBSA, should continue and expand on the training given to members and staff on issues of racial, religious and ethnic profiling and on interaction with Canada's Muslim and Arab communities.

In recommendation 3(e), I point out the practical reasons why national security investigators need to understand the norms, practices and values of communities they may need to investigate. It is also very important that investigators have a sound grasp of these communities in order to avoid offending individuals and even unintentionally causing people to view them with suspicion or distrust.

There is a wide scope for involving members of Canada's Arab and Muslim communities in training programs aimed at informing investigators of their culture, values and history. Some intervenors in the Inquiry suggested that a coherent training program could be developed in partnership with Canadian Muslim and Arab communities.

Materials produced by interested community groups may be helpful in this respect. For example, a pamphlet prepared by the Canadian Council on American-Islamic Relations, *Islam and Muslims: What Police Officers Need to Know,* explains how terms like *jihad* and *fatwa* are commonly misunderstood and may have innocent meanings not tied in any way to criminal conduct. The pamphlet also notes that "if eye contact is not made with a police officer, it can be a sign of respect, rather than one of guilty behaviour."[70] Such background information can be relevant in determining the reliability and relevance of information.

Other outreach initiatives may be helpful as well. In material submitted to the Inquiry, the RCMP outlined a number of specific outreach initiatives carried out with Canada's Arab and Muslim communities. These include the RCMP

Commissioner's delivery of the keynote address at a "Reviving the Islamic Spirit" conference in January 2004, Montreal INSET's acquisition of a full-time community relations officer, and Vancouver INSET's establishment of a liaison with the B.C. Muslim Association.[71] Senior officials from the RCMP and CSIS should continue to meet with community leaders to seek their assistance and listen to their concerns about how investigations are affecting the communities and, of importance, how they are perceived in those communities.

CSIS and the RCMP should consider whether it would be helpful to create a database of available and reliable resources within the Canadian Muslim and Arab communities for questions that might arise during investigations about Islam or about Arab or Muslim culture. Members of the communities concerned should be consulted about this initiative.

CSIS and the RCMP should continue their recruiting efforts in the Canadian Arab and Muslim communities with a view to improving diversity among their personnel. Moreover, they should promote greater sensitivity and awareness in their national security policies and operations.

I accept that the RCMP and CSIS are taking steps to enhance their interaction with Canada's large and diverse Muslim and Arab communities. Increased efforts in this respect can and should be made, to ensure that discrimination does not occur and to improve relations with and co-operation from these communities.

VII.
USE OF BORDER LOOKOUTS

Recommendation 21

Canadian agencies should have clear policies about the use of border lookouts.

A) REQUESTS

The RCMP and CSIS should develop guidelines governing the circumstances in which border lookouts may be requested both in Canada and in other countries.

Border lookouts can be a useful investigative tool and may be very helpful in national security investigations. They are not the most intrusive type of investigative technique; however, since they do involve some invasion of an individual's privacy, they should only be requested when there is some basis for believing that information that may be obtained will advance an investigation.

Accordingly, there should be reason to believe that there is a connection between the person targeted by the lookout and the activity or individual being investigated.

The facts in the Arar case provide one example of the point I am making. Mr. Arar was properly a person of interest in the relevant RCMP investigation, as he was associated with suspects who were being investigated. Although the RCMP did not consider Mr. Arar a suspect, they had a legitimate interest in knowing more about him because of those associations. However, there was no information linking Mr. Arar's wife, Monia Mazigh, to any suspect or activities being investigated. Thus, there was no basis to request a lookout for her.

In addition, when a border lookout is requested in another country, it is important to consider the implications of such a request for the liberty and rights of the individual targeted. It should not be assumed that all other countries will treat a lookout request as merely an information-gathering exercise. In the post-9/11 environment, with the increased concern about threats of terrorism, some other countries may react to information connected with terrorist investigations in a far more aggressive manner than Canadian authorities might intend. For example, I heard evidence in the Factual Inquiry about one country that refused to remove the name of an individual from a lookout list even after Canadian officials indicated that there was an error in certain information Canada had provided to that country. The need for careful consideration of the possible implications of making foreign lookout requests in terrorist investigations has been greatly heightened since 9/11. It is important that officials with the appropriate experience and understanding of processes and cultures of other countries be involved in decisions to request foreign lookouts.

Finally, it is essential in making a lookout request that care be taken to ensure that any information conveyed in the request is accurate and precise and that, if the request contains information about an individual, it is accompanied by appropriate caveats. My comments about information sharing generally apply equally to lookout requests.

B) ISSUING LOOKOUTS

The CBSA should establish clear, written criteria for placing individuals on a lookout list.

For reasons of national security confidentiality, I am unable to discuss the nature of lookouts or some of the criteria that may be applied in making decisions in their regard. There is an obvious advantage to having the criteria clearly spelled out, to provide those responsible for making decisions with as much guidance

as possible. That said, it is not possible to be prescriptive, as all possible circumstances cannot be envisioned. A criterion of "reasonableness" for issuing lookouts makes sense, but further detail would be helpful, as would specific examples of what does or does not constitute a "reasonable" basis.

The facts in the Arar case provide an example of where I would draw the line in terms of what should be considered "reasonable." I have not heard evidence dealing with the wide range of circumstances that must be considered when a lookout is requested. Thus, I can go no further in making specific suggestions.

C) EXAMINING DOCUMENTS

The CBSA should establish clear policies or guidelines concerning criteria for examining and photocopying documents and retrieving information from computers and electronic devices when individuals are seeking entry into Canada.

Existing policies or guidelines relating to these matters are poorly drafted and very confusing. In some situations, it would be very difficult for Canadian frontline officials to determine what is authorized. Clear direction is essential.

In preparing policy directives, the CBSA should ensure that border examinations are not unnecessarily intrusive. Directives should spell out the types of examinations that are permitted and those that are not, and give specific examples of each. Such directives should be set out in clear, simple language, in a single document with readily understandable headings.

D) DR. MAZIGH

Canada Customs should purge the information about Dr. Mazigh and her children from the Intelligence Management System.

The information concerning Dr. Mazigh and her children should not have been uploaded in the first place. It should be removed from the System if this has not already been done,

VIII.
MAHER ARAR

Recommendation 22

The Government of Canada should register a formal objection with the governments of the United States and Syria concerning their treatment of Mr. Arar and Canadian officials involved with his case.

The American authorities who handled Mr. Arar's case treated Mr. Arar in a most regrettable fashion. They removed him to Syria against his wishes and in the face of his statements that he would be tortured if sent there. Moreover, they dealt with Canadian officials involved with Mr. Arar's case in a less than forthcoming manner. They were not candid, either with the RCMP officers with whom they had been working jointly on the investigation that involved Mr. Arar, or with Canadian consular officials seeking to assist Mr. Arar, about their intentions or about the process that led to Mr. Arar's removal.

Canada should formally register an objection about both what happened to Mr. Arar and how American officials treated Canadian officials.

The fact of objecting is more symbolic than anything else. Unquestionably, Canada should continue to co-operate fully with American authorities in the global fight against terror. Co-operation between the two countries is vitally important. However, Canada is entitled to expect that American authorities will treat Canada and Canadian citizens in a way that is consistent with our co-operative efforts. That did not happen in the case of Mr. Arar.

With regard to Mr. Arar's detention in the United States, I note that, under the Vienna Convention on Consular Relations, a contracting state has an obligation to inform a foreign national of his or her right to contact consular officials and to facilitate such contact without delay. On October 3, 2002, Mr. Arar told Canadian consul Maureen Girvan that, while in custody at John F. Kennedy International Airport in New York, he had asked to see someone from the Canadian Consulate. American officials failed to contact the Consulate General in New York and Mr. Arar was held in U.S. custody for four days without access to a lawyer or his family. Essentially, no one knew where he was.

Breaches to the Vienna Convention should not be allowed to pass without objection. At one point, Canadian officials considered sending a diplomatic note to the United States in regard to its failure to provide Canadian consular officials with timely notification of Mr. Arar's detention. In my view, such a course of action is appropriate under the circumstances.

Moreover, the RCMP should inform American authorities with whom it shared information about Mr. Arar that all such information was or should have been subject to caveats restricting its dissemination to other agencies as well as its use, particularly in legal proceedings such as the immigration proceedings held with respect to Mr. Arar during his time in New York. In addition, the RCMP should correct any inaccurate information about Mr. Arar that was provided to American agencies. Mr. Arar, for one, has serious concerns about what will happen to him should he find himself in the United States again. He told the independent fact-finder that he fears flying even within Canada because of the possibility that a flight will be diverted to an American airport.[72] We have no way of knowing what information American officials have concerning Mr. Arar, but Canada has an obligation to correct any inaccurate information about him that it may have provided to American authorities. It is important that the record be set straight. In this report, I discuss at length the problems that can arise from providing inaccurate information and from sharing information without caveats. That discussion need not be repeated here. However, I repeat that inaccuracies should be corrected and caveats attached.

With regard to Syria, I conclude that the Syrian authorities tortured Mr. Arar when interrogating him and held him in inhumane and degrading conditions for about a year. Moreover, I conclude that they misled Canadian officials about Mr. Arar's presence in Syria after he first arrived there. If Canada has not already done so, it should send a formal objection to the Syrians.

Recommendation 23

The Government of Canada should assess Mr. Arar's claim for compensation in the light of the findings in this report and respond accordingly.

I have been asked to recommend that the Government of Canada compensate Mr. Arar for damages for his ordeal. However, I am specifically precluded from making any findings (or even assessments) as to whether the Government of Canada would be civilly liable to Mr. Arar. Moreover, the actions of others — the United States and Syria — played significant roles in what happened to Mr. Arar. I have been informed that Mr. Arar is suing the Canadian government, as well as the governments of the United States, Syria and Jordan, both here and in the United States. Those cases are before the courts, which can properly explore issues of civil liability, although an American court recently ruled that Mr. Arar could not sue the American government in relation to his rendition to Syria because of national security and foreign policy issues.[73] Even if this holding

is appealed, it appears that Mr. Arar will face serious roadblocks in his litigation against the United States and the other foreign governments.

I wish to make two comments about Mr. Arar's claim for compensation. First, in addressing the issue of compensation, the Government of Canada should avoid applying a strictly legal assessment to its potential liability. It should recognize the suffering that Mr. Arar has experienced, even since his return to Canada. Among other things, after his return, he was subjected to several very improper and unfair leaks of information that damaged his reputation, caused him enormous personal suffering and may have contributed to the difficulties this well-educated Canadian man has experienced in finding employment in his chosen field of computer engineering. Mr. Arar's inability to obtain employment has had a devastating economic and psychological impact on both him and his family.[74] In addition, as the Inquiry has proceeded, some of the mental suffering that Mr. Arar experienced in Syria has re-surfaced. Based on the assumption that holding a public inquiry has served the public interest, Mr. Arar's role in it and the additional suffering he has experienced because of it should be recognized as a relevant factor in deciding whether compensation is warranted.

The only other observation that I wish to make is that, if the Government of Canada chooses to negotiate with Mr. Arar, negotiated arrangements can be more creative than a mere damage award. A compensation agreement could involve anything from an apology to an offer of employment or assistance in obtaining employment.

Finally, I have been asked to recommend that appropriate disciplinary proceedings be instituted with respect to Canadian officials involved in Mr. Arar's case. However, I have not assessed the evidence with that in mind. Those responsible for discipline will have my report. They can take my findings and decide what steps, if any, need to be taken.

Summary List of Recommendations Arising from Factual Inquiry

Recommendation 1

The RCMP should ensure that its activities in matters relating to national security are properly within its mandate as a law enforcement agency.

(a) The RCMP should take active steps to ensure that it stays within its mandate as a police force to perform the duties of peace officers in preventing and prosecuting crime. It should ensure that it respects the distinct role of CSIS in collecting and analyzing information and intelligence relating to threats to the security of Canada.

(b) The RCMP should continue to develop its capacity for intelligence-led policing while ensuring that it remains within its law enforcement mandate.

(c) The RCMP should establish internal controls for all national security investigations to ensure that, when commencing and carrying out investigations and collecting information, it is properly within its law enforcement mandate to prevent, investigate and prosecute crimes.

Recommendation 2

The RCMP should continue to engage in integrated and co-operative operations in national security investigations, but agreements or arrangements in this respect should be reduced to writing.

(a) The RCMP's integrated policing initiatives with other Canadian police forces are necessary and beneficial and should continue.

(b) While respecting their different mandates, the RCMP and CSIS should continue to co-operate with one another and expand upon the ways in which they do so.

(c) The RCMP should continue to adhere to and refine its policy of co-operating with other federal agencies or departments involved in national security investigations.

(d) The RCMP should continue to work co-operatively with foreign agencies in pursuing its law enforcement mandate in national security investigations.

(e) The RCMP's agreements or arrangements with other entities in regard to integrated national security operations should be reduced to writing.

Recommendation 3

The RCMP should ensure that those involved in national security investigations are properly trained in the particular features of such investigations.

(a) Investigators in the national security field require all of the skills and expertise of investigators in other criminal investigations, but they should also be given training relating specifically to national security aspects.

(b) The RCMP should ensure that the specific types of information at the basis of national security investigations are analyzed with accuracy, precision and a sophisticated understanding of the context from which the information originates, with a view to developing intelligence that can lead to successful prevention and prosecution of a crime.

(c) The RCMP's National Security Enforcement Course curriculum should be reviewed in the light of the findings and recommendations of the Inquiry. In future, training curricula should be reviewed periodically by the RCMP and by the proposed independent review body.

(d) Training for national security investigators should include a specific focus on practices for information sharing with the wide range of agencies and countries that may become involved in national security investigations.

(e) The RCMP should continue and expand upon its social context training, which is necessary to be able to conduct efficient investigations while ensuring fairness to individuals and communities.

Recommendation 4

The RCMP should maintain its current approach to centralized oversight of national security investigations.

Recommendation 5

The minister responsible for the RCMP should continue to issue ministerial directives to provide policy guidance to the RCMP in national security investigations, given the potential implications of such investigations.

Recommendation 6

The RCMP should maintain its policy of sharing information obtained in the course of national security investigations with other agencies and police departments, both domestic and foreign, in accordance with the principles discussed in these recommendations.

Recommendation 7

The RCMP's Criminal Intelligence Directorate (CID) or another centralized unit with expertise in national security investigations should have responsibility for oversight of information sharing related to national security with other domestic and foreign departments and agencies.

Recommendation 8

The RCMP should ensure that, whenever it provides information to other departments and agencies, whether foreign and domestic, it does so in accordance with clearly established policies respecting screening for relevance, reliability and accuracy and with relevant laws respecting personal information and human rights.

(a) The RCMP should maintain its policy of screening information for relevance before sharing it.

(b) The RCMP should ensure that information provided to other countries is reliable and accurate and should amend its operational manual accordingly.

(c) Information should also be screened by the RCMP for compliance with the applicable law concerning personal information before it is shared.

Recommendation 9

The RCMP should never share information in a national security investigation without attaching written caveats in accordance with existing policy. The RCMP should review existing caveats to ensure that each precisely states which institutions are entitled to have access to the information subject to the caveat and what use the institution may make of that information. Caveats should also

generally set out an efficient procedure for recipients to seek any changes to the permitted distribution and use of the information.

(a) The RCMP's current policy of requiring caveats on all documents being provided to other agencies is sound and should be strictly followed.

(b) The RCMP should review the language of its existing caveats to ensure that it clearly communicates the desired restrictions on the use of information being shared. Caveats should clearly state who may use the information, what restrictions apply to that use, and whom to contact should the recipient party wish to modify those terms.

Recommendation 10

The RCMP's information-sharing practices and arrangements should be subject to review by an independent, arms-length review body.

Recommendation 11

Canadian agencies other than the RCMP that share information relating to national security should review recommendations 6 to 10 above to ensure that their information-sharing policies conform, to the appropriate extent, with the approaches I am recommending for the RCMP.

Recommendation 12

Where Canadian agencies become aware that foreign agencies have made improper use of information provided by a Canadian agency, a formal objection should be made to the foreign agency and the foreign minister of the recipient country.

Recommendation 13

The Department of Foreign Affairs and International Trade (DFAIT) should provide its annual reports assessing the human rights records of various countries to the RCMP, CSIS and other Canadian government departments or agencies that may interact with such countries in connection with investigations.

Recommendation 14

The RCMP and CSIS should review their policies governing the circumstances in which they supply information to foreign governments with questionable human rights records. Information should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture. Policies should include specific directions aimed at eliminating any possible

Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.

Recommendation 15

Canadian agencies should accept information from countries with questionable human rights records only after proper consideration of human rights implications. Information received from countries with questionable human rights records should be identified as such and proper steps should be taken to assess its reliability.

Recommendation 16

The Government of Canada should develop a protocol to provide for coordination and coherence across government in addressing issues that arise when a Canadian is detained in another country in connection with terrorism-related activity. Essential features of this protocol should include consultation among relevant Canadian agencies, a coherent and unified approach in addressing the issues, and political accountability for the course of action adopted.

Recommendation 17

The Canadian government should develop specific policies and training to address the situation of Canadians detained in countries where there is a credible risk of torture or harsh treatment.

(a) Consular officials posted to countries that have a reputation for abusing human rights should receive training on conducting interviews in prison settings in order to be able to make the best possible determination of whether torture or harsh treatment has occurred.

(b) If there is credible information that a Canadian detained abroad is being or has been tortured, the Minister of Foreign Affairs should be informed and involved in decisions relating to the Canadian response.

(c) Canadian officials should normally insist on respect of all of a detainee's consular rights.

Recommendation 18

Consular officials should clearly advise detainees in foreign countries of the circumstances under which information obtained from the detainees may be shared with others outside the Consular Affairs Bureau, before any such information is obtained.

Recommendation 19

Canadian agencies conducting national security investigations, including CSIS, the RCMP and the Canada Border Services Agency (CBSA), should have clear written policies stating that such investigations must not be based on racial, religious or ethnic profiling.

Recommendation 20

Canadian agencies involved in anti-terrorism investigations, particularly the RCMP, CSIS and the CBSA, should continue and expand on the training given to members and staff on issues of racial, religious and ethnic profiling and on interaction with Canada's Muslim and Arab communities.

Recommendation 21

Canadian agencies should have clear policies about the use of border lookouts.

(a) The RCMP and CSIS should develop guidelines governing the circumstances in which border lookouts may be requested both in Canada and in other countries.

(b) The CBSA should establish clear, written criteria for placing individuals on a lookout list.

(c) The CBSA should establish clear policies or guidelines concerning criteria for examining and photocopying documents and retrieving information from computers and electronic devices when individuals are seeking entry into Canada.

(d) Canada Customs should purge the information about Dr. Mazigh and her children from the Intelligence Management System.

Recommendation 22

The Government of Canada should register a formal objection with the governments of the United States and Syria concerning their treatment of Mr. Arar and Canadian officials involved with his case.

Recommendation 23

The Government of Canada should assess Mr. Arar's claim for compensation in the light of the findings in this report and respond accordingly.

Notes

1 In the report on the Policy Review, I also discuss ways in which the RCMP review mechanism may interact with the mechanisms of other accountability bodies to ensure coherent and comprehensive review.

2 Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Freedom and Security under the Law, Second Report (Ottawa: Supply and Services Canada, 1981) (Chair: D.C. Macdonald) [McDonald Commission report].

3 CASIS Conference, October 16–18, 2003, Vancouver, B.C. [online] http://www.csis-scrs.gc.ca/en/newsroom/speeches/speech17102003.asp [accessed February 8, 2006].

4 R.S.C. 1985, c. R-10. Section 18 of the Act reads:

> It is the duty of members who are peace officers, subject to the orders of the Commissioner,
>
> (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;
>
> (b) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;
>
> (c) to perform all duties that may be lawfully performed by peace officers in relation to the escort and conveyance of convicts and other persons in custody to or from any courts, places of punishment or confinement, asylums or other places; and
>
> (d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

5 [P] Hooper testimony (June 22, 2004), p. 415.

6 *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 33 [*CSIS Act*].

7 [IC] Hooper testimony (September 23, 2004), pp.1923–1924.

8 Exhibit P-12, Tab 42, p.1.

9 Ibid., p.5.

10 Ibid., Tab 44, p.19.

11 For a discussion of the differences between "sharing up" from law enforcement agencies to security intelligence agencies and "sharing down" from security intelligence agencies to law enforcement agencies, see Stanley A. Cohen, *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (Toronto: LexisNexis Butterworths, 2005), pp. 396–407 [*Privacy, Crime and Terror*].

12 Integration refers to the full range of co-operative activities, including formal integration (as in the case of Integrated National Security Enforcement Teams, or INSETs), joint operations, and information exchange.

13 [P] Submissions by the Ottawa Police Service (September 8, 2005), para 15.

14 [P] Policy Review hearing transcript (November 17, 2005), p. 333 (submissions).

15 [P] Submissions by the Ottawa Police Service (September 8, 2005), para 5.

16 [P] Loeppky testimony (July 28, 2005), p. 8891.

17 *Security Offences Act*, R.S.C. 1985, c. S-7, s. 6(1).

18 *CSIS Act*, s. 19(2)(a).

19 The Honourable Bob Rae, *Lessons to be Learned* (Ottawa: Air India Review Secretariat, 2005), p. 13 [Lessons to Be Learned].

20 Ibid., p. 22.

21 With regard to the advantages of a paper-trail approach, see Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability – Phase 2 Report* (Ottawa: Supply and Services, 2006), pp. 127-128, which calls for mandatory record-keeping requirements.

22 *R. v.Terry*, [1996] 2 S.C.R. 207 at 216.

23 Exhibit P-12, Tab 23.

24 Ibid.

25 [P] Loeppky testimony (June 30, 2004), p. 894.

26 Ibid., p. 896.

27 I note that Project A-O Canada did obtain legal advice from time to time, but that advice did not give rise to a written agreement or arrangement governing the flow of information.

28 Exhibit P-12, Tab 23.

29 Exhibit P-12, Tab 44, p. 7.

30 Ibid., p. 1.

31 Ibid., Tab 45, pp. 9–14. The course outline contains the following headings: Overview of the National Security Program; Criminal Intelligence and the Threat Assessment Process; Anti-Globalization / Criminal Protests Movements; The Psychology of Terrorism; Cultures: Middle East and Islamic Perspectives; The Roots of Terrorism; Terrorist Threats; National Counter-Terrorism Plan; Terrorist Funding; FBI Case Studies; Cyber-Terrorism; Relationship with Operations; Immigration and Document Examination; Terrorist Use of Chemical, Biological, Nuclear Materials; and Human Source Development.

32 Human Sector Resources, *Challenge, Choice and Change: A Report on Evidence-based Practice in the Provision of Policing Services to Aboriginal Peoples*, pp. 12–13 [online] www.ipperwashinquiry.ca/policy-part/policing/pdf/Human_Sector_Resources_Report.pdf.

33 Exhibit P-12, Tab 24, "Ministerial Direction – National Security Responsibility and Accountability," pp. 2-3.

34 Ibid., "Ministerial Direction – National Security Investigations in Sensitive Sectors."

35 Ibid., Tab 21.

36 [P] Submissions by the Ottawa Police Service (September 8, 2005), paras. 12 and 16 (emphasis in original).

37 National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, s. 13.3 [online] http://www.9-11commission.gov/report/911Report.pdf.

38 *Lessons to Be Learned*, *supra* note 19, pp. 22–23.

39 McDonald Commission report, *supra* note 2, pp. 745–746. The McDonald Commission noted the dangers of overclassification and how "need to know" can hamper teamwork and co-operation between different agencies, reduce the quality of training and development in an agency, lessen the quality of decisions and frustrate effective oversight and inspection.

40 Exhibit P-12, Tab 44, p. 7.

41 R.S.C. 1985, c. C-23.

42 Exhibit P-64, U.S. Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003), p. 111.
The Inquiry also heard expert testimony from Julia Hall of Human Rights Watch in which she described the immediate post-9/11 "round-up" of hundreds of individuals who were categorized as "persons of interest" or "persons of high interest" and arrested on various immigration violations. See [P] Hall testimony (June 7, 2005), pp. 5578–5579 and 5826.

43 Exhibit P-64, p. 158. The Office of the Inspector General (OIG) found that the FBI's initial assessment of its level of interest in specific 9/11 detainees directly affected the detainees conditions of confinement within the institution and their access to telephone, legal counsel and

their families (p. 111). As a threshold matter, the OIG questioned the criteria — or lack thereof — used by the FBI to make its initial designation of the potential danger posed by 9/11 detainees. The arresting FBI agent usually made this assessment without any guidance, based on the initial detainee information available at the time of arrest (p. 158). The OIG recognized the uncertainties and confusion surrounding the initial policies and treatment relating to the 9/11 detainees. The FBI loosely applied an assessment of these detainees as "of interest" to the terrorism investigation (p. 159).

44 Stanley A. Cohen, *Privacy, Crime and Terror*, *supra* note 11, p. 116.

45 Exhibit P-12, Tab 27, *Operational Manual*, I.3 Assistance, L. Release of Information.

46 R.S.C. 1985, c. P-21.

47 *Privacy, Crime and Terror*, *supra* note 11, p. 149, citing the *Treasury Board Manual*, Chapter 2, "Use and Disclosure of Personal Information" (December 1, 1993), para. 5 [online] http://www.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_128/CHAP2_4-2_e.asp#cons.

48 See, for example, *R. v. Arp*, [1998] 3 S.C.R. 339; *R. v. D'Amour*, (2002) 4 C.R. (6th) 275 (ON C.A.); *R. v. Dore*, (2002) 4 C.R. (6th) 81 (ON C.A.).

49 R.S.C. 1985, c. P-21.

50 Treasury Board guidelines for this provision read: "Disclosures under this provision are to be made in accordance with a formal, written agreement or arrangement" and are to be appropriately documented. *Treasury Board Manual*, Chapter 2, "Use and Disclosure of Personal Information" (December 1, 1993), s. 6.6 [online] http://www.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_128/CHAP2_4-2_e.asp#cons.

51 Exhibit P-12, Tab 27, *Operational Manual*, I.3 Assistance, L. Release of Information.

52 "Designated" information is information with value or importance that warrants safeguarding. Exhibit P-12, Tab 26, *Administration Manual*, XI.1 Organizational and Administrative Security, p. 4 of 11.

53 Ibid., App. XI-1-5.

54 "Classified" information is information deemed to be sensitive in the national interest. Ibid., p. 3 of 11.

55 Ibid., App. XI-1-5.

56 Ibid., Tab 27, *Operational Manual*, I.3 Assistance, App.1-3-8.

57 *Application under Section 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42 at paras. 74–79.

58 Exhibit P-120, Tab 4, Stephen Yale-Loehr and Jeffrey O'Neill, "The Legality of Maher Arar's Treatment Under U.S. Immigration Law" (May 16, 2005).

59 McDonald Commission report, *supra* note 2, p. 1081.

60 Ibid., p. 888.

61 *CSIS Act,* s. 17(2).

62 Exhibit P-12, Tab 24, "Ministerial Direction – National Security Related Arrangements and Co-operation."

63 Exhibit P-12, Tab 31, s. M.3

64 Ibid., s. M.3.b.

65 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [online] http://www.ohchr.org/english/law/cat.htm.

66 Exhibit P-12, Tab 31, s. M.3.

67 Ibid.

68 Exhibit P-130, "Cultural Diversity Training in the RCMP," Tab B, App. B.

69 Ibid., Tab B, App. A.

70 Exhibit P-12, Tab 47.

71 Exhibit P-130, Tab J, pp.48–52.

[72] Report of Professor Stephen J. Toope, Fact Finder, October 14, 2005, Appendix 7, pp. 815–816.
[73] *Arar v. Ashcroft et al.*, [2006] U.S. Dist. LEXIS 5803.
[74] Ibid., pp. 21–23.