Arar:
The Affair, the Inquiry, the Aftermath

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Biographical Notes

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Summary

The Maher Arar affair can be divided into three components: the scandal of a Canadian citizen's "extraordinary rendition" from the United States to a year of torture in a Syrian prison; the public inquiry under Mr. Justice Dennis O'Connor into the complicity of Canadian officials; and the aftermath of the inquiry reports, including the impact on the government of Canada on national security policy and on Canadian society. The Commission of Inquiry experienced difficulties concerning the public disclosure of information, some of which were resolved by the Federal Court only after the Commission had reported. Mainly through closed hearings and a thorough examination of classified documentation, however, the Commission was able to answer satisfactorily all the questions of fact that lay within its mandate. By the time the inquiry's factual report was released, public opinion was strongly supportive of its recommendations, which the government endorsed without exception. Mr. Arar was vindicated and offered generous financial compensation. In the aftermath of the factual report, the commissioner of the Royal Canadian Mounted Police was forced to resign and was succeeded by the first civilian commissioner in the force's history.

Arising from the factual report are two major pieces of unfinished business. One is the unresolved question of illegal media leaks that were designed to cast doubt on Mr. Arar's innocence and bolster the reputation of the officials who were investigating his alleged terrorist links. Although strongly condemned by O'Connor, none of the officials responsible has ever been identified and charged. Moreover, the question of the complicity of at least some sections of the media in this matter has instigated a debate about media ethics in relation to national security that is still ongoing. The other matter of unfinished business is the effect of the Arar affair on Canadian-US intelligence-sharing practices. Although the Commission recognized the crucial importance of international intelligence sharing in mounting anti-terrorist operations, the role of the United States in violating the rights of a Canadian citizen and in ignoring Canadian sovereignty raises serious issues of trust. This problem has been exacerbated by the refusal of US authorities to remove Mr. Arar from their terrorist watch list, despite repeated and direct Canadian requests to do so.

The second part of the inquiry was a policy review to recommend an independent, arm's-length review mechanism for the RCMP's

national security activities. Commissioner O'Connor chose to interpret his mandate as extending to all national security activities of the federal government, and his recommendations in part two of the report reflect this broad interpretation. The Commission recognized that post-9/11 anti-terrorist efforts are much more integrated, between agencies and across governments, than in the past and that new review mechanisms must be more integrated than the narrowly institutional-based review mechanisms now in place. The Commission concluded that enhanced review mechanisms for the RCMP, the Canadian Security Intelligence Service and other departments and agencies with national security responsibilities should be integrated through the device of "statutory gateways," which some European countries use to permit an investigative trail to be pursued past narrow jurisdictional boundaries. The Commission also recommended a new integrative body linking the various review bodies that would offer a complainant a single entry point for registering a concern. The government has yet to respond to the recommendations in Part 2 of the inquiry, while it awaits the results of two other public inquiries into national security matters and changes to the RCMP's management culture in response to serious non-national-security issues besetting the force.

At the same time, O'Connor's policy recommendations contain two serious shortcomings: the lack of any consideration of the role of Parliament in national security review, and the deliberate focus on propriety issues at the expense of consideration of the efficacy of national security operations. Effective scrutiny would require that agencies be monitored for compliance with government policy objectives, as well as assessed for performance. It might be possible to link a stronger parliamentary presence in national security review to the recommended review mechanisms, with the review bodies offering expert investigative and research support for parliamentary review that would focus as much or more on efficacy as on propriety.

Résumé

L'affaire Maher Arar peut se diviser en trois parties : le scandale de l'« extradition exceptionnelle » d'un citoyen canadien depuis les États-Unis vers les prisons syriennes, où il sera torturé pendant un an ; l'enquête publique menée par le juge Dennis O'Connor sur la complicité des autorités canadiennes ; et les suites à donner aux rapports d'enquête, y compris en ce qui a trait à leur incidence sur le gouvernement fédéral, la politique de sécurité nationale et la société canadienne. La Commission d'enquête a connu des difficultés concernant la divulgation d'information, dont certaines n'ont été réglées par la Cour fédérale qu'une fois son rapport déposé. Essentiellement par le biais d'audiences à huis clos et de l'examen approfondi des documents classifiés, elle a tout de même répondu de façon satisfaisante à toutes les questions de fait soulevées dans le cadre de son mandat. Et quand elle a déposé son rapport factuel, l'opinion publique a clairement soutenu ses recommandations, approuvées totalement par le gouvernement. Maher Arar a été innocenté et a obtenu une généreuse compensation financière. Cette publication du rapport factuel a forcé à la démission le commissaire de la Gendarmerie royale du Canada, auquel a succédé le premier commissaire civil de l'histoire de la GRC.

Mais le rapport factuel laisse en suspens deux problèmes majeurs. Le premier concerne la question non résolue des fuites illégales dans les médias visant à jeter le doute sur l'innocence de Maher Arar et à préserver la réputation des fonctionnaires qui enquêtaient sur ses présumés liens terroristes. Même s'ils ont été vivement condamnés par le juge O'Connor, aucun de ces responsables n'a été identifié ou accusé de quoi que ce soit. L'éventuelle complicité d'au moins certains éléments de la presse a par ailleurs suscité un débat toujours d'actualité sur l'éthique des médias touchant la sécurité nationale. L'autre problème en suspens concerne l'incidence de l'affaire Arar sur les pratiques d'échange de renseignement entre le Canada et les États-Unis. Si la Commission a reconnu l'importance capitale du partage de renseignement international pour planifier des opérations antiterroristes, le rôle des États-Unis en ce qui touche la violation des droits d'un citoyen canadien et le mépris de la souveraineté du Canada soulève de sérieuses questions de confiance. Ce problème a été aggravé par le refus des autorités américaines de retirer M. Arar de leur liste de surveillance terroriste, malgré les demandes directes et répétées d'Ottawa.

La seconde partie de l'enquête consistait en une évaluation des politiques visant à recommander un mécanisme autonome et indépendant d'examen des activités de sécurité nationale de la GRC. Le juge O'Connor ayant choisi d'étendre son mandat à l'ensemble des activités de sécurité nationale du gouvernement fédéral, les recommandations qu'il formule dans la deuxième partie du rapport traduisent cette interprétation élargie. La Commission a reconnu que les efforts antiterroristes de l'après-11 septembre sont mieux intégrés que par le passé, entre les agences gouvernementales aussi bien qu'entre les gouvernements, tout en préconisant une intégration plus poussée des nouveaux mécanismes d'examen par rapport aux mécanismes existants, étroitement délimités par institution. En conclusion, la Commission a proposé d'intégrer les mécanismes d'examen améliorés de la GRC, du Service canadien du renseignement de sécurité et des autres agences et ministères ayant des responsabilités de sécurité nationale suivant un dispositif de « passerelles statutaires » semblable à celui qu'utilisent certains pays européens pour autoriser l'investigation au-delà des limites de juridiction. La Commission a de même recommandé la création d'un nouvel organe intégrateur reliant entre eux les différents organes d'examen afin d'assurer aux plaignants un point d'entrée unique où soumettre leurs doléances. Avant de réagir à ces recommandations de la deuxième partie du rapport, le gouvernement attend les résultats de deux autres enquêtes publiques sur des questions de sécurité nationale, ainsi que l'application de changements à la culture de gestion de la GRC en réponse aux graves problèmes qui l'accablent, non liés cette fois à la sécurité nationale.

Les recommandations du juge O'Connor n'en comportent pas moins deux sérieuses lacunes : l'absence de toute prise en compte du rôle du Parlement dans l'évaluation de la sécurité nationale, et la priorité délibérément accordée aux questions de pertinence au détriment de l'efficacité des opérations de sécurité nationale. Or, pour être efficace, tout examen minutieux exigerait de vérifier, au même titre que leur performance, la conformité des agences aux objectifs politiques du gouvernement. On pourrait envisager de renforcer la contribution du Parlement à l'examen des opérations de sécurité en lien avec les mécanismes recommandés, les organes d'examen offrant alors un soutien spécialisé en matière d'enquête et de recherche qui focaliserait le suivi parlementaire sur l'efficacité de ces opérations, tout autant sinon plus que sur leur pertinence.

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The Arar Affair: Scandal and Response

The affair of Maher Arar's "extraordinary rendition" from a New York airport to the nightmare of a Syrian prison has had a profound impact on Canada. Following Arar's release and return to Canada, the story of his ordeal became a public scandal. Eventually, Prime Minister Paul Martin called a Commission of Inquiry under a distinguished Ontario judge, Dennis O'Connor.[1] The Commission, in its factual inquiry (2006b, 2006c), reported it found no evidence that Arar had any terrorist links; that the Royal Canadian Mounted Police (RCMP), as well as some other Canadian agencies, had made numerous errors in the case; and that the RCMP would have to make serious reforms to its own procedures. The US government, which had refused to cooperate with the inquiry, was implicitly and, to a limited extent, explicitly condemned for its behaviour.

The government of Stephen Harper accepted the first report and all its recommendations, issued an unprecedented official apology to Arar and his family and provided him with financial compensation of $10.5 million. In the fallout from the inquiry, the commissioner of the RCMP was eventually forced to submit his resignation, and the government, under pressure from the Arar affair as well as other issues surrounding the force, felt compelled to appoint for the first time a civilian commissioner. The second part of the Commission's report, the policy review, recommended a sweeping reform of the structure of external review of national security in Ottawa, including a much beefed-up public complaints process for the RCMP and a new accountability regime that would bring many more components of the federal government's security apparatus under scrutiny (Commission of Inquiry 2006a). While Ottawa has yet to respond to these recommendations, the enactment of even a part would constitute some serious changes.

From the original point in September 2002, when Arar, then a completely unknown figure to Canadians, disappeared from view into US and then into Syrian hands, to his ultimate public vindication, the entire affair has constituted a quite extraordinary example of what is called in French a *bouleversement*, an abrupt upending of the usual order of things. In 2002, Arar was a member of a suspect minority community who could be snatched away to little public notice or objection; at the end of 2006, the *Globe and Mail* named Arar as "Canadian of the Year."[2]

The real significance of the Arar affair and the inquiry is both deeper and wider than the personal reversal of fortune. Consider some of the dimensions of its impact. First, Arar's story constituted the first public notice of the US practice of "extraordinary rendition." The O'Connor Commission provided the first officially documented description of this practice and inspired subsequent investigations such as that conducted by the Council of Europe into European complicity in the practice. The Arar inquiry did not stop with mere description, but provided a compelling condemnation of the ethics of torture in the name of counterterrorism. In the words of the Swiss parliamentarian who led the European inquiry, "Of all the countries to have launched investigations into rendition scandals, only Canada has made a real effort to put right the wrong done to the victim — and in a way that does not endanger its legitimate national-security interests" (Marty 2007). The latter point is extremely important: the Commission made every effort to steer its recommendations away from any potential constriction of appropriate and effective counterterrorist tactics and strategies, while targeting for criticism unethical — and likely ineffective — methods such as rendition and torture.

Second, the fallout of the inquiry drew a clear line of demarcation between Canada and the United States in the so-called Global War on Terrorism, one drawn earlier when Canada refused to join the United States in its invasion of Iraq. That a grave injury had been done by US authorities to a Canadian citizen in the name of fighting terrorism situated Canada in the broader global context of Guantánamo and Abu Ghraib.[3] That the United States obdurately continues to maintain Arar on its own terrorist watch lists, despite official protests from Canada, serves to keep open the rift between the two countries (and, as a welcome spinoff for the Harper government, provide an opportunity for the Conservatives to show some needed distance from the deeply unpopular Bush administration). Yet Canada must continue to cooperate with the United States across a broad range of counterterrorism measures, critically including intelligence sharing, both to fulfill its international obligations and to fulfill its primary obligation to ensure the safety of its own citizens. The Commission was constantly aware of the potential for disrupting the flow of intelligence and the costs that such disruption could cause, while at the same time wishing to make sure that no other Canadians would ever be victimized again as a result of the reckless

disclosure of information abroad. This was a very fine and potentially perilous line to negotiate, but one that the Commission seems to have carried off skilfully.

Third, the symbolic significance of a major public inquiry into the fate of a Muslim of Arab background and his public vindication, along with an official apology and compensation, should not be underestimated, either at home and abroad. The difficulties encountered by Muslim and Arab minorities post 9/11 as they find themselves deemed "suspect communities" in the eyes of the North American and European majorities will require more than one public inquiry to resolve, especially in light of the emergence of "homegrown" extremism and terrorist outrages planned and in some cases perpetrated against fellow citizens by young radicalized Muslims born and raised in the West. Nonetheless, Arar offers some hope that the authorities will take marginalization and alienation seriously. It is noteworthy that Arar himself has praised Canada as a "great country" and spoken about the importance of rebuilding public trust in institutions like the RCMP that protect all Canadians against terrorism, even as he himself struggles to recover from his betrayal by those same institutions.

The Inquiry: Establishment and Terms of Reference

Calls for a public inquiry began after Arar's return to Canada, in the late stages of the Jean Chrétien government. The Liberals were initially reluctant to order a public inquiry into a matter of national security and the Conservative opposition, despite later diplomatic amnesia, was lukewarm at best to Arar's claims of injustice. Paul Martin had hinted at an inquiry before replacing Chrétien as prime minister, but once in office did not follow through until a story broke in the media about an extraordinary RCMP raid in January 2004 on the home of an *Ottawa Citizen* journalist, Juliet O'Neill. She had published a story in November 2003 that contained an unprecedented amount of classified information leaked from the files of Project A-O Canada, which had established Arar as a "person of interest" in an antiterrorist investigation in the Ottawa area. With the Martin government threatening to charge the journalist under the *Security of Information Act* (the 2001 successor to the old *Official Secrets Act*), the

media focused their attention angrily on the affair. The government quickly concluded that a public inquiry had become unavoidable and, by an Order in Council of February 5, 2004, appointed a Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar.

It would be unfair to suggest that the Martin government was simply trying to use the inquiry as a means of removing a political embarrassment from centre stage (not an unknown manoeuvre in Ottawa). Just two weeks later, Martin appointed Justice John Gomery to inquire into the sponsorship affair (see Gomery Commission 2005, 2006). The Gomery public hearings were widely credited with severely weakening the federal Liberal party in Quebec and helping bring down the Martin government in 2006. As prime minister, Martin was a tireless advocate of "getting to the bottom of" various troubling matters, including Arar, that were on the public agenda, even, as it turned out, at his own political cost. Moreover, in his choice of Dennis O'Connor to head the Arar inquiry, the prime minister indicated clearly that he was not looking for a whitewash. O'Connor had headed the Walkerton inquiry into the contaminated drinking water scandal in Ontario; in his report on that affair, he had not shied away from very tough criticism of the government that had appointed him (Ontario 2002).

The terms of reference for Part 1, "The Factual Inquiry," were

> *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.*

This covered the issues that needed to be addressed, with the exception of the role of US officials, which, of course, remained outside the jurisdiction of any Canadian inquiry. Section (v) provided the commissioner with broad discretion to enlarge the scope of the inquiry if required.

The terms of reference for Part 2, "The Policy Review," mandated O'Connor

> *(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.* (Arar commission 2006d, 1)

O'Connor chose to interpret this as a mandate to examine and make recommendations on national security review across the entire institutional spectrum, rather than exclusively focusing on the RCMP.

The Factual Inquiry

Conduct

Equipped with full powers under the *Inquiries Act*, the Commission had the authority to access all relevant documentation, regardless of security classification, and question all officials with relevant knowledge of any aspect of the affair. Since the subject matter of the inquiry was largely considered a matter of national security confidentiality, the issue of public disclosure of findings presented serious difficulties from the start, and even extended beyond the normal life of the Commission. O'Connor has said that the Arar inquiry was the most difficult and complex task he has ever faced in his professional life, and most of these difficulties stemmed from the requirements of official secrecy imposed upon a "public" inquiry.

Before examining this issue of secrecy and disclosure, it is important to make clear that the commissioner and his staff, who were security cleared to "Top Secret," had relatively untrammelled access.[4] The Commission was never denied access to any information it had identified as potentially relevant, but given the restrictions on public disclosure of much of the supporting evidence for O'Connor's findings, building credibility for the findings in the eyes of the public and, importantly, Mr. Arar himself represented a challenge throughout the process, and raises a general issue for other public inquiries into national security matters.[5] Unfortunately, the government chose to interpret its rules

for disclosure rather restrictively, causing considerable delays in the process of bringing the Commission's work to a final conclusion, not to speak of adding to the overall costs. Ironically, the government's aggressive stance over disclosure, widely seen as excessive, probably undermined its own credibility, while inadvertently enhancing the credibility of the Commission in the eyes of the public.

Most of the Commission's investigative work had to be done behind closed doors. The most important testimony came, for the most part, from *in camera* sessions, and much of the important documentation was classified. Declassified versions of key documents were released after often lengthy negotiations, but in their severely redacted form they sometimes proved unreliable guides. Limited public testimony by witnesses who had earlier testified fully in closed sessions could be misleading, and persistent interventions in the open sessions by Crown lawyers who challenged public disclosure of parts of the testimony gave the impression to the general public of government obstruction of the Commission's work.

The public did catch glimpses in the open hearings of one strength the Commission was able to bring to bear on its investigation of the facts: an able, well-prepared and insistent legal team headed by Lead Counsel Paul Cavalluzzo (who had served in the same capacity under O'Connor in the Walkerton inquiry) that was not hesitant to ask tough and well-directed questions of sometimes reluctant witnesses. It helped that the focus of the factual inquiry was relatively specific. Diversions, deliberate or inadvertent, were avoided, and by the end of the process it could surely be said, borrowing the famous phrase of Paul Martin, that the inquiry had "got to the bottom of" the matter of Canadian officials' complicity.

It was above all to provide Arar with some sense of what was going on behind closed doors that the commissioner decided to make public brief summaries of secret testimony, the first of which was a summary of evidence from the Canadian Security Intelligence Service (CSIS). Commission staff paid considerable attention to vetting this document to remove anything that would reasonably fall within the definition of national security confidentiality. Yet, when it was submitted to government lawyers, extensive cuts were demanded, and entire paragraphs of an already short summary were removed. It was the opinion

of the Commission that these exclusions were based on an interpretation of national security that was unreasonably expansive, if not excessive.[6] Further negotiations proved fruitless, and when the government made it clear that the dispute would have to go before the Federal Court for adjudication, O'Connor decided there was no point in prolonging indefinitely the work of the Commission for the sake of an interim summary of evidence, and so abandoned the initiative (see Arar Commission 2006c, 710-60).

The confrontation over secrecy, however, did not end there. When lengthy delays were threatened in the publication of the Commission's report, the decision was finally made to go ahead while pursuing the issue of disputed cuts in the Federal Court. When Mr. Justice Simon Noel ruled largely in favour of the Commission,[7] additional material from the report was released almost a year after the initial publication (Arar Commission 2006c, addendum). Although the Noel ruling agreed with a few of the government's claims, the Commission declined to appeal further, stating that "the more important information in dispute" had now been ordered released (Arar Commission 2007). When the additional material was made public as an addendum to the report, it became apparent that many of the government's national security claims had been dubious at best — indeed, they were subjected to well-deserved ridicule in the media. Some cuts that had been demanded were almost laughable: all references to the US Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI) had been excised, even though any reader with even a superficial knowledge of current events could easily have filled in the blanks.[8] There were more serious omissions. One indicates that the RCMP neglected to disclose in a warrant application that information had been obtained by a country with a poor human rights record (that is, obtained by torture). Another demonstrates that CSIS knew the Americans were likely to send Arar to Syria so the Americans "could have their way" with him. Disclosure of these passages has done no harm to national security, but it has caused embarrassment to the government. Using national security as a cover to avoid embarrassment, however, demeans the legitimate uses of secrecy. The additional material does not in any way alter O'Connor's findings or recommendations, of course, and the government had already accepted all of his

recommendations in the factual inquiry. Nonetheless, obstinate persistence in trying to prevent public disclosure of some of the key points in the evidence that led O'Connor to his conclusions served only to waste time and money and cast doubt on the government's motives.[9]

The disputes over disclosure raise an important question. Why did an often confrontational and at times even antagonistic relationship set in between the Commission and the government that had appointed it? There is a general tendency for confrontations to develop over secrecy between the government and any body of inquiry, whether parliamentary committees, commissions, external reviewers and so on — confrontations in which the executive usually prevails, if for no other reason than the time constraints of the inquiring party. Yet, in the case of the Arar inquiry, there seemed to be a particular disjuncture between the government's stated objective of greater transparency and its reluctance to follow through. By the end, the government probably expended more resources in responding to (and trying to contain) the inquiry than the Commission itself actually spent.[10] As I indicated above, the terms of reference and the appointment of O'Connor as commissioner were indicative of a desire on the part of the Martin government to arrive at the truth in as transparent a manner as possible. Yet the initial good intentions quickly evaporated as government lawyers made clear their intention to force the "public" inquiry as firmly behind closed doors as possible.

There are a number of possible answers to this question. After the prime minister's initial appointment of O'Connor, the attention of the Prime Minister's Office — not to speak of the media — wandered away to focus on the much more politically explosive Gomery inquiry. In the absence of firm command from the top, the government's position was determined by the everyday players in the national security field, particularly the Department of Public Safety and its key agencies, the RCMP and CSIS. The Justice Department lawyers reflected the views of those who had little interest in transparency — rather, the opposite. Nor did the Liberal government, any more than its Progressive Conservative successor, have any wish to maximize publicity around possible shortcomings or worse in its national security apparatus. It is possible as well that the highly publicized Gomery inquiry, with its sensational revelations of Liberal corruption, reduced the Martin government's

enthusiasm for public exposés of any kind. This does not explain, however, why the Harper government, with no political stake of its own, continued to pursue the dispute over disclosure in the final report all the way to the Federal Court. Perhaps by this point the bureaucratic momentum was unstoppable.

Still, all's well that ends well. It was the factual inquiry that raised all the national security confidentiality objections, yet the Harper government received the factual report with a degree of acceptance that is rather unusual in this sensitive policy area. Part 2, the policy review, encountered no impediments to its work; indeed, full cooperation was accorded by all agencies and departments of government. The government's response to the significant long-term recommendations of the policy review has yet to be unveiled, but at this point it is possible to suggest that the Arar inquiry has been highly successful in gaining acceptance of its Part 1 recommendations, despite the difficulties placed in its path by both the government that appointed it and the one that ultimately welcomed its findings.

Findings

O'Connor's most striking finding, according to the public presentation of his report through the media, was not precisely his at all. Maher Arar's *innocence* was widely reported, but, as O'Connor pointed out, it is impossible to prove a negative — that is, that someone is *not* a terrorist or has never associated with, or assisted, terrorists. What the Commission did find was that Arar, who has never been charged with any offence, had appeared in the files of Project A-O Canada only as a "person of interest" — that is, as someone who knew or associated with a person or persons who were targets of an investigation. O'Connor pointed out that there was nothing intrinsically wrong or harmful in Arar's appearing in the project files in this context. This is how intelligence develops pictures of possible terrorist networks — by finding the dots and drawing the lines that *might* connect them. The problem was the improper dissemination of information that in no way indicated that Arar was himself an appropriate target of a terrorist investigation — and the deliberate misidentification of Arar (not to speak of his wife) as a suspect in communication with the United States. There was, O'Connor found, not a scrap of evidence that credibly linked Arar to terrorism, a

point now accepted by the Canadian government when it officially, but unsuccessfully, asked the United States to remove him from the US terrorist watch list. It is in this sense that Arar was found to be an "innocent" victim of torture and human rights abuse and given an apology and compensation. In the larger sense, if not in the narrow technical sense, the media and the public were right to conclude that innocence had been proven. Yet an elusive point is easily missed in the discussion of guilt or innocence: even if Arar's "innocence" had been less clear or his case more ambiguous, what happened to him in terms of his kidnapping, rendition to Syria, torture and abuse of his human rights, and Canadian official complicity in the process, should have been seen as just as offensive and open to the same degree of condemnation and censure.

The inquiry found deficiencies in the conduct of the A-O Canada investigation, especially in the handling and sharing of information, and in communications between the project team and RCMP headquarters. The report makes due allowance for the extenuating circumstances of the time, the pressures being exerted from the United States and the inexperience in national security investigations of officers who were well qualified in other areas of criminal investigation. But poor judgment and mistakes had very drastic consequences. Although O'Connor did not find evidence that Canadian officials knowingly cooperated or were complicit in Arar's removal by the Americans to Syria, he did find serious deficiencies in how Canada responded to his detention by a country known to have a poor human rights record and how the Syrians were approached for his release. He also pointed to some evidence that Canadian authorities were willing to accept "intelligence" obtained by torture.

In formulating the 23 recommendations in Part 1, O'Connor focused on a number of particular issues, three of which would also be central to the recommendations of Part 2, the policy review. The first two broadly involve the integration of national security investigations across a range of Canadian agencies, and cooperation and intelligence exchange with foreign agencies. These are crucial elements of post-9/11 antiterrorism activities and integral to any successful response, yet at the same time they lie at the heart of the problems that plunged Arar into his nightmare. O'Connor's task was to reconcile the expansion and enhancement of integrated antiterrorist operations — integration and information sharing being unanimously understood by experts as keys to responding effectively

to the transborder networked threat of terrorism — with protection for the rights of individuals.

Another difficult issue lies with the RCMP's role as a law enforcement agency cooperating with security intelligence organizations like CSIS. Law enforcement agencies traditionally operate at some degree of arm's length from government, especially with regard to opening and closing investigations and laying criminal charges. The precise degree of distance is a matter of continuing debate, but the so-called principle of police independence is generally accepted as an appropriate guide to keep governments from misusing police powers for partisan purposes. Security intelligence agencies, on the other hand, operate (or should operate) more closely under government direction and supervision. Yet both should cooperate with one another in integrated operations. One of the dilemmas in shaping the Arar recommendations was how to design appropriate guidelines for a law enforcement agency engaged in national security investigations without undermining the legitimate claims for police independence.

O'Connor recommended that the RCMP confine itself to its law enforcement mandate to prevent, investigate and prosecute crimes while engaged in national security investigations. The recent trend toward "intelligence-led policing" should be encouraged, but only within a law enforcement framework. Integrated and cooperative operations are "necessary and beneficial," but agreements with other agencies, especially CSIS, should be "reduced to writing" so as to avoid misunderstanding (Arar Commission 2006b, recommendation 2). Particular stress is laid on better training for RCMP officers in national security investigations, including a "specific focus on practices for information sharing with the wide range of agencies and countries that may become involved" (recommendation 3). A centralized RCMP approach to national security investigations should be continued, with headquarters continuing to operate under ministerial directives that provide policy guidelines, "given the potential implications of such investigations."

Recommendations 6 to 11 look to various aspects of information sharing, both domestic and foreign, a practice which the Commission recognized as essential. The report suggests that RCMP headquarters centrally oversee information-sharing practices. Essential are "[c]learly established policies" to screen information to be shared for "relevance, reliability and

accuracy" and compliance with "laws respecting personal information and human rights." Crucially, the report also recommends that "the RCMP should never share information in a national security investigation without attaching written caveats in accordance with existing policy." Such 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 the terms."

It is important to stress that none of these recommendations represents any drastic change in policy or imposes new and onerous burdens upon RCMP investigators. In most cases, they reiterate existing policy while formalizing it and making it more precise. Many of the problems identified in Project A-O Canada represented departures from existing policy or inappropriate interpretations of policy made by investigating officers. The recommendations strive to accommodate the legitimate uses of integration and cooperation, information sharing and intelligence-led policing while spelling out policy guidelines to avoid abuses.

Despite all checks, it sometimes might be necessary to close the barn door after the occupants have escaped — hence recommendation 12: "When 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." More specifically, recommendation 22 spells out unequivocally that the government of Canada should "register a formal objection with the governments of the United States and Syria concerning the treatment of Mr. Arar and Canadian officials involved with his case."

Recommendations 13 through 18 deal with various issues arising from relations with countries with "questionable human rights records," including the identification of such countries and cautions about sharing information with human rights abusers. Canadian diplomatic policy with regard to Canadians detained in countries "where there is a credible risk of torture or harsh treatment" requires some revision, including training diplomatic personnel to conduct interviews in prisons where human rights might be abused.

Canadian agencies, including the Canada Border Services Agency as well as CSIS and the RCMP, should have clear policies about the use of border lookouts (lists of suspected terrorists in use at border

crossings), including guidelines for when lookouts may be requested, written criteria for placing individuals on a lookout list and policies for managing and protecting information used in lists.

Recommendations 19 and 20 tackle the controversial issue of racial, religious or ethnic profiling in national security policing. Agencies involved should have clear, written policies prohibiting the use of profiling as an investigative tool.[11] As well, there should be expanded training on issues of profiling "and on interaction with Canada's Muslim and Arab communities" for persons involved in antiterrorism investigations.

The last recommendation called on the government to assess appropriate compensation for Arar, but left to the government the responsibility for determining what that amount should be.

As already pointed out, the Harper government agreed to act on all of these recommendations, without exception. Compensation was provided, in what was widely seen as a generous amount. Moreover, the government went a step further than O'Connor had recommended and issued an official apology to Arar and his family. The context within which the Commission's factual findings were received was remarkably favourable, not only in terms of the government's warm reception and opposition party support, but also in terms of the overwhelmingly positive coverage in the media and, so far as this can be determined, the sympathetic response of the public at large. Given the relatively low interest when Arar first vanished into the shadowy antiterrorist gulag, the mixed response on the part of both politicians and the press to the campaign for his release and the publicity immediately following his return, this extraordinary turnaround in public and political perception requires explanation.

Perhaps Arar's case was simply so compelling that it made itself, so to speak, in the court of public opinion. The narrative of injustice and persecution personalized in a single blameless individual ensnared in the tentacles of a menacing Leviathan is certainly a powerful one, and one that is readily told and retold through the popular media. Timing has much to do with this as well: when Arar first vanished, the shadow of 9/11 still loomed threateningly over not just the United States but its allies as well, and the fate of a single Muslim "suspect" in the "Global War on Terrorism" perhaps did not ripple the conscience of many in the West. By the time O'Connor reported, however, there was a much wider

appreciation of the costs of that war, its errors and excesses and the degree to which the Bush administration has, in the words of Vice-President Dick Cheney, gone over to "the dark side" in confronting the terrorist evil,[12] at the price of endangering civil liberties at home and the infamy of Guantánamo, Abu Ghraib and the ghostly gulag of the rendition program abroad.

However much the external context may have changed, the effective work of the Commission itself must be given prominent place in any explanation. Quite simply, the Commission played its hand with considerable skill. Difficulties thrown up by the Crown with regard to public disclosure were actually turned to the Commission's advantage in the longer run. This outcome, however, was not inevitable by any means. One need only recall the debacle of the Somalia inquiry, which the Chrétien government abruptly scrapped with little or no political fallout.[13] The Gomery inquiry, which was going on at the same time, found itself encountering some heavy weather, including some not-implausible accusations of partisanship, the humiliating spectacle of the commissioner's issuing a public apology for some ill-judged and possibly even prejudicial remarks he had made to the press and a *tour de force* appearance by former prime minister Jean Chrétien as a witness in which he heaped scorn on the commissioner. No such difficulties ever attended the O'Connor inquiry, which instead gained a well-deserved reputation for professionalism and integrity.

Unfinished business

Successful as the Commission may have been, the factual inquiry raised two important issues, one explicitly and the other somewhat indirectly, that have yet to be resolved satisfactorily. The first is the matter of the deliberate and illegal leaks to the media designed to discredit Arar, critically highlighted by O'Connor but yet to result in any criminal charges against those officials who broke the law. The second is the question for Canadian security and Canadian democracy raised by the role of the US government in the Arar affair. It lies largely outside O'Connor's terms of reference, yet it remains, like the elephant in the room that almost everyone wishes to pretend does not exist.

The matter of the press leaks is important not only for the unresolved outcome, but for the light it sheds on the role of the media in the

Arar affair. By the time the factual report was released, the media were almost unanimously in Arar's camp. This had not, however, always been the case. The press leaks certainly cast a shadow over at least some officials inside the Ottawa security establishment, but they also cast some of the media in a highly unflattering light, and have indeed set off an internal debate within the media over ethics in national security reportage.

The facts in the case may be briefly outlined as follows (Arar Commission 2006b, 255-63; 2006c, 485-97). Prior to Arar's release, reports in the Canadian media attributed to an "anonymous Canadian official" a reference to Arar as a "very bad guy" who had received al-Qaeda training. Following Arar's return, anonymous officials were quoted as saying Arar had been to Afghanistan "several times" and denying that he had been tortured in Syria. It was reported that "senior government officials in various departments" claimed that Arar had provided information to the Syrians concerning al-Qaeda cells operating in Canada — specifically, information on four named Canadians. Other reports suggested that Arar had divulged critical information on terrorist plots in Canada. Yet another report claimed Arar had been in an Afghan terrorist training camp, and quoted a "senior Canadian intelligence source" that "This guy (Arar) is not a virgin." As O'Connor wrote later, these leaks were "timed to implicate Mr. Arar in a terrorist scheme just after his return to Canada. Obviously, being called a terrorist in the national media will have a severe impact on someone's reputation" (Arar Commission 2006c, 487).

These leaks paled, however, beside the bombshell that appeared in the *Ottawa Citizen* on November 8, 2003, just four days after Arar's press conference on his return. The front-page story by Juliet O'Neill (2003) was replete with numerous details that could be found only in the files of Project A-O Canada, making it patently evident that a person or persons within the high-security investigation had deliberately leaked classified information (not all of which was accurate) purporting to discredit Maher Arar. In O'Neill's words, "it was in defence of their investigative work — against suggestions that the RCMP 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." In short, in an effort to cover their own behaviour (subsequently found by O'Connor to be subject to serious

criticism), officials in positions of public trust were willing to betray that trust by selectively leaking secret information to which they held privileged access, in violation of the *Security of Information Act*. Worse was the intention to smear the reputation of a man who had been kidnapped and tortured, partially as a result of the very actions of those doing the leaking. And this had been carried under the cloak of anonymity, and thus with impunity. Such behaviour is odious by any reasonable standard of decency. The effect of the media leaks on Arar certainly was devastating and contributed to his fragile psychological state — in effect, deepening the lingering effects of his ill-treatment in Syria. For a time at least, they also contributed to a smokescreen around the truth — hardly a legitimate objective of the free press.

If the leaks were not discreditable enough, the RCMP then compounded the discredit by the clumsy methods by which it tried to uncover O'Neill's sources. A January 21, 2004, raid on O'Neill's home and the ham-handed manner in which the Mounties had tried to threaten the reporter with the *Security of Information Act* as a club to force her to name her sources was the political equivalent of an "own goal" in soccer. In one moment, it transformed the media from sometimes willing tools of the police to harsh critics. It raised the spectre of "police state" versus "free press" where before there had been the imagery of public safety versus terrorism. The RCMP failed to disgorge any information from Ms. O'Neill, now elevated to a temporary career as a courageous martyr for a free press. In the courts, the abortive raid served only to invalidate three sections of the *Security of Information Act* and to offer a platform for a ringing judicial rejection of attempts to force reporters to act as arms of the state. Most crucially, it finally triggered the Martin government's decision to set in motion the long-demanded public inquiry that, in the end, was to cast a harsh light not only on the RCMP's Arar investigation, but also on the highest levels of management in the force.

This cycle of ineptitude has yet to run its course. The unfinished business of the post-O'Connor leaks is the fact that no one has ever been identified and charged with the offence of passing classified information to O'Neill.[14] Former RCMP commissioner Giuliano Zaccardelli attempted to reassure a parliamentary committee following the release of the O'Connor report that there could be no more stringent investigation of the leaks than an internal one by the RCMP itself. Needless to say, this

claim fell flat. In fact, only a finite number of people had access to the information leaked to O'Neil, yet that the internal investigation uncovered nothing; instead, it resorted to threatening the recipient of the leaks. Moreover, every officer who could have been the source of the leaks has subsequently been promoted or otherwise rewarded for his service. All these suggest the futility, rather than the utility, of an internal probe (and perhaps thereby inadvertently giving further ammunition to the O'Connor recommendations for an effective external RCMP review mechanism with teeth). It now seems highly unlikely that anyone will ever be charged in this matter, and if that is the case, all the other changes in the RCMP — from the resignation of the former commissioner through the implementation of the O'Connor recommendations by the new civilian commissioner — will remain incomplete.

Parenthetically, this issue has set off an interesting debate within the media on the ethics of journalists' protecting sources in states that have used them as tools for discreditable purposes, such as smearing Maher Arar. Ms. O'Neill has never wavered in her refusal to name her sources (O'Neill 2006), although critics have suggested she was acting more as a dupe than as an investigative reporter. The case against much of the media coverage of the Arar affair has been made, in his usual combative style, by Andrew Mitrovica (2006/7) in a blistering attack on the journalistic ethics displayed by some of the media in the early Arar coverage. Some journalists have reacted defensively to Mitrovica's criticism. Others, such as the former editor in chief of *CBC News* (Burman 2006) and the editor in chief of the *Globe and Mail* (Greenspon 2007), have added their own voices of concern that the traditional privileges of the press might not always be justified. It is not possible to go into this debate here, but it too is part of the unfinished business of the Arar inquiry. Given the crucial role of the media in the public perception of terrorism and counterterrorism, the outcome of this debate should be of considerable interest.

The other main piece of unfinished business is more complex and ambiguous. The elephant in the room that few wish to acknowledge is the role of the US government in the Arar affair and the implications for future Canadian-US intelligence sharing. The US government refused to cooperate with the inquiry, which was its sovereign right, but this refusal left many questions unanswered. Nor

did the terms of reference and jurisdictional rules permit the Commission to investigate or evaluate US counterterrorist practices, except as they impinged directly on Arar's treatment. Nonetheless, a critique is implicit in the report — for example, when it firmly rejects the use of torture in antiterrorist investigations. O'Connor explicitly called on the Canadian government to register a formal objection with the US government, but most of the implications for the role of the United States are necessarily implied, but not spelled out.

Prior to the report's release, the US secretary of state had agreed that, in future, any Canadian citizen held as a terrorist suspect would be returned to Canada rather than dispatched to a third country. That undertaking, itself only a reiteration of what should have been recognized as correct and usual practice that had been wilfully violated in the Arar removal, represents a rare concession anyone in the US government has made to Canada's outrage at Arar's mistreatment.[15] Following the release of the report and a subsequent request by the Canadian government that Arar be removed from the US terrorist watch list, Canada was told, in effect, to mind its own business. Of course, as the US ambassador to Canada pointed out, the United States has every right to make its own determination of who represents a terrorist risk. But this was not the point. Intelligence sharing is a two-way street, and if Canadian authorities had determined that a Canadian citizen did not represent and never had represented a terrorist threat, contrary to some inaccurate intelligence they had previously sent the US agencies, surely, in the spirit of bilateral cooperation, the United States should have responded in a positive manner. Instead, the Americans claimed they had their "own" intelligence that justified keeping Arar on their terrorist watch list. The Arar investigators, who had examined every piece of information on Arar held in Canadian files, including CIA and FBI intelligence passed to their Canadian counterparts, judged the US claim highly doubtful.[16] It is much more probable that any piece of negative information on Arar that the United States might have gathered would have been passed on to its Canadian ally. Yet the Bush administration persists in perpetuating the injustice against Arar, shrugging off the detailed findings of the Commission and rejecting any examination of the United States' extraordinary rendition program.

In its deliberations, the Commission was cognizant of what might be called the Canadian dilemma in antiterrorist cooperation. Countering terrorism requires close cooperation and intelligence sharing with the United States and other allies. Yet the unilateralist approach of the Bush administration — not to speak of Congress under either Republican or Democratic majorities — and its stated philosophy of "fighting fire with fire," entails the risk that cooperation might undermine Canadian sovereignty and the rights of Canadian citizens. Despite the many checks and balances emphasized by O'Connor on intelligence sharing with the United States — the caveats on documents, the written rules, centralized supervision, external review and so on — the danger always remains that, in future, other Canadian citizens could be at risk as a result of information passed by Canada to the United States.

Given Washington's rather contemptuous reception of the inquiry's findings, the trust factor remains in question. Of course, no one in official Ottawa will acknowledge this, but the trust factor continues to hover like a ghost over intelligence sharing with the United States. Whether it will inhibit day-to-day cooperation at the street level, whether front-line officers will in practice be deterred from sharing certain kinds of information, could depend upon the manner in which new review mechanisms are established and operated (a question I examine next). But to deny that the Arar affair will have any effect on intelligence sharing would be to deny that the inquiry has had any effect on the Canadian government or on Canadian public opinion. Things will never again be quite the same between Canada and the United States after Arar, even if there is discreet reluctance to acknowledge publicly the degree to which things have changed.

The Policy Review

Process

Part 2 of the Commission's mandate, the policy review, involved a very different process, but one that proceeded in parallel with the factual inquiry. This part was largely uncontroversial, at least in terms of contemporary media coverage, and certainly less adversarial than the factual investigation sometimes proved to be. At the outset, the commissioner

decided that the process for the policy review should be "research-based and consultative" and should adhere to four guiding principles: "openness/accessibility, thoroughness, fairness and expedition" (Arar Commission 2006a, 611). Fairness was related to openness, involving an insistence that everyone, whether within government or outside, who might be affected by any proposed changes would have the opportunity to offer their views. The interested public was advised of the issues before the inquiry and public submissions invited, culminating in a round of public hearings later in the process. Relevant government agencies were consulted extensively, and advised fully with regard to possible policy recommendations that might affect them.

The main work of the policy review was undertaken by Commission counsel dedicated to the Part 2 phase and assisted by an advisory panel of five academics (including, as noted, this author) and former practitioners in law enforcement and public policy. The panel prepared background papers on various matters, which were posted on the Commission Web site, and a consultation paper was prepared to advise the public of the issues on which its views would be invited. Outside experts, both Canadian and foreign, were also consulted in round table discussions and in other, less formal, contexts. The research effort focused on a fact-finding investigation of the current state of the institutional structure, process and functioning of national security in Canada, with special emphasis on the existing state of external review and accountability. Possible foreign models were canvassed and assessed, and finally a set of recommendations was arrived at in interaction with relevant agencies, experts and public interveners.

In the spirit of "expedition," the policy inquiry proceeded simultaneously with the factual inquiry, rather than awaiting its results. Every effort was made to ensure that those working on the policy review were kept fully abreast of what was being learned in the factual investigation. However, a crucial observation was made early in the process that bore directly on the policy recommendations: what had happened to Arar was *not*, in fact, representative of how the government of Canada was handling national security investigations. Arar's case, however important for the lessons it could teach, was actually anomalous. An early response to the challenge of 9/11, Project A-O Canada showed many signs of haste and improvisation, but the government soon moved on,

in effect already absorbing some of the lessons learned. The policy review recommendations therefore do not simply respond to the errors and shortcomings found in the factual inquiry, in the way that, say, a public inquest into a fatal traffic accident at an intersection might conclude with a recommendation that the intersection be redesigned. Instead, the policy review process was designed to identify the actual state of affairs post Arar and to shape proposed review mechanisms to that reality. If the botched Arar case had still been typical of the ways things were done, the policy recommendations would have been more drastic; instead, the Commission could afford to respond to a complex and evolving reality in a relatively nuanced manner.

This point is made for two reasons. First, it has not always been appreciated in the media and by the public that the two parts of the inquiry maintained a certain distance from each another. Second, assessments of the policy recommendations should not be made simply in the framework of the Arar affair, but in a much wider frame of reference: the entire field of national security policy and practice. In reserving its response to the recommendations of the policy review and taking time to reflect on the ramifications of the proposed changes, the government is acting prudently and appropriately, just as it did to the factual inquiry findings when it accepted them all without further lengthy deliberation. The long-term effect of the policy review recommendations will be more significant than the Arar case findings, important as these were in the context of a scandal that had to be resolved.

Findings

A New Review Mechanism for the RCMP's National Security Activities (Arar Commission 2006a) actually delivers more than the title promises. The 630 pages of the report serve in the first instance as a reference work for anyone interested in the current state of national security policy and practice in Canada. A major contribution of public inquiries, from the Rowell-Sirois Commission (Canada 1940) onward, has been the accumulation of a body of primary research that adds to both scholarship and public enlightenment. The O'Connor Commission is no exception.[17] The Part 2 report includes a detailed discussion of the legislative changes after 9/11, followed by a close examination of the national security activities of the RCMP, which have grown in scope in the post-9/11 environment.

Chapter 5 of the report is especially useful: a description of Canada's national security landscape, surveying almost two dozen departments and agencies that play some role in national security and assessing their relative significance. Until this information was compiled, few outside government — and perhaps even within — had much sense of the scope of national security responsibilities across the range of government. The report then turns to a survey and evaluation of the existing "patchwork" (the term is used advisedly) of review and accountability mechanisms. The report also surveys the international experience of reviewing national security activities. It examines seven Western countries with forms of law and government similar in some respects to Canada's to offer a comparative framework of reference as well as some ideas that might prove useful in designing made-in-Canada review mechanisms.

When it turned to prescription, the Commission faced a number of tricky questions. From the outset of the policy review, as indicated earlier, O'Connor had decided that the question of a review of the RCMP could not be looked at in isolation from the broader field of national security activities. The wisdom of this decision was confirmed by one of the earliest and most emphatic findings — that a key concept animating national security activities in the post-9/11 environment is *integration* of antiterrorist efforts, by which is understood integration across government agencies and departments, across governments in Canada and across borders in joint activities with allies. Since the terrorist threat is notoriously borderless and networked, it stands to reason that effective counterterrorist responses must overcome traditional institutional and jurisdictional "stovepipes." The now-infamous turf wars between the CIA and FBI had substantially contributed to the catastrophic intelligence failure that permitted the 9/11 attacks. But Canada had its own case study of how stovepipes and turf wars involving the RCMP and CSIS could have tragic consequences in the lost lives of innocents in the 1985 Air India bombing (itself a subject of another commission of inquiry).

The lesson of these disasters had finally sunk in: the Commission was impressed with the degree of interagency cooperation achieved through devices such as the Integrated National Security Enforcement Teams (INSETs), which work together under RCMP direction but involve CSIS and other federal agencies, as well as provincial police forces where appropriate; Integrated Border Enforcement Teams and

other similar cooperative efforts that might involve not only federal and provincial agencies but US federal and state agencies as well. INSETs have succeeded the hastily constructed early post-9/11 investigations such as the ill-starred Project A-O Canada, and have already registered one apparent success in the June 2006 arrests of 18 alleged terrorists in Toronto (charges against 11 of whom are now proceeding under the 2001 *Anti-terrorism Act*). While the Commission strongly endorsed the investigative philosophy embodied in the INSET model, it also noted that it presented certain difficulties in designing a new review mechanism to cover an RCMP that was increasingly interacting in a formal institutional sense with other bureaucratic players in the process.

Another leading trend with similar implications for policy prescription is the adoption of *intelligence-led policing* by law enforcement agencies throughout the Western world. Again, the Commission recognized the value of this approach in enhancing investigative methods, but it also noted that, in the area of national security, the RCMP could not be expected to limit its role narrowly to criminal investigation and law enforcement but would be engaged in intelligence gathering, either on its own or, more likely and more profitably, in close collaboration with other agencies, both domestic and foreign, that are primary intelligence producers. Once more, the advantages offered by this approach are manifest, but it makes problematic the drawing of clear lines of accountability focused along institutional boundaries.

Another element of complexity is the principle of police independence. While it is clear that police independence is attenuated when it comes to national security investigations — a point fully recognized both by the RCMP itself and by the government in its issuance of ministerial directives to guide the RCMP in its conduct of national security investigations — the fact remains that national security involves only a relatively small proportion of RCMP resources and personnel. The bulk of RCMP activity remains focused on criminal law enforcement, and here an arm's-length relationship with government remains the rule. External review of the RCMP's national security activities, the focus of the O'Connor mandate, faced the problem of applying a mechanism with one kind of activity in mind to an agency most of whose activities do not correspond with that focus but follow a different set of rules with regard to relations with government.

One option that was on the table at the start was the status quo: to leave the RCMP Public Complaints Commission in place under its current rules. It soon became apparent that this was a nonstarter. The Arar affair itself was precisely the kind of matter that should have been handled by a viable complaints body, but this did not, and could not, happen. The former chair of the Complaints Commission, Shirley Heafey, has described the existing process as dysfunctional (see Sallot 2005; Shephard 2005).[18] In any event, O'Connor's was not the only voice calling for a radical reform of RCMP accountability: additional inquiries have been launched following the resignation of Commissioner Zaccardelli, the appointment of a civilian commissioner with a mandate for change and the public eruption of a bitter internal dispute within the force concerning pension funds. A Task Force on Governance and Cultural Change in the RCMP (2007) has recommended a serious overhaul of the Complaints Commission and the entire RCMP accountability process. The Public Accounts Committee of the House of Commons has investigated and issued a report on the RCMP's troubles in which it, too, called for strengthening the powers of the Complaints Commission (Parliament of Canada 2007).[19] No one, it seems, any longer thinks that the status quo is viable.

A variation of the status quo was also on offer: a beefed-up version of the Complaints Commission with powers appropriate to the enlarged work order post Arar and shorn of the weaknesses that had been pointed out in the existing body. On its own, however, this option did not address the issue of integrating national security activities with other agencies. Instead, there was much debate, both inside and outside the Commission, over other options that would address this wider horizon.

The option that stood at the front of the pack, so to speak, early on was described as the "Super SIRC" option, referring to the Security Intelligence Review Committee that acts as the CSIS review body. Although not without critics who point to its sometimes less-than-critical distance from CSIS, SIRC is generally seen as relatively successful in establishing an appropriate working relationship between agency and reviewer while providing Parliament and the public with some light on an otherwise dark place. One of SIRC's limitations, embedded in its specific mandate in the 1984 *CSIS Act*, is that it can look only at CSIS and has no jurisdiction to review national security activities undertaken by

other agencies, including the RCMP. The "Super SIRC" option looked to SIRC as a model that, with appropriate additional resources and enlarged powers, could provide external review of national security operations on a functional, rather than an institutional, basis. In effect, a "Super SIRC" could replace the RCMP Complaints Commission, perhaps replace the Communications Security Establishment Commissioner and expand its review capacity to the national security activities of all government departments and agencies with a foot in the field.

This option gained early support within the Commission, and interestingly was the preferred option of the outside experts, both domestic and foreign, as well as of the public interveners who testified and presented written submissions. Certainly, this option had some definite attractions: it offered clarity and uniformity of treatment across the board, and it directly answered the challenge of the post-9/11 integration of national security activities with the integration of review. Yet even if it represented a large step forward, it also built on existing strengths: SIRC had a track record and a body of working experience; why not simply expand this in a manner logically consistent with evolving government national security practices?

However attractive this option might have appeared at first blush, the more closely it was examined, the more complicated and difficult it began to appear, to the point where it was finally dropped. In effect, "Super SIRC" fell victim to the old adage about the devil being in the details. For one thing, it failed to engage the issue of the RCMP as predominantly a law enforcement agency, with the accompanying issue of police independence. Under this option, either the entire operations of the RCMP would have to be brought under a review process designed for national security alone, not law enforcement, or the new body would cover only a small portion of the RCMP's overall activities, which could lead to complications. Another point against was that, for all the emphasis on the integration of national security activities and the denigration of stovepipes, the government had not actually integrated the various agencies into a single "Super CSIS/RCMP/CSE et al." but relied instead on improved mechanisms for cooperation and communication among existing agencies that would retain their separate identities and mandates. Might not external review be better designed if it mirrored these institutional arrangements? This leads to another, persuasive,

argument that each agency has developed a particular "culture" (this is, of course, especially true of the RCMP, with its paramilitary police traditions). Only a review body dedicated to a particular agency, the argument goes, can effectively learn the culture through the day-to-day experience of interaction.

The result of this evolution in thinking was a solution that tries to marry the advantages of government-wide review of national security and the advantages of dedicated institutional focus. Keys to this compromise include an idea drawn from comparative international study, the concept of "statutory gateways" that permit a review body to follow the trail of evidence from one institution to another, and one institutional innovation, a committee to coordinate the activities of the existing review bodies and to offer a single focus of entry to the complaints process for the public. I now turn to the policy recommendations.

Recommendations

The first eight recommendations deal with the design of a new, "independent, arm's-length review and complaints mechanism with enhanced powers" for the RCMP. The old Complaints Commission would be significantly restructured and renamed the Independent Complaints and National Security Review Agency (ICRA). ICRA would have the ability to conduct self-initiated reviews, investigate complaints, conduct joint reviews with SIRC and the CSE commissioner into integrated operations and conduct reviews on ministerial request. ICRA would have investigative powers similar to those under the *Inquiries Act*, including the power to subpoena documents and compel testimony, initiate research and conduct public education programs. Importantly, taking account of the principle of police independence, ICRA would also have the "power to stay an investigation or review because it will interfere with an ongoing criminal investigation or prosecution."

ICRA's complaints process would be much enhanced over the deficient process presently in place. Complaints could be referred to the RCMP for investigation, but a complainant could request that ICRA itself conduct the review. Both the complainant and the RCMP would have the opportunity to make representations at hearings. Every effort would be made to make complaint proceedings as transparent as possible, but in the case of national security confidentiality, ICRA would have

discretion to appoint security-cleared counsel independent of the government to test the need for confidentiality.[20]

Turning to the wider ambit of national security activities, the policy review identifies and targets for review five departments or agencies with significant roles in national security: Citizenship and Immigration Canada, Transport Canada, the Financial Transactions and Reports Analysis Centre and Foreign Affairs and International Trade would be reviewed by SIRC, while the Canada Border Services Agency — which, unlike the others, exercises some law enforcement powers — would be reviewed by ICRA.

The policy review advises the government to establish "statutory gateways among the national security review bodies, including ICRA, in order to provide for the exchange of information, referral of investigations, conduct of joint investigations and coordination in the preparation of reports." Also, a new body, the Integrated National Security Review Coordinating Committee (INSRCC) — comprising the chairs of ICRA and SIRC, the CSE commissioner and an outside person to act as committee chair — would ensure the statutory gateways were operating effectively, avoid duplicate reviews, provide a single intake mechanism for complaints, report on accountability issues and trends in the area of national security in Canada (including the effects on human rights), conduct public information programs and initiate discussions with review bodies for provincial and municipal police involved in national security activities.

In some of these recommendations, the Commission is navigating uncharted waters. Consequently, its final recommendation is for an independent review of the framework after five years.

Already, however, some apprehension has been voiced in some quarters, especially among retired RCMP and CSIS officers, that this scheme consists of too much review and new layers of review bureaucracy and that it could build into the process inhibitions among operating agencies against taking risks and innovating and could even interfere with continuing investigations. These are not inconsiderable concerns, and should be taken seriously, but the commissioner was clearly sensitive to such objections and had tried to take them into account. As for the concern about new layers of bureaucracy, the proposal would actually minimize them. ICRA would certainly have more

teeth than its predecessor, but after the Arar scandal and other issues of RCMP accountability, as well as the other initiatives currently underway for bringing change to RCMP management, such a reform is almost certainly inevitable. The only new body proposed is INSRCC, but this would be made up of existing chairs and mainly concerned with coordinating existing bodies and acting as a kind of traffic controller for complaints. Adding some capacity to review integrated activities does not really constitute an unreasonable burden of additional bureaucracy, but simply allows review to keep pace with contemporary developments in national security practices. Finally, almost all the review envisaged in the O'Connor report is *ex post facto*, with only minor exceptions where some reference to continuing investigations might be unavoidable. Interference with ongoing investigations would be highly unlikely.

Unfinished business

Commissions of inquiry always face a dilemma in framing recommendations: should they recommend the best possible solutions or should they aim for what might be judged politically possible? Commissioners have a responsibility not to harbour such utopian expectations that their recommendations can be set aside as unrealistic and impractical. On the other hand, they have an equal responsibility not to compromise the opportunity to offer recommendations that stand at enough of a critical distance from government to constitute a useful critique of existing practice. In my view, the policy review recommendations steer a sensible course between these poles, being substantial yet realistic.

Inevitably, though, there are gaps and unresolved questions. I would point to two, although others undoubtedly will surface from time to time as O'Connor's reforms are acted upon. First, O'Connor interpreted his mandate as excluding recommendations on the role of Parliament in national security accountability. Simultaneously with the Arar inquiry, the Martin government had introduced a discussion paper looking to the introduction of a UK-style "committee of parliamentarians" to review national security issues (Public Safety Canada 2004).[21] The Commission was aware of this proposal, but as it was never finalized through the course of the deliberations on the Part 2 recommendations (and indeed has yet to be acted upon by the Martin government's successor), the

decision was made to leave the relationship between the O'Connor recommendations and any parliamentary reform open-ended. It would have been useful nonetheless to consider how the proposed changes would fit with an expanded and enhanced parliamentary role.

Second, O'Connor also interpreted his mandate as examining review primarily for propriety, rather than efficacy. Historically, the rhythm of reform of national security institutions and policy in Canada has been set by a pattern of recurrent scandals followed by responses geared mainly to ensure that institutions act properly — that is, in accordance with law and ethical standards. Much less attention has been paid to whether these institutions are acting as effectively as they should — that is, in accordance with government policy objectives. The Arar affair corresponds to this historical pattern; as O'Connor writes, "I note that it was concern about the propriety of actions taken with respect to Maher Arar that gave rise to this Inquiry." Thus, he did not conduct the inquiry "with the goal of making recommendations about the efficacy of the RCMP's national security activities, and I am therefore not in a position to evaluate whether an independent review mechanism is needed from this perspective." He does go on to admit that "issues of efficacy and propriety are interwoven" and that "while efficacy will not be the primary objective of the review mechanism I recommend, it will in many cases be a necessary element of a robust review for propriety" (Arar Commission 2006a, 467).

O'Connor's focus on the form of accountability has serious implications. The report makes a key distinction between *review* and *oversight*, with the former defined as after the fact, as opposed to the hands-on scrutiny of ongoing investigations. The latter course was rejected, for a variety of reasons convincing enough within the limits of the Commission's mandate. The most important concern was that reviewers' independence would be compromised by their previous engagement in the subject of their review. Since propriety is about adherence to laws and norms of ethical behaviour, adherence to quasi-judicial principles of impartiality in reviewing propriety is a compelling consideration, and any entanglement of the reviewing body in the evidentiary trail would call this impartiality into question.

A main objective of the Commission was to devise an appropriate *ex post facto* review mechanism that would be effective and withstand

legal challenge. In the literature on national security accountability, however, review and oversight are accorded more complex definitions than in the O'Connor report, usually with more factors in mind than the predominantly legal focus of the Commission on propriety. Effective review of national security from the point of view of efficacy might well require scrutiny that predates as well as postdates the closure of operations. Moreover, it is difficult to see how propriety and efficacy could *ever* be cleanly disentangled when considering national security. Always according propriety the primary place in reform might be an unfortunate tendency that has had the effect of downplaying important questions of efficacy.

In recent years, some of the most crucial questions requiring external independent review have been precisely those of efficacy arising out of catastrophic intelligence failures. The 9/11 Commission report, for example, focused on the inefficacy of US intelligence and recommended reforms to address these serious deficiencies (United States 2004). In Canada, the Major Commission, which is investigating the 1985 Air India tragedy, is focused almost entirely on the efficacy, rather than the propriety, of Canadian national security. SIRC undertook an inquiry — long delayed under pressure from the government not to impede its ongoing criminal investigation — but its report remains "Top Secret" to this day. A public version appeared very late and provided only inadequate answers to the many questions. The then SIRC chair Ron Atkey later admitted that, "with the value of hindsight, sitting in the year 2005, we should have been more aggressive" (quoted in Clark 2005). Part of the problem was that SIRC's mandate directed it more toward propriety than efficacy issues.

The O'Connor recommendations do leave efficacy as something of an afterthought in the review process. At the same time, there are sound reasons for keeping review for propriety *ex post facto*, which could suggest that any body reviewing for efficacy might have to be separated from a body reviewing for propriety. Whether this would require institutional separation or simply functional partition between two parts of the same body is open to question. O'Connor himself suggests one possible solution to this problem when he proposes that Parliament might be a more appropriate venue for efficacy reviews — the sole instance in the report where he specifically refers to an enhanced role for Parliament (Arar

Commission 2006a, 467). There is an intriguing potential here to coordinate the specialized expertise and dedicated research capacity of the review bodies and their staffs with the constitutional power and legitimacy of Parliament to oversee and scrutinize national security policy and performance. If the review bodies could be marshalled to offer support for parliamentary scrutiny while at the same time playing an independent role in reviewing for propriety, both weaknesses in O'Connor's recommendations could be addressed at the same time.

Conclusion

It is now more than a quarter of a century since the McDonald Commission on the RCMP published its findings on a series of security scandals (McDonald Commission 1981). McDonald had a significant impact on the shape of national security policy. The *CSIS Act* of 1984, which created a civilian security service with an innovative set of review and accountability mechanisms, was the direct result of McDonald's recommendations. But his reforms were cast within the context of the vanished world of the Cold War. Today, in the post-9/11 world, threats to national security and the appropriate methods of meeting them have changed radically. National security is once again centre stage and once again in need of creative rethinking about how to reconcile security with respect for human rights and civil liberties. The scandal of what happened to one Canadian citizen caught up in the nightmarish vector of the "Global War on Terrorism" was the spark that set off another season of inquiry. The O'Connor Commission seized the opportunity not only to right a great wrong against one man, but also to chart a course for the accountability of national security agencies in the age of terrorism. There are other inquiries, but Iacobucci is strictly limited in scope and Major looks backward to the failure of counterterrorism two decades ago. O'Connor points one way forward. The ball is now in the government's court.

Notes

1 In the interests of disclosure, I should indicate that I was a member of the five-person advisory panel to Justice O'Connor on Part 2 of the Commission's mandate, the policy review. This assessment of the Commission's work thus partially reflects an "insider's" view that does not claim to be that of a fully detached and objective observer, although I do offer some critical reflections.

2 To be sure, he shared this honour with the "Canadian soldier in Afghanistan," perhaps for reasons of journalistic "balance."

3 The case of Omar Khadr, the Canadian "child soldier" held at Guantánamo, is a more complicated issue than that of Arar, but by 2007 there were increasing voices of protest in Canada against his treatment, including a united front of all three opposition parties in Parliament, the Canadian Bar Association, leading newspapers and civil liberties associations and other nongovernmental organizations — but as yet not the government of Canada.

4 There was one exception: a few documents were withheld on grounds of "solicitor-client privilege." O'Connor did not believe that this claim in the particular circumstances impeded his inquiry (Arar Commission 2006b, 112, 137). However, he did raise this admittedly "complex" issue with regard to the proposed new review body for the RCMP, where he insisted that it would be crucial for such a body's effectiveness that, under certain circumstances, access to solicitor-client information be permitted (Arar Commission 2006a, 538). This matter has also arisen in the Air India inquiry, this time in the context of the justice department's seeking to withhold information from the inquiry on grounds of solicitor-client privilege when the solicitor is the justice department, the client government departments or agencies and the information may be relevant to the inquiry.

5 Conflict between the Air India inquiry and the government over redactions in publicly disclosed documents boiled over to the point that Commissioner John Major actually recessed public hearings until more disclosure was forthcoming. The Iacobucci probe into three other Canadians held in Syria — itself a result of one of O'Connor's recommendations — will be almost entirely held *in camera* (see Iacobucci Inquiry 2007).

6 I am unable to refer to the excluded material, but one required deletion might safely be revealed: a reference to the fact that CSIS maintains files on suspected terrorists was deemed by the Crown to be a matter of national security confidentiality!

7 Federal Court of Canada, 2007 FC 766, July 24, 2007, *Attorney General of Canada v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*.

8 One claim reached the point of absurdity: a reference to the RCMP and CSIS as the Canadian "counterparts" of the US agencies, thereby presumably permitting a clever reader to deduce the references to the FBI and CIA!

9 Another potential roadblock to the factual inquiry followed the issuance of "Section 13 Notices" to certain witnesses alerting them to specific areas in which their conduct might be found subject to criticism. A number of motions were then brought by Section 13 recipients to quash the notices. A similar situation in the 1997 Krever inquiry into the Canadian blood system had resulted in a lengthy delay in the publication of the

findings while the issue went to the courts. In August 2005, after *in camera* hearings, Commissioner O'Connor dismissed all these motions (Arar Commission 2006c, 655-68).

10 The RCMP alone is reported to have spent $5 million in expenses related to the Arar inquiry; see "Arar affair cost RCMP about $5-million: report," *Canadian Press*, January 3, 2007. In 2005, it was reported that the government was spending as much as the Commission had been budgeted (Brown 2005). In fairness, this proportion in expenditure between inquiries and government response seems to be the rule in Ottawa, as it applied to Gomery and no doubt will also apply to the Air India probe.

11 This recommendation might appear to be uncontroversial, since all the agencies insist officially that they do not profile and that such a practice would be inappropriate and ineffective. However, there might be differences when it comes to defining what practices actually constitute profiling.

12 In an interview on September 16, 2001, Cheney told NBC that the government needed to "work through, sort of, the dark side" (quoted in Suskind 2006, 18).

13 The Somalia Commission of Inquiry was established in 1994 by the Chrétien Liberal government following a public outcry over the torture and murder of a Somali teenager while in the custody of Canadian forces attached to the Somali peacekeeping mission. In 1997, it was cut short by the same government, which claimed that it was exceeding its mandate and had overrun its budget and deadline. Nevertheless, a five-volume report was published highly critical of the military command.

14 While there were a number of serious leaks and attributions of damaging statements to anonymous officials, only the O'Neill story clearly involved the passing of specific classified material that could be traced to specific files to which a limited and identifiable number of persons had access.

15 After the report appeared, US Secretary of State Condoleezza Rice admitted that Arar's case had not been properly handled, but offered no apology and no promise to remove his name from the US terrorist watch list (*CBC News*, "U.S. handling of Arar case 'by no means perfect': Rice," October 24, 2007).

16 A recent press report suggests that Arar's name might have been raised by a terrorist suspect in US detention, but since the United States subsequently dropped terrorism charges against this individual, this would appear to be a thin basis on which to keep Arar on the watch list (see Freeze 2007, 2008).

17 The Part 2 report (Arar Commission 2006a) includes a CD-ROM containing the text of the report and supplementary materials.

18 In private conversation with the author, Ms. Heafey described the Complaints Commission system as "broken."

19 The Committee reported that Ms. Heafey's successor as chair of the Complaints Commission testified that when he arrived in the job, he found the review mechanisms "quite archaic" (Parliament of Canada 2007, 48).

20 ICRA would issue a report annually to the minister, a disclosable version of which would be laid before Parliament. It would also issue reports to the minister on its self-initiated reviews and complaint investigations.

21 It should be noted that a "committee of parliamentarians" is not a committee of Parliament, either standing or special,

and lacks the rights and privileges of Parliament. If enacted along the lines of the UK committee, it would be appointed by and answerable to the prime minister, rather than Parliament (see Farson and Whitaker 2007).

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