# COMMISSION OF INQUIRY INTO THE INVESTIGATION OF THE BOMBING OF AIR INDIA FLIGHT 182

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## WRITTEN SUBMISSION BY THE ATTORNEY GENERAL OF CANADA IN RESPONSE TO THE AIVFA'S REQUEST FOR DIRECTION REGARDING ACCESS TO UNRESTRICTED DOCUMENTS AND *IN CAMERA* AND *EX PARTE* HEARINGS

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## A. OVERVIEW

1. The success of this inquiry depends upon striking the proper balance between the public interest in transparency and the public interest in guaranteeing the safety of the nation by protecting information which could injure national security, national defence or international relations if it were disclosed.

2. Counsel for the Air India Victims' Families Association have brought a Request for Direction seeking (1) participation by their counsel, Messrs. Shore and Boxall ("AIVFA counsel"), in any determinations by the Commissioner as to anticipated *in camera* and *ex parte* proceedings; (2) attendance and participation in any *in camera* and *ex parte* proceedings; and (3) access to unredacted versions of redacted materials disclosed to the parties.

3. The Attorney General of Canada, (AGC) is prepared to make any request to review information *in camera* and *ex parte* in public and, when doing so, to identify generally the aspect of national security, national defence or international relations involved in the request. However, if the determination of such a request requires the use of privileged information it must be received *in camera* and *ex parte*.

4. The AGC opposes the provision of access to unredacted copies of redacted documents to any parties or their counsel and opposes the attendance of any parties or counsel except Commission counsel and counsel for the AGC at *in camera* or *ex parte* hearings where unredacted documents are received and national security privileged testimony is presented. The Government opposes such access and attendance because (1) the Terms of Reference do not allow it; (2) it would be contrary to the procedures in s. 38 of the *Canada Evidence Act*; (3) it would be an unprincipled departure from the way national security is treated in other legal proceedings; and (4) it is unnecessary given the Inquiry's other guarantees of fairness.

5. Protecting national security privileged information from even the possibility of disclosure is a legal and normative imperative of the highest order for the Government, the Commission and all those involved in this Inquiry. It is an integral part of the protection of national security in general.

6. Vigilance in protecting this information is necessary because its disclosure, the possibility of its disclosure or any other loss of control could jeopardize a wide variety of government operations, assets and personnel, by revealing details about *inter alia* ongoing investigations (including ongoing Air India investigations), police investigative techniques, intelligence operations, government employees whose identities require protection, targets of investigations, cryptographic and telecommunications protocols, informer identities, confidential sources, information sharing arrangements between agencies or countries, and aviation security procedures.[1] The protection of these types of information is firmly entrenched in common law and statute law, including ss. 37 and 38 of the *Canada Evidence Act*, R.S., 1985, c. C-5 ("the *CEA*").

7. As the Federal Court stated in *Singh v. Canada (Attorney General)*:

[1] See *Henrie v. Canada* (1988), 53 D.L.R. (4th) 568 (Fed. Ct. T.D.) at 578, affirmed at [1992] F.C.J. No. 100 (C.A.) for a similar list of assets to be protected by national security privilege.

> To effectively provide a defence against terrorism and to participate in a global effort to constrain it, it is imperative for Canada to maintain as highly confidential the investigational interests of our security services, the sources of their information, the technologies and techniques they employ, the identities of their employees and particularly their informants.[2]

8. The other parties and their counsel do not have a strict "need to know" national security privileged information. Granting access increases the risk of inadvertent disclosure. Furthermore, this Inquiry has adequate procedures to fulfill the Terms of Reference in as open a manner as possible in the circumstances. Commission counsel represent the public interest and will advance and protect the interest of the families as part and parcel of their role.

9. These *in camera* and *ex parte* hearings ensure that the Commission has unfettered access to all the evidence that touches on its mandate no matter how sensitive it is, while at the same time protecting this information from disclosure, the possibility of disclosure, or any other loss of control. As constitutional scholar Stanley Cohen wrote in *Privacy, Crime and Terror*, "[o]penness must be tempered by practical exigencies, lest the very values it supports come under threat."[3]

10. Contrary to the suggestion advanced in paragraph 6(vi) of AIVFA's written submissions, Prime Minister Harper, in announcing this Inquiry in the House of Commons, called only for a full public inquiry. The Prime Minister's statement cannot be taken to mean the provision of access to unredacted documents and to *in camera* and *ex parte* hearings. The Terms of Reference which establish the mandate of this Commission authorize the Commissioner to grant the families an opportunity for

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[2] *Singh v. Canada (Attorney General)* (2000), 186 F.T.R. 1, [2000] F.C.J. No. 1007 at para. 32 (T.D.) (QL).

[3] Cohen, Stanley, *Privacy, Crime and Terror*, Markham, LexisNexis; 2005, at 290. See also *Henrie v. Canada* (1988), 53 D.L.R. (4th) 568 (Fed. Ct. T.D.) at 575, affirmed at [1992] F.C.J. No. 100 (C.A.).

appropriate participation in the Inquiry.[4] The denial of access to parties and their counsel, apart from the AGC and Commission counsel, to unredacted copies of redacted documents and to *in camera* and *ex parte* proceedings must be upheld to maintain the balance between transparency and protection of national security. Denial of such access does not deprive such parties of appropriate participation in the Inquiry.

## B. STATEMENT OF FACTS

11. The Terms of Reference and Rules of Practice and Procedure in this Inquiry recognize that the Commission will have to hear some evidence which could injure Canada's international relations, national defence or national security if it were disclosed ("sensitive information or potentially injurious information").[5]

12. Although the Commission and the parties are committed to holding public hearings with publicly available information, resort to *in camera* and *ex parte* hearings will be necessary when sensitive information or potentially injurious information is the only way to give the Commission the full picture of events relevant to the Terms of Reference.[6]

13. The relevant provisions of the Terms of Reference provide:

> (f) that the Commissioner be authorized to grant to the families of the victims of the Air India Flight 182 bombing an opportunity for appropriate participation in the Inquiry;
>
> m) The Commissioner, in conducting the Inquiry, to take all steps necessary to prevent disclosure of information which, if it were disclosed, could, in the opinion of the Commissioner, be injurious to international relations,

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[4] Terms of Reference, P.C. 2006 – 293 at para (f)
[5] Terms of Reference, supra at paras. (m), (n), (o), (p) and (q). Air India Inquiry Rules of Procedure and Practice, July 17, 2006, at paras. 8, 53, and 61-63. Although international relations, national defence and national security are often enumerated as three distinct categories, there is considerable overlap between them in both a legal and practical sense; *Khan v. Canada*, [1996] 2 F.C. 316 (T.D.) at para. 22.
[6] Terms of Reference, *ibid*.

> national defence or national security and to conduct the proceedings in accordance with the following procedures, namely,
>
> (i) on the request of the Attorney General of Canada, the Commissioner shall receive information in camera and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information could be injurious to international relations, national defence or national security...
>
> (n) nothing in that Commission shall be construed as limiting the application of the provisions of *The Evidence Act*.
>
> (o) the Commissioner to follow established security procedures, including the requirements of the Government Security Policy, with respect to persons engaged pursuant to section 11 of the *Inquiries Act* and the handling of information at all stages of the inquiry;
>
> ...
>
> (q) the Commissioner to perform his duties in such a way as to ensure that the conduct of the Inquiry does not jeopardize any ongoing criminal investigation or criminal proceeding... [Emphasis added.]

14. Under para. (m)(i), if the Commissioner agrees that certain information *could* be injurious to international relations, national security or national defence, at the request of the Attorney General, the Commission must receive that information in private ("*in camera*") and in the absence of "any party and their counsel" ("*ex parte*"). The French language version of paragraph (m) of the Terms of Reference with respect to *in camera* hearings requested by the Attorney General provides:

> "... à la demande de procureur général du Canada le commissaire reçoit, à huis clos et en l'absence des parties et de leurs avocats, les renseignements qui, s'ils étaient divulgués, pourraient selon lui porter préjudice aux relations internationales ou à la défense ou a la sécurité nationales..." [emphasis added.]

this translates as:

> "...at the request of the Attorney General of Canada, the Commissioner receives *in camera* and in the absence of the parties and their lawyers, the information which, if it was disclosed, could, in his opinion be injurious to international relations or to national defence or national security."

15. Paragraph (m) of the Terms of Reference contemplates the AGC will make submissions to the Commission with respect to what privileged information can be summarized or disclosed to the public, which exercise will necessarily require the AGC's presence.

16. The Attorney General represents all government witnesses who may be giving testimony *in camera* and *ex parte*. These witnesses are entitled to legal representation. It is expected that all documents that may have to be considered *in camera* and *ex parte* are documents that will be produced by the Government of Canada.

17. Pursuant to s. 38 of the *CEA*, the Attorney General has the right to make *ex parte* representations concerning the redaction of sensitive or potentially injurious information.[7] Further, the Attorney General has a more general role under s. 38 of the *CEA* to safeguard national security privileged information. Pursuant to s. 5 of the *Department of Justice Act*, R.S 1985 c. J-2, the AGC is charged with the conduct of all litigation to the Crown or any department within the authority of Canada.

## C. ISSUES TO BE DETERMINED

18. (a) Should AIVFA counsel be permitted to attend the *in camera* and *ex parte* hearings in which this Commission considers privileged information?

(b) Should AIVFA counsel have access to unredacted copies of redacted documents containing privileged information?

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[7] *CEA* s. 38.11(2)

## D. LEGAL ARGUMENT

19. It is not necessary to develop separate arguments with respect to the legal issues identified in the preceding paragraph. The same principles which militate against allowing the access requested by AIVFA counsel to *in camera* and *ex parte* proceedings applies to the request for unredacted copies of redacted documents.

### 1. General Principles Regarding National Security Privilege

20. There is no more important obligation for a government than the protection of its citizens and institutions.[8] Any decisions made by the Commission regarding national security privilege must be made with an appreciation of this fact and the general principles of the law of national security.

21. The cost of failure in matters of national security can be enormous. Questions of national security are matters of policy and expert judgment which the executive arm of government is in the best position to determine because it possesses the necessary expertise, context and resources.[9] Both the Supreme Court of Canada and the British House of Lords have recognized and accepted the importance of this constitutional framework:

> ...in matters of national security, the cost of failure can be high. This seems to me to underlie the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.[10]

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[8] Cohen, Stanley, *Privacy, Crime and Terror*, Markham, LexisNexis; 2005, at 154.
[9] *Ibid.*, at 305.
[10] *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877 at paras. 26 and 62; quoted approvingly by the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 33.

22. The deference that the courts show to the Crown in national security matters extends to the determination of when sensitive information or potentially injurious information can and cannot be disclosed. The Federal Court of Appeal has held in the context of an application under s. 38 of the *Canada Evidence Act* that because of the AGC's access to special information and expertise, the submissions of the AGC should be given considerable weight in determining whether disclosure of the information would cause the alleged harm. If the AGC's assessment is reasonable, then the reviewing judge should accept it.[11]

23. In *Goguen v. Gibson,* the Federal Court held that the public interest in safeguarding the secrecy of sensitive information or potentially injurious information is rarely superseded by other considerations.[12] In *Singh v. Canada (Attorney General)*, the Federal Court held that, as a general principle, the public interest in keeping national security matters secret will only be outweighed in "clear and compelling" cases:

> The public interest served by maintaining secrecy in the national security context is weighty. In the balancing of public interests here at play, that interest would only be outweighed in a clear and compelling case for disclosure.[13]

24. In *Ribic v. Canada,* the Federal Court of Appeal extended this principle, suggesting in *obiter dicta* that national security information should be protected on the same level as "informer privilege" – which is to say that the public interest in maintaining secrecy is only outweighed when a person accused of a criminal offence can demonstrate that his or her "innocence is at stake".[14]

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[11] *Ribic v. Attorney General of Canada*, 2003 FCA 246 at para. 19.
[12] *Goguen v. Gibson*, [1983] 1 F.C. 872 (T.D.) at para. 24; affirmed at [1983] 2 F.C. 463 (C.A.).
[13] *Singh v. Canada (Attorney General)* (2000), 186 F.T.R. 1, [2000] F.C.J. No. 1007 at para. 32 (T.D.) (QL).
[14] *Canada v. Ribic*, [2003] F.C.J. No. 1964 (C.A.) at paras. 25-27. See also *R. v. Brown*, [2002] S.C.J. No. 35 for an extensive discussion of the "innocence at stake" exception to the sanctity of informer privilege. See also *R. v. Leipert*, [1997] 1 S.C.R. 281 at paras. 9-14.

25. In sum, due to the dire consequences arising from the inadvertent disclosure of national security privileged information, courts should rely on the Government's expertise and adopt a cautious approach to disclosure. National security privilege is so sensitive that it cannot be relaxed or abrogated except in extraordinary circumstances involving grave consequences for the individual seeking access or disclosure.

## 2. The Terms of Reference

26. The Terms of Reference do not allow counsel for other parties to have access to *in camera* and *ex parte* hearings which the AGC requests in order to protect privileged information. *This fact is determinative of the motion before this Commission.*

27. The intention of the Governor-in-Council is further made apparent by comparing these Terms of Reference with those in the Commission of Inquiry concerning Maher Arar. The use of the word "could" in para. (m)(i) distinguishes this Inquiry from the Arar Commission, in which a similar provision protecting national security was triggered when the information in question "would" be injurious to international relations, national defence of national security. There is a lower threshold for invoking national security in this Inquiry than in Arar, based on the *potential* and not the *certainty* of injury. Similarly, unlike in the Arar Inquiry, this Commission is not empowered to weigh the sufficiency of disclosure to the public against the potential injury. Therefore, it is clear as a matter of statutory interpretation and comparative reading that this Commission exercise the utmost concern for any risk of unauthorized disclosure.

### *i) The "Need to Know" Principle*

28. Denying other parties access to the *in camera* and *ex parte* proceedings under para. (m)(i) conforms to the Commission's more general duty to

prevent the unauthorized disclosure of sensitive or potentially injurious information. The proposal of AIVFA counsel for access to documents and *in camera* hearings jeopardize national security and ongoing investigations because the secrecy of information is breached any time it is shared with those who do not have a strict "need to know".

29. The Federal Court of Appeal has held that highly sensitive information, such as information disclosing the identity of human source, is endangered whenever it is shared among people who do not strictly "need to know", such as among those who are not directly involved in the enforcement of the law.[15] In *Canada (R.C.M.P. Public Complaints Commission) v. Canada (Attorney General)*, Létourneau J.A. held that information stamped with informer privilege cannot even be shared with an oversight body since the role that the body plays is not to enforce the criminal law but "to ensure the highest possible standard of justice":

> To add the Chairperson of the [Complaints] Commission and some of her staff to an already long list would be to add persons who are interested in accessing the privileged information in order to "ensure the highest possible standard of justice". However, as laudable as this goal may be, it cannot justify granting access to persons who are not persons who need to know such information for law enforcement purposes as required in the context of police informer privilege [citations omitted]. I am persuaded that, if consulted, informers would, for safety reasons, strongly oppose the opening of an additional circuit of distribution of their names, especially where the justification for this distribution is the furtherance of a purpose other than that of law enforcement in the strict sense.[16] [Emphasis added.]

30. *Canada (R.C.M.P. Public Complaints Commission) v. Canada (Attorney General)* concerned police informer privilege only, but the reasoning applies to other sorts of information which are also protected by s. 38 of the *CEA*. The Federal Court of Appeal held in *Canada v. Ribic* that police

[15] *Canada (Royal Canadian Mounted Police Public Complaints Commission) v. Canada (Attorney General)*, [2006] F.C.J. No. 1011 (C.A.) at paras. 43-48.
[16] *Ibid.*, at para. 46.

informer privilege and national security privilege are analogous with respect to the interests at stake and the necessity of protection.[17]

*ii) The Risk of Inadvertent Disclosure*

31. Providing the access requested by AIVFA counsel to national security privileged information is also unacceptable from a security standpoint.

32. The intelligence and diplomatic communities operate in a world unknown to most of us. The true sensitivity of information is often only apparent to those who are aware of the underlying context, whether it be investigations, international relations, witness protection or aviation security. Breaches of national security can occur by revealing information which, at first glance, seems trivial or innocuous. However, in the hands of an informed reader, apparently trivial or unrelated pieces of information, which may not in themselves be particularly sensitive, can be used to construct a more comprehensive picture when compared with information already known by the recipient or available from another source.[18] The ability to bring together seemingly disparate pieces of information to form a picture that in the end constitutes a damaging revelation is known as the "mosaic effect."[19]

33. Therefore, if counsel for other parties are permitted access to copies of unredacted documents and to *in camera* and *ex parte* hearings, there is a risk that in communicating with their client, they may inadvertently reveal information which seems innocuous or unprivileged, but which may in fact contribute to the mosaic effect if leaked further. The consequences of inadvertent disclosure are particularly high in this case because of ongoing Air India investigations.

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[17] *Canada v. Ribic*, [2003] F.C.J. No. 1964 (C.A.) at paras. 25-27.
[18] *Henrie v. Canada* (1989), 53 D.L.R. (4th) 568 (Fed. Ct. T.D.) at 578ff, affirmed at [1992] F.C.J. no. 100 (C.A.)
[19] *Ibid.*

*iii) Conclusion with Respect to the Terms of Reference*

34. The declaration sought by AIVFA counsel would result in a breach of the Terms of Reference, a violation of the "need to know" principle, and increase the risk of inadvertent disclosure. Denial of the access requested to national security privileged information is consistent with other legal proceedings involving national security information, including the Arar Inquiry. As well, as will be discussed below, there are other mechanisms in this Inquiry to ensure that the highest standard of justice is achieved, including the active participation and cooperation of Commission counsel.

### 3. The *Canada Evidence Act* Involves *Ex Parte* Hearings

35. This Inquiry's Terms of Reference and Rules of Procedure and Practice reflect the principles and procedures of CEA s.38. In the *CEA*, sensitive information or potentially injurious information is heard *in camera* and in the absence of all parties except the AGC. This Inquiry should not deviate from the *CEA*'s arrangement because to do so would create inconsistencies with respect to a statutory regime.

36. The Terms of Reference in this Inquiry provide:

> (n) that nothing in that Commission shall be construed as limiting the application of the provisions of the *Canada Evidence Act*.

37. Both the *CEA* and the Terms of Reference are designed to protect information that would be injurious to Canada's "international relations, national defence or national security". Paragraph (m) of the Terms of Reference provides that when the Commissioner decides to disclose such information over the Attorney General's objections, then that decision will constitute notice under 38.01 of the *CEA*. This directly connects the Commission's process to the CEA s.38 statutory regime.

38. Section 38 of the *CEA* codifies the common law of national security privilege and creates a complete statutory procedure for adjudicating

claims of this privilege.[20] Section 38 reflects the fact that the safeguarding of sensitive or potentially injurious information is a pre-eminent concern that requires a specialized statutory regime as created by Parliament.

39. Section 38.01 creates the obligation for a participant to notify the AGC when there is a possibility that sensitive information or potentially injurious information is to be disclosed in any proceeding. Section 38.02(1) provides that once notice is sent to the AGC, disclosure of the information can only be done in accordance with the provisions of s. 38.

40. Section 38.11 of the *CEA* dictates that the hearings in the Federal Court under s. 38.04 shall be heard "in private". Furthermore, s. 38.11 provides that at the request of the Attorney General of Canada, the Court shall receive *ex parte* submissions. The AGC uses these *ex parte* hearings to present the Court with sensitive information or potentially injurious information.[21]

41. Resorting to *ex parte* submissions is compliant with Supreme Court jurisprudence – such as *Ruby v. Canada*, where the Court (albeit in the context of the analogous provisions in the *Privacy Act*, R.S., 1985, c. P-21) permitted the use of *ex parte* and *in camera* proceedings as a method of protecting privileged information.[22]

42. The access requested by AIVFA counsel would constitute an unprincipled deviation from the procedure set out in the *CEA*.

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[20] *Canada v. Ribic*, [2003] F.C.J. 1864 (C.A.) at para. 49; Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada*, Aurora, Canada Law Books; 2006, at 4.100.

[21] *Canada v. Ribic*, [2002] F.C.J. No. 1186 (T.D.) at para. 6; and *Henrie v. Canada* (1988), 53 D.L.R. (4th) 568 (Fed. Ct. T.D.) at 570, affirmed at [1992] F.C.J. No. 100 (C.A.). see also Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada*, Aurora, Canada Law Books; 2006, at 4.200. Please note: ss. 38.04(4), 38.11(1) and 38.12 (2) of the *CEA* have been constitutionally challenged in the Federal Court case *Toronto Star Newspapers Ltd. et al. v. Canada*, T-739-06. The Court's decision is currently under reserve. It is not expected that the outcome of the Toronto Star's challenge will have a great impact on the issue before this Inquiry because the Toronto Star is not challenging the validity of *ex parte* hearings that consider privileged information. Rather, the Toronto Star is alleging that s. 38 violates the open court principle by requiring the Court to hold "private" hearings even when privileged information is not being presented.

[22] *Ruby v. Canada*, [2002] S.C.J. No. 73 at para. 3

### 4. *Ex Parte* Hearings in Analogous Situations

43. Maintaining the prohibition on counsel for other parties having access to *in camera* and *ex parte* hearings puts this Inquiry on the same footing as other legal procedures involving information stamped with national security confidentiality.

44. In considering analogous legal proceedings, however, it is vital to recognize that the rights at play in a criminal or immigration proceeding are categorically different than the interests of parties in a public inquiry. Criminal and immigration matters often revolve around the liberty interests of the individual, thus triggering constitutional rights to fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms*. This Inquiry, on the other hand, does not implicate the liberty, security of the person, property or civil rights of the involved parties.[23]

45. In criminal matters, immigration hearings, and administrative hearings, sensitive information or potentially injurious information is to be heard *in camera* and *ex parte*. Even when the person seeking access to the *in camera* proceeding has a direct, personal interest involving his or her liberty, civil rights or security of the person, the privileged information is still heard *ex parte*. The importance of the participation of the families in this Inquiry is undeniable, but it does not justify greater access to national security privileged information than is permissible in situations where liberty interests are directly at stake.

#### *iv) National Security Privileged Information in Criminal Matters*

46. In *Ribic v. Attorney General of Canada*, the Federal Court of Appeal approved of a procedure by which counsel for an accused (a Canadian citizen) facing charges of forcible confinement (an offence punishable with life imprisonment) was excluded from *in camera* and *ex parte* proceedings

[23] See *May v. Ferndale Institution*, [2005] S.C.J. No. 84 at paras. 89-93.

in which the Court considered secret evidence and whether to disclose this evidence under s. 38 of the *CEA*.[24] Létourneau J.A. writing for a unanimous bench approved of a special arrangement whereby counsel for the accused was excluded from the *ex parte* and *in camera* hearing but where a government lawyer was appointed to pose questions written by the accused's lawyer to the *in camera* witnesses.

47. The procedure in *Ribic* is similar to the process in this Inquiry, in which counsel for the families can suggest lines of questioning to Commission counsel for the *in camera* and *ex parte* hearings.[25]

48. *R. v. Khazaal* is a recent case from Australia illustrating the same principles.[26] In that case, defence counsel for Mr. Khazaal obtained unauthorized access to an affidavit that was national security privileged. The Crown moved to have the defence counsel prohibited from acting for the accused. The defence counsel hired lawyers of their own, who argued that procedural fairness required that they should be allowed to see the privileged affidavit as well as other privileged evidence that the Crown was using to support its motion to dismiss them from conducting Mr. Khazaal's defence. The lawyers seeking access volunteered to make undertakings that they would not share the privileged information with their clients.

49. The Supreme Court of New South Wales refused to allow the lawyers for the defence counsel to see the privileged material. Mr. Justice Whealy held that even though he had "absolute confidence" in the integrity of the counsel seeking access, their willingness to make undertakings was ultimately unsatisfactory because of the very real risk of inadvertent disclosure.[27] His Lordship also held that there are individuals or groups who would deliberately try to "seek out" national security information from

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[24] *Ribic v. Canada*, [2003] F.C.J. 1864 (C.A.).
[25] See, for example, the ruling of Commissioner O'Connor in the Arar Inquiry; June 15, 2004 - Ruling: Rules of Procedure and Practice at p. 5.
[26] [2006] N.S.W.S.C. 1061 (Oct. 25, 2006).
[27] *Ibid., at* para. 34.

wherever it can be found, and that the danger that these groups represent are another reason to limit disclosure "wherever that is possible."[28] In sum, Whealy J. found that the risk of disclosure of any privileged counter-terrorism related information could jeopardize the security of the state and the lives of citizens, and thus could not be justified in the circumstances of the case before him.[29]

50. In their materials, counsel for the families state that undertakings were provided in *R. v. Malik and Bagri* to allow defence counsel to review national security privileged information. This analogy is unhelpful. The trial of Malik and Bagri raised the accused's rights under s. 7 of the *Charter* to full answer and defence. These rights are not in the same category as the families' interest in participating in this Inquiry. Moreover, in *R. v. Malik and Bagri*, defence counsel were afforded a limited right to examine some privileged documents in the control or possession of C.S.I.S. This was an exceptional allowance made in order to ensure that the prosecution was not jeopardized by unreasonable delay or a related constitutional violation. *R. v. Malik and Bagri* was an exceptional case that does not provide a suitable precedent for criminal prosecutions, much less for public inquiries.

51. In this Inquiry, privileged information and evidence may arise from numerous government departments and agencies. AIVFA counsel, apparently on the instructions of their clients, are prepared to give an undertaking not to divulge to their clients any privileged information. Without expressing any view as to whether in such circumstances they are able to fulfill their duties to their clients, there is no question that access under these conditions does not in any way provide information, educational or otherwise, to the public. As such, the requested access would not seem to promote the objectives of public education identified by AIVFA counsel in their submission.

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[28] *Ibid.*, at para. 39.
[29] *Ibid.*, at paras. 30 and 37.

*v) National Security Privileged Information in Immigration Matters*

52. Although there are codified procedures set out in the *Immigration and Refugee Protection Act*, R.S. S.C. 2001, c.27 (IRPA) which address issues of national security, the same concerns for protection of privileged information exist under that regime. In *Sogi v. Canada*, Rothstein J.A. (as he then was) writing for the Federal Court of Appeal decided that the Immigration and Refugee Board may, in making a decision about the admissibility of a refugee claimant, consider *ex parte* security intelligence information without disclosing it to the claimant.[30]

53. Similarly, the Federal Court of Appeal has consistently held that the "security certificate" procedure by which national security privileged evidence can be heard *ex parte* in order to deport a non-citizen from Canada is constitutional and in accordance with fundamental justice.[31] The Federal Court of Appeal accepted that the obligation to disclose evidence is not an absolute principle of law, and where national security concerns arise, there can be legal alternatives to the procedures usually followed in the course of a regular adversarial trial.[32]

54. In *Re Harkat*, [2004] F.C.J. No. 2101, Justice Dawson reiterated the importance of the "need to know" principle in the security certificate context. Dawson J. noted that one of the reasons Parliament created the security certificate regime was to ensure that the minimum number of people possible were privy to the sensitive information used in the hearings, "... the genesis of the concept of a designated judge confirms the view that Parliament intended security certificates to be reviewed by a designated judge alone in order to limit access to protected information

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[30] [2005] 1 F.C.R. 171 (C.A.), leave to appeal denied, [2004] S.C.C.A. No. 354.
[31] *Re Charkaoui*, [2004] F.C.J. No. 2060 (C.A.); *Re Harkat*, [2005] F.C.J. No. 1467 (Fed. C.A.); and *Ahani v. Canada* (1997), 201 N.R. 233 (C.A.).
[32] *Re Charkaoui*, *supra*, at para. 84. While it is true that the constitutionality of the security certificate regime is currently being considered by the Supreme Court of Canada, in the absence of a ruling, the Federal Court of Appeal's decision is good law: *Re Harkat*, [2005] F.C.J. No. 1467 (Fed. C.A.) at para. 9.

and to thereby protect both national security and the means by which information regarding national security is obtained."[33]

*vi) Privileged Information in Administrative Hearings*

55. In *Ruby v. Canada*, the Supreme Court of Canada held that the procedure in the *Privacy Act* for holding *ex parte* hearings when the Crown presents sensitive or potentially injurious information was in accordance with the rules of fairness and the principles of fundamental justice.[34]

56. Similarly, in *Canada (Royal Canadian Mounted Police Public Complaints Commission) v. Canada (Attorney General)*, the Federal Court of Appeal held that highly sensitive information (like information that is informer privileged) must be kept secret, even against an oversight body like the R.C.M.P. Public Complaints Commission. The Commission sought an order of *mandamus* compelling the R.C.M.P. to disclose to the Commission information about a confidential tip that it had received. The Commission argued that the Chairperson of the Commission was a Crown servant with the proper security clearance and that the disclosure of this information to her was vital to the fulfillment of her important role of reviewing R.C.M.P. behaviour.[35] The Court of Appeal rejected this argument, holding that informer privilege must be restrained to as narrow a circle of people as possible on a "need to know" basis only.[36]

*vii) The Arar Commission*

57. Although each Commission of Inquiry is different and depends upon its own Terms of Reference, it is instructive to examine the way sensitive or potentially injurious information was treated in the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("the Arar

[33] At para. 50.
[34] *Ruby v. Canada*, [2002] S.C.J. No. 73 at paras. 39ff.
[35] [2005] F.C.J. No. 1011 (C.A.), at paras. 39 and 44.
[36] At para. 46

Commission") since both this Commission and the Arar Commission are contemporary inquiries into issues of national security.

58. The Terms of Reference for the Arar Commission addressing the protection of national security privilege are almost identical to the corresponding Terms for this Commission. As has been noted in paragraph 27 above, the primary differences between the Terms of Reference for the Arar Inquiry and the Terms of Reference for this Inquiry demonstrate that this Inquiry is even more circumscribed in disclosing information which has the potential to injure international relations, national defence or national security.

59. Consistent with his Terms of Reference, Commissioner O'Connor ruled that counsel for parties (such as Mr. Arar) would be excluded from *in camera* and *ex parte* proceedings. In his ruling on National Security Confidentiality, Commissioner O'Connor held:

> I note that there will in many cases be no party, other than Commission counsel and the *amicus curiae*, to assert the public interest in disclosure. This is because the *in camera* hearings at which these decisions are made are held in the absence of the parties and intervenors, with the exception of the government and its officials.[37]

60. The Rules of Procedure in the Arar Commission make it clear that the only people who would have access to *in camera* and *ex parte* evidence are those with (1) adequate security clearance and (2) the permission of the Crown:

> Rule 52. Except as contemplated by Rules 47-50, no party, witness or intervenor, or counsel for such party, witness or intervenor, shall receive any information, including any document or proposed evidence (e.g. statements of anticipated evidence) for which National Security Confidentiality has been claimed without possessing a valid and appropriate security clearance and without the prior agreement of the Attorney General of Canada.

[37] Ruling on National Security Confidentiality, December 10th, 2004, at para. 63.

> **Rule 53.** The Commissioner shall hear evidence that is subject to National Security Confidentiality *in camera* and in the absence of parties and their counsel. Counsel for the Attorney General of Canada and subject to National Security Confidentiality any other persons permitted by the Commissioner shall be entitled to attend. Witnesses shall provide the evidence taken *in camera* and in the absence of parties and their counsel under oath or upon affirmation. Commission counsel will thoroughly test the evidence heard *in camera* and in the absence of parties and their counsel by examination in chief or by cross-examination where deemed appropriate. [Emphasis added.]

61. In his decision on the rules governing the Arar Inquiry, Commissioner O'Connor stressed that the exclusion of the parties from the *in camera* and *ex parte* proceedings would *not* render the Inquiry unfair:

> ... It is inevitable that some of the evidence will have to be heard *in camera* and in the absence of parties and their counsel...
>
> In designing the Rules I have attempted to minimize, to the extent possible, the impact of the *in camera* hearings on the principles of openness and fairness...
>
> The Rules also provide that before evidence is heard *in camera* Commission Counsel will, to the extent possible, advise the parties and intervenors of the nature of the anticipated evidence. The parties and intervenors will be able to advise Commission Counsel of areas of evidence that they wish to be covered and after the hearings will be informed if those areas were in fact addressed.[38]

62. There is no reason for this Commission to depart from the example set by the Arar Inquiry for denying parties' access to *in camera* and *ex parte* hearings.

*viii) Conclusion with Respect to Analogous Procedures*

63. The common thread that runs though all the procedures involving national security information is a tolerance for departures from the standard

[38] June 16, 2004 - Ruling: Rules of Procedure and Practice.

adversarial structure of common law trials. Adversarial conceptions of fairness are insufficient to accommodate the public interest in keeping national security privileged information secret. It is customary that such information be heard *in camera* and *ex parte* in order to guarantee that this information is controlled and the risk to the nation is minimized. There is nothing in this Commission of Inquiry that distinguishes it from the other processes described in *Ruby, Ribic, Sogi* or *Harkat* and that justifies a departure from reliance on *in camera* and *ex parte* hearings or that requires that the families of the victims be accorded more rights than are available for an accused person or a potential deportee.

### 5. AIVFA Counsel do not Require Access

64. The administration of justice will not be frustrated or diminished by preventing counsel for families access to the *in camera* and *ex parte* hearings. This Commission has several tools which ensure that all parties can participate meaningfully in an effective public inquiry.

65. The Court of Appeal's decision in *Re Charkaoui* is especially illuminating with respect to the safeguards that a judicial procedure can offer in order to ensure that the use of *ex parte* hearings does not result in unfairness.[39] *Re Charkaoui* is one of the line of Federal Court cases dealing with the constitutional validity of the "security certificate" procedure under the *Immigration and Refugee Protection Act*, 2001, c. 27. In *Re Charkaoui*, the Federal Court of Appeal made a special point of noting that the prejudice caused to the deportee by the *ex parte* hearing is mitigated by several factors:

> (1) The judge conducting the hearing is obligated to summarize whatever information that he or she can for the benefit of the deportee, and this obligation is ongoing throughout the hearing.[40]

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[39] *Re Charkaoui*, [2004] F.C.J. No. 2060 (C.A.); at para. 78.
[40] *Ibid.*, at paras. 60-61.

> (2) The judge is obligated to play a "pro-active role" in ensuring fairness during the *ex parte* hearings, so that the judge may examine witnesses and interrogate the origins, reliability, and sensitivity of documents.[41]
>
> (3) The Crown is under a special responsibility during the *ex parte* hearings to present evidence in the most even-handed and candid way possible.[42]

66. All these factors exist in the context of this Inquiry. The Commissioner is an active participant in the process of the Inquiry. The Commissioner is empowered by the Terms of Reference to issue summaries of *in camera* and *ex parte* evidence. Finally, the Commissioner is assisted by a team of experienced counsel whose explicit job *inter alia* is to represent the public interest by investigating the classified information impartially and to argue (where appropriate) that the public interest requires that it be disclosed.[43] The assistance of Commission counsel enhances the level of fairness beyond even what is available at a security certificate hearing, where the designated judge is not assisted by his or her own counsel or by an *amicus curiae* as can be the case in public inquiries.

67. Commission counsel have the responsibility to represent fully the public interest. As Mr. Justice O'Connor wrote in his non-judicial article, "The Role of Commission counsel in a Public Inquiry":

> ...commission counsel's role is not to advance any particular point of view, but rather to investigate and lead evidence in a thorough, but also completely impartial and balanced, manner. In this way, the commissioner will have the benefit of hearing all of the relevant evidence unvarnished by the perspective of someone with an interest in a particular outcome.[44]

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[41] *Ibid.*, at para. 80.
[42] *Ibid.*, at para. 79.
[43] Ruling on Standing and Funding, O'Connor J., Arar Commission, May 4, 2004, page 5; Ruling on National Security Confidentiality, O'Connor J., Arar Commission, December 20, 2004, pages 34-35; and Ruling on Standing, Gomery J., Commission of Inquiry into the Sponsorship Program and Advertising Activities, July 5, 2004.
[44] Dennis O'Connor, "The Role of Commission Counsel in a Public Inquiry", (2003) 22 Advocates Soc. J. No. 1, at para. 12.

68. As impartial representatives, Commission counsel can question classified information on behalf of the public interest and the interests of the families or other parties and interventors, who may in turn direct the Commission's lines of questioning.[45] This is especially true in the context of this Inquiry, which does not appear to involve notices under s. 13 of the *Inquiries Act* R.S., 1985, c. I-11, or other situations at the adversarial end of the spectrum; this is a policy-oriented Inquiry where the interests of the parties in rigorously exploring that which is mandated in the Terms of Reference substantially overlap with the interests of the Canadian public in general. There is no conflict if the families' lawyers work closely with the Commission counsel.

69. Just because the families will not benefit from the most favourable procedure possible does not render the Inquiry unjust so long as the procedure is fair.[46] The exceptional nature of the *in camera* and *ex parte* proceedings within the Inquiry as a whole, the oversight and discretion of the Commissioner, the power to create summaries, and the assistance of Commission counsel make this a fair procedure for all the parties.

70. In their Request for Directions, AIVFA counsel argue that they should be given access to the *in camera* and *ex parte* proceedings in order to increase the transparency of this Inquiry and promote the goal of public education. However, counsel also concedes that they would have to provide an undertaking prohibiting themselves from sharing any privileged information with their clients or anyone else. This proposal will not further the laudable goal of educating the public since the families' counsel will be bound to secrecy.

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[45] This was the procedure adopted during the Arar Inquiry. See the ruling of Commissioner O'Connor in the Arar Inquiry, June 15, 2004 - Ruling: Rules of Procedure and Practice.
[46] *Ruby v. Canada*, [2002] S.C.J. No. 73 at para. 46.

## 6. Conclusion

71. The jurisprudence and legislation concerning national security is clear that the protection of national security privileged information is a paramount concern for the Government, for the court and for all participants. It is also clear that the Government has a special obligation and a special expertise in protecting this information and that courts are inclined to defer to governmental decisions in that regard.

72. In this case, the Terms of Reference require the Commission to exclude other parties from the *in camera* and *ex parte* hearings. The Government of Canada requests that the Commission give these Terms effect because it is the Government's view that widening the circle of people who have access to the classified information at issue would be a violation of the "need to know" principle, would raise the risk of inadvertent disclosure and would therefore be an undue risk to national security.[47] Privileged information can be so sensitive that any breach of the "need to know" principle introduces an unacceptable risk that the Government may lose control over the information.

73. Security intelligence depends necessarily upon good relations with international partners. Canada is a net importer of intelligence. We rely upon the confidence of our international allies that we will protect the confidential information they share with us. AIVFA counsel are independent of the Government of Canada, are not included in the schedules of the *CEA*, and do not have a "need to know". The possibility that these counsel would have access to national security privileged information may trouble our international allies that the Government of Canada does not respect the norms surrounding the exchange of intelligence.

[47] See *Ruby* v. *Canada*, *ibid.*, at para. 45.

74. Counsel for the families do not need to have access to the *in camera* proceedings because the Commissioner and Commission counsel can ensure that the highest standard of justice is achieved in this Inquiry. The national security law canvassed in this factum is uniform. There is no principle in this Inquiry that merits a departure of this rule intended to preserve national security.

## E. DIRECTION SOUGHT

75. The AGC asks that AIVFA counsel's access to unredacted versions of redacted documents and participation in *in camera* and *ex parte* hearings be denied.

Dated at Ottawa this 30th day of November, 2006.

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