INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND MUAYYED NUREDDIN

SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA ON STANDARDS OF CONDUCT

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I. OVERVIEW

1. The five questions posed by the Commissioner are expressly set in the appropriate time frame: 2001 - 2004. In considering these questions, it is important to keep that time period in mind as well as the significant domestic and world events which occurred throughout. It was a unique time in our history, one never to be repeated.

2. It is also important not to set standards for that time period with the benefit of hindsight. Canadian officials did not have that benefit; they should not be judged on that basis. To be clear, however the Government of Canada now benefits from that hindsight, informed in part by the *Report of the Events Relating to Maher Arar* whose recommendations have been accepted by the government.

3. There can be no doubt about the appropriateness of the activities at the heart of the Commissioner's questions.

4. Canada must share information in its efforts to combat terrorism. It is in our national interest; it serves both national security and public safety. The necessity to share information flows from Canada's international obligations to share information as a matter of reciprocity and as a matter of operational necessity. These international obligations are informed by Canada's international human rights obligations.

5. The conduct of investigations cannot be circumscribed by Canada's borders – terrorism certainly is not. Investigative steps which extend beyond Canada's borders, such as those referred to by the Commissioner[1], are appropriate investigative techniques.

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[1] See Notice of Hearing, Question 2

6. When those investigative techniques extend beyond Canada, it is quite proper for DFAIT to cooperate in assisting the RCMP or CSIS. All departments and agencies of the Government of Canada are expected to cooperate within their mandates to ensure the safety and security of Canada.

7. The challenge raised by these activities is to determine the circumstances when it is justified to undertake such activities and the considerations which should be taken into account before doing so. There is no simple answer. Circumstances must be judged and considerations analyzed on a case-by-case basis, always with due respect for Canada's human rights obligations. In no instance does Canada countenance torture.

8. This case-by-case approach is equally applicable when considering the provision of consular services. Cases of Canadian dual nationals detained in the Middle East on security grounds are rare and raise unprecedented challenges. There is no template as to what should be done and when it should be done. To treat such cases homogenously is to risk the welfare of Canadians detained abroad.

9. As the Commissioner's fact-finding continues, this is not the occasion for addressing specific facts. Nor cannot it be assumed that any particular facts that might be implied by the questions are true or occurred.

II. STANDARDS OF CONDUCT

A. Question 1(a) - Sharing of Information with Foreign Authorities

11. Canada is expected by its foreign partners to share information with them to combat and prevent terrorism. In sharing information, Canada respects and is guided by reciprocity and the comity of nations. These principles are reflected in Canada's international obligations – both legal and diplomatic. Together with the particular parameters under which CSIS and the RCMP operate to fulfill their

respective national security mandates, these must be the starting point for any discussion of the circumstances and considerations regarding the sharing of information with foreign authorities.

12. It is also important to consider the environment that existed in the 2001-2004 period. Decisions by CSIS and the RCMP were made with due regard to significant domestic and world events. These events included: the September 11th attacks in the United States; the concerns over a "second wave" of attacks in North America; recognition that Islamist terrorism posed the greatest threat to Canada's national security;[2] concerted efforts by international organizations such as the United Nations towards international cooperation and coordination to combat terrorism, including greater information sharing obligations;[3] the November 2002 statement by Osama Bin Laden identifying Canada as a priority Al Qaeda target; multiple deadly terrorist attacks around the world by Islamist extremists; and the reality that there were Canadian citizens suspected of engaging in activities in support of terrorism.

13. As noted by previous commissioners, international cooperation and coordination are key elements of the effort to counter terrorism.[4] Canada has committed to act in concert with other nations to combat terrorism, including fully implementing United Nations and other international instruments relating to terrorism, including those relating to information sharing.[5]

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[2] *CSIS Annual Report, 2001*, at http://www.csis-crs.gc.ca/en/publications/annual_report/2001/report2001.asp; *CSIS Annual Report, 2002*, at http://www.csis-scrs.gc.ca/en/publications/annual_report/2002/report2002.asp; and *CSIS Annual Report, 2003*, at http://www.csis-scrs.gc.ca/en/publications/annual_report/2003/report2003.asp.

[3] See for example, *UN Security Council Resolution 1368 (*2001), http://www.state.gov/p/io/rls/othr/2001/4899.htm and *UN Security Council Resolution 1373 (*2001), http://www.state.gov/p/io/rls/othr/2001/5108.htm.

[4] *Report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*, Freedom and Security Under the Law, Second report, vol. 1 (Ottawa: Minister of Supply and Services Canada 1981), p. 632 and 634 ("McDonald Report"); *Report of the Events Relating to Maher Arar*, Analysis and Recommendations, *supra*, at p. 103 ("O'Connor Report"), http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf.

[5] *Anti-Terrorism Act*, preamble, http://www.canlii.ca/ca/sta/a-11.7/whole.html.

14. States share information between governments or agencies by agreement or through membership in international organizations. Sharing of information can also occur informally, not just by way of a formal mechanism such as a treaty.

15. Travel information is one of the most important forms of information that may be shared internationally to combat the global phenomenon of terrorism.

16. The challenge for national security in an age of terrorism is to prevent the very few people who may pose significant risks to national security, public safety and the preservation of peace from entering a country undetected. For terrorists, travel documents are as important as weapons. Terrorists must travel clandestinely to meet, train, plan, case targets and gain access to attack. In their travels, terrorists use evasive methods, such as altered and counterfeit passports and visas, specific travel methods and routes, human smuggling networks, supportive travel agencies, and immigration and identity fraud. [6]

17. While carefully considered, the sharing of travel information amongst and between security intelligence agencies and among law enforcement agencies is a common practice. Internationally, constraining terrorist travel is a vital part of counterterrorism strategy.

1) Canada's International Obligations to Share Information

18. Canada's international legal obligations concerning information sharing can be found in core United Nations (UN) documents, UN conventions and declarations of the Security Council or General Assembly. These obligations are complimented by the principle of comity which encourages states to cooperate in the investigation of transnational criminal activity, even where no treaty legally compels them to do so.[7]

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[6] *The 9/11 Commission Report*, Final Report of the National Commission on Terrorist Attacks Upon the United States, Volume 2, (Official Government edition), p. 383 to 385; http://www.gpoaccess.gov/911/pdf/sec12.pdf.

[7] *R.* v. *Hape, 2007* SCC 27, http://scc.lexum.umontreal.ca/en/2007/2007scc26/2007scc26.html, para 52.

19. Canada's international diplomatic obligations to share information, beyond legal obligations, can be found in the declarations of the multilateral organizations to which Canada is a member including, but not limited to, the Group of 8 (G8), the North Atlantic Treaty Organization (NATO) and the Organization of American States (OAS). Canada's diplomatic obligations can also be found in the documents concerning its bilateral relationships with countries such as the United States (US).

20. Of particular significance concerning the sharing of information to combat terrorism are Canada's international legal obligations identified in UN Security Council Resolution 1373 (2001) and its diplomatic obligations identified in G8 recommendations on counter-terrorism and the US – Canada Smart Border Action Plan.

21. Canada's international obligations recognize the importance of, and the need to ensure that, the sharing of information with foreign agencies respects international human rights conventions, including the *Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment.*

(i) United Nations

22. Canada is a member of the UN. The UN is the principle mechanism by which Canada contributes to the global struggle against terrorist activities. Canada's international legal obligations to combat terrorism and share information stem from founding UN documents, UN terrorism conventions and declarations of the UN General Assembly and Security Council.

23. The *Charter of the United Nations* and the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*

in Accordance with the Charter of the United Nations provide the legal basis for cooperation among nations to maintain peace.[8]

24. Article 1(1) of the *Charter of the United Nations* states that the purposes of the United Nations are to maintain international peace and security, and to that end to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace.

25. The *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States* provides that states have a duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in order to maintain international peace and security.

26. Canada has ratified several multilateral treaties dealing with terrorism. A common element in these conventions is a general requirement that member states exchange information in accordance with their national laws.[9] For example:

- Article 15 of the *International Convention for the Suppression of Terrorist Bombings,* 1997, requires states to cooperate in the prevention of the offences listed in Article 2 by exchanging accurate and verified information in accordance with their national law, and

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[8] http://www.un.org/aboutun/charter/, Article 1, para 1; and http://www.whatconvention.org/en/conv/0703.htm, 1st para under heading "The duty of States to co-operate with one another in accordance with the Charter".

[9] See for example, *Convention on International Civil Aviation*, 1944; Convention on Offences in Certain Other Acts Committed on Board Aircraft, 1963; *Convention for the Suppression of Unlawful Seizure of Aircraft*, 1970; *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 1971; *Convention of the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents*, 1973; *Convention Against the Taking of Hostages,* 1979; *Convention on the Physical Protection of Nuclear Materials*, 1980; *Convention Concerning the Making of Plastic Explosives for the Purpose of Detection*, 1991; *Convention for the Suppression of Terrorist Bombings*, 1997; *International Convention for the Suppression of Terrorist Financing*, 1999; *Convention for the Suppression of Acts of Nuclear Terrorism*, 2005; etc.

coordinating administrative and other measures taken as appropriate to prevent the commission of offences as set forth in Article 2.[10]

- Article 18 of the *International Convention for the Suppression of the Financing of Terrorism,* 1999, requires that states establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning terrorist financing including the identity, whereabouts, and activities of persons for whom there is a reasonable suspicion are involved in terrorist financing.[11]

27. The UN General Assembly and Security Council have passed resolutions concerning the prevention of terrorism. Each of these resolutions contains articles that recognize the need for cooperation between states in order to prevent terrorism. Some contain specific provisions concerning the sharing of information.

- Article 5(d) of the *UN General Assembly Declaration on Measures to Eliminate International Terrorism,* 1994, requires states to cooperate with one another "in exchanging relevant information concerning the prevention and combating of terrorism."

- "Article 6 notes that "[i]n order to combat effectively the increase in, and the growing international character and effects of, acts of terrorism, States should enhance their cooperation through systematizing the exchange of information concerning the prevention and combat of terrorism."[12]

- Article 8 of the *UN General Assembly Declaration to the Supplement on Measures to Eliminate International Terrorism*, 1996, requires

[10] http://www.un.org/law/cod/terroris.htm, Article 15, para (b).
[11] http://www.un.org/law/cod/finterr.htm, Article 18, paras 3(a) and (b)(i).
[12] http://www.un.org/documents/ga/res/49/a49r060.htm, paras 5(d) and 6.

> states to take steps to share expertise and information about terrorists, their movements, their support, and their weapons and to share information regarding the investigation and prosecution of terrorist acts.[13]

28. Articles 3 and 4 of *UN Security Council Resolution 1368 (2001)* require states to work together urgently to bring to justice those responsible for the 9/11 attacks through a redoubling of their efforts, including increased cooperation and full implementation of anti-terrorist conventions and Security Council resolutions.[14]

29. Article 3(a) of the *UN Security Council Resolution 1373 (2001)*, requires states to find ways of intensifying and accelerating the exchange of operational information regarding terrorism, especially regarding actions or movements of terrorist persons or networks. Article 3(b) requires states to cooperate in accordance with international and domestic law, and article 3(c) requires states to cooperate through bilateral and multilateral arrangements and agreements to prevent and suppress terrorist attacks.

(ii) Group of 8 (G8)

30. Canada is a member of the G8. The G8 has made commitments to combat terrorism as a result of G8 Foreign Ministers' Meetings and G8 Summit Meetings. The Foreign Ministers' and Summit Meetings outline Canada's international diplomatic obligations to abide by, and adhere to, the requirements of the UN conventions and declarations on terrorism and to cooperate in the area of information sharing concerning terrorism.

31. There have been a number of G8 Foreign Ministers' Meetings on these issues - the G8 Foreign Ministers' Meeting held in June 2002 is particularly

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[13] http://www.un.org/documents/ga/res/51/a51r210.htm, Annex, para 8.
[14] *Supra, note 2.*

significant.[15] At the conclusion of that meeting, the G8 committed itself to implementing and strengthening international measures against terrorism by, among other things, "[I]implementing UN Security Council Resolution (UNSC) 1373 along with all of the UN counter-terrorism instruments...making efforts to further strengthen international obligations in this area...[and] working to ensure adherence to these UN counter-terrorism instruments, which require countries to implement specific measures to prevent and combat terrorist threats, such as bombing, hijacking and hostage-taking".[16]

32. Specifically with respect to counter-terrorism, the G8 urged all its members and all other states to:

- enhance their abilities to share timely information internationally with law enforcement and other appropriate counterparts, in accordance with applicable laws, with respect to passengers concerning whom there are specific and serious reasons to consider they may engage in a terrorist act (Transportation Security);

- take strong measures, including relevant legislative measures if necessary, in cooperation with other countries, to prevent terrorist acts and the international movement of terrorists by strengthening, *inter alia*, border, immigration, and travel document control and information sharing (International Cooperation).[17]

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[15] See for example the conclusions of the G8 Foreign Ministers Meeting in 1998 and in particular the conclusions regarding terrorism and the need to "exchange information on new or growing threats, including those from chemical and biological terrorism.", http://www.dfait-maeci.gc.ca/g8fmm-g8rmae/bir_g8concl-en.asp, para 27; the conclusions of the G8 Foreign Ministers Meeting in July 2000 which, among other things, called upon all states to become parties to the 12 Counter Terrorism Conventions, especially the *Convention for the Suppression of Terrorist Bombings, 1997, supra, note 10*, and the *Convention for the Suppression of the Financing of Terrorism*, 1999, *supra, note 11*, http://www.g7.utoronto.ca/foreign/fm000713.htm, paras 12 and 13.

[16] http://www.dfait-maeci.gc.ca/g8fmm-g8rmae/progress_report-en.asp, para under heading "Implementing and strengthening international measures against terrorism".

[17] http://www.g8.utoronto.ca/foreign/fm130602f.htm, Section 6, para 4 and Section 8, para 4.

33. Similarly, all G8 Summit Meetings since 2002 have addressed these important issues and have committed the G8 to improving the sharing of information on, among other things, the movement of terrorists across international borders.[18] For example, the G8 Summit Meeting in Kananaskis in 2002 committed the G8 to sharing information and coordinating activities to identify potential links between terrorist groups and criminal activities and strengthening information and intelligence exchange to achieve improved assessment of potential chemical, biological, radiological and nuclear terrorist threats.[19]

(iii) NATO

34. Canada is a member of NATO. The NATO Charter deals primarily with the collective defence of its member states and the preservation of peace and security. In October 2001 and November 2002, NATO adopted action plans against terrorism which specifically identified the need for increased information sharing amongst NATO members to combat terrorism.

35. On October 4, 2001, NATO allies met in a session of the North Atlantic Council and agreed on eight measures to combat terrorism. The allies agreed, *inter alia*, to:

- enhance intelligence-sharing and cooperation, both bilaterally and in the appropriate NATO bodies, relating to the threats posed by terrorism and the actions to be taken against it; and

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[18] See for example statements made at the conclusion of the G8 Summit Meeting in Kananaskis 2002, http://www.g7.utoronto.ca/summit/2002kananaskis/transport.html and http://www.state.gov/e/eeb/rls/fs/11477.htm; Evian 2003, http://www.g7.utoronto.ca/summit/2003evian/will_action_en.html, paras 3.2 and 3.3; Sea Island 2004, http://www.g7.utoronto.ca/summit/2004seaisland/travel.html; Gleneagles 2005, http://www.g7.utoronto.ca/summit/2005gleneagles/counterterrorism.pdf, paras 2 and 4; and Heiligndomm 2007, http://www.g7.utoronto.ca/summit/2007heiligendamm/g8-2007-ct.html.

[19] http://www.g8.gc.ca/2002Kananaskis/counterterrorism-en.asp 1st and 3rd bullets under heading "Assessing terrorist threats and being prepared for the unexpected".

- provide, individually or collectively, as appropriate and according to their capabilities, assistance to allies and other states which are or may be subject to increased terrorist threats as a result of their support for the campaign against terrorism.[20]

36. In November 2002, the Euro-Atlantic Partnership Council of NATO adopted the *Partnership Action Plan against Terrorism* [21] which includes:

> Preamble
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> "On 12 September 2001, the Member States of the Euro-Atlantic Partnership Council (EAPC) condemned unconditionally the terrorist attacks on the United States of America on 11 September 2001, and pledged to undertake all efforts to combat the scourge of terrorism.
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> ...
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> 3. EAPC States will make all efforts within their power to prevent and suppress terrorism in all its forms and manifestations, in accordance with the universally recognised norms and principles of international law, the United Nations Charter, and the United Nations Security Council Resolution 1373. In this context, they will in particular "find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks" and "emphasise the need to enhance co-ordination of efforts on national, sub-regional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security."

(iv) Organization of American States

37. Canada is a member of the OAS. In 2002 and 2003, the OAS adopted resolutions and made a Declaration requiring member states to exchange information concerning terrorism and terrorist travel:

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[20] See NATO, "Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty following the 11 September Attacks against the United States", Brussels, 04 October 2001, available at http://www.nato.int/docu/speech/2001/s011004b.htm.

[21] http://www.nato.int/docu/basictxt/b021122e.htm, paras 1 and 3.

- Articles 7 and 8 of the AG/RES 1840, *Inter-American Convention Against Terrorism* [22] adopted at the first plenary session held on June 3, 2002, reads:

> "1. The states parties, consistent with their respective domestic legal and administrative regimes, shall promote cooperation and the exchange of information in order to improve border and customs control measures to detect and prevent the international movement of terrorists and trafficking in arms or other materials intended to support terrorist activities."
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> ...
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> "Cooperation among law enforcement authorities – The states parties shall work closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences established in the international instruments listed in Article 2. In this context, they shall establish and enhance, where necessary, channels of communication between their competent authorities in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences established in the international instruments listed in Article 2 of this Convention."

- Paragraphs 22 and 23 of the *Declaration On Security in The Americas* [23], adopted at the third plenary session, held on October 28, 2003, reads:

> "22. We affirm that terrorism poses a serious threat to security, the institutions, and the democratic values of states and to the well-being of our peoples. We renew our commitment to fight terrorism and its financing with full respect for the rule of law and international law, including international humanitarian law, international human rights law, international refugee law, the Inter-American Convention against Terrorism, and United Nations Security Council resolution 1373 (2001). We will undertake to promote the universalization and effective implementation of current international conventions and protocols related to terrorism.
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> 23. In the legal framework referred to in the previous paragraph, we shall foster, in the countries of the Hemisphere, the capacity to prevent, punish, and eliminate terrorism. We shall strengthen the Inter-American Committee against Terrorism and bilateral,

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[22] http://www.state.gov/p/wha/rls/59287.htm, Article 7, para 1 and Article 8. For a list of the Conventions in Article 2, see http://untreaty.un.org/English/Terrorism.asp.

[23] http://www.oas.org/documents/eng/DeclaracionSecurity_102803.asp, paras 22 and 23.

> subregional, and hemispheric cooperation, through information exchange and the broadest possible mutual legal assistance to prevent and suppress the financing of terrorism, prevent the international movement of terrorists, without prejudice to applicable international commitments in relation to the free movement of people and the facilitation of commerce, and ensure the prosecution, in accordance with domestic law, of those who participate in planning, preparing, or committing acts of terrorism, and those who directly or indirectly provide or collect funds with the intention that they should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts. We undertake to identify and fight new terrorist threats, whatever their origin or motivation, such as threats to cyber security, biological terrorism, and threats to critical infrastructure".

38. Canada's international diplomatic obligations to share information can also be found in the declarations of other multilateral organizations to which Canada belongs, including Asia-Pacific Economic Cooperation (APEC),[24] the Organization for Security and Cooperation in Europe (OSCE),[25] the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO) and the World Customs Organization (WCO).

(v) US-Canada Smart Border 30-Point Action Plan

39. In December 2001, Canada and the US signed the *Manley-Ridge Smart Border Declaration*, a 30-point plan to identify and address security risks while expediting the legitimate flow of people and goods between the US and Canada.

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[24] Canada is a member of APEC. APEC is a multilateral organization concerned with facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region. It has issued statements concerning counter-terrorism and the sharing of information, and has called for the implementation of advance passenger information (API) Systems. See for example APEC Leaders Statement on Counter-terrorism, Shanghi, People's Republic of China, 21 October 2001, http://www.apecsec.org.sg/apec/leaders__declarations/2001/statement_on_counter-terrorism.html; Bangkok Declaration on Partnership for the Future, Bangkok Thailand, 21 October 2003, http://www.apecsec.org.sg/apec/leaders__declarations/2003.html; and 12 APEC Economic Leaders Meeting Santiago Declaration "One Community, Our Future", Santiago de Chile, 20-21 November 2004, http://www.apecsec.org.sg/apec/leaders__declarations/2004.html.

[25] For example, in 2001 the OSCE adopted the Bucharest Plan of Action for Combating Terrorism which is a comprehensive multilateral framework centered on expanded activities, facilitating state interaction, and identifying appropriate new instruments for action.

The text of the declaration recognized that information and intelligence must be shared in a timely way. The 4th pillar of the *Smart Border Declaration* [26] reads:

> "(4) *Coordination and Information Sharing in the Enforcement of these Objectives*
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> We will put the necessary tools and legislative framework in place to ensure that information and intelligence is shared in a timely and coherent way within our respective countries as well as between them. We will strengthen coordination between our enforcement agencies for addressing common threats."

40. These are a representative sample, but not an exhaustive list, of Canada's international legal and diplomatic obligations to share information to prevent terrorism. Together, they unequivocally establish that Canada must share information internationally, including, in particular, travel information, in order to combat terrorism. These examples of Canada's international obligations also show that Canada is not alone in the international sharing of information; rather Canada is meeting international standards in combating terrorism. Canada is playing its role in keeping the world safer.

2) CSIS and the RCMP

41. Canada shares information domestically and internationally in pursuit of its national interests and security.[27] Canada's international obligations to share information provide the framework for the work of many departments and agencies of the Government of Canada. The Commissioner's questions about information sharing focus on the work of CSIS (intelligence gathering) and the RCMP (crime prevention and law enforcement) whose mandates directly involve them in efforts to combat terrorism and therefore engage Canada's international obligations to share information. These submissions do not address the work of those other departments and agencies.

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[26] http://geo.international.gc.ca/can-am/main/border/smart_border_declaration-en.asp, para 4.
[27] Domestic obligations to share information will not be discussed in these submissions.

(i) CSIS

42. CSIS only collects the kind and amount of information that is "strictly necessary" to understand and assess activities that may, on reasonable grounds, be suspected of constituting threats to the security of Canada. This determination is based on CSIS's expertise in investigating national security threats. Information collected also includes "incidental information" obtained by CSIS in the performance of its duties and functions.

43. The collection of information by CSIS must conform to the *CSIS Act*, Ministerial Directions and internal policies. Targeting policy and approval permits the investigation of the activities of an individual, group or organization which may on reasonable grounds be suspected of constituting threats to the security of Canada pursuant to section 2 of the *CSIS Act*. The most intrusive investigative techniques may only be deployed after the Federal Court agrees that there are reasonable grounds to believe an individual's activities constitute a threat such that appropriate warrants are issued.

44. All of CSIS's operations, including targeting, must comply with the following five fundamental principles:

i. the rule of law must be observed;

ii. the investigative means must be proportional to the gravity and imminence of the threat;

iii. the need to use intrusive investigative techniques must be weighed against possible damage to civil liberties or to fundamental societal institutions;

iv. the more intrusive the investigative technique, the higher the authority required to approve its use; and

v. the least intrusive investigative methods must be used first, except in emergency situations or where less intrusive investigative techniques would not be proportionate to the gravity and imminence of the threat.[28]

45. What CSIS shares is derived from what it collects. Section 12 of the *CSIS Act* authorizes CSIS to "collect by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada."[29]

46. In this context, the term "or otherwise" includes the receipt of unsolicited information, including that obtained from foreign, domestic and open sources.

47. If Canadian citizens are suspected on reasonable grounds of engaging in activities which pose a threat to national security, and CSIS suspects that foreign agencies may possess or be able to obtain information which will further a particular investigation, it may be appropriate for CSIS to share information with those agencies, depending on the circumstances and the considerations discussed below.[30]

48. CSIS is a centralized organization. Decisions about what information should be shared internationally and with whom are made at CSIS's headquarters in Ottawa and by more senior members of the organization. Decisions to share information, or not to share information, are considered subject to balancing a number of factors as described below.

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[28] Public Exhibit P-004.0001 filed before the O'Connor Commission of Inquiry.
[29] *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 12, http://www.canlii.ca/ca/sta/c-23/sec12.html. (the "*CSIS Act*"). Information collected and shared can be exculpatory.
[30] The Government of Canada has recognized the importance and the need for foreign arrangements and the exchange of information with foreign agencies. See for example, *Ministerial Direction – CSIS Operations* which was issued in 2001and in particular, Annex D, *Arrangements and Cooperation* and Appendix I to Annex D, *Standards and Guidelines for Establishing a Foreign Arrangement.*

49. Section 17 of the *CSIS Act* authorizes CSIS to enter into an arrangement or otherwise cooperate with any government department, any police force or any foreign government or agency. As of November 2007, CSIS had arrangements with 271 agencies in 147 countries. CSIS is also a participant in a number of multinational organizations dealing with terrorism-related matters.

50. When CSIS proposes to enter into any arrangement with a government or agency of a foreign state, the Minister of Public Safety must approve those arrangements.

51. In addition, section 17 requires that the Minister consult with the Minister of Foreign Affairs. Each section 17 arrangement is unique. The parameters of cooperation, including what information can be shared pursuant to foreign arrangements, are defined in CSIS policy.

52. The type of information that may be shared includes, but is not limited to intelligence concerning the activities that may, on reasonable grounds, be suspected of constituting threats to the security of Canada and information related to maintaining international peace and security, public safety in other countries and the security of Canada's allies. This information is produced by investigative techniques and cooperation with other departments and agencies.

53. There are a number of structures that govern the method, manner and decision to share information. They include:

- **Legislative provisions in the *CSIS Act***
    - Section 17 requires Ministerial approval before CSIS can enter into an arrangement, or otherwise cooperate, with any government department, police force, foreign government or agency. The latter requires consultation with the Minister of Foreign Affairs.

- Section 38 states that any arrangement, and any information exchanged pursuant to any arrangement, is expressly subject to review by the Security Intelligence Review Committee.

- Section 19 authorizes CSIS to disclose information obtained in the course of its duties and functions only in specific circumstances, including for the purpose of performing its duties and functions under the *CSIS Act.*

- **Ministerial Direction and Consultation**

  - The Minister of Public Safety has the responsibility to provide direction to the Director of CSIS on matters concerning policies, operations and management of CSIS.

  - Policy guidelines for CSIS are established through directives. *Ministerial Direction – CSIS Operations* was issued in 2001. Annex D, *Arrangements and Cooperation* and Appendix I to Annex D, *Standards and Guidelines for Establishing a Foreign Arrangement,* provide an overall framework for establishing and managing foreign arrangements and cooperation.

- **CSIS Policies**

  - There are a number of CSIS policies that govern the sharing of information with foreign agencies. Some of these address matters such as:

    - section 17 arrangements with foreign governments and institutions;

    - responsibilities of foreign liaison officers;

    - procedures for recording and tracking information exchanged with external organizations;

- guidelines for the disclosure of operational information; and
- use of caveats in the exchange of information.

54. Information shared by CSIS with a foreign state may include the travel plans of Canadian citizens suspected on reasonable grounds of engaging in activities which constitute a threat to national security. Knowledge of their movements, contacts and activities abroad may be required to further investigations and better equip CSIS to assess any threat to national security and to advise the Government of Canada of any such threats. CSIS has an expectation that receiving agencies will reciprocate by sharing information concerning threats to Canada's national security and public safety.

55. The expectation flowing from the sharing of travel information is that a receiving agency will act in accordance with its domestic laws and respect CSIS caveats which restrict the use and dissemination of the information. Information is shared for intelligence rather than enforcement purposes.[31]

(ii) RCMP

56. CSIS and the RCMP have overlapping but different mandates and responsibilities. As a police force, the RCMP always places great priority on collecting information in a way that will ensure its admissibility in the course of an eventual criminal proceeding.

57. The RCMP has been engaged in information sharing with domestic and foreign governments and law enforcement agencies for well over one hundred years.[32] Most information-sharing is done on an informal basis - that is, not by way of a treaty or other more formal mechanism. Information shared pursuant to a mutual legal assistance treaty, for example, is the exception, not the rule. The method by which information can be shared varies according to the situation and the needs of the parties.

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[31] By virtue of the *CSIS Act*, CSIS has no powers of detention and arrest.
[32] There is a widespread state practice internationally of sharing information among police forces, as is exemplified by the work of INTERPOL.

58. The RCMP may share information to the extent reasonably necessary for law enforcement purposes, with appropriate safeguards and in accordance with applicable policies and agreements.[33] As noted by Commissioner O'Connor, the RCMP "...does not indiscriminately provide all information it collects to others. It, like other agencies that share information, has developed policies aimed at carefully screening the content of information that may be shared for relevance and reliability, as well as for personal information."[34]

59. Internationally, the RCMP generally focuses its international information-sharing with agencies actively engaged in law enforcement. The RCMP is a member of INTERPOL, the world's largest international police organization. INTERPOL facilitates cross-border police cooperation and provides assistance to all organizations, authorities and services which are involved in the prevention or detection of international crime. As a member of INTERPOL, the RCMP is required to respond to requests for assistance or information from other INTERPOL members and to share information essential to criminal investigations and to terrorism prevention measures.[35]

60. The RCMP has developed a body of policies for criminal investigations and national security investigations. National security investigations are a particular type of criminal investigation; they are subject to the RCMP's criminal investigation policies and, more specifically, to policies relating to national security investigations.[36] The nature of the information shared is determined primarily by investigative needs and guided by a number of policies, including the

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[33] *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-9, s. 18; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, http://scc.lexum.umontreal.ca/en/2007/2007scc41/2007scc41.html, para 116.

[34] O'Connor Report, Analysis and Recommendations, at p. 103, http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf,

[35] http://www.interpol.int/Public/ICPO/GeneralAssembly/AGN67/Resolutions/AGN67RES12.asp, Section (3), and http://www.interpol.int/Public/ICPO/GeneralAssembly/AGN70/Resolutions/AGN70RES5.asp para 1.

[36] O'Connor Report, Factual Background, p. 30, http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf.

use of caveats and the existence of an operational reason to share the information. In accordance with those principles, the RCMP shares information with foreign law enforcement agencies. The RCMP also maintains a network of liaison officers posted abroad. These liaison officers usually serve as the points of contact when the RCMP needs to contact a foreign agency.

61. The type of information collected and which could conceivably be shared, subject to various controls and limitations, includes but is not limited to:

- criminal history information;
- personal information, such as biographical details or other pertinent information about a person of interest or target's activities;
- investigative information with a partner agency, where the exchange will assist with a lawful investigation, e.g. forensic information;
- evidence obtained from lawful investigations, such as the products of lawfully- executed search warrants, where there is an investigative need to do so;
- criminal intelligence information, i.e., raw information that has been analyzed by the RCMP; and
- training materials.

62. There are a number of control structures that govern the method, manner and decision to formally share information. These structures apply equally to the informal sharing of information, albeit with allowances to deal with the unique circumstances of the investigation. Commissioner O'Connor found that the standard contained in various Ministerial Directives and in the RCMP Policy

Manuals for national security investigations in general, and the sharing of information in particular[37] were "essentially sound."[38] They include:

Policies and Caveats

- There are a number of RCMP policies that govern the sharing of information with other agencies, including foreign agencies, in the context of a national security investigation, some of which are:
  - Caveats: all sensitive information collected or received by the RCMP must be either "designated" or "classified". Where information is designated or classified, caveats must be attached to all outgoing correspondence, messages and/or documents.
  - Operational Reasons: Classified information should normally only be released where there is an operational need to share, i.e. a need-to-know. As Commissioner O'Connor noted, policies on sharing of information "... help ensure that information is shared for appropriate purpose only ..."[39]

- **Mutual Legal Assistance treaties (MLATs)**
  - Canada has signed Mutual Legal Assistance treaties (MLATs) with a variety of countries. These treaties create formal obligations on Canadian law enforcement agencies to provide assistance to foreign law enforcement agencies in criminal matters.

[37] Exhibit P-12 filed before the O'Connor Commission of Inquiry.
[38] O'Connor Report, Analysis and Recommendations, p. 331, http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf.
[39] Ibid., p. 104.

- Canada's obligations are outlined in the *Mutual Legal Assistance in Criminal Matters Act*.[40]

- **Ministerial Direction**

  - The Minister of Public Safety has the responsibility to provide direction to the Commissioner of the RCMP on matters concerning policies, operations and management of the RCMP.

  - The *Directive on RCMP Agreements* was issued in 2002 and pertains to the RCMP's cooperation with foreign law enforcements agencies or organizations.[41]

  - The Minister issued the *Direction on National Security Related Arrangements and Cooperation* in 2003.[42] Among other things:

    - It governs RCMP arrangements with foreign security or intelligence organizations for the purpose of performing its duties and functions under section 6(1) of the *Security Offences Act* and outlines the appropriate division of effort between the RCMP and CSIS in this regard;

    - In general, foreign relations and cooperation are managed directly by the Commissioner, subject to any conditions imposed by the Minister;

    - Records are maintained of details of international cooperation, and periodic evaluation and audits are conducted internally with the results provided as part of agency annual reporting to the Minister.

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[40] R.S.C. 1985, c. 30. Canada has entered into 34 bilateral MLATs and is a signatory to several conventions through which Canada can receive and provide assistance in gathering evidence in criminal cases.
[41] Public Exhibit, P-012.0023 filed before the O'Connor Commission of Inquiry.
[42] Public Exhibit, P-012.0024 filed before the O'Connor Commission of Inquiry.

63. In the conduct of its criminal investigations, the RCMP is a decentralized organization. This decentralization reflects the combination of the independence recognized at common law of peace officers and the fact that the RCMP must, when acting as a provincial or municipal police force, report to the appropriate provincial or municipal authorities.

64. Within the constraints imposed by this combination of factors, the sharing of information with foreign authorities remains subject to central oversight and coordination. At the relevant time, decisions about what information should be shared and with whom were made by the investigators, with RCMP Headquarters coordinating communications with foreign agencies in the case of national security investigations.

65. If an investigator suspects that foreign agencies may possess, or be able to obtain, information which will further a particular investigation, it may be appropriate for the RCMP to share information with those agencies, depending on the circumstances discussed above and the considerations discussed below.

66. Information shared with a foreign state may include the travel plans of Canadian citizens, as knowledge of their movements, contacts and activities abroad may be required to prevent the commission of a criminal act, further investigations, and better equip the RCMP to investigate any threat to national security.

67. The sharing of travel information should lead to confirmation, by the receiving agency, of the details provided by the RCMP, not to any other action. The RCMP expects that a receiving agency will act as it best sees fit in accordance with its domestic laws and will respect applicable caveats. Should the RCMP wish to request further action from the receiving agency, such as engaging the individual at a port of entry, questioning and/or searching the individual, it will clearly state the request and provide the receiving agency with

the reasonable and probable grounds which, in the opinion of the investigator, justify the exercise of this power.

3) Other Observations

68. The sharing of information must be understood in the context of a number of additional observations. These include the need to share information to protect the security of Canada, the notion of reciprocity, the fact that Canada is a net importer of information and the reality that the Government of Canada may have to engage in the sharing of information with countries that have poor human rights records.

69. Commissioner O'Connor's comments with respect to the sharing of information are particularly apposite:[43]

> "I strongly endorse the importance of information sharing. Sharing information across borders is essential for protecting Canada's national security interests, in that it allows more complete and accurate assessments of threats to our security. The importance of information sharing has increased in the post-911 era, when it is clear that the threats that need to be addressed are globally-based and not confined within national borders. However, information must be shared in a principled and responsible manner."
>
> "Prevention is frequently the primary objective when investigating terrorist threats. The harm resulting from a terrorist attack is potentially devastating. Investigators often work under great pressure to identify the source of a threat and ascertain ways of disrupting or preventing an attack. To this end, they must obtain as much information as possible from domestic and foreign sources."
>
> ...
>
> "Information sharing among agencies allows a more comprehensive picture to emerge. Viewing different pieces of information together may allow a more complete and accurate assessment of the threat being investigated and the steps needed to address that threat. Sometimes, seemingly inconsequential bits of information may take on an importance not otherwise apparent

[43] O'Connor Report, Analysis and Recommendations, http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf, p. 22 and p. 102.

> when viewed alongside other information. Broad information sharing is therefore essential to effective prevention."

70. Effective information sharing requires the receipt of information and intelligence from foreign agencies to meet Canadian needs. Given the reciprocal nature of Canada's international legal and domestic obligations in regards to the sharing of information, Canada must be willing to provide information in return.

71. The *McDonald Commission* expressed the same view:

> "Relationship with foreign security and intelligence agencies inevitably involve a sharing or exchange of intelligence: in order to receive information, Canada must be willing to give information to those agencies. The notion of reciprocity is, then, central to successful liaison relationships with foreign agencies."
>
> "... [A]n effective Canadian security intelligence agency requires information and intelligence from foreign agencies to meet Canadian needs. These foreign agencies may provide not only useful general assessments of potentially or actually dangerous situations, but also intelligence concerning individuals who may come to Canada or who are already here. Given the reciprocal nature of these relationships, the Canadian security agency must be willing to provide similar kinds of information in return." [44]

This view applies equally to all agencies and departments that form part of the Government of Canada's security and intelligence community.

72. Canada is a net importer of information. It does not have the information-gathering capabilities of, for instance, the US, the United Kingdom or France. Information sharing is particularly important in the Canadian context as it has been repeatedly recognized by the courts that Canada is a net importer of information and that Canada's law enforcement and intelligence agencies require information obtained by foreign law enforcement and intelligence agencies in order to nourish their investigations.[45]

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[44] McDonald Report, *supra*, vol. 1 p. 632 and 634.
[45] *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, para 44, http://scc.lexum.umontreal.ca/en/2002/2002scc75/2002scc75.html; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, para 68,

73. The Government of Canada must maintain relationships with "non-traditional" allies, some of whom may have poor human rights records, in order to assist in the fulfillment of its domestic and international obligations to combat terrorism. As much as the Government of Canada cannot afford to have investigative agencies adopt an isolated, stand-alone approach to terrorism investigations, it must also equip these agencies, subject to appropriate review, with the ability to engage, and to share information, with all countries, regardless of geographic location. It is an unfortunate reality that many terrorist threats to the security of Canada originate in, or have connections with, countries that have poor human rights records.

74. The fact that a particular country may have a poor human rights record is not sufficient, without other compelling circumstances, to preclude the sharing of information.

B. Question 1(b) - Considerations

1) CSIS

75. Considerations which could have been taken into account by CSIS, depending on the particular circumstances of an investigation, include:

- CSIS's policy on Disclosure which requires it to consider the potential threat to the security of Canada, national interests, privacy of the person(s) and organization(s) concerned and operational necessity, as well as the impact of disclosure on the safety of individuals, human and technical sources, investigative and collection techniques, the third party rule, and the possibility of disclosure through access to information legislation;

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http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html; *Canada (Attorney General) v. COI into the Actions of Canadian Officials in Relation to Maher Arar*, 2007 FC 766, para 78, http://decisions.fct-cf.gc.ca/en/2007/2007fc766/2007fc766.html,; and *Canada (Attorney General) v. Momin Khawaja*, 2007 FC 490, paras 127 and 138, http://decisions.fct-cf.gc.ca/en/2007/2007fc490/2007fc490.html.

- CSIS's mandate which makes the collection of information on current and future threats to national security, including public safety, the highest priority;

- the nature, imminence and seriousness of the suspected threat posed by the individual and /or the organization with which that person is affiliated;

- whether sharing such information would further CSIS's investigation or is required to clarify existing threat-related information (e.g. knowledge of movements of target, contacts and activities);

- the potential adverse consequences for public safety in Canada and abroad resulting from the failure to share such information;

- whether there was an approved foreign arrangement in place and whether the scope of that arrangement allowed for such sharing;

- the reliability and accuracy of the information being shared;

- the human rights record of the receiving country/agency;

- the reliability of the foreign agency, including respect for caveats and potential use of the information;

- any information received from a foreign agency providing information as to the nature, imminence and seriousness of a suspected threat; and

- the continued need of a foreign agency to receive information about an individual or organization.[46]

[46] These considerations are not unique to the circumstances in question and apply to the broader scope of CSIS investigations. They are not provided in order of priority or significance.

2) RCMP

76. Considerations which could have been taken into account by the RCMP, depending on the particular circumstances of the investigation, include:

- the reasonable belief that the individual about whom information is exchanged is involved in, or connected to, the commission of a specified offence contrary to a law of Canada;

- the reasonable belief that sharing the information will either further the RCMP's investigation, will assist the receiving agency in the conduct of its own investigation or will assist the receiving agency in preserving peace and preventing the commission of a criminal offence;

- the impact of disclosure on the safety of individuals, human and technical sources, investigative and collection techniques and the third party rule;

- the potential adverse consequences for public safety in Canada and abroad resulting from the failure to share such information;

- the reliability and accuracy of the information being shared;
- the human rights record of the receiving country/agency; and,
- the reliability of the foreign agency, including respect for caveats and potential use of the information.[47]

C. Question 2 – Questioning Canadian Citizens Detained in Foreign States

77. The circumstances and considerations mentioned above, and in particular in response to Question #1, are equally applicable to any discussion concerning

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[47] These considerations are not unique to the circumstances in question and apply to the broader scope of RCMP national security investigations. They are not provided in order of priority or significance.

the questioning of Canadian citizens detained in foreign states. However, some additional general and specific observations should also be noted.

78. Both CSIS and the RCMP require the assistance of foreign agencies to fulfill their respective national security mandates. Canada is a net importer of information and may require information from foreign agencies to advance their investigations.

79. In exceptional circumstances, Canadian citizens who are the subject of a security intelligence or law enforcement investigation may travel abroad and may be detained by foreign authorities. In these situations, foreign agencies may, in relation to question 2(a)(i), be in a position to answer, either directly or indirectly, important questions on the activities of the detained individual and threats to Canada's national security, or, in relation to questions 2(a)(ii) and 2(a)(iii), be in a position to provide direct or indirect access to facilitate interviews.[48]

80. In some cases CSIS and/or the RCMP may have an approved arrangement with a foreign agency holding a Canadian citizen or with a foreign agency in the jurisdiction holding the Canadian citizen which allows for exchanges of security intelligence or law enforcement information, or with a different foreign agency that has the ability to engage the foreign agency holding the Canadian citizen and can, in exceptional circumstances, facilitate such exchanges.

1) CSIS

81. Additional appropriate considerations which could have been taken into account by CSIS, depending on the particular circumstances of an investigation, include:

- mandate coordination (e.g. the position of DFAIT with respect to any implications, negative or otherwise, for consular access and the health

[48] Information collected can be exculpatory.

and welfare of the detainee; and, in cases where the individual is subject to criminal investigation, the position of the RCMP with respect to jeopardizing their investigative interests; and which Canadian agency can secure access);

- the nature, imminence and seriousness of the threat posed by the individual or the organization with which he is affiliated and the degree to which it had or had not been mitigated by the detention;
- whether the individual has expressed a desire or willingness to meet CSIS officials;
- the reason for the individual's detention by the foreign authorities and the position of the foreign agency on providing access to the individual;
- the potential benefits of a first-hand assessment of the individual and the ability to control the interview;
- whether there was previous contact between CSIS and the individual, and the circumstances of that contact;
- whether the foreign agency has provided threat-related information, directly or indirectly, which requires clarification and the potential consequences of not seeking clarification;
- whether any interview conditions imposed by the foreign agency were unreasonable;
- whether there has been prior access (consular or other) and the information arising from the access, including information regarding conditions of detention and treatment during detention;
- the nature and scope of the arrangement with the foreign agency; and

- whether Ministerial notification is appropriate in the circumstances, further to standing Ministerial Directions.[49]

2) RCMP

82. A primary consideration for the RCMP would be whether, in all of the circumstances of a proposed interview, the investigators believe that the resulting information will be admissible in an eventual prosecution. It is of great importance that investigators avoid the possibility of having relevant evidence excluded, or a stay of prosecution entered, on the grounds that its use would violate the principles of fundamental justice, the *Charter of Rights and Freedoms* or render the trial unfair. [50]

83. Within that context, the remarks made in relation to CSIS equally apply, with appropriate modifications, to the RCMP.

D. Question 3 – Provision of Consular Services to Canadian Citizens Detained in Foreign States

1) The Role of the DFAIT in the Provision of Consular Services

84. The powers, duties and functions of the Minister of Foreign Affairs are set out in section 10 of the *Department of Foreign Affairs and International Trade Act* [51] (the DFAIT Act). Section 10(1) provides:

> "The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to the conduct of the external affairs of Canada, including international trade and commerce and international development."

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[49] These considerations are not unique to the circumstances in question and apply to the broader scope of CSIS investigations. They are not provided in order of priority or significance.
[50] See *R. v. Hape*, 2007 SCC 26, *supra, note 6*, *R. v. Terry*, [1996] 2 S.C.R. 207, para 25, http://scc.lexum.umontreal.ca/en/1996/1996rcs2-207/1996rcs2-207.html; and *R. v. Cook*, [1998] 2 S.C.R. 597, http://scc.lexum.umontreal.ca/en/1998/1998rcs2-597/1998rcs2-597.html.
[51] R.S.C., 1985, c. E-22, s. 1; 1995, c. 5, s. 2.

85. Section 10(2) further specifies that the Minister is to:

> (a) conduct all diplomatic and consular relations on behalf of Canada;
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> (b) conduct all official communication between the Government of Canada and the government of any other country and between the Government of Canada and any international organization;
>
> (c) conduct and manage international negotiations as they relate to Canada;
>
> ...
>
> (g) coordinate the direction given by the Government of Canada to heads of Canada's diplomatic and consular missions; and
>
> (h) have management of Canada's diplomatic and consular missions.

86. DFAIT supports the Minister in the exercise of these powers, duties and functions.

2) Consular Services

87. DFAIT is responsible for the conduct of consular relations. One of the defining aspects of the consular services of every nation, including Canada, is the provision of assistance to its citizens when they travel abroad, including in the event that they are detained or incarcerated in another country. The concept that all states are entitled to protect the interests of their nationals abroad is a basic principle of international consular law and diplomatic practice.[52]

88. The *Vienna Convention of Consular Relations* ("the VCCR"), a multilateral treaty adopted in 1963 and ratified by over 160 countries including Canada, Egypt and Syria, codifies consular rights and obligations. These include the right of Canada to be informed if one of its citizens is arrested or detained by a foreign state, if the individual so requests, and the right to visit the individual, converse

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[52] *Vienna Convention on Consular Relations*, Article 5.

and correspond with them and to arrange for their legal representation.[53] DFAIT seeks to exercise these rights for the benefit of the detainee in all cases irrespective of the charges laid against them.

89. Most consular services are provided as a matter of discretion by virtue of the royal prerogative, with only those that are expressly provided for by statute giving rise to entitlement as a legal right. Nevertheless, while access to consular services is generally not a legal right, protection and assistance remain the overall objective of consular officers.[54]

90. Canadian consular officials will intervene with local authorities on behalf of a Canadian who appears to have been a victim of a denial of justice or a violation of basic human rights. Consistent with Canada's commitment to fundamental human rights, consular officers seek to protect Canadians against violations of these rights.

91. Canada is a party to numerous international human rights instruments including, *inter alia*, the *U.N Charter*, the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, the *Optional Protocol to the International Covenant on Civil and Political Rights* and the *Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment.* Violation of the standards established in these and other important international human rights instruments may serve as the grounds for consular action by Canada on behalf of its citizens.

92. Nevertheless, depending on the situation, it may not always be possible to provide assistance and protection to Canadians detained abroad. The basis for protection is a compromise between two conflicting principles: the territorial

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[53] VCCR, Article 36(1)(b) and (c).

[54] Canadians are advised on the consular services which may be available through DFAIT publications such as "*Bon Voyage, But...*", "*A Guide for Canadians Detained Abroad*" and more generally at www.voyage.gc.ca.

sovereignty of states and the jurisdiction of states to assist and protect their nationals. In navigating these two principles, Canada cannot interfere with the internal laws and judicial processes of another state. For this reason, consular officials are not mandated to seek the release of Canadians detained abroad. Rather, consular officials seek to ensure due process consistent with the domestic law of the country of detention.

93. Unfortunately, despite its best efforts, DFAIT cannot always ensure the protection of its citizens who are dual nationals. Since 1977, Canada has permitted its citizens to maintain dual nationality. Canada seeks to assist and protect its dual nationals. However, the VCCR is silent in respect of dual nationality and some countries, particularly in the Middle East, will not recognize the formal rights of the other country of nationality because they do not recognize the individual in question as being a foreign national. In those instances, Canada may not receive notice that a dual national is detained and, even if DFAIT can confirm that a dual national is detained, access to that individual may simply be denied.

94. When a Canadian is detained by the security service of a foreign country, particularly those in the Middle East, DFAIT's abilities are compromised by the fact that its normal interlocutor in such cases – the Ministry of Foreign Affairs (MFA) of that country – will not have control over the case. Instead, the MFA must solicit the cooperation of the security service in question, cooperation that may not be forthcoming. This dynamic is particularly prevalent in Middle Eastern countries, where security services tend to have considerably greater power and influence domestically than the MFA.

3) Consular Service Standards[55]

95. In determining the appropriate standards for the provision of consular services, reference should be made to the Service Standards published by DFAIT. Canada is the only country among its major allies to publish such

[55] http://www.voyage.gc.ca/main/about/service_standards-en.asp

standards. DFAIT's Service Standards are statements of general application and do not take into account the unique circumstances that may arise in different cases. The nature and frequency of consular efforts is heavily influenced by the cooperation received from the state detaining the individual. In addition, the conduct of consular services depends greatly on the laws and regulations of the detaining state and the domestic and geopolitical events that affect that state.

96. The domestic legal situation in the country of detention also bears heavily on the nature and frequency of consular services. Despite international human rights frameworks, basic human rights are not always adhered to and respected by many countries, including many in the Middle East. Moreover, both Syria and Egypt were under Emergency Law during the material time. Such laws allowed for the detention of individuals without charge.

97. In addition, consular cases with security implications involving dual nationals detained in countries with poor human rights records are rare. Such cases are so unique that they attract different standards than would ordinarily apply. Standards specific to those kinds of cases did not exist between 2001 and 2004. Accordingly, while service standards from that time period may be referred to, they cannot be determinative of the standards that would have been appropriate at the time in exceptional cases. What was reasonable in each instance must be determined on a case-by-case basis.

4) Efforts to Confirm the Detention and Location of a Canadian Citizen[56]

98. Under the VCCR, Canada has a right to be notified without delay of the arrest or detention of a Canadian citizen if the detainee so requests.[57] However, as explained above, these rights are not necessarily recognized in cases

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[56] The list of questions respecting the nature and frequency of consular services has been re-ordered from that appearing in the Notice of Hearing. The questions are addressed in the order in which a typical consular case unfolds, beginning with efforts to confirm detention and ending with services provided following release.

[57] VCCR, Article 36

involving dual nationals and are not necessarily respected in some countries, including those in the Middle East.

99. Accordingly, DFAIT's efforts to confirm the detention and location of a Canadian citizen often begin in the absence of the cooperation envisioned by the VCCR. As a result, DFAIT may only discover through other means that a Canadian dual national is detained in the Middle East.

100. When DFAIT does learn of the detention of a dual national, its ability to seek consular services may be determined by the source of the information. For example, if the detainee's family informs DFAIT of the detention, DFAIT can formally pursue access. However, if the source of the information is unconfirmed, DFAIT will normally seek to confirm the information before taking formal action. Similarly, if the source of the information is a foreign security agency, there may be little that DFAIT can do because of the caveats that may have been imposed by the foreign agency and because it may jeopardize the source of the information.

101. When DFAIT learns of a Canadian being detained abroad, that fact alone may be insufficient to engage a foreign state. Ideally, DFAIT requires, at a minimum, the name of the detainee and the approximate date of detention. This information is required so that representations to the detaining state can be made and in order to confirm, through passport records, that the individual is in fact a Canadian citizen.

102. Once DFAIT receives actionable information that a Canadian has been detained, DFAIT seeks to react within 24 hours and, in any event, with a minimum of delay. A diplomatic note seeking information is sent within days. Depending on the case, follow up may occur by telephone or other action on a regular basis.

103. Depending on the response received, additional follow up may be required. The frequency of appropriate follow up is difficult to generalize. First,

responses from the detaining country rarely arrive in a timely manner and can take many months, particularly in cases where the MFA requires information or cooperation from other government agencies, such as the police, the Ministry of the Interior or security agencies in order to respond. Second, follow up may often be done in an informal rather than formal way, as informal requests often yield more timely results. Third, DFAIT must be sensitive to not overwhelming its interlocutors with requests, or risk having its requests fall in priority or inadvertently jeopardizing cooperation. Finally, it is not unusual to receive responses that simply deny the detention or otherwise do not respond to the request but clearly communicate that no additional information or assistance is forthcoming. At that point, further requests may prove futile or worse absent the passage of time or a change in circumstances.

5) Efforts to Gain Access to the Detainee

104. Every diplomatic note sent at the outset of a case of detention includes a request for access. This request, contained in a formal diplomatic communication from the Government of Canada, is the strongest representation that can be made in the first instance.

105. As with the frequency of follow up to determine whether a Canadian is detained, follow up to gain access to a detainee occurs as needed, with due considerations for the uniqueness of each case.

106. In consular cases with security implications, DFAIT has experienced a broad range of responses to requests for access, from ready access to outright prolonged denial. DFAIT takes a case-by-case approach to these situations. There is no general framework for pursuing consular access in circumstances where detaining states resist. Efforts to secure access are pursued as a matter of course, but often with little to judge whether efforts will yield results.

6) Consular Visits and Efforts to Determine Treatment

107. The DFAIT Service Standards call for contact with Canadians detained abroad once every three months. However, as with each of the standards, the standard is explicitly recognized as being subject to factors beyond DFAIT's control, including the detaining state's willingness to recognize the dual nationality of the detainee and a foreign security service's willingness to accommodate requests from its own MFA, much less Canada's.

108. For cases where there may be serious concerns about a country's human rights record, the likely conditions of detention, the manner in which the individual was detained or allegations against the individual, DFAIT interprets contact as "consular visit". In any event, in many countries around the world, including those in the Middle East, contact can in fact only be made through an in-person visit.

109. Where such concerns exist, DFAIT will strive for a greater frequency of visits at the outset of incarceration. Such visits allow access to be established, permit assessment of the detainee's condition, needs/requests noted and, if possible, access for family arranged. Thereafter, and with particular consideration for the frequency of access by the detainee's family, visits may be reduced to once every three months or as needed.

110. Consular visits are of a "health and welfare" nature. To the fullest extent possible, DFAIT would normally seek to ascertain the following kinds of matters:

i. the detainee's physical and mental condition;

ii. the conditions of detention and the treatment received in detention, including access to adequate nutrition and essential clothing;

iii. medical issues or needs such as medications;

iv. the charges or any other information that may assist DFAIT in making representations on the detainee's behalf;

v. consent to disclose information about the case to family or a designated contact and/or delivery of messages or letters, if allowed, to them; and

vi. the extent to which the detainee is being treated in accordance with local laws and standards and accorded due process.

111. In conjunction with consular visits, and depending on the circumstances, DFAIT may also:

i. request regular access;

ii. make informal requests and/or seek to obtain comfort items such as reading materials or additional food;

iii. obtain information about the status of the case and encourage authorities to process the case without undue delay;

iv. provide a list of local lawyers with expertise in the relevant kind of case; and

v. attempt to locate missing personal property.

112. When meeting with a detainee, consular officials would be very sensitive to the ability of the detainee to speak freely and privately to him/her, particularly as consular visits in cases involving security issues are conducted in the presence of prison or security officials. In many of these situations, fine judgments are essential to determine what questions to ask and what questions not to ask in order to preserve consular access.

113. Obtaining a private visit with Canadians detained on security grounds, while ideal, would not have been a realistic option. This remains especially so where even gaining access may be an unprecedented demonstration of cooperation from a detaining state.

7) Efforts to Secure Release

114. There is a misperception that consular officials have a mandate to secure the release of Canadian citizens detained in foreign countries. Provided that the detention is in accordance with local laws, this is not the case[58]. The Government of Canada cannot interfere in the judicial affairs of another country any more than a foreign government can interfere in the judicial affairs of Canada. Rather, consular officials seek to ensure due process consistent with the domestic law of the country of detention and treatment at least consistent with nationals of the detaining state. Consular officials will also seek to address the health and welfare issues listed above.

115. Of course, efforts can be made to assist the detainee in understanding the local judicial systems, which can ultimately result in release. Further, if no signs of a judicial process emerge, Canada may request that the detaining state either proceeds towards a judicial process or consider releasing a detained Canadian in the absence of a judicial process.

8) Contact with a Detainee's Family

116. The nature and frequency of contact with detainees' families varies. If the family has contacted DFAIT about the detention, a DFAIT consular case manager will provide their contact details in order that the family can be updated on efforts made to locate and obtain access to the detainee.

117. When access to a detainee is obtained, consent to share information about the case will be sought. Often times, the consent need not be sought as detainees request that family be informed. Such a request cannot be presumed, however. For personal reasons, a detainee may not wish their family to be informed of their detention. For this reason, DFAIT generally does not contact family members who have not themselves contacted DFAIT about a case.

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[58] This is explicitly stated in, for example, DFAIT's *Guide for Canadians' Detained Abroad*

118. Once consent to share information about the case has been obtained, the family is kept abreast of developments either as they arise or in response to requests for information from the family.

119. Family members can be a particularly valuable source of information for DFAIT, though of course the privacy rights of the detainee must be respected. In particular, families may pursue their own efforts and contacts to locate or obtain access to a detained Canadian. Often, they are useful sources of information on the background to detention or on local conditions. DFAIT's consular efforts can suffer without the participation of family.

9) Efforts to Assist a Detainee upon Release

120. The services provided to a Canadian released from detention depend on their needs in the circumstances. Services might include assistance with replacement of lost documents or issuance of temporary passports. These services form part of normal consular assistance and are available upon attendance by the Canadian at the mission.

121. In the event there are extenuating circumstances, such as medical issues or potential difficulties in transiting home through a third country, DFAIT may take steps beyond the norm to assist. These steps may include making arrangements for the returning Canadian to be met at transit points, advancing funds for travel on an undertaking to repay, engaging local authorities to ensure a smooth departure, or assisting in securing the services of a physician.

122. It is not DFAIT's policy to escort Canadians back to Canada once they are released. Those whose medical conditions enable them to travel alone generally do so. When assistance is required, families are expected to provide necessary support.

123. No measure of "protection" arises when consular officials travel with Canadians released from detention. Consular officials have no power to prevent

further arrests or detentions en route and enjoy no consular privileges outside of the country to which he or she is accredited.

124. Given the international legal obligations of diplomats to respect the law of the country to which they are accredited, the inviolability of the premises of a mission cannot be used to provide asylum in order to escape local justice. There are limited situations where Canada can grant temporary safe haven at missions but only in the face of serious injury or death.

10) Considerations respecting the nature and frequency of the consular services provided to a Canadian citizen detained in Syria or Egypt

125. Prior to access being granted to the detainee, the primary goal of DFAIT officials is to locate the individual, confirm the detention, update the family and gain access. There are no particular considerations that bear on the nature and frequency of efforts to achieve these goals. In all cases around the world, detainees and their families are bound to be anxious, scared, disoriented and maybe in need of some form of assistance. Therefore, in all cases, the steps referred to above to confirm the individual has been detained and to gain access are pursued vigorously.

126. If access is denied in the first instance, DFAIT may raise the case through other means and through other interlocutors in an effort to secure the access it requires to perform its consular functions. Despite these efforts, access to dual nationals has been denied to Canada as well as several other western nations.

127. Assuming access is granted, the nature and frequency of consular services depends on the circumstances of each case. As stated above, given what was known about detention conditions and treatment in the Middle East, more than the quarterly visits required by the service standards would have been sought.

128. At the same time, irrespective of DFAIT's efforts, the reality of detention abroad is that detained Canadians are subject to whatever local conditions might

exist at that time. There are no grounds for claiming preferential treatment because someone is Canadian. Most prison systems in the Middle East, particularly those run by security services, feature small cells, over-crowded conditions, poor food, little or no exercise and little or no contact with the outside world. Unfortunately, Canadians generally receive treatment which is no better than the treatment accorded the nationals of a given state.

129. Once the first visit occurs, various factors govern the nature and frequency of requests for consular visits. The needs and requests of the detainee and their condition would have been of prime importance. Medical needs, special needs, requests for contact with family or comfort items (additional clothes or food, reading materials, personal hygiene items, etc.) would have been noted and sought to be provided by consular officials subject to approval by the detaining state.

130. A detainee who appears in relatively good physical and psychological condition and is alert, responsive and acclimated to their circumstances may not request nor require anything particular in the way of consular assistance. On the other hand, a detainee who appears subdued, withdrawn, unresponsive or exhibits physical health issues, may require more frequent visits and potential interventions for issues such as exercise or medical needs.

131. A family's success in obtaining access and meeting the needs of the detainee would also be considered. A detainee who is regularly visited by family and whose family is successful in meeting the needs of the detainee will generally require less in the way of consular services than a detainee whose family is not involved in the case.

132. The ability of the prisoner to access comfort items on their own would also assist in determining the relative level of need for consular assistance. In some situations, these items are available for purchase through the prison authorities.

133. Consular officials are keenly aware that the access granted in cases of dual nationals detained on security grounds may be precarious. Such access was unprecedented in the Middle East and would only be granted through the cooperation of the MFA and security services. For this reason, consular officers exercise judgment as to how and when to make representations aimed at meeting the needs of a detainee. Meeting these needs must be balanced against the greater goal of sustaining access.

134. Following the release of the detainee, consular services again would be provided based on the needs and goals of the Canadian citizen subject, as always, to being within the consular mandate.

11) Practices respecting the assessment of whether the Canadian citizen was being or had been mistreated

135. Consular officials who are granted access to Canadian dual nationals detained in security cases in the Middle East are limited to assessing visual indications of well being and detention conditions while carefully noting whatever responses to questions are allowed by prison officials.

136. Such consular visits will normally be monitored and would be conducted in the presence of prison officials owing to the security aspects of such cases and the unprecedented nature of access being granted. It may be considered ill-advised to request a private visit or other accommodations in those circumstances and, in any event, it is extremely unlikely that such requests would be allowed. Because visits are monitored, neither consular officers nor the detainee would be able to speak freely.

137. Consular officers conducting such visits are familiar with the human rights reputations of the countries in which they serve. Similarly, DFAIT's knowledge of how such cases would be handled by detaining states evolved over time. Visits would have been conducted with an assumption that the detainee would be found in difficult circumstances. While mistreatment, torture and harsh conditions

could not have been presumed, neither could they be discounted. The mere fact of detention in a foreign country is likely to produce fear, anxiety and disorientation. Such factors inform a consular officer's assessment of a detainee.

138. In these circumstances, a visual assessment of the detainee is the primary tool used to assess the detainee's physical condition and conditions of detention. Consular officers would observe items such as clothing, physical marks, body language, eye contact, demeanour, hygiene, posture, gate, choice of words and conditions within the detention room. For example, it may be apparent to what extent answers have been coached or words carefully selected. Similarly, detainees have been known to give signals to consular officers to indicate that answers are being chosen carefully.

139. It should be noted that not all assessments will necessarily be included in the report about the visit relayed to DFAIT Headquarters. For example, a remark may not be made about a detainee's clothing if that clothing is appropriate to the circumstances. In other words, only those assessments which may give rise to issues may be noted.

140. There were no established practices between 2001 and 2004 for how to assess whether an individual had been mistreated while detained in the Middle East. This task would have been undertaken with both common sense and compassion because a Canadian citizen may be in a precarious emotional or psychological state. As previously stated, it was generally understood that the manner of detention and the detention in conditions prevalent in the Middle East would have been difficult.

141. Following the release of a Canadian citizen from detention in the Middle East, consular officials would have been responsive to the particular circumstances of the individual, their wishes, needs, fears and expectations. It would be appropriate to ensure that medical services were available to ensure the health and well-being of the individual.

142. Citizens are under no obligation to relate their experiences to consular officials. Should they choose to do so, careful notes would be made, recognizing that the statements made would be the most proximate to the detention. Nevertheless, a Canadian citizen would never be forced to make statements. Consular officials are there to listen and provide support, including arranging for medical attention if necessary. In addition, DFAIT will not seek to persuade any sharing of information beyond what the Canadian citizen is comfortable with.

E. Question 4 – Disclosure of Information Obtained by Consular Officials

1) Disclosure of information obtained by consular officials

143. Personal information collected from Canadian citizens who were receiving, or had received, consular services is subject to the *Privacy Act* [59] and could only be disclosed pursuant to that Act. A CSIS or RCMP official could properly request disclosure of information that DFAIT had obtained from a Canadian citizen to whom they were providing or had provided consular services, so long as it might be of operational significance. DFAIT would then assess whether the information could properly be disclosed to the requesting department or agency consistent with the *Privacy Act.*

144. Section 8 of the *Privacy Act* details those circumstances in which personal information may be disclosed. Examples include: where the disclosure is for a use consistent with the purposes for which it was collected;[60] for any purpose in accordance with an Act of Parliament;[61] to specified investigative bodies request for the purposes of carrying out a lawful investigation;[62] and for any purpose where the public interest in disclosure clearly outweighs the invasion of privacy or

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[59] R.S.C. 1985, c. P-21.
[60] Section 8(2)(a).
[61] Section 8(2)(b).
[62] Section 8(2)(e).

where disclosure would clearly benefit the individual to whom the information relates.[63]

F. Question 5 - Role of consular officials in national security or law enforcement matters

145. Pursuant to the *DFAIT Act*, the Minister of Foreign Affairs is responsible for the coordination of directions given to the heads of Canada's missions[64] and those Heads of Mission are responsible for the supervision of the official activities of the various departments and agencies of the Government of Canada.[65]

146. There exists a misperception that Canadian missions abroad are comprised solely of DFAIT consular officials. This is not the case. At any particular embassy, officers from a wide variety of Canadian departments and agencies generally outnumber consular officers. Government departments, agencies and programs with representatives overseas include National Defence, Citizenship and Immigration Canada, the Canadian International Development Agency, trade and political officers.

147. The consular program is just one of the many programs which operate in a Canadian mission overseas. For this reason, if requested, it is both appropriate and expected that Canadian missions, and by extension DFAIT, would have assisted with requests from a variety of Canadian officials, including those referred to in question 1(a), to carry out their respective mandates.

148. An important consideration for DFAIT officials in respect of the activities referred to in question 2(a)(i) and (iii) would be the potential effect of those activities on the welfare of the detained Canadian. As a result of the awareness of the human rights reputations of countries in the Middle East, legitimate concerns might arise with respect to activities that may result in interrogation by officials in those countries and that may entail a violation of human rights.

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[63] Section 8(2)(m).
[64] *DFAIT Act*, section 10(2)(g).
[65] *DFAIT Act*, section 13(2).

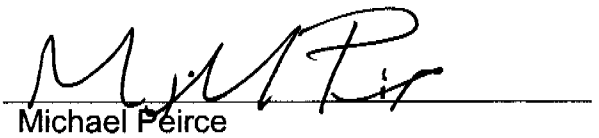
However, the presence of a Canadian official at the interview of the detainee is unlikely to result in, and would in fact discourage the mistreatment of that detainee.

149. DFAIT is obliged to ensure that any conflict between consular and policing/security programs is avoided both in reality and appearance.[66] Potential conflicts, including perceived precedence of one program over another, are to be considered by DFAIT officials at Headquarters and the Head of Mission, who weigh the merits of any case in the context of relations with the country concerned and the rights and interests of the Canadian citizen involved.[67]

150. Such a weighing of competing interests ensures that the legitimate security/policing pursuit of a case does not impede the legitimate consular pursuit of the same case. The two can co-exist and, in fact, can be mutually beneficial. For example, if consular access is denied, an alternative may involve seeking access to the detainee through security and police channels in order that some contact with the detainee may occur and some assessment of health and welfare may occur.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: December 14, 2007



Michael Peirce
Lead counsel to the Attorney General
of Canada

[66] *Manual of Consular Instructions*, clause 2.4.10.
[67] *Manual of Consular Instructions*, clause 2.4.10.