**INTERNAL INQUIRY INTO THE ACTIONS
OF CANADIAN OFFICIALS REGARDING
ABDULLAH ALMALKI, AHMAD EL MAATI AND MUAYYED NUREDDIN**

JOINT FINAL SUBMISSIONS BY ABDULLAH ALMALKI, AHMAD EL MAATI & MUAYYED NUREDDIN

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FINAL SUBMISSIONS

A. GENERAL CONSIDERATIONS AND AREAS OF CONCERN

1. Before making specific submissions on the legal and factual findings that ought to be made, it is important to address several key issues that permeated the entire Inquiry process. The unprecedented nature of this Inquiry gave rise to many challenges for Messrs. Almalki El Maati and Nureddin ("the Participants") and their counsel: how to safeguard the reputations of these men whose lives have come under intense scrutiny; how to create fairness for them in an entirely secret process; how to advocate on their behalf when the evidence is not disclosed; and how to advance useful factual and legal arguments when we know so little.

2. Forty witnesses were interviewed, and over 25,000 documents reviewed by government and Commission counsel. No disclosure has been provided to Messrs. Almalki, El Maati and Nureddin although some limited disclosure has been provided to counsel. The secretive nature of this process severely limits our ability to make truly meaningful submissions in this process. These submissions represent our best efforts to assess the facts as known to us and to identify deficiencies in the conduct of Canadian officials in respect of Messrs. Almalki, El Maati and Nureddin. Part A of these submissions will canvass five main areas of concern that we submit ought to inform the Commissioner's approach to the fact-finding exercise. Part B will focus on Canadian officials' deficient conduct in sharing information and labeling the three men. Part C will discuss the issues of deficient consular services, and Part D will address the question of torture.

i. Mandate of the Inquiry and the Scope of Findings

3. This Inquiry undoubtedly raises a host of legal and policy issues of national and international significance. Nonetheless, the Commissioner must not lose sight of the fact that this Inquiry is first and foremost about three innocent Canadian citizens, Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin ("the Participants"), who were subjected to horrific, life-altering experiences.

4. Despite years of investigation by Canadian security and policing officials, none of these men has ever been charged. They, like every other Canadian citizen, have the fundamental right to be presumed innocent. It must, therefore, be made clear in the final analysis that Messrs. Almalki, El Maati and Nureddin should in no way be viewed as having any connections to terrorist activity. Failure to do so inverts the presumption of innocence and propounds the injustice already inflicted on the men.

5. As Commissioner O'Connor said in the Arar Inquiry, "this is not a case where investigators were unable to effectively pursue their investigative goals because of a lack of resources or time constraints."[1] On the contrary, the RCMP and CSIS made every effort – including physical surveillance as well as numerous searches and interrogations – over many years to unearth information that could implicate Messrs. Almalki, El Maati and Nureddin. Despite these extensive investigative efforts, Canadian and U.S. authorities have laid no charges against any of them. Like Mr. Arar, Mr. Almalki has been doggedly investigated.[2] He has never been charged with an offence in either Canada or the United States. In late

[1] *Report of the Events in Relation to Maher Arar: Analysis and Recommendations* ("Arar Report"), p. 59
[2] He was first interviewed by CSIS agents in the summer of 1998 and the RCMP became interested in him in 2000: Almalki Draft Narrative, paras. 2 and 5

2003, after 18 months of detention without charge, he was charged under Article 278 of the Syrian Penal Code.[3] The Syrian Supreme State Security Court, a court whose trials fall far short of international standards for fair trials,[4] found him innocent of that charge. FBI investigators refused to launch a criminal investigation into Mr. Almalki's activities.[5] The Syrians concluded there was no connection between Mr. Almalki and terrorist groups. And still, Mr. Almalki lives under a cloud of suspicion.

6. Mr. Nureddin has also been the subject of an extensive investigation starting in the late 1990s.[6] He has been interviewed by CSIS and other Canadian officials on a number of occasions. Other individuals were interviewed to confirm information he provided. Although he was detained and tortured in Syria, he had never charged there or anywhere else. In an interview with CSIS shortly after his release from Syria, Mr. Nureddin was told that CSIS had determined he posed no threat to national security.[7] And still, Mr. Nureddin lives under a cloud of suspicion.

7. Mr. El Maati too was investigated extensively and aggressively by Canadian intelligence and enforcement authorities in the 1990s and early 2000s. His activities and movements were monitored by security authorities. He and his family members have been

[3] This provision of the Syrian Penal Code deals with taking action or making a written statement or speech which could endanger the state or harm its relationship with a foreign country, or expose it to the risk of hostile action by that country. For a further description of Article 278, see "Urgent Action Update: Syria – Prisoners of Conscience/Fear of Torture/Incommunicado Detention", Syrian Human Rights Committee, 21 December 2006.
[4] "Syria: Memorandum to the Syrian authorities calling for the reform or abolition of the Supreme State Security Court", Amnesty International, 20 August 2007.
[5] Arar Report, *Addendum* at p. 103: "Project A-O Canada was not successful in convincing the FBI to institute a criminal investigation."
[6] Nureddin Draft Narrative, paras. 1 - 4
[7] See Schedule A attached

interviewed by Canadian security officials.[8] His employer and other acquaintances have also been interviewed by security officials.[9] Mr. El Maati was tortured brutally and indefatigably in two different countries, Syria and Egypt. He was ordered released three times by the Egyptian Court because there was insufficient evidence to detain him.[10] This is despite the fact that the Egyptian judiciary is not known to observe procedures and safeguards that are normally observed in Western Democracies. Mr. El Maati has never been charged in Canada. At least one Canadian official, involved in his case, was concerned that there was a lack of evidence notwithstanding the allegations Canadian security officials have made against him.[11] And still, Mr. El Maati lives under a cloud of suspicion.

8. Messrs. Almalki, El Maati and Nureddin want nothing more than to definitively and finally clear their names and lift the suspicion that plagues them. However, the process adopted by the Commission precludes them from challenging the evidence presented or to question the propriety of the ways in which they were targeted by Canadian officials. They have not seen any of the documents relied on by the Commissioner. They were not permitted

[8] CSIS became interested in Mr. El Maati in 2000: El Maati Draft Narrative, paras. 1. He was placed on the lookout lists of the Integrated Customs Enforcement Service and Canadian Police information Center. The US also included Mr. El Maati on the Us Customs Treasury Enforcement Communications System and later on, for a short period, on the FBI watch list. (El Maati Draft Narrative, paras. 18-22) Mr. El Maati was interviewed by CSIS on September 11, 2001. He and his mother were interviewed by RCMP agents on November 11, 2001. (El Maati Draft Narrative para. 33) His father was interviewed by RCMP agents on November 26, 2001 and again in early December, 2002. RCMP agents also searched his home on January 22, 2002, seizing many items including, computer databases, Mr. El Maati's Will, his logs and other documents. Mr. El Maati's Aunt was interviewed by RCMP agents on November 16, 2001. (Public Chronology)

[9] In September 2001, RCMP agents interviewed one of Mr. El Maati's employers and a prior driver of one the delivery trucks he had driven for work (El Maati Draft Narrative, para. 5)

[10] Mr. El Maati was tried in the Egyptian State Security Supreme Court and was. He was vindicated and order released on October 15, 2002. This order was confirmed by Egypt's State Security Supreme Court of Appeal On November 3, 2002. He was cleared again and for the third time the Egyptian State Security Supreme Court in August 20, 2003. (Public Chronology)

[11] Gar Pardy, then Director General of the Consular Affairs Bureau, noted in his Action Memorandum prepared for the Minister of Foreign Affairs on April 7, 2003 that "Mr. El Maati seems to be a case of little evidence to support the allegations of involvement in terrorist activities but rather one of associating with others who may have." (Public Chronology)

to participate in any of the evidentiary hearings. They have not seen transcripts of the evidence. While their counsel have had an opportunity to review a summary of the evidence prepared by Commission counsel ("Draft Narrative") without any access to the evidentiary record upon which it was based, Messrs. Almalki, El Maati and Nureddin were not permitted to review the summary. As a result of the secretive nature of the Inquiry, Messrs. Almalki, El Maati and Nureddin have not been given an opportunity to meaningfully respond to evidence.

9. Notwithstanding the Terms of Reference, which unfortunately required the Commissioner to take "all necessary steps to ensure that the Inquiry is conducted in private", the Commissioner still owes a duty of fairness to Messrs. Almalki, El Maati and Nureddin. This duty arises because their reputations and their psychological well-being will be significantly affected, positively or negatively, by the findings made in the final report. Consequently, we ask the Commissioner to expressly find that there is no evidence to indicate that Messrs. Almalki, El Maati or Nureddin committed any offence or that their activities constitute (or ever constituted) a threat to national security. This finding is supported by the information contained in the Draft Narrative.

10. We further ask the Commissioner to find categorically that labels attached to the three men by Canadian officials were grossly inaccurate, unfair, misleading, and inflammatory. Such finding would be entirely consistent with the information contained in the Draft Narrative. Unless and until these two crucial findings are made clearly and without reservation, the unfair suspicion and labels will continue to haunt Messrs. Almalki, El Maati and Nureddin.

11. There is no other forum in which Messrs. Almalki, El Maati and Nureddin will be able to clear their names. Absent a criminal charge, the men will not be afforded the opportunity to know and meet the case against them. Civil litigation is unlikely to provide them access to justice in light of the government's consistent overuse of national security confidentiality claims. The Terms of Reference for the Arar Inquiry did not expressly include a mandate to clear Mr. Arar's name or to assess the legitimacy of the investigation of him. Nevertheless, Commissioner O'Connor considered both these issues to be central to his analysis of the conduct of Canadian officials.

12. Commissioner Iacobucci has a singular opportunity to expose the ways in which these three Canadian citizens were mislabeled and mischaracterized, and identify the deficiencies in the investigations which led to the sharing of inaccurate and misleading information, and ultimately, to their detention and mistreatment abroad. We urge the Commissioner to provide Messrs. Almalki, El Maati and Nureddin with the answers – and the justice – they deserve.

13. In the alternative, if the Commissioner interprets his mandate as precluding him from clearing the men's names in this manner, it is respectfully submitted that the Commissioner's decision to provide no disclosure to Messrs. Almalki, El Maati and Nureddin of the evidence or testimony significantly limits the findings that can be made in the final report. It would be fundamentally unfair for the Commissioner to make any finding that suggests, directly or indirectly, or even tends to suggest that Messrs. Almalki, El Maati or Nureddin were involved in any illegal or suspicious activity, without giving them a full opportunity to test the evidence and provide evidence in their own defence. It is incumbent on this Commission not to simply repeat the Government's unproven, untested and libelous allegations against the three men.

To do so, even with a strongly worded disclaimer about the presumption of innocence, runs the great risk of further harming the reputations of the three Participants; repeating allegations made by government witnesses can easily be misconstrued as statements of truth.[12] Further, to the extent there are contradictions between public accounts provided by Messrs. Almalki, El Maati and Nureddin of their experiences and the testimony heard by the Commission, it would be unfair to accept the Canadian officials' version of events without providing an opportunity for cross-examination or testimony from the men. On the other hand, to the extent that the testimony of Canadian officials confirms or corroborates statements made by Messrs. Almalki, El Maati and Nureddin on the public record that should be specified and should cause the Commissioner to place great weight on the public statements of the Participants.

(ii) Perceived Over-reliance on "National Security Confidentiality"

14. Another issue of serious concern is the scope of National Security Confidentiality (NSC) claims made by the Government. This was an issue that arose in the Arar Inquiry. Counsel for Mr. Arar complained repeatedly that the government's NSC claims were overbroad and designed to hide embarrassing information from public scrutiny.[13] Both Commissioner O'Connor,[14] and ultimately the Federal Court,[15] agreed that the government "overclaimed" NSC. The same pattern of conduct revealed itself in the Air India Inquiry.[16]

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[12] Commissioner O'Conner confirmed that in terrorist investigations, improper and unfair labels in a written document carry an air of authority. 'Statements made by police officers tend to be taken at face value." See Arar Report, *Analysis and Recommendations*, p .25.

[13] See, for example, *Arar Inquiry*, Exhibits P-42, tab 131, P-134, tab 3, P-242 and P-243, tab 21; Ruling on Process and Procedural Issues, May 9, 2005; Ruling on Confidentiality, July 29, 2004

[14] Arar Report, *Analysis and Recommendations*, pp. 301-304.

15. As set out above, Messrs. Almalki, El Maati and Nureddin have not had access to any of the documents or evidence at the Inquiry, even where the material is not protected by claims of NSC or privilege. Without any disclosure, we are not in a position to challenge in specific detail the government's NSC claims as overbroad or otherwise improper. However, a comparison between what is revealed in the Arar Report, and what is seemingly redacted in the Draft Narrative, suggests that overly broad NSC claims have been made here.

16. By way of example, the Almalki Draft Narrative states that the results of the January 22, 2002 searches were shared with "a U.S. agency".[17] The Arar Report, however, specifies that the fruits of the searches were shared with the FBI and partner agencies.[18] Similarly, in the El Maati Draft Narrative Inspector Clement is described as talking to a "foreign agency" about the possibility of interviewing Mr. El Maati in December 2001.[19] In the Arar Report, it is specified that Inspector Clement discussed the possibility with "the Americans".[20] Finally, the El Maati Draft Narrative states that November 12, 2001 CSIS learned that a "foreign agency" had taken steps to have Mr. El Maati detained and questioned in Syria.[21] The Arar Report finds that it was reasonable to assume that Syria was informed of a Canadian's arrival (which at the time could only be Mr. El Maati) by US Authorities. It also found it reasonable

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[15] *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar,* 2007 FC 766

[16] "Judge threatens to suspend Air India Inquiry", Canadian Press, 19 February 2007 ["Former Supreme Court Justice John Major said Monday that he will give lawyers two weeks to reassess their claims that national security would be endangered by fuller disclosure of documents and public hearings on many issues. … [H]e will adjourn the hearings until at least March 5, saying he hopes the government will come around to share his view by that date."]

[17] Almalki Draft Narrative, para. 13

[18] Arar Report, *Factual Background: Volume 1*, p. 78

[19] El Maati Draft Narrative, paras. 94 and 100

[20] Arar Report, *Factual Background: Volume 1*, p. 104 - 105

[21] El Maati Draft Narrative, para. 37

that Project AO Canada was aware of this. Cabana says that in all likelihood Mr. El Maati was detained because of information given by the Americans.[22]

17. There are gaps in the Draft Narrative where relevant information has already been made public in the Arar Report. For example, El Maati Draft Narrative indicates that information was shared information in 2000-2001.[23] The Arar Report documents specific incidents of sharing and specific labels attached in the various reports that were shared. None of this is mentioned in the draft narrative. Some is very important. For example, the Arar Report notes on September 23, 2001 that the FBI sent letter asking Canadian agencies to interview, and if possible, detain those believed to have ties to others believed to be terrorists.[24] Similarly, the El Maati Draft Narrative contains only a general statement of the label attached to Mr. El Maati by CSIS in September 2001.[25] By way of contrast, the Arar Report notes that between September 24 and September 27, 2001 CSIS transferred cases to the RCMP. In one letter, CSIS advised of an "imminent threat to public safety and security of Canada" arising from individuals living in Toronto which led to the creation of Project O Canada.[26] Given that the description used to describe Mr. El Maati is already publicly known, this information cannot or ought not to be subject to an NSC claim.

18. It is difficult to understand how information made public almost two years ago can now be subject to a valid NSC claim. There is also a great deal less detail about events, the nature of the information shared with "foreign agencies", and the content of documents in the

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[22] Arar Report, *Factual Background: Volume 1*, p. 64
[23] El Maati Draft Narrative, para. 8
[24] Arar Report, *Factual Background: Volume 1*, p. 15
[25] El Maati Draft Narrative, para. 10
[26] Arar Report, *Factual Background: Volume 1*, p. 15, 117

Draft Narrative than was presented in the Arar Report. It is impossible for us to know whether this is the result of overclaiming NSC, the deliberate exclusion of the information from the Draft Narrative, or an oversight.

19. The absence of blacklining or even asterisks to mark the information that has been redacted from the Draft Narrative (or what is ultimately redacted from the public version of the final report) insulates the government from public scrutiny on the nature and amount of the information being kept secret. It is an alarming retreat from the traditional approach to redaction in our democracy. The Commissioner is urged to reconsider this manner of dealing with redacted information.

20. Finally, we can only ask that the Commissioner be vigilant in his assessment of each and every NSC claim. The Commissioner must also scrutinize the public record, particularly the statements of Messrs. Almalki, El Maati and Nureddin, when deciding what information is properly the subject of an NSC claim. We further ask that the Commissioner disclose to Messrs. Almalki, El Maati and Nureddin and to the public as much information as possible in the final report without causing further damage their reputations or well-being.

(iii) Standard of "Proof" to be Applied when Assessing the Acts of Canadian Officials

21. The Terms of Reference direct the Commissioner to determine "whether the detention of Abdullah Almalki, Ahmad Abou El-Maati and Muayyed Nureddin in Syria or Egypt

resulted, directly or indirectly, from actions of Canadian officials."[27] The Participants submit that this requires to Commissioner to simply determine whether the actions of Canadian officials created a serious risk of the events that befell the three men. The Commissioner is not to apply a civil standard of proof; nor should he be restricted to finding only those facts that have a direct or "but for" causal relationship with the detention or torture of the Participants. We make this submission for three reasons.

22. First, the Commissioner is not presiding over a criminal or civil trial. Inquiries are not focused on solely whether actions have caused certain harms. "They are concerned more generally with the propriety of actions, even when those actions merely increase the risk of harm, rather than "cause harm" in the legal sense."[28]

23. Second, because the events in question involve the detention and torture of the three men, Canadian officials' must be assessed with reference to the absolute prohibition against torture. Both the *Convention Against Torture* and the *International Covenant on Civil and Political Rights*, as interpreted and applied by the International Court of Justice, the U.N. Human Rights Committee and other bodies, give rise to a clear obligation on Canadian officials not to expose persons to a serious risk of torture or ill-treatment.[29] Both our Federal Court and the House of Lords have adopted the "serious possibility" test in relation to prospective human rights breaches when determining if a person has a well founded fear of persecution. This standard for assessing risk generally requires more than a mere possibility

[27] Terms of Reference, a (i)
[28] Arar Report, *Analysis and Recommendations*, at p. 207
[29] Submissions of Amnesty International, January 25, 2008 at p. 4

but less than proof on a balance of probabilities.[30] The Commissioner ought to apply a similar standard when assessing the conduct of Canadian officials: did their conduct create a "serious possibility" or a "serious risk" that the Participants would be detained and mistreated abroad?

24. Third, the refusal of Syrian and American authorities to co-operate with this Inquiry effectively prevents the Commissioner from being able to conclude on a balance of probabilities or some higher standard that certain actions of Canadian officials had a direct causal relationship with detention, interrogation or torture. Commissioner O'Connor operated under the same impediments. He expressly rejected government counsel's argument that he ought not make any critical findings unless he could "find as a fact that the actions of their clients 'caused or contributed to' what happened to Mr. Arar." Commissioner O'Connor made the following observations:

> I have two further remarks to make about the "causation argument." First, as I have already stated, I do not read into the mandate the requirement that I report only on actions that caused Mr. Arar's fate. In several places in the Report, I comment on the actions of Canadian officials that created or increased a risk that Mr. Arar would be subjected to unacceptable treatment. While creating or increasing an unacceptable risk may sometimes fall short of establishing causation as that term is used in a strictly legal sense, creating an unacceptable risk is still something that should be avoided. In my view, reporting on the

[30] *Chiau v. MCI*, [1998] F.C.J. No. 131. (T.D.) at para. 27; see also *Al Yamani v. Canada (Solicitor General)*, [1996] 1 F.C. 174 (T.D.); *Ramirez v. Canada (M.C.I.)*, [1992] 2 F.C. 306; and *Sivakumar v. M.C.I.* [1994] 1 F.C. 433; *Adjei v M.E.I.*, [1989] F.C.J. No. 67 at para. 11. The Court in *Adjei* drew upon the reasoning of the House of Lords in *Reg. v. Governor of Pentonville Prison, Ex Parte Fernandez*, [1971] 1 W.L.R. 987, at p. 994 (per Lord Diplock), which addressed the obligation not to extradite a fugitive where he might, if returned, be prejudiced at his trial or punished, detained or restricted. The House of Lords adopted the serious reasons test in part because the decision maker was required to make an assessment of future events, not yet occurring. See also UNCAT General Comment on the Implementation of Article 3 in the Context of Article 22 of the *Convention Against Torture*, UN Doc. CAT/CIXX/Misc. 1 (1997), at paras. 6, 7.

> creation of unacceptable risks fall within the mandate set out in the Order in Council and is something that the Canadian public would expect me to do.[31]

22. The government, in calling this Inquiry, could not have expected any higher standard to apply. Indeed, the Terms of Reference contemplate findings being made on a standard short of direct causation. To preclude Commissioner Iacobucci from making findings and drawing reasonable inferences based on the record before him (where one is available) would be to render this Inquiry process meaningless. Commissioner O'Connor rejected the Attorney General's argument against addressing matters which could not be said to have "caused" Mr. Arar any harm as an unnecessarily narrow view of his mandate.[32] To the extent government counsel pursue the same "causation argument" in this Inquiry, it should be rejected an unnecessarily narrow. The Commissioner must assess as deficient any actions of Canadian officials that created serious risks of initial and continued detention, torture or ill-treatment of the three men, whether directly or indirectly. The Participants will make their submissions on this basis.

(v) Assessing the Evidentiary Record

23. As outlined above, the Participants have not seen nor heard any of the government witnesses or received disclosure of exhibits or transcript. As such it is virtually impossible to make comments on the credibility of the witnesses. The Participants do, however, have a

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[31] Arar Report, *Analysis and Recommendations*, p. 288

[32] Arar Report, *Analysis and Recommendations*, pp. 206-207. It is worth noting that government counsel fought vigorously to prevent Commissioner O'Connor from investigating or reporting on the actions of Canadian officials as they related to Mr. Almalki. Government counsel tried to keep the January, 2003 questions and cover letter for Mr. Almalki secret because, it was argued, there was no evidence that SMI had paid any attention to the letter as it never responded and thus could not be said to have caused Mr. Arar any harm. As stated above, Commissioner O'Connor rejected that unduly narrow interpretation of his mandate.

number of several concerns about assessing the credibility of evidence called before the Inquiry.

24. Canadian officials clearly developed impressions, in fact misimpressions, of Messrs. Almalki, El Maati and Nureddin and set out to construct 'facts' and collect "evidence" in support of their views which were subsequently included in official reports. While the RCMP/CSIS can start an investigation for any reason (so long as it is not based on racial, religious or ethnic profiling), more is needed before steps are taken that have a prejudicial effect on individual suspects. For example, the police must have reasonable and probable grounds to lay charges or obtain search warrants. More importantly, such intrusive investigative steps cannot be taken without objective evidence which is probably true.[33] Reasonable grounds cannot be said to exist if not rooted in facts which are likely true.[34] A similar standard should be applied to sharing information with foreign agencies: information ought not to be shared unless it has been determined to be probably or likely true.

25. This is particularly significant in these cases. As Justice O'Connor noted in his analysis, labels have a way of sticking to the person regardless of their accuracy.[35] This observation does not just apply to labels, but to all characteristics or conduct attributed to the

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[33] *R. v Zeolkowski*, [1989] 1 S.C.R. 1378, at p. 1385; *Adjei v M.E.I.*, 7 Imm.L.R. (2d) 169 (F.C.A.), at p. 172; *Naredo v M.E.I.* (1981), 130 D.L.R. (3d) 752 (F.C.A.); *Satiacum v M.E.I.* (1989), 99 N.R. 171 (F.C.A.), at p. 173-174; *Penate et al v M.E.I.*, F.C.T.D. 93-A-292, Nov. 26, 1993, at p. 2-3; *Poblete Cardenas v M.E.I.*, F.C.T.D., 93-A-171, Feb. 4, 1994, at p. 4

[34] Even the assessment of likelihood of the facts being true is attenuated by the purpose of the determination. Courts have recognized that the more serious the consequences to the person, the greater the care to be taken in the assessment of the evidence. *Continental Insurance v Dalton Cartage*, [1982] 1 S.C.R. 164; *Bater v Bater*, 50 All E.R. 458, at p. 459; *R v Barber*, [1968] O.R. 245 (O.C.A.), at p. 252; *Smith v Smith and Smedman*, [1952] 2 S.C.R. 312, at p. 317, 331

[35] Arar Report, *Analysis and Recommendations*, p. 25

person. There is a danger that suspicions are reinforced and take on greater significance with each retelling. Mere suspicion begins to look like and is accepted as fact when, in reality, it is based on no facts at all. The caution which the International Court of Justice noted with respect to news reports equally applies to any instance where suspicions are widely repeated:

> ... However, although it is perfectly proper that press information should not be treated in itself as evidence for judicial purposes, public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to public knowledge. In the case of *United States Diplomatic and Consular Staff in Teheran*, the Court referred to facts which 'are for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries.' *(I.C.J. Reports, 1980, p. 9, para. 12)*. On the basis of information, including press and broadcast material, which was 'wholly consistent and concordant as to the main facts and circumstances of the case', the Court was able to declare that it was satisfied that the allegations of fact were well founded. *(ibid. p. 10, para. 13)*. The Court has however to show particular caution in this area. Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source.[36]

26. The comments of the British Colombia Court of Appeal in *Farnya v Chorny* are no doubt well known in respect of credibility assessment:

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. Raymond v. Bosanquet (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is

[36] *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua,* I.C.J. Reports, 1986, p. 40-41, para. 62-63

> actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
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> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth" is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case. [24]

27. The Commissioner must incorporate an element of plausibility when assessing the evidence called at the Inquiry. This is of particular import in light the evidence of Canadian officials contained in the Draft Narrative. The majority of Canadian officials examined, for example, disclaimed knowledge of the torture practices of Syria and Egypt, even those stationed in these countries. It is not a matter of simply whether each individual comes across as being credible. The Commissioner must also consider whether the testimony is plausible given the context. It is difficult, if not impossible to accept in today's world that Canadian

[24] *Farnya v Chorny* , [1952] 2 D.L.R. 354 (BCCA)

officials posted in Syria and Egypt would not have been aware of the reputations of those countries as human rights abusers. Further, while it may be more understandable that a regular police or security officer acting in Canada might not be aware of such matters, those tasked to deal with cases involving Canadians detained in Egypt and Syria must have been aware of allegations of torture and 'extreme treatment'. It takes just the flick of a mouse to discover the reports on human rights abuses committed by security and police officials in Egypt and Syria. If it can be said that any of these officials were truly unaware, then they were wilfully blind and incompetent in carrying out their responsibilities.

28. Presumably, CSIS, RCMP and DFAIT witnesses were also questioned about their knowledge of the U.S. practice of extraordinary rendition at relevant times. In the course of the Arar Inquiry, various witnesses claimed to have little or no knowledge of the practice extraordinary rendition. For example, Mr. Elcock, the former Director of CSIS, and Mr. Hooper, Deputy Director of Operations, both testified that while they were generally aware of the U.S. policy of rendition, they understood that it only involved forcibly bringing persons back to the United States to face justice.[37] To the extent similar testimony was provided by witnesses at the Inquiry, it should be rejected as implausible, particularly by the time Mr. Nureddin was detained and tortured in Syria.

29. It is also important for the Commissioner to consider the credibility of the conclusions drawn by Canadian officials about Mr. Almalki, Mr. El Maati, and Mr. Nureddin. The officers

[37] *Testimony of Ward Elcock, Transcript of Proceedings,* June 21, 2004, pp. 163 – 164; *Testimony of Deputy Director Operations Jack Hooper, Transcript of Proceedings,* August 25, 2005, p. 10600

known to be involved with Project O Canada and Project AO Canada were, for the most part, Euro-Canadians. There was one Ottawa police officer with AO Canada for a short period of time, who was said to be Muslim. The testimony of RCMP witnesses before Justice O'Connor demonstrated clearly that the officers knew little, if anything, about the Arab and/or Muslim community which they were monitoring. Yet they were quick to drawing highly prejudicial conclusions about individuals without any understanding of their culture or religion. Perhaps more troubling, they formed opinions about individuals based on preconceptions rooted, as is evident with CSIS at least, in gross stereotyping.[25] Given this reality, the Commissioner must not simply accept an officer's statement that he/she reasonably believed the Participants posed a threat to national security. For example, the Commissioner must not accept that Mr. El Maati was properly or reasonably considered to be an extremist because he had been in Afghanistan, he is a practising Muslim, he drove a delivery truck into the US regularly, there was a delivery map in that truck, he took some flying lessons, and his brother was believed to be an extremist. Take out 'practising Muslim' and exchange it for 'practising' Christian or Bhuddist or Hindu and the strength of the conclusion that the person is a terrorist drops from 'certainty' as no doubt Canadian officials believed, to speculation at best. Similarly, the Commissioner must not simply accept that the police and/or intelligence officers reasonably believed that Mr. Nureddin was a "financial courier for Islamic extremists" simply because he was associated with a particular mosque, he travelled to Iraq and the Middle East and he carried relatively large sums of cash when he travelled. Again, to draw this conclusion from

[25] See, for example,CSIS Information Bulletin 2005-6/10(b), June 24, 2005, "Islamic Extremists and Detention: How Long does the Threat Last?" As noted in the comments to the draft narrative, the bulletin is a good example of the kind of stereotyping and simplistic analysis in which CSIS engages. The bulletin gives examples of 'extremists', released from detention, who returned to violent activities, including 10 released from Guantanamo Bay. The brief left out the rest of the Washington Post article, which it plagiarised, that a significantly higher number - some 2000 persons - had actually been released, not 10- and of the group addressed in the article, 146 had been freed outright and 56 kept in custody, many of whom had since been freed.

these pieces of information set out in the Draft Narrative is entirely inappropriate and would be based on stereotypes of the Muslim community.

30. A further concern, and one which is arising with increasing frequency, is the reliance of Canadian officials on evidence obtained through torture or other forms of cruel, inhuman or degrading treatment. This is where the government's plea to be absolved of responsibility for what happened to Messrs. Almalki, El Maati and Nureddin becomes transparently cruel. There are some principles which are sacrosanct - the prohibition on torture is one. It is an absolute prohibition, considered to be a *jus cogens* norm. Torture, as the House of Lords noted, has been condemned in the common law since at the Middle Ages.[26] It is just not open to Canadian officials to claim ignorance in respect of their obligation not to rely upon evidence obtained under torture or to be wilfully blind to the likelihood that information obtained for a "foreign source" is the product of torture. Nor is it open to this Commission to find that the use of evidence obtained under torture from Mr. Almalki, Mr. El Maati or Mr. Nureddin by Canadian officials was in any way appropriate or justified. Torture is always wrong. Evidence obtained through torture can never be used.[38] If a Canadian police or security official holds an honest belief that tortured evidence can be rehabilitated through corroboration that official is unfit to be a police or security officer in Canada.[39]

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[26] *A (FC) v Secretary of State for the Home Department*, [2006] UKHL 71, at para. 11-13, 33, 64, 91, 97, 104, 112-113

[38] *A (FC) v Secretary of State*, *supra* at para. 43-45, 51,91, 97, 104, 112-113 as Lord Hope stated at para. 112: "The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of such methods to the executive.

[39] This is a concern because of statements attributed to Mr. Hooper and a senior CSIS official in para. 57-58 of the El Maati summary, that his tortured confession could be used if capable of corroboration; and Inspector Reynolds belief at para. 162 that although reprehensible tortured evidence should be used for the greater good, and para. 187 that regardless of how much torture is inflicted a person is only capable of disclosing facts that she knows.

(v) Political Climate is Not an Excuse for Breaching Canadian or International Human Rights Standards

31. One final contextual matter needs to be addressed. At the January hearing on standards of conduct, the Attorney General repeatedly referred to the 2001-2004 timeframe as a "unique time in our history, one never to be repeated."[40] The emotionally charged political climate post 9/11 is no excuse for shoddy investigations and willful blindness to torture. Times of crisis do not justify lowering standards of conduct. As submitted by Ms. Jackman earlier this year:

> September 2001 was a tragedy. However, there have been other tragedies and horrific events, such as the Holocaust, the Rwandan Genocide and Hiroshima. Such events can never justify reactive conduct which leads to severe human rights violations. Officials cannot be absolved of responsibility because they were in "crisis mode", acting without thinking of their human rights responsibilities. … International human rights and humanitarian law protections are meant to be applied in times of war, times of crisis, and national emergency as well as in times of peace …[41]

32. The Attorney General's attempt to carve out 2001 - 2004 as a unique period in history marks yet another example of the retreat of the rule of law in the arena of national security. It is an attempt to remove the actions of Canadian officials from scrutiny because, as their argument goes, these three cases are unprecedented and, as a result, there was no template available at the time as to what should be done.[42] This argument must be expressly and unequivocally rejected.

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[40] See for example, Submissions of the Attorney General, December 14, 2007 at para. 1
[41] Outline of Submissions on behalf of Ahmad El Maati concerning Standards of Conduct, December 19, 2007 at para. 3(b).
[42] AG's Submissions, December 14, 2007 at paras. 7 and 8

33. Unfortunately, this argument is painfully familiar. The same justification was used in the United States in relation to its extraordinary rendition policy and Guantanamo Bay Detention Camp. One week ago, the U.S. Supreme Court rejected the pervasive notion that in this time of "war" against "radical Islamists", constitutional and human rights norms must necessarily be abrogated or suspended. For the majority, Kennedy J. wrote:

> Unlike the President and some designated Members of Congress, neither the members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.
>
> Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 in like matters to be far removed from the Nation's present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. *Security depends upon a sophisticated intelligence apparatus and the ability of our armed forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles.* Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. …
>
> *The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law*.[43]

34. Commissioner Iacobucci should use this opportunity to echo Justice Kennedy's words by making clear, in his final report, that our own constitutional imperatives and commitment to human rights are strong, as much in times of "war" as in peace. Canada cannot countenance actions that put its own citizens at risk – neither those at home nor those in the underground cells of Syria and Egypt.

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[43] *Boumediene et al. v. Bush, President of the United States, et. al,* 553 U.S ____ (2008) (Slip op. at pp. 68-70) (emphasis added).

(vi) Limits of Submissions Based on Time and Other Restrictions

35. This Inquiry was called on December 11, 2006 and has been working since then to collect documents, interview witnesses and prepare a Draft Narrative. Despite repeated requests for disclosure of witness statements, transcripts, summaries of evidence and documents (in whole or redacted on the basis of NSC claims), counsel for Messrs. Almalki, El Maati and Nureddin received nothing until mid-May, 2008. Beginning on May 14, 2008, counsel were granted access to the Draft Narrative on an undertaking that they not discuss the contents with anyone other than counsel. We were not permitted to discuss the contents with Messrs. Almalki, El Maati and Nureddin. Though we could take notes while reviewing the Draft Narrative, we were not permitted to make or keep a copy of the document. Despite these various and significant impediments, we were asked to make submissions on the Draft Narrative by June 3, 2008. This deadline was extended to June 10, 2008.

36. On June 10, 2008, counsel for Messrs. Almalki and Nureddin submitted extensive comments on the Draft Narrative to the Inquiry; on June 13, counsel for Mr. El Maati submitted their comments. Though far from complete, the comments

(a) highlighted gaps and inaccuracies in the Draft Narrative;

(b) challenged factual assertions made by government witnesses; and

(c) suggested important facts and findings from the Arar Report to be included.

Most of the questions put to Commission Counsel in these comments remain unanswered.

37. Given that counsel are subject to an undertaking that precludes us from discussing the Draft Narrative with Messrs. Almalki, El Maati and Nureddin, we do not have the authority to accept the facts as presented therein. We are also unable to offer comprehensive submissions on the factual findings that ought to be made by the Commissioner. Nonetheless, it is clear on the face of the Narrative that the evidence presented to Commission Counsel is incomplete and misleading. In the absence of answers to Counsel's questions or a revised Draft Narrative, counsel for the three men incorporate the comments made on June 10 and June 13, 2008 by reference into these submissions and reserve our right to challenge the evidence proffered by government witnesses in relation to Messrs. Almalki, El Maati and Nureddin.[44]

38. In addition to the restrictions placed on our ability to consult with Messrs. Almalki, El Maati and Nureddin regarding the Draft Narrative, we were given less than two weeks after comments on the Draft Narrative were due to prepare final submissions. These final submissions represent our best efforts, in the limited time available, to evaluate the limited facts that have been made known to us, to apply legal standards to those facts, and to make submissions as to what findings of deficiency ought to be made.

[44] The comments are attached hereto as Schedule "A". For privacy reasons, the attachments to the charts are not included.

B. INFORMATION SHARING BY CANADIAN OFFICIALS CREATED A SERIOUS RISK OF INITIAL AND CONTINUED DETENTION

(i) Sharing inaccurate, incomplete and inflammatory information

39. It is accepted that States have an obligation to investigate threats to national security, and that they will share information with each other. However, this cannot be done without adequate controls.[45] Commissioner O'Connor held that every piece of information, no matter how small or seemingly insignificant, that is shared about a Canadian citizen with a foreign policing or intelligence agency must be accurate and precise.[46] In the report, Commissioner O'Conner spoke of the risks associated with sharing inaccurate information:

> Inaccurate information can have grossly unfair consequences for individuals, and the more often it is repeated, the more credible it seems to assume. Inaccurate information is particularly dangerous in connect with terrorism investigations in the post-9/11 environment. Officials and the public are understandably concerned about the threats of terrorism. However, it is essential that those responsible for collecting, recording and sharing information be aware of the potentially devastating consequences of not getting it right.[47]

Canadian agencies also must have due regard to laws protecting personal privacy and human rights when deciding what, when and with whom to share information.[48] For example, information should never be shared with a foreign government where there is a serious risk that it will cause or contribute the use of torture.[49] This issue is explored further in section D below.

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[45] Arar Report, *Analysis and Recommendations*, p. 331
[46] Arar Report, *Analysis and Recommendations*, pp. 26, 103 - 104
[47] Arar Report, *Analysis and Recommendations*, pp. 61 - 62
[48] Arar Report, *Analysis and Recommendations*, p. 331
[49] Arar Report, *Analysis and Recommendations*, p. 367

40. It is clear from the Draft Narrative that the RCMP and CSIS failed in both respects in these cases. The Commissioner ought to find that, to the extent inaccurate information was shared with any foreign agencies about Messrs. Almalki, El Maati and Nureddin that had the tendency to overstate or mis-state their involvement in suspicious activities, Canadian officials' conduct was deficient. The Commissioner also ought to find that, to the extent the RCMP and CSIS shared inaccurate and misleading information about the Messrs. Almalki, El Maati and Nureddin with foreign agencies in circumstances where they knew or ought to have known that it would be used (directly or indirectly) to justify detaining and torturing them, their conduct was deficient.

41. The Arar Report explored in detail the information sharing arrangements that were in place before and after September 11, 2001. While there appears to have been some confusion within the RCMP, Commissioner O'Connor found that the project managers for Project A-O Canada had the following understanding of the "open-book investigation" agreement reached between the RCMP, CSIS and other American agencies shortly after September 11, 2001:

- Caveats were down. Project managers testified that they had understood that it was not necessary to attach caveats to documents being shared with the other agencies, and that RCMP policies requiring this to be done did not apply. However, they said there had been an implicit understanding that information shared would be used for intelligence purposes only.

- All information obtained by Project A-O Canada could be transferred to the "partners to the agreement". It was not necessary to screen the information transferred to the other agencies for relevance and reliability or for personal information. RCMP policies and practices requiring such screening did not apply.

- The parties could share information received from one party to the agreement with other parties without the consent of the originator, even if caveats had been attached by the originator.[50]

42. Commissioner O'Connor found that the "urgency of investigation and the workload of investigators did not justify such a departure" from RCMP policy. He further found that the misunderstanding about the manner in which information could or should be shared with U.S. agencies "played an important role" in what happened to Mr. Arar.[51] It is respectfully submitted that this misunderstanding also played an important role in the flow of information about Messrs. Almalki, El Maati and Nureddin from Canada to agencies around the world and contributed to their detention and torture in Syria and Egypt.

Information Sharing in relation to Mr. Almalki

43. Leaving aside for the moment Mr. Almalki's direct observations of documents in the hands of his Syrian interrogators and what was told to him, we know that on the following dates, information was shared by Canadian officials with the Americans, Syrians and others:

- **September 22, 2001**: Meeting at CSIS headquarters between U.S. agencies, RCMP and CSIS marks the beginning of a period of regular communication between A-O Canada team members and the FBI. The purpose of these communications varied, from transferring information about Mr. Almalki, to seeking help with analyzing information and obtaining operational support[52]

- **November 30, 2001**: Corporal Buffam notified the FBI of Mr. Almalki's itinerary and the FBI likely notified the CIA.[53]

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[50] Arar Report, *Analysis and Recommendations*, p. 110
[51] Arar Report, *Analysis and Recommendations*, p. 110 -111
[52] Arar Report, *Factual Background: Volume 1*, p. 52
[53] Draft Narrative, para. 18. But see comments chart re: para. 15 for description of facts that cast into doubt the assertion that Canadian officials were not aware of Mr. Almalki's itinerary before November 27, 2001.

- **Early December, 2001**: Buffam asked Singapore liaison officer to liaise with foreign agencies and obtain the documents Mr. Almalki produced on arrival in Malaysia. Six days later, the RCMP, CID instructed Rome liaison officer to immediately discontinue efforts to obtain information from foreign agencies. It is not clear whether, in the intervening six days, information or documents were collected by the foreign agency and/or delivered to Canadian officials.[54]

- **Late November or early December, 2001**: Clement told the Ottawa Police and a foreign agency that Mr. Almalki had left the country because he felt Mr. Almalki was surveillance conscious.

- **February 6, 2002**: The fruits of the January 22, 2002 searches were already being shared with the FBI and partner agencies.[55]

- **February 8, 2002**: First evidence of a direct transfer of search information to the Americans. Note, however, much of the information in question had already been discussed in open meetings involving the RCMP and its partner agencies.[56] The information to obtain for the January 22, 2002 searches was given to the Americans for review.[57]

- **February 14, 2002**: Project A-O Canada provided the Americans with CDs containing approximately 50 megabytes of data; the CDs contained digital copies of paper documents seized from the search.[58]

- **February 21, 2002**: By no later than this date, the Americans had the hard drive information in their possession.[59]

- **July 2002**: No later than July 4, 2002, Ambassador Pillarella is meeting regularly with General Khalil.[60] It is not clear from the Narrative precisely how many times they met, but it is confirmed that they continued to meet until the very end of Ambassador Pillarella's tenure in Damascus, August 2003.[61] It is not known what information is exchanged or what discussions the two men had about Mr. Almalki during all of their official and unofficial encounters.

- **November, 2002**: CSIS delegation meets with SMI. Mr. Almalki's counsel rejects the assertion at paragraph 67 of the Draft Narrative that CSIS did not provide any reports or information about Mr. Almalki to the Syrians during this trip. Without access to the evidence, we are unable to confirm or properly test the accuracy of the assertion. It is unknown whether General Khalil or

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[54] Almalki Draft Narrative, para. 19
[55] Arar Report, *Factual Background: Volume 1*, p. 78
[56] Ibid., pp. 86-87
[57] Ibid., p. 87
[58] Ibid. p. 87
[59] Ibid.
[60] Almalki Draft Narrative, para. 41 *ff*
[61] Ibid., para. 131

someone else from SMI took notes of the meeting. Mr. Almalki has long stated that the November, 2002 interrogators were using handwritten notes of a meeting with "the November 24 delegation".[62]

- **January, 2003**: We have known since the Arar Report that questions were sent for Mr. Almalki, delivered by Mr. Martel to SMI on January 15, 2003. Mr. Almalki has consistently maintained since his release from detention that the interrogators also relied on a report as well as two pages of questions, both of which obviously originated with Canadian authorities.[63]

44. The Draft Narrative is surprisingly bereft of details and dates on which information about Mr. Almalki was shared with U.S., Syrian or other agencies. Virtually no description is given of the nature of the information shared and there are huge gaps in the chronology. For example, there is nothing about the specific information sharing that took place between January and May, 2002, or after January 15, 2003. There is also no reference to information being shared with the Syrians about an Ottawa family, who the RCMP had questioned, and about whom Mr. Almalki was also questioned in March and April 2004.[64] However, given the "open book" information sharing agreement between the Canadian and U.S. agencies, it is reasonable to infer that Project A-O Canada shared any information or suspicion they had about Mr. Almalki with the Americans, regardless of its accuracy.[65]

45. We know from the Arar Report that Project A-O Canada transferred information to U.S. agencies without screening the information for relevance or reliability or for personal information. Moreover, it did not attach caveats to most of the documentary information.[66] With one exception, there is nothing in the Draft Narrative to suggest that this practice of

[62] See comments chart, Schedule A, para. 67
[63] See comments chart, Schedule A, para. 115
[64] Notes given to Alex Neve (Aug. 2004) at pp. 28-29
[65] Arar Report, *Analysis and Recommendations*, pp. 108 to 111
[66] Ibid., p. 110

information sharing differed at all in respect of Mr. Almalki. Liaison Officer Fiorido apparently testified before this Inquiry that he thought information passed by a police agency was always treated as being subject to the third-party rule.[67] As explained in greater detail in Schedule "A", his view is not sustainable. As set out above, Project A-O Canada managers understood it was no longer necessary to attach the caveats to information shared and that the implied third party rule no longer applied.[68]

46. Again, given the lack of information disclosed to the Participants, it is difficult to make submissions about actions of Canadian officials. Nonetheless, the following inaccuracies gleaned from the Almalki Draft Narrative created serious risks of detention by U.S., Syrian and other agencies for the reasons set out below. This information-sharing also shows the nexus between the Canadian investigation and Syrian interrogation.

47. Mr. Almalki was described as an employee of Human Concern International (HCI), an organization publicly alleged "to have links to terrorism".[69] As explained in Schedule "A", it was CSIS who publicly linked HCI to terrorism. Even with classified material before it to consider, SIRC found that there was insufficient information to conclude that HCI worked closely with al-Qaeda and that CSIS had made unsubstantiated statements in linking HCI to terrorism. Linking Mr. Almalki to an organization inaccurately described as connected to terrorism created an inaccurate and inflammatory picture of him to the receiving agencies.

[67] Almalki Draft Narrative, para. 120
[68] Arar Report, *Factual Background*, Vol. 1 at p. 38
[69] Draft Narrative, para. 2

48. TECS lookouts for Mr. Almalki and several family members described them as "Islamic extremists."[70] Such a description was clearly inaccurate and inflammatory. It has not been disclosed whether the family members included children, as was done in the case of Mr. Arar's family. Nonetheless, Commissioner O'Connor highlighted the risk of attaching such a label to an individual:

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

Despite knowing in late 2001 how "foreign agencies" treated "Islamic extremists", RCMP and CSIS officials continued to refer to Mr. Almalki as an Islamic extremist throughout 2002, 2003, and possibly beyond. [72]

49. Neither Mr. Almalki nor his counsel knows what Canadian officials claimed to be the results of the search of his parents' home. Syrian interrogators claimed weapons were found in the search. It can be inferred that Canadian authorities shared inaccurate information about the results of the search, since no weapons were found in Mr. Almalki's home. The Draft Narrative does specify that the CD shared with American authorities contained names Canadian officials alleged to be Mr. Almalki's aliases.[73] Mr. Almalki had and has no aliases. One of the names Mr. Almalki saw on a report during an interrogation in Syria was "Abu Wafa", a nickname given to him by his father when Mr. Almalki was a baby, and which was

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[70] Almalki Draft Narrative, para. 12
[71] Arar Report, *Analysis and Recommendations*, p. 115
[72] In December 2001, CSIS and RCMP officials were discussing the possible rendition of Mr. Almalki with a "foreign agency"; Draft Narrative, paras. 22-25.
[73] See Schedule A, para. 14

written inside the cover of a Qur'an in his parents' home in Ottawa.[74] To the extent Canadian officials conveyed to foreign agencies that Mr. Almalki had an "alias", or that weapons were found in the January 2002 search of his parents' home, they created a serious and unacceptable risk of detention.

50. On October 2, 2001, the RCMP sent a fax to liaison officers in seven cities identifying Mr. Almalki as an "important member" of al Qaeda.[75] Two days later, the Rome Liaison Officer sent a letter to Syrian officials providing information about Mr. Almalki.[76] Mr. Almalki was never a supporter of al Qaeda, let alone an "important member" of al Qaeda. Mr. Almalki saw a line in an Arabic report early in his detention in Syria that referred to him as an "active member of al Qaeda".[77] His interrogators also told him that "we got that you are even an active member of al Qaeda".[78] It is open to the Commissioner to infer that Canadian officials' faulty and repeated identification of Mr. Almalki as an "important" member of al Qaeda caused or created serious risks of the Syrians identifying him as such in the early part of his detention.

51. In 1998 and 2000, CSIS officials interviewed Mr. Almalki and asked him a series of questions relating to his business, including whether he had sold any equipment to the Taliban.[79] They also asked him about Ahmad Khadr.[80] In 2000 he was asked about another

[74] Almalki Interview Summary, paras. 24-25
[75] Almalki Draft Narrative para. 6. Mr. Almalki was also identified in this way in the Powerpoint presentation given to FBI representatives in April, May, June and July 2002: Arar Report, *Factual Background: Volume 1*, pp. 100-103.
[76] Ibid.
[77] Almalki Notes given to Alex Neve (August 2004), pp. 8-9
[78] Almalki Interview Summary, para. 24
[79] Alex Neve's Notes, p. 2
[80] Alex Neve's Notes, p. 1

Muslim Canadian.[81] The very same questions were asked by Syrian interrogators in May, June and July 2002.[82]

52. Prior to May 3, 2002, Project A-O Canada gave a "U.S. agency" (presumably the FBI, and by extension, the CIA) three CDs which included Mr. Almalki's business invoices and applications for corporate name changes.[83] Mr. Almalki was interrogated about invoices and shipping documents and about the proposed names changes in June and August, 2002, respectively.[84] It is believed that Canadian investigators did not properly analyze or understand the invoices and shipping documents and misled other agencies into suspecting that Mr. Almalki sold equipment to the Taliban or al Qaeda. The Commissioner should make it clear in the final report that the evidence disclosed to him did not support the allegation that Mr. Almalki sold anything to terrorist groups.[85]

53. On July 4, 2002, Ambassador Pillarella and the RCMP Liaison Officer (Mr. Covey) met with General Khalil.[86] The Draft Narrative is alarmingly silent about the contents of this meeting.[87] The Arar Report refers to the meeting that took place when Mr. Covey debriefed A-O Canada about the meeting with General Khalil. According to Cabana's notes of the meeting, it was "agreed it would be appropriate to share with the Syrians as it might assist (xxx) should the exchange of info continue."[88] What "exchange" of information had there been to date that might continue? Within days of the meeting between Canadian officials and

[81] Alex Neve's Notes, p. 2
[82] Notes given to Alex Neve (Aug. 2004), pp. 3, 6, 9; Interview Summary, para. 28
[83] Draft Narrative, para. 13
[84] Notes given to Alex Neve (Aug. 2004), p. 8; Interview Summary, paras. 28, 39
[85] A sampling of these documents was provided to Commission Counsel on June 10, 2008.
[86] Arar Report, *Factual Background: Volume 1*, p. 106
[87] Draft Narrative, para. 41
[88] Arar Commission, Exhibit P-166, p. 41

General Khalil, Mr. Almalki was again severely tortured and interrogated about Canadians, including Khadr, and about al Qaeda training camps. The document referred to by the interrogators referred to a search of his parents' home.[89] This information clearly originated with Canadian officials.

54. On November 23 and 24, 2002, a CSIS delegation met with SMI and discussed Mr. Almalki. The Draft Narrative suggests that no information was given to SMI. This is untenable, for the reasons explored in Schedule "A". Since August 2004, Mr. Almalki has consistently and accurately described the interrogation that took place following the meeting between CSIS and SMI, including that the interrogator had "papers in his hand, hand written"[90] and which was entitled "Meeting with the Canadian delegation November 24th 2002".[91] Moreover, counsel for the Attorney General has repeatedly stressed that Canada is a net importer of intelligence and it is therefore necessary for Canada to share information with foreign states.[92]

55. On January 15, 2003, Martel delivered questions to be used by the Syrians in their interrogations of Mr. Almalki. The following date, Mr. Almalki was called up for questioning. Since at least August 2004, Mr. Almalki has consistently described the date of that interrogation, the source of the questions, and the content of the questions.[93] His evidence as to what happened at the interrogations, what documents were shown (inadvertently or otherwise) to him, and what the interrogators said to him about Canadian

[89] Interview Summary, para. 37; Notes given to Alex Neve (Aug. 2004), p. 11
[90] Notes given to Alex Neve (Aug. 2004), p. 16
[91] Interview Summary, para. 47; a general reference to a Nov. 24 meeting with the delegation is also contained in the Notes to Alex Neve, p. 16.
[92] AG Submissions, Dec. 14, 2007, at paras. 68, 72
[93] Notes given to Alex Neve (Aug. 2004), p. 18

involvement should be given great weight. This is especially so given that the opportunity to tailor evidence has been significant vis-à-vis many government witnesses.

56. Commissioner O'Connor has already found that sending questions created an unacceptable risk both to Mr. Almalki's immediate well-being, as well as to the possibility that the Syrians would not respond favourably to entreaties to release Mr. Arar. [94] Given the complete *absence* of any entreaties on the part of Canadian officials to secure Mr. Almalki's release – a fact now admitted by officials in the Draft Narrative[95] – sending the questions could convey only one message: keep Mr. Almalki and do with him what you wish.

57. To what extent the information and questions about Mr. Almalki in SMI's possession came directly from Canadian officials (be they the RCMP Liaison Officer, the Ambassador, the Consul, or CSIS officials) or indirectly as a result of Canada's "caveats down" information sharing policy with the Americans may never be known. This, however, is a distinction without a difference. Canadian officials knew, almost immediately after 9/11, that the FBI would share information with the CIA and with its international partners. Canadian officials knew that the CIA "had a lot more latitude than law enforcement agencies when it came to the war on terror".[96] Canadian officials knew of the serious risks of torture that accompanied indefinite detention in Syrian military prisons.[97] And Canadian officials knew (or ought to have known) that a country like Syria, eager to do its part in the "war on terror",

[94] Arar Report, *Analysis*, p. 213
[95] Draft Narrative, para. 80: Pillarella admits that the Embassy desisted in pursuing Mr. Almalki's case as a consular one "from the start".
[96] Arar Report, *Addendum*, p. 75
[97] Arar Report, Factual Background, pp. 239-249

would detain anyone labeled an al Qaeda suspect, let alone the alleged leader of the Ottawa cell.

58. The inevitability of the Syrian response to the depiction of someone as an al Qaeda member was confirmed by Deputy Foreign Minister Mouallem when he explained that the arrival of Mr. Arar was a surprise, but that "because of Syria's commitment to the international campaign to combat terrorism, the government had no choice to but take custody of Mr. Arar, a dual citizen of Syria and Canada, and question him on his alleged affiliation with al Qaeda."[98]

59. Any doubts about what Syria would do with information about Mr. Almalki passed along by either the Canadians or the Americans were put to rest when Mr. El Maati was detained, "in all likelihood", "as a result of information the Americans gave to the Syrians."[99] The proverbial writing was on the wall again one month later when discussions about the forced disappearance or rendition of Mr. Almalki were taking place with CSIS and RCMP officials.[100] The possibility that Mr. Almalki would travel to Syria was raised by RCMP officials when they interviewed Mr. Almalki's cousin in January 2002.[101]

60. Moreover, seeking access to Mr. Almalki to interview him for criminal enforcement or intelligence purposes, and sending information and questions to be put to him, created serious

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[98] *Factual Background*, vol. 1, p. 352. See also "Cageprisoners Calls for Enquiry Into Outsourcing of Torture of Danish Resident", 20 February 2008 (available online), in which a senior researcher for this British human rights organization states that "Syria has become a prime location for intelligence authorities to have people detained and the Syrian authorities are quite willing to collude."
[99] Ibid. at 64 (referring to Inspector Cabana's testimony)
[100] Draft Narrative, paras. 22-25
[101] See Public Chronology, Jan. 22, 2002 entry

and unacceptable risks of mistreatment, prolonged detention and torture. Commissioner O'Connor stated on this very point that he "would be very concerned about the RCMP providing information or questions to authorities in a country such as Syria for purposes of interrogating a Canadian detainee."[102] This concern applies equally to CSIS.

61. The manner in which Canadian officials shared information about Mr. Almalki and the nature of the information shared (including information that was entirely inaccurate), created significant risks that he would be detained, incarcerated indefinitely, and mistreated or tortured.

Information Sharing in relation to Ahmad Abou El Maati

62. Canadian Security officials shared extensive amounts of information about Mr. El Maati with security and intelligence agencies of the U.S., Syria, Egypt and other foreign countries. Much, if not most, of this information was erroneous, deliberately inflated, and involved stereotypical and disparaging labels, portraying Mr. El Maati as a terrorist without an evidentiary basis for this characterization. A review of the events in Mr. El Maati's situation can only, logically and rationally, lead to one conclusion: the actions of Canadian officials directly or indirectly caused Mr. El Maati's detention in Syria and his subsequent transfer to Egypt; the actions of Canadian officials caused Mr. El Maati's torture and mistreatment; and, the actions of Canadian officials prolonged the duration of his detention and mistreatment in Syria and Egypt. In some instances this causal connection is direct and in others, it can be discerned by reasonable inference, as no other sustainable inference arises.

[102] Arar Report, *Analysis and Recommendations*, pp. 200, 208-212

63. Further, the actions of Canadian officials can only be characterized as deficient. In light of the known facts, no other rational inference can be made. The extent of information sharing between Canadian agencies and their U.S., Syrian and Egyptian counter parts is extensive and spread over many years. Not all of it can be fully addressed and analyzed here because of the limitations imposed on counsel as noted elsewhere in these submissions. A brief listing of the information sharing chronology in Mr. El Maati's case is as follows:

* In 2000 and 2001 CSIS shared information with RCMP and foreign intelligence and law enforcement agencies including the US.
* Post September 11, 2001, in a series of meetings between Canadian agencies and their US counterparts, Canadian agencies shared information about Canadian investigations, including that related to Mr. El Maati. On September 23, 2001, the FBI sent a letter to Canadian agencies asking them to interview, and if possible detain, persons believed to have ties to others who were believed to be terrorists.[103] This should have been a clear indication to the RCMP that detention of alleged extremists was to be the operating norm.
* In late Sept 2001, based on information obtained from CSIS and U.S agencies, RCMP sent a fax to the FBI and RCMP liaison officers abroad requesting urgent information about Mr. Elmaati. He was described as posing an imminent threat to public safety and the security of Canada.[104] The RCMP Rome Liaison Officer sent out faxes at least three times in September and October, 2001 to countries including Egypt and Syria indicating that there was recent and reliable information of an imminent threat to public safety and requesting background and verification checks on Mr. El Maati and others. It is difficult to see how Canadian officials could disclaim causality in respect of Mr. El Maati's later detention. He had visited Syria in April and May, but after these faxes were sent he was detained on his next entry into that country. Further the Rome RCMP LO knew that when information was given to a foreign country, such as Syria, it would lose complete control of the information.[105]
* On October 31, 2001, Project O A Canada requested that Mr. El Maati, Mr. Arar and others be placed on the TECS lookout list.[106] They were described as "Islamic Extremists" suspected of being linked to AQ.[107]

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[103] Arar Report, *Factual Background: Volume 1*, p. 15
[104] El Maati Draft Narrative, para. 11
[105] Mr. El Maati takes issue with the apparent conclusion in para 17 of the El Maati Draft Narrative that the influence of this information can not be assessed because of a lack of response from Syria. As noted his own travels give rise to the inference that the letters contributed to his detention. He had no prior difficulties visiting Syria. Even if a request to detain came to the Syrians from the US, this could be another contributing factor, and one largely itself arising from information originally sent to the US from Canada; see also El Maati Draft Narrative, para. 14
[106] El Maati Draft Narrative, para. 19

* On Nov. 9, 2001 the RCMP informed LOs in Germany and Vienna of Mr. El Maati's travel plans to Syria, for his marriage. The LOs were instructed to notify the local agencies.[108] The LO Patrick McDonnell in Austria told the Austrians that Mr. El Maati was of interest in terrorism investigation in Canada.[109]
* On November 10, 2001 the RCMP shared Mr. El Maati's itinerary and travel plans with CIA and FBI. It was the Americans who requested his detention in Syria,[110] and while Canadian officials later indicated that the Americans could have been aware of his travel plans without Canadian assistance, the facts are that it was the RCMP who told the Americans of his travel plans. The RCMP provided this information after having been advised by the FBI on September 23, 2001[111] that it wanted individuals like Mr. El Maati detained. Cabana was clearly 'troubled' in passing on this information although he does not explain why on the public record.
* In early November 2001, AO Canada made plans for Mr. El Maati to be followed on his trip to Syria. This appears to have involved Syria (or perhaps their involvement was as a result of US actions) because Mr. El Maati was told by one of his Syrian interrogators that he was on the flight with him to Damascus.
* The case against Mr. El Maati was publicized in leaks to the press in October, 2001, extending the information sharing beyond intelligence and police agencies to the public at large. Such reporting lends legitimacy to the allegations against Mr. El Maati and could very well be seen by Syria and Egypt as a confirmation that Mr. El Maati was a terrorist.
* More extensive information sharing may be inferred by Mr. El Maati's mother's examination by Egyptian officials a few days after her son was detained in Syria about the same matters Canadian officials asked of her at PIA on her departure from Canada.[112]
* In December, 2001 Mr. Galati, Mr. El Maati's counsel at the time, gave the RCMP a copy of the map which was in the truck that Mr. El Maati drove on August 13, 2001 when he was stopped at the US border.[113] After this, in February and March, 2002, Mr. El Maati is shown the map by Egyptian officials during one of his torture sessions. Around the same time, Mr. El Maati was questioned about a TV remote control that he had bought for his mother prior to his departure from Canada. It is unlikely that any one other than Canadian officials would have had this information. As CSIS sent questions it may have come from CSIS.[114]

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[107] Arar Report, *Factual Background: Volume 1*,p. 55
[108] El Maati Draft Narrative, para. 35
[109] El Maati Draft Narrative, para. 27
[110] El Maati Draft Narrative, para. 37
[111] El Maati Draft Narrative, paras. 8, 29
[112] El Maati Draft Narrative, para. 40
[113] El Maati Draft Narrative, para. 75
[114] CSIS appears to have a preoccupation with TV remote controls as they have been a concern in other cases.

* In mid November 2001, CSIS and the RCMP received information that a confession had been obtained from Mr. El Maati.[115] CSIS provided an analysis to other agencies including foreign ones and promptly sent off a list of questions for Mr. El Maati to answer. They received answers through a foreign agency form the Syrians to some of the questions submitted in December 2001.[116] The confession was apparently widely shared around the world.[117] CSIS may have directly caused prolongation of Mr. El Maati's torture, because Syria tortures to get answers to questions.
* On January 21, 2002 the RCMP sought and obtained search warrants for 7 residences, including the home of Mr. El Maati's father. A meeting was held between the RCMP, US agencies, CSIS and police officials to discus the results of the seizure. On February 2, 2002 Canadian agencies gave their entire Supertext database to the U.S. agencies.[118] The Arar Report addresses the serious problems with this sharing of information.
* Mr. El Maati's will was among the items seized during the January 2002 search. It was shared with US agencies in April 2002.[119] As indicated in Schedule "A", the will was done for Mr. El Maati's in preparation for his haj trip. It was not done because of his brother's alleged instructions to take flying lessons, which in any event had even allegedly occurred yet according to CSIS.
* In April, 2002 Project A-O Canada gave presentations to other agencies, including American ones - devoting significant time to Mr. Al Maati and Mr. Almalki. These were updated in July, 2002.
* Mr. El Maati indicated in August that he had been tortured in Syria, yet in November, 2002 CSIS agents traveled to Syria, presumably to further develop a working relationship with an agency engaged in gross human rights abuses. This willingness to overlook torture sent a clear message that CSIS was not concerned about such matters even with respect to Canadians.
* CSIS sent questions for Mr. El Maati twice, getting answers back once. It wanted to interview him. It was the RCMP who made persistent efforts to interview Mr. El Maati while he was detained in Syria and Egypt. They tried through every conceivable avenue available to them. They had no evidence to lay charges in Canada, so it is logical to assume that they were hoping to get evidence from him while he was detained and vulnerable.[120] These efforts were made in the face of mounting awareness that the confession received from Syria by Mr. El Maati may have been obtained by torture. Not only did CSIS and the RCMP completely ignore this in their contacts with Syrian and Egyptian officials, their acceptance of evidence suspected of being obtained through the torture of a Canadian is appalling.
* CSIS made clear efforts to influence the Egyptians into keeping Mr. El Maati in detention. It may well have prolonged his detention.[121]

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[115] El Maati Draft Narrative, para. 51
[116] El Maati Draft Narrative, paras. 66 - 78
[117] El Maati Draft Narrative, para. 51- 67
[118] El Maati Draft Narrative, para. 108
[119] Arar Report, *Factual Background: Volume 1*, pp. 100 – 101, 126
[120] El Maati Draft Narrative, paras. 194 - 242
[121] El Maati Draft Narrative, para. 248 - 250

64. Like Messrs. Almalki, Arar and Nureddin, mixed signals were given to the Syrians and the Egyptians and these were never resolved before Mr. El Maati was released from detention by Egypt.[122] Mr. El Maati's father had the clear impression from his discussion with CSIS officials that they did not want Mr. El Maati returning to Canada.[123] This is consistent with the communications of CSIS in March and May, 2003 to DFAIT-ISI and the Egyptian authorities expressing concern about Mr. El Maati being released and about his activities if he were to be released.[124] CSIS sent clear and direct messages to the Egyptians that Mr. El Maati should not be released. The continued efforts by CSIS and the RCMP to have contact with Mr. El Maati reinforced the message that he was an offender in need of detention. So while CAB officials were seeking to find Mr. El Maati, to ensure he was given due process, and to visit him, there was no message ever sent to the Syrians or the Egyptians that he need not be detained; that the concerns about him were no more than mere suspicions; that he was not wanted in Canada on any criminal charges; or even, that there was insufficient evidence to lay such charges. It would not be surprising for the Egyptians or Syrians to believe that they were doing Canada's bidding by detaining Mr. El Maati and torturing him for information.

Information Sharing in relation to Muayyed Nureddin

65. It is clear from the Draft Narrative that false, misleading, incomplete and inflammatory information about Mr. Nureddin was share with US and other foreign

[122] El Maati Draft Narrative, para. 266
[123] El Maati Draft Narrative, para. 229
[124] El Maati Draft Narrative, paras. 247 - 248

intelligence and policing agencies. It is also clear that information gathered by Canadian officials ultimately made its way into the hands of Syrian officials and was used by them during their interrogation and torture sessions with Mr. Nureddin. Obviously, the Commission may not know whether the information was provided directly to the Syrians by the RCMP or CSIS or, perhaps more likely, indirectly through a third party. This, however, is irrelevant. What is clear is that information originating from Canada was used in the mistreatment of Mr. Nureddin in Syria. The failure on the part of Canadian officials to strictly safeguard information from misuse in this way is a clear and palpable deficiency.

66. In February 2003, the RCMP Liaison Officer in Washington provided US authorities with a SITREP which reported that Mr. Nureddin traveled to Paris, France carrying approximately $6000 in US and Canadian currency. This comment was likely intended to leave the inaccurate and misleading impression that Mr. Nureddin – as some in the RCMP no doubt mistakenly and unreasonably believed – was a financial courier for "Islamic extremists". This factual summary is completely inaccurate. As set out in greater detail in Schedule "A", in January 2003, Mr. Nureddin traveled with an organized tour group to participate in Hajj. He only transited through Paris with the group en route to Jeddah. More importantly, all of the $6000 he was carrying on his trip to the Hajj was later accounted for by Canadian officials. During his trip, he purchased $2065.32 worth of gold jewellery. When he returned to Canada he was detained and questioned by the CCRA. He was required to and did pay tax and penalties in the amount of $1,404.42 on the gold. Mr. Nureddin also advised the CCRA officials that he was carrying a large amount of the original $6000 he had when he left Canada (somewhere between $3700 and $4000). The CCRA official counted the money he had with him on re-entry. Mr. Nureddin paid the $1,404.42 in cash with the money he had in

his possession. The full extent of the errors and omissions in the SITREP is not known. However, to the extent this crucial information was not included or information was presented in a misleading way which tended to suggest that this spiritual pilgrimage is evidence of Mr. Nureddin's involvement in terrorist activities, the author's conduct was deficient and created a serious risk that Mr. Nureddin would be mischaracterized by other "foreign agencies" as a threat to national or international security and that he would be detained and tortured as a result.

67. Similarly, in September 2003, the RCMP shared information with US authorities that Mr. Nureddin was carrying large sums of money when he left Canada for the Middle East, presumably to confirm the impression left by other information shared that Mr. Nureddin was a "financial courier" for "Islamic extremists." Again, this information was entirely misleading, inaccurate and incomplete. Mr. Nureddin was interviewed before he left Canada and advised the officers that he was carrying money on behalf of three other Iraqi Canadians to deliver to their families. Mr. Nureddin provided the officers with the name of the individuals for whom he was carrying the money. The three individuals Mr. Nureddin identified were subsequently questioned by CSIS and confirmed his account. Again, without access to the information provided, the extent of the errors, omissions or exaggerations is not known. It is, however, evident that the information provided was designed to leave the unfair impression that Mr. Nureddin may have been a financial courier when, in fact, there is no evidence to support this and there was an entirely innocent explanation, which Mr. Nureddin provided to Canadian officials, for carrying large sums of money to Iraq. The RCMP clearly did not consider the issue of remittances and their significance to the Iraqi economy and Iraqi families like Mr. Nureddin's. According to a report entitled "Sending Money Home"

prepared by the *International Fund for Agricultural Development*, a United Nations agency, remittances (the portion of a migrant worker's earnings sent home to help support their families) "have been a critical means of financial support for generations." The Report suggests approximately 10 percent of the world's population benefits from remittances. In 2006 alone, remittances to Iraq totaled more than $3 billion. The annual average remittances per migrant to countries in the Near East were approximately $2,250. The Report specifically acknowledges that "a percentage of migrants hand-carry the money upon return to their home country or on visits." This is, in part, because access to financial services in the Near East is extremely limited. [125] In some states, including Iraq at times, international financial transactions are forbidden. Sharing inaccurate information with the US and other "foreign agencies" that tended to suggest that Mr. Nureddin was a financial courier created a serious risk that he would be detained, interrogated and tortured.

68. Information gathered by Canadian official before Mr. Nureddin's departure on September 16, 2003 was used by Syrians in the course of interrogating and torturing him. Prior to boarding his plane in Toronto, RCMP INSET inspectors searched Mr. Nureddin's belongings, including his phone book, and interrogated him. He was asked how many times he had visited Iraq, how much money he was carrying with him and how much money he carried with him on previous trips. He was also asked whether he knew three particular individuals. This information was clearly shared with Syrian Military Intelligence either directly by the RCMP or indirectly through a third party, presumably the U.S. When detained in Syria, Mr. Nureddin was repeatedly questioned about two of the same individuals he was

[125] Attached is a copy of the International Fund for Agricultural Development entitled "Sending money Home: Worldwide Remittance Flows to Developing and Transition Countries" (available at: www.IFAD.org/events/remittances/maps/brochures.pdf)

questioned about in Toronto. The Syrians had a report when they were questioning Mr. Nureddin about these two individuals.[126] Mr. Nureddin was not asked about these two specific individuals anywhere other than Canada and Syria.[127] When Mr. Nureddin provided unsatisfactory answers to questions about these individuals, he was tortured by the Syrian Military Intelligence officers. Mr. Nureddin was repeatedly questioned by the Syrian Military Intelligence about how much money he was carrying when he left Canada and for whom he was carrying it.[128] The Syrian officials asked whether he had a telephone book they could search.[129] The similarities between the content of the interrogation in Toronto on September 16, 2003 and the interrogations in Syria are striking. The Commissioner ought to find that information collected from Mr. Nureddin on September 16, 2003 was shared with the Syrian authorities and was used as a basis for his detention, interrogation and torture.

69. What is even more disturbing is that Canadian officials shared Mr. Nureddin's travel itinerary with US authorities and other foreign agencies, including information about his plan to travel through Syria. CSIS shared his full itinerary, including his scheduled return from Damascus, Syria in December 2003 with a US agency and two other foreign agencies.[130] The RCMP shared a SITREP containing travel information with US authorities in late September 2003.[131]

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[126] *Transcript of Testimony before Mr. Stephen Toope,* p. 92, ll. 2 – 22; *Interview Transcript of Muayyed Nureddin,* December 13, 2007, p. 222, l. 5 – p. 226, l. 23; p. 228, l. 21 – p. 229, l. 4
[127] *Interview Transcript of Muayyed Nureddin,* December 13, 2007, p. 222, l. 5 – p. 226, l. 23; *Transcript of Testimony before Mr. Stephen Toope,* p. 92, ll. 2 – 22
[128] *Interview Transcript of Muayyed Nureddin,* December 13, 2007, p. 187, ll. 4- 20; p. 193, ll. 6 - 17; p. 226, l. 24 – p. 227, l. 24; p. 243, l. 13 – p. 244, l. 14; p. 203, l. 14 – p. 204, l. 7
[129] *Interview Transcript of Muayyed Nureddin,* December 13, 2007, p. 191, ll. 2 - 9
[130] Nureddin Draft Narrative, para. 14
[131] Nureddin Draft Narrative, para. 20

70. Sharing of travel information creates a unique risk and requires added care and consideration. When a Canadian citizen travels abroad, he leaves behind the robust protections of Canadian law. He becomes profoundly vulnerable to the whims of other regimes and to the possibility of extrajudicial measures that could occur in Canadian. Providing information to foreign agencies about the travel plans of a Canadian citizen who has been labeled as an "Islamic extremist" or "financial courier for people believed to be supporters of Islamic extremists" creates a serious and palpable risk that this information will be used by foreign agencies to orchestrate his detention, interrogation and torture. It is tantamount to an invitation to arrest him and, depending on the country with which the information is shared it may be tantamount to an invitation to torture him. In any event, sharing travel information creates an unacceptable risk that it will be perceived by the receiving state or states as a request to detain and interrogate the person in question.

71. The Commissioner must carefully consider the purported or actual purpose for which travel information was shared about Mr. Nureddin by Canadian officials. Admittedly, stopping a terrorist acts may justify alerting authorities in another state of the intended movement of a suspect where the threat is real and imminent and based on credible, accurate and precise information. This analysis, however, is clearly not applicable to Mr. Nureddin. There is no evidence he posed an imminent threat to international security.[132] In fact, he posed no threat at all to international security. As set out above, to the extent information was shared about him that tended to suggest he was a "financial courier" or an "Islamic extremist"

[132] Commissioner O'Connor found that by January 2003, some ten months before travel information was shared about Mr. Nureddin, the threats being investigation by Project A-O Canada "no longer fell within the 'imminent' category." He went on to explain: "Sixteen months had passed since the attacks of 9/11 and the last specific threat – a threat to blow up a prominent building in the National Capital Region – was over a year old. Moreover, the two main targets of the Project A-O Canada investigation, Messrs. Almalki and El Maati, were in custody overseas."; see *Analysis and Recommendations*, p. 213

it was simply of inaccurate, misleading and inflammatory. As a result, there can be no legitimate or acceptable explanation for the decision to share travel information about Mr. Nureddin with foreign agencies. To the extent the Commissioner can conclude the information was shared by Canadian authorities with the intention that it would be used as a basis to detain and interrogate Mr. Nureddin abroad that is a clear deficiency which likely caused or contributed to his mistreatment in Syria. In the alternative and at a minimum, the Commissioner ought to find that Mr. Nureddin's travel information was shared without due regard to the potential that it would be used by the receiving state or another foreign agency to justify detaining, interrogating and torturing Mr. Nureddin.

72. The explanation provided by Mr. Hooper that CSIS was under an obligation to share Mr. Nureddin's travel itinerary must be rejected. First, the Commissioner must make it clear that Canadian officials are not under an absolute or unfettered obligation to "advise allied services of any terrorist, affiliates or operative moving around the international arena." The decision to share any information must always take into account any potential risk that it will result in the violation of the human rights of the individual(s) involved. It must also be based on a strict analysis of the accuracy of the information and the urgency of any threat. Neither appear to have been done in this case. This is a clear deficiency which contributed to Mr. Nureddin's arrest, detention and torture in Syria. Second, the Commissioner must confirm that even if there is some sort of obligation to "advise allied services of any terrorist, affiliates or operative moving around the international arena", that would not justify sharing information about Mr. Nureddin because he is not and never was a "terrorist, affiliate or operative."

73. The draft narrative suggests that when information was shared with US authorities about Mr. Nureddin's travel schedule and his interrogation by CSIS and the RCMP, it was accompanied by caveat. The draft narrative also suggests that CSIS made a considered decision not to send information to Syria. Finally, the draft narrative suggests that CSIS had "no information indicating that the US agency passed on Mr. Nureddin's travel itinerary provided to it to Syria." CSIS did receive information that some another foreign agency did advise Syria that Mr. Nureddin was "on his way to Syria." Without access to the testimony of the witnesses, it is difficult to comment on the credibility of these statements. However, they seem to be designed to leave the impression that Canada did all it could to prevent Syria from receiving information about Mr. Nureddin's travel plans. Given the political climate at the time, and the evidence from the Arar Inquiry that "caveats were down" after September 11, 2001, this position is untenable. At least the RCMP understood that as soon as information was shared with the US, they lost control over it and it would be shared more broadly.[133] In fact, Commissioner O'Connor made the following findings in relation to the US practice of sharing information received from foreign agencies:

> Finally, a common investigative practice involved notification of American agencies whenever a Canadian suspected of terrorism-related activities departed Canada for any reason, as well as provision of the Canadian's intended destination. In light of the American practice at the time, it is reasonable to assume that the country of destination was informed by the American authorities of the Canadian's travel to that country.
>
> In one internal communication, an RCMP official stated that his agency would have notified the Middle East country of destination of the departure from Canada of a Canadian suspected of terrorist activity if he had no been confident that the Americans would notify that country of the departure. The RCMP had given the American authorities the information concerning the departure of the Canadian.[134]

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[133] Arar Report, *Analysis and Recommendations*, p. 110
[134] Arar Report, *Analysis and Recommendations*, pp. 275 - 276

74. The Commissioner ought to adopt this analysis as it applies to Mr. Nureddin as well. In fact, this analysis is even more applicable to Mr. Nureddin's case. By the time information was shared about Mr. Nureddin's travel plans with the United States and others in September and October 2003, Messrs. Almalki, El Maati and Arar had already been detained, interrogated and tortured in Syria. Canadian officials had known for over a year that Mr. El Maati had been interrogated and tortured in Syria.[135] Further, CSIS officials had received information directly from Syrians Military Intelligence that they extricated from Messrs. Almalki and Arar through the use of torture.[136] On this basis, CSIS and the RCMP knew or at least ought to have known that information shared with US authorities was being shared more broadly and was being used repeatedly to justify detaining, interrogating and torturing Canadian citizens. By September and October 2003, they must have known the risk they were creating (or were reckless as to the risk they were creating) by sharing information about Mr. Nureddin's travel plans with US and other foreign agencies. Their decision to share this information created a serious and unacceptable risk that Mr. Nureddin would be detained and tortured in Syria. It is reasonable to conclude that their decision to share information with the US and others about his travel arrangements directly or indirectly contributed to his mistreatment abroad.

75. There is one final issue that the Commissioner ought to address in relation to the sharing of information about Mr. Nureddin: the use of diplomatic assurances. The draft narrative suggests that CSIS came to learn that Mr. Nureddin might be detained while traveling in the Middle East. The draft also suggests that CSIS "requested that, if he was

[135] Arar Report, *Factual Background: Volume 1*, 106
[136] Draft Narrative (Almalki Chapter), para. 58; Arar Report, *Factual Background: Volume 1*, pp. 273 – 276. 315

detained, he be treated in accordance with international conventions and due process." The draft narrative also suggests that CSIS suggested that assurances be sought with respect to Mr. Nureddin's treatment. [137] The Arar Inquiry heard extensive expert evidence on the ineffectiveness of diplomatic assurances in relation to the treatment of detainees. By way of a brief example only, in her report to the Arar Inquiry, Wendy Patton, U.S. Advocacy Director for Human Rights Watch wrote the following about diplomatic assurances:

> *Assurances against torture versus assurances against the death penalty*
>
> Assurances may provide an appropriate safeguard against the death penalty, but their use in the context of torture and ill-treatment is quite different. Regardless of one's views about the death penalty and the trend toward worldwide abolition, it is not *per se* a violation of international human rights law. Because capital punishment remains lawful in the United States, it is carried out publicly and only after the imposition of a death sentence at a public trial. A government that extradites or transfers a criminal suspect to U.S. custody on the basis of assurances against the death penalty would know whether the U.S. government or a state government had violated those assurances at the moment when it sought the death penalty at trial or when it scheduled the case for execution. A sending state could protest the violation of the assurances before the execution.
>
> By contrast, ensuring compliance with assurances against torture is complicated and often ineffective. Torture and ill-treatment are illegal in all circumstances, and governments therefore attempt to hide their illegal conduct. Abusive governments that engage in torture are typically highly skilled at using torture methods that do not leave physical marks or indications. The secrecy and obfuscation that surround the use of torture make it impossible for sending governments to know whether the assurances have been violated – unless the victim survives, is freed, and finds safe haven in order to recount his or her experiences. For these reasons, diplomatic assurances may be appropriate in the context of extradition to states that retain the death penalty, but they do not protect against torture or ill-treatment.[138]

The Commissioner ought to take this opportunity to categorically find that diplomatic assurances are an ineffective way of protecting Canadians against torture and other human rights violations while in custody abroad. Further, the Commissioner ought to find that seeking and obtaining assurances in no way relieves Canadian officials of responsibility if

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[137] Draft Narrative (Nureddin Chapter), para. 23 - 25

[138] available at: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/PattenReport_may17.pdf, p. 21

information they shared is ultimately used to justify detaining and torturing a Canadian citizen abroad.

(ii) Labeling

76. As set out above, inaccurate, misleading and inflammatory labels were used describe Messrs. Almalki, El Maati and Nureddin in documents shared with American authorities and other "foreign agencies". This is a clear deficiency in the conduct of Canadian officials. It significantly increased the risk that they would be detained and tortured abroad. Canadian police and security intelligence officials had to know or ought to have known that other countries would act upon and react to the labels placed on them by Canadian officials, particularly inflammatory labels suggesting they were involved in terrorist activities. In fact, one witness called before the Inquiry appeared to suggest that they attached provocative labels to individuals in order to get action and information from other countries.[139] This approach to information is shockingly irresponsible. It creates a real risk that other countries will act in a way that jeopardizes the life, liberty and psychological integrity of Canadian citizens.

77. Commissioner O'Connor highlighted the risks created when the police or security services improperly, inaccurately or unfairly labeling individuals:

> Written labels, particularly when no caveats are attached, have a way to sticking to an individual and then spreading to others and becoming accepted fact or wisdom. Threats of terrorism understandably arouse fear and elicit emotional responses that, in some cases, lead to overreaction. The need for accuracy and precision when sharing information in terrorist investigations cannot be overstated. This is especially so when the

[139] El Maati Draft Narrative, para. 10

> information is contained in a document that, rightly or wrongly, carries an air of authority. Statements made by police officers tend to be taken at face value.[140]

Commissioner O'Connor went on to conclude that there can be no excuse for sharing inaccurate or imprecise information about Canadian citizens. There can also be no excuse for inaccurate, imprecise or inflammatory labels being used to describe Canadian citizens, particularly in the context of terrorism investigations.

78. Commissioner O'Connor specifically pointed out that "the potential consequences of labeling someone an Islamist extremist in post-9/11 America are enormous."[141] Commissioner O'Connor found deficiencies in the RCMP's use of labels and recommended that there be a revised manual which provided definitions of commonly used terms.[142] He emphasized the importance to be precise in the use of labels and descriptions:

> Caution is also necessary with respect to the use of potentially emotive or inflammatory phrases. To say that someone is an "Islamist extremist" or a "jihadist" can open the door to a slipshod and casual process in which guilt is assigned by association. … The use of loose or imprecise language about an individual or an event can have serious and unintended consequences. Labels, even inaccurate ones, have a way of sticking.
>
> The importance of using accurate and precise labels is magnified when information is shared outside the RCMP. In such cases, it is essential not only that information be screened for accuracy and precision, but also that consideration be given to how the recipient agency may interpret the assessment or label attached by the RCMP.[143]

The same pattern of mislabeling occurred in the cases of Messrs. Almalki, El Maati and Nureddin.

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[140] Arar Report, *Analysis and Recommendations*, p. 25
[141] Arar Report, *Analysis and Recommendations*, p. 25
[142] Arar Report, *Analysis and Recommendations*, p. 336
[143] Ibid. at p. 337

79. The investigations of Mr. Arar, Mr. Almalki and Mr. El Maati were carried out contemporaneously, often by the same officials, and at least in broad terms, as part of the same investigation.[144] Commissioner O'Connor found that these investigators had no formal training in national security investigations, nor were they trained on sharing information with external agencies.[145] Canadian officials knew or were willfully blind to the consequences of labeling Mr. Almalki an Islamist extremist or a member of an al-Qaeda cell when it shared those labels with the FBI, CIA and others.[146] Because of the use of "foreign agencies" in the narrative, we do not know who, beyond the Americans, were the recipients of the inflammatory labels and therefore cannot direct our submissions as to the possible interpretation of those labels by the receiving States. But even if the information was only shared with the Americans, the labeling created a serious risk of detention by the Americans or one of its partners.[147]

80. The draft narrative contains few examples of the ways in which Mr. Almalki was labeled by Canadian officials. The Arar Report contains further examples. These include:

- "suspected of supporting Islamic extremism"[148]
- "important member of al Qaeda"[149]
- "Islamic extremist"[150]
- "Membership in a Canadian terrorist cell"[151]

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[144] Arar Report, *Factual Background*, Volume 1 at p. 51
[145] Ibid. at 21.
[146] *See eg.* Draft Narrative, paras. 4, 6, 9, 12.
[147] The reality of that risk is confirmed in paras. 22 to 25 of the Draft Narrative where some foreign agency, presumably an American agency, discussed the possible illegal rendition or disappearance of Mr. Almalki with CSIS and RCMP officials.
[148] Draft Narrative, para. 6
[149] Ibid. at para. 6
[150] Ibid, para. 12

- "A Bin Laden associate"[152]
- "A serious terrorist threat"[153]
- "Heavy hitter"[154]
- An "elder" in his community "educated in the Koran"[155]

These labels are factually inaccurate, inflammatory and misleading. There is no evidence to support such labels, and none has been described in the Draft Narrative.

81. According to the Draft Narrative, it appears that Mr. Nureddin was variously labeled in documents shared by CSIS and/or the RCMP with the U.S. and other foreign agencies as an "Islamic extremist", "a financial courier for people believed to be supporters of Islamic extremism", an associate of "a suspected senior member of al Qaeda", associated with "criminal extremism". These descriptions are all completely inaccurate. Mr. Nureddin was not a financial courier. Nor was he associated with "Islamic extremists" or anyone involved with al Qaeda. Based on the information contained in the draft narrative, it is clear that there is no basis for these labels to have used in relation to Mr. Nureddin. Further, all of these labels grossly exaggerate Mr. Nureddin's importance in the Project O-Canada investigation and the risk he posed to national and/or international security. Attaching these labels to Mr. Nureddin in documents shared with foreign agencies, particularly American agencies, created

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[151] Ibid. para. 90
[152] Arar Report, *Analysis* at p. 25
[153] Ibid. at p. 126
[154] Ibid.
[155] Arar Report, *Factual Background* at p. 51. While these are not, strictly speaking, labels, the fact that Mr. Almalki was erroneously described as an elder in his community and as educated in the Koran is perhaps just as damaging given the religious profiling done by both CSIS and the RCMP. While Mr. Almalki was a devout Muslim, he was only in his late twenties during the period of the investigation and in no sense held a leadership role at the Mosque he attended. Moreover, he was not formally educated in the Koran in the way that would support the RCMP's profile of an al-Qaeda sympathizer or adherent of Wahhabism.

a clear and unacceptable risk that Mr. Nureddin would be detained, interrogated and tortured on the basis of these mischaracterizations.

82. The Draft Narrative also makes reference to labels used to identify Mr. El Maati. Notwithstanding statements of CSIS officials that they would use terms like believed or suspected,[156] the actual labels were not all so qualified:

* In 2000 he was identified as having links to Islamic extremists and as being possibly violent.[157]
* In 2000-2001 he was identified as involved in the Islamic extremist movement and was likely one of those whom Mr. Hooper identified as having the "capability and intent of facilitating an act of terrorism, if not actually executing it".[158]
* His case was one of those transferred by CSIS to the RCMP after September 11, 2001. In one letter CSIS advised there was an "imminent threat to public safety and security of Canada" and provided background information on several individuals, including Mr. El Maati.[159]
* In late September, 2001 the RCMP sent a fax to the FBI and the RCMP Liaison Officers, describing Mr. El Maati as posing an imminent threat to public safety and the security of Canada.[160]
* After receiving the above fax, the RCMP Liaison Officer stationed in Rome sent an urgent request for assistance to law enforcement agencies including in Syria and Egypt repeating the imminent nature of the threat to public safety and asking for a background and verification check on Mr. El Maati and others. Follow up faxes were sent out twice repeating these concerns in October. 2001.[161]
* On October 31, 2001 a request was made to list him on the TECS lookout, along with several others.[162] The Arar Report indicates Project O Canada was requesting the listing of a "group of Islamic Extremist individuals suspected of being linked to AQ movement".[163]

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[156] El Maati Draft Narrative, para. 10
[157] El Maati Draft Narrative, para. 1
[158] El Maati Draft Narrative, para. 9; see also Arar Report, *Factual Background: Volume I*, p. 14
[159] Arar Report, *Factual Background: Volume I*, p. 15
[160] El Maati Draft Narrative, para. 11
[161] El Maati Draft Narrative, paras. 13 - 14
[162] El Maati Draft Narrative, para. 19
[163] Arar Report, *Factual Background: Volume I*, p. 55

83. What started out as suspicion of Mr. El Maati, with the passage of time and the occurrence of 9/11 became ‘fact’. He was initially identified in terms of ‘possibly’ being a threat or of engaging in violence. The ‘possibly’ qualification was dropped from the communications as time passed - he became an Islamic extremist outright. There was no evidence to support such conclusions. They were incorrect. They implied the existence of actual evidence which did not exist. They were inflammatory. They were calculated to motivate the authorities in Egypt and Syria and other like countries to apprehend Mr. El Maati should he arrive in one of their jurisdictions. One does not advise secularist Islamic regimes, notorious for engaging in human rights abuses against Islamists, that a particular person is an Islamic extremist capable and intent on engaging in violence and poses an imminent threat to public safety, with the expectation that such information will just be ignored if that particular person arrives in the country.

84. It is unknown whether, and to what extent, Commission Counsel in this Inquiry explored the accuracy of these labels or whether Government witnesses appreciated the risks caused by inaccurately labeling someone or exaggerating his importance in documents shared with “foreign agencies”. Without access to the government witnesses and non-NSC documents, the Participants are prevented from definitively establishing the inaccuracy of these labels.

85. It is evident through the Draft Narrative that Canadian officials assume the labels attached to the three men were accurate. The Attorney General will undoubtedly urge this Commission to accept that the investigations of the men were well-founded and necessary and

that the labels were appropriate. If this Commission were to accept the government's submissions in this regard, it would perpetuate the stigma and unfairness that comes with labeling in the national security context. It is worth repeating the words of Commissioner O'Connor: "labels have a way of sticking to individuals, reputations are easily damaged and when labels are inaccurate, serious unfairness to individuals can result."[164]

C. CONSULAR SERVICES WERE DEFICIENT

86. The appropriate standards for consular services where citizens are detained abroad were explored at length by Commissioner O'Connor.[165] The Participants' submissions on consular standards were set out in Mr. Norris' December 2007 submissions at pages 6-9. Amnesty International also offered instructive submissions on consular conduct in their January 25, 2008 submissions, at pages 16-26. Those findings and submissions will not be repeated here.

87. It is anticipated that the AG will submit that little can legally be done for dual citizens detained in a country where dual citizenship is not recognized. Such an argument ignores the human rights obligations that compel Canada to provide assistance to the detainee and intercede on their behalf. Syria's treatment of dual citizens was not unknown to Canadian officials.[166] DFAIT officials recognized the particular harm that might befall dual Syrian nationals at the hands of American officials when it issued a travel advisory in late October 2002 warning Canadians born in Iraq, Iran, Libya, Sudan or Syria not to travel to or through

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[164] Arar Report, *Analysis and Recommendations*, p. 19
[165] See, for example, Arar Report, *Analysis and Recommendations*, pp. 164 – 178, 229 – 250 and 349 - 354
[166] Arar Report, *Factual Background*, vol. 2, pp. 530-532

the United States. DFAIT did so in response to U.S. legislation authorizing Immigration officials to monitor the entry and exit of citizens from those countries.[167]

88. Given the state of knowledge in the fall of 2001 about U.S. agencies and Syria's willingness to detain its own nationals, DFAIT officials could have issued a similar advisory at that time. No such warnings were issued.

Deficient Consular Services in relation to Mr. Almalki

89. The Draft Narrative confirms that consular officials did not do what was needed to help Mr. Almalki and protect him from 22 months of horror. Ambassador Pillarella admits that the Embassy desisted in pursuing Mr. Almalki's case as a consular one "from the start".[168] Mr. Pardy acknowledges that consular activity was less intense than for Messrs. El Maati and Arar, and that "CAB lost focus".[169]

90. Some of the specific actions which ought to be deemed deficient include, but are not limited to:

- Although Pillarella learned of Mr. Almalki's detention no later than July 4, 2002,[170] he does not appear to have conveyed the information to anyone else at the Consular Affairs Bureau (CAB)
- A diplomatic note was not sent until August 15, 2002[171]

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[167] "Canada issues U.S. travel warning", 30 October 2002 (available online at www.cnn.com). The State Department spokesman commented that Canada's warning to its citizens was not surprising: "governments do that because they have an obligation to their own citizens."
[168] Almalki Draft Narrative, para. 80
[169] Ibid., para. 81
[170] Ibid., para. 40
[171] Ibid., para. 71

- Despite Mr. Almalki's family meeting with Senator Stratton (a person not interviewed by this Commission) in August 2002, and Mr. Edelson's meeting with A-O Canada managers and DOJ lawyers in June 2002 expressing concern about Mr. Almalki's detention,[172] no steps were taken to contact the family by CIB until December 2002.[173]

- Despite the family's efforts in June 2003 to get a police clearance to give to Syrian officials, a Camant note confirming the request is not made for another four months, and then only a letter is sent to the Ottawa Police requesting the certificate.

- A misconception arises among members of CIB as to the family's wishes and the Draft Narrative reveals a conflict in the evidence. It is submitted that the evidence of Pardy and Pastyr-Lupul should be preferred: it is absurd to suggest that the family "instructed" DFAIT not to make efforts to get Mr. Almalki released, and that CIB would heed such instructions and instruct the Ambassador "not to treat Mr. Almalki's case as consular one".[174]

- Other than the diplomatic notes, fifteen months apart, there were no concerted efforts to get consular access to Mr. Almalki. Mr. Martel's claim that he was "unofficially" asking Colonel Saleh about access is not supported by any documents, and contradicts the instructions he says he received from the Ambassador.[175]

91. As previously submitted, sending questions or seeking access for intelligence officials sends "mixed signals" to the detaining State and was deficient. The Supreme Court of Canada recently confirmed that "it may often be essential that Canadian officials interview citizens being held by violative regimes to provide assistance to them."[176] Instead, Canadian officials, including the Ambassador and Consul Martel, were more interested in arranging and attending meetings between SMI and Canadian intelligence officials.

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[172] See Schedule "A", p. 16
[173] Almalki Draft Narrative, at para. 77
[174] Ibid. at paras. 80-81
[175] Ibid. at paras. 73, 79. Mr. Martel's version of events in relation to what happened after Mr. Almalki's release should be viewed with suspicion. His evidence in Arar, especially in terms of his recounting of what Mr. Arar told him about his torture experience, was not wholly accepted.
[176] *Canada (Justice) v. Khadr*, 2008 SCC 28 (May 23, 2008) at para. 27 (emphasis added).

92. The "special relationship" between the Ambassador and his Consul, on the one hand, and General Khalil and Colonel Saleh, on the other, was described in the Arar Report.[177] Khalil is described by the Syrian Human Rights Committee as being in charge of Military Intelligence, "the most terrifying" of the many security bodies in Syria.[178] Nevertheless, the Ambassador had a good relationship with this man, and testified in Arar that Khalil "could always be relied on to keep his word and would respond quickly to requests for consular access and information."[179] Yet, despite Khalil being disposed to allowing a Canadian official to meet Mr. Almalki in November 2002,[180] the Ambassador did not get access. It is open to the Commissioner to infer from these facts that genuine efforts to seek *consular* access were not being made, and were not been interpreted as such by Khalil. After all, why would Pardy and Pillarella conclude that what Khalil meant was that he would allow intelligence officials to have access?[181] Clearly, the signal being sent to SMI was that Canada was not interested in providing consular services to Mr. Almalki. Such conduct is deficient and created serious risks that Mr. Almalki would be detained indefinitely.

93. That firm steps by the highest members of DFAIT yield results is evidenced by what happened when the Minister became involved in Mr. Arar's case. Had such steps been taken in the spring of 2002, Mr. Almalki may not have spent almost two years in detention.

94. Post-release, consular officials also failed to:

- Expedite passports for Mr. Almalki's family

[177] Arar Report, *Factual Background: Volume 1*, pp. 250-251
[178] http://www.shrc.org/data/aspx/ANNUALREPORT2003.aspx under "Security Bodies"
[179] Arar Report, *Factual Background: Volume 1*, p. 251
[180] Draft Narrative, para. 74
[181] Ibid., para. 75

- Provide Mr. Almalki safe haven when Mr. McTeague specifically instructed him to do so to avoid possible detention
- Direct Mr. Almalki to immediate medical care and assessment
- Accompany him home, as was done with Mr. Nureddin

95. Even when it was clear that Mr. Almalki required assistance, after being acquitted by the State Security Court in Syria, Canadian officials had skewed priorities. Ambassador Davis attempted to dissuade McTeague from coming, while Minister McLellan expressed concern that visits to Syria and statement/actions by McTeague "not undermine Canada's security relationship with key allies."[182]

Deficient Consular Services in relation to Mr. Nureddin – Mixed Messages

96. In the Arar Inquiry, Commissioner O'Connor considered whether the actions of various Canadian officials had the effect of sending mixed messages to the Syrian Military Intelligence about Canada's position in respect of Mr. Arar. In the end, he found that the decision to send questions in respect of Mr. Almalki in January 2003 "had the potential to create an impression in the Syrian's minds of mixed messages from Canada regarding what should happen to Mr. Arar." Commissioner O'Connor was careful to point out that he was unable to determine what effect, if any, the decision to send questions in respect of Mr. Almalki had on Mr. Arar's detention and treatment. Nonetheless, he found that sending the questions increased the risk that the Syrians would not respond to requests from other

[182] Draft Narrative, para. 165. Ambassador Davis' relationship with SMI is also atypical. In June 2005, he was linked to a scandal involving the granting of a "visitor's permit to the pregnant daughter of a notorious Syrian general", so that she could give birth in Canada. In the Globe article describing the incident, Davis is said to be linked socially with the son of the General and the two met at the Embassy at the time the visas were issued. See "Revoke visa to Syrian general's daughter, House immigration committee chair says", Globe and Mail, 25 June 2005.

Canadian officials to release Mr. Arar.[183] In the end, Commissioner O'Connor recommended that the Government of Canada develop a protocol to provide for coordinated responses in cases of Canadians detained abroad in connection with terrorism-related activities with DFAIT taking the lead. Obviously, Commissioner O'Connor's recommendations were not in place when Mr. Nureddin was detained in Syria. Nonetheless, his case provides another example of the risk posed when mixed messages are sent by Canadian officials.

97. According to the draft narrative, CSIS learned that Mr. Nureddin had been detained in Syria on December 19, 2003. It seems that DFAIT learned of his detention on December 18, 2003 from another source. There does not, however, appear to have been a coordinated response on the part of the Canadian government. In fact, the first agency to contact Syrian officials was CSIS who asked "if they had any information pertaining to Mr. Nureddin's arrest and detention." It was not until December 21, 2003 that DFAT sent a diplomatic note requesting consular access to Mr. Nureddin.[184]

98. Further, in early January 2004, CSIS learned that Mr. Nureddin was to be released "immediately." CSIS made inquiries of Syrian Military Intelligence about the reasons for Mr. Nureddin's detention and whether any charges had been laid.[185] These inquiries were made at the same time DFAIT was attempting to secure consular access to Mr. Nureddin.[186] Mr. Nureddin was not released until January 13, 2004.[187]

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[183] *Arar Report, Analysis and Recommendations*, p. 212 - 213
[184] Nureddin Draft Narrative, paras. 27 - 29
[185] Nureddin Draft Narrative, para. 35
[186] Nureddin Draft Narrative, para. 31 - 32
[187] Nureddin Draft Narrative, para. 40

99. Obviously, the Commissioner is not in a position to find with certainty that the mixed signals coming from Canadian officials in fact prolonged Mr. Nureddin's detention or contributed to his mistreatment at the hands of the Syrian Military Intelligence. Nonetheless, the Commissioner is encouraged to find that the failure on the part of Canadian officials to coordinate their response created an unacceptable risk that Mr. Nureddin would be further detained and tortured by the Syrian Military Intelligence.

Deficient Consular Services in relation to Mr. El Maati

100. The Draft Narrative confirms that, on some levels Consular officials attempted to carry out their responsibilities in a timely fashion. However, on other levels the consular assistance was sadly deficient. The officials in the Consular Affairs Bureau (CAB) were responsive to Mr. El Maati's family while he was detained. It is apparent in the Draft Narrative that they maintained ongoing and timely contact with his family[188] and assisted in arranging for family visits[189] when he was permitted to have visitors while detained in Egypt.

101. There were deficiencies, however, in the provision of consular services.

* DFAIT-CAB was advised by DFAIT-ISI of Mr. El Maati's detention on November 13, 2001. Mr. El Maati's aunt made the first family contact on November 16, 2001.[190] While the request to the Syrians for information could have been made more quickly, of greater concern is that the request to the Syrians appears not to have assumed that Mr. El Maati was detained, but was more of a request for information. There was some indication that Mr. El Maati was detained, and even missing the other confirmations of this the diplomatic note could have been stronger from the outset. While Mr. Pardy and Ms. Pastyr-Lupul were not aware of the prior communications with Syria and

[188] El Maati Draft Narrative, paras. 87, 91, 93, 148, 177, 208, 211, 226 and 254
[189] El Maati Draft Narrative, paras. 210, 211 and 238
[190] El Maati Draft Narrative, para. 38 and 40

Egypt by the RCMP about Mr. El Maati being an imminent threat, in light of these prior communications, a mere request for information about Mr. El Maati reasonably could appear to the Syrians to be *pro forma* only.

* It appears that the efforts to locate Mr. El Maati were not robust. It was only after Mr. Pardy pressed Ambassador Pillarella towards the end of December, 2001 to discuss the case with the Syrian MFA that Mr. El Maati's detention was confirmed.[191] This could well have furthered an impression among the Syrians that the efforts taken by Canada on Mr. El Maati's behalf were no more than the minimum required of it. This impression may well have been emphasized by Ambassador Pillarella, who told the RCMP "not to concern itself with Mr. El Maati's case because of his alleged Syrian citizenship",[192] even though Mr. El Maati was not a Syrian citizen. Although CAB was not aware till much later of Mr. El Maati's transfer to Egypt in January, 2002 its further efforts to have consular access to him were weak.
* The efforts to locate Mr. El Maati and to keep in contact with him while he was in Egypt were not particularly robust or consistent. It is not clear when CAB became aware of the January, 2002 transfer but it is apparent that efforts to locate him were first made in May, 2002. Consular visits after the first one in September, 2002, were fairly regular (August, twice in September, November, January, February) but then there was an inexplicable breakdown in the schedule of some seven months with the next visit after February, 2003 not occurring until September, 2003even though the consular official at the post was asked in July, 2003 by Ms. Pastyr-Lupul to make a visit.[193]
* DFAIT - CAB officials were too quick to share information obtained from Mr. El Maati in the consular visits or from his family with ISI, CSIS or the RCMP.[194] This was recognized, with hindsight, by some of these officials.[195]
* The consular officials at the post appeared to be taking on an enforcement role more appropriate for CSIS or the RCMP. It was not appropriate for Mr. Bale or Mr. Chen to continue press Mr. El Maati to meet with Canadian police or security officials. He had indicated when first asked that he would not meet while detained in Egypt, yet, like a broken record, he was pressed to meet almost every time one of them came to visit.
* Consular officials failed to press for Mr. El Maati's outright release when made aware of the release orders from the Egyptian Supreme Court (October 15, 2002; affirmed November 3, 2002; affirmed August 20, 2003). All that was done was sending a diplomatic note to confirm the veracity of the orders.[196] It was not until October, 2003 that they sought a local legal opinion about these orders,[197] although the evidence would indicate that they became aware of each shortly after it was issued. While it is recognized the CAB normally presses for due process, Mr. El Maati's ongoing detention without charge and

[191] El Maati Draft Narrative, paras. 88 - 92
[192] El Maati Draft Narrative, para. 127
[193] El Maati Draft Narrative, para. 255
[194] El Maati Draft Narrative, paras. 178, 212, 215, 218, 220
[195] El Maati Draft Narrative, paras. 179, 192, 218, 221
[196] El Maati Draft Narrative, para. 257
[197] El Maati Draft Narrative, para. 258

the court release orders made it clear that it was inappropriate to request, as was suggested at the end of 2003, that due process be followed.[198] Immediate release ought to have been sought under the circumstances.

* Consular officials lack training in respect of dealing with victims of torture. There was no common practice for seeking to have consular visits alone with the detainee. The consular officials involved in the visits to Mr. El Maati did not ask for private interviews. They may have discovered that he was being subjected to torture, although Mr. El Maati would likely only have told Ms. Wassef who came across as having sympathy with his circumstances. Mr. Bale and Mr. Chen, in pressing for Mr. El Maati to meet with CSIS or the RCMP destroyed any rapport that they could have developed with Mr. El Maati by acting as police agents instead of consular officials.[199]
* CAB officials should have provided Mr. El Maati with an escort for his return to Canada.[200] He had just been released from over two years of detention without charge. He had explained to the consular officials that he was tortured. There was clearly a risk of further detention given his identification as an Islamic extremist. The extraordinary circumstances existed which warranted an escort. The failure to provide an escort, along with the delays in providing him with the necessary documents to travel, give rise to an inference that Consular officials did not want to assist him because they believed he was guilty of something. If they had this impression it was imparted to them by CSIS and the RCMP.

102. Far more serious were the deficiencies in communication among and between Canadian officials which impeded the effective provision of consular assistance.

* There was no briefing at the outset of DFAIT -CAB by DFAIT - ISI, the RCMP or CSIS of about Mr. El Maati's case. Specifically, the RCMP did not tell CAB that just a short time before in late September and early October it had sent three faxes to Syrian authorities identifying Mr. El Maati as an imminent threat to public safety. CSIS and the RCMP did not even advise the CAB that it had received information from its own sources that Mr. El Maati was detained. Had adequate information been passed on, it might have resulted in stronger representations from CAB to Syrian authorities. Mr. El Maati's family, who had no real idea of where he was, thought he might be. Mr. Pardy indicated that a stronger approach would have been taken if it had known that Mr. El Maati was detained.[201] As noted above, the failure to take strong action at the outset with the Syrians could leave the impression that the request was pro forma only. Syria may well have seen it this way as it did not even officially confirm Mr. El Maati's detention until the end of December, 2001.

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[198] El Maati Draft Narrative, para. 265
[199] El Maati Draft Narrative, paras. 180 – 181; 198 - 201
[200] El Maati Draft Narrative, paras. 284, 286
[201] El Maati Draft Narrative, para. 81 - 82

* There were no later briefings as the detention continued. It would have been very helpful if DFAIT-CAB had been advised that Mr. El Maati had 'confessed' and that CSIS had sent off questions to be asked of him by the Syrians and had received answers.[202] This would have triggered on the part of the CAB officials, like Mr. Pardy and Ms. Pastyr-Lupul, a real concern about torture, of which they were already clearly cognizant might be a concern. It might well have nipped in the bud the developing 'wilful blindness' of virtually all the Canadian officials not in the CAB.
* CAB was not consulted by CSIS about sending questions.[203]
* CAB was not advised by CSIS that it had received information in February, 2004 that a foreign agency had advised that it was seeking to have Mr. El Maati detained and questioned if he entered an allied country.[204] This may well have influenced the decision on a consular escort, although given the apparent views of CAB officials that they could not prevent his lawful detention anywhere, it may not have.
* No Canadian officials, not DFAIT -CAB, not CSIS, and not the RCMP made any inquiries in Syria or Egypt to confirm the assertions of torture. While officials had to be sensitive in how this was done, some indication of concern might have allayed the impression given that Canada did not care about Mr. El Maati and did not want him back. While a complaint is made above about police and security agencies not advising CAB about what they were hearing about Mr. El Maati, a complaint can equally be made about CAB's failure to alert those agencies about the dangers of torture of which Ambassador Pillarella, Mr. Pardy and Ms. Pastyr-Lupul were aware.[205]

103. Rather than a concern about Mr. El Maati's well being or about sharing information with appropriate Canadian officials to facilitate effective consular assistance, the RCMP and CSIS were singularly focused on their own agendas - wanting desperately to interview Mr. El Maati and/or have him answer their questions while he was detained in Syria and then Egypt. Their lack of effort to conduct detailed interviews in Canada with counsel present either before or after his detention abroad, make it patently clear that they wished to take advantage of his vulnerable circumstances while in Syria and Egypt. This persistent conduct is

[202] El Maati Draft Narrative, paras. 68 - 74
[203] El Maati Draft Narrative, para. 78
[204] El Maati Draft Narrative, para. 283
[205] El Maati Draft Narrative, paras. 165 – 167; The lack of credibility of assertions by consular officials posted in Egypt and Syria that they were not aware of the poor human rights records of those countries has already been noted in the opening part of these submissions.

completely inconsistent with their professed ignorance of the torture and other forms of cruel, inhuman and degrading treatment perpetrated routinely on detainees in those countries.

D. CANADIAN OFFICIALS CAUSED OR CONTRIBUTED TO THE TORTURE OF MESSRS. ALMALKI, EL MAATI AND NUREDDIN

(i) Messrs. Almalki, El Maati and Nureddin Were Tortured

104. The Commissioner's mandate includes determining whether the three men were tortured. The government argued that the Terms of Reference did not require him to make the determination despite its treaty obligation to investigate claims of torture of its citizens.

105. Despite repeated requests by counsel for the Participants, the government has not stated publicly or on the record its position on whether Messrs. Almalki, El Maati and Nureddin were tortured. Yet, the AG insisted on reserving the right to cross-examine the men on their torture experience, and has seemingly rejected Prof. Toope's clear and unequivocal findings that the men were tortured:

> There are a number of similarities in the cases of Messrs. Arar, Almalki and El Maati. All three are Muslim Canadian men and all were linked in some way with the Project A-O Canada investigation. All three ended up being imprisoned in Syria by the Syrian Military Intelligence (SMI) at its Palestine Branch at a time when they were being investigated by Project A-O Canada. Professor Toope concluded that all three had been interrogated and tortured while in Syria and that the interrogators had been based on information that had originated in Canada.[206]

[206] Arar Report, *Analysis and Recommendations*, p. 269, 276; see also Report of Professor S. Toope, Fact Finder, October 14, 2005 (available at: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/ToopeReport_final.pdf)

Interestingly, Canadian government has not lodged a formal protest to the Syrians and Egyptians over the treatment of its three citizens, although it did so in respect of Mr. Arar.

106. No credible evidence has been presented to Commission Counsel to dispute the men's evidence of torture. The self-serving, ambiguous statement by a CSIS official to the effect that there was information Mr. Almalki was in good health and not being mistreated should be accorded no weight.[207] No official ever interviewed Mr. Almalki while he was in detention to assess his physical or mental state; therefore no neutral third party was in a position to render that kind of assessment.

107. In the result, the Commissioner must make a definitive, unambiguous finding that the three men were subjected to torture, cruel, inhuman and degrading treatment in the course of their detentions.

(ii) Standard of Conduct Where Torture a Serious Possibility

108. Extensive submissions were made in December 2007 and January 2008 regarding the nature of the prohibition against torture (including complicity in torture), the need for officials to conduct risk assessment of torture, the unreliability of diplomatic assurances that torture will not be used, and the duty on the part of officials to investigate and intervene to prevent torture.[208] Those submissions will not be repeated here, but are relied upon in their entirety.

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[207] Draft Narrative, para. 66.
[208] Amnesty International Submissions on Standards, January 25, 2008, pp. 9-37; Human Rights Watch Submissions on Standards, December 18, 2007, pp. 6-16; Mr. Almalki's Submissions on Standards, December 19, 2007, pp. 8-12

109. Commissioner O'Connor also explored in detail the reports and other information available to Canadian agencies regarding Syria's poor human rights record.[209] He found that when Mr. Arar arrived in Syria in October 2002, "Syria had a well-established reputation for committing serious human rights abuses. Canadian officials had easy access to information about Syria's record in the area of human rights."[210]

110. The same information was available to Canadian officials before November 2001, when Mr. El Maati arrived in Syria.[211]

111. Commissioner O'Connor found that Canadian officials should have realized Mr. Arar had likely been tortured after the first consular visit. Among the factors cited by the Commissioner for reaching this conclusion:

- The Syrian human rights record showed abuse of political prisoner during interrogation
- Mr. Arar was a terrorism-related prisoner and, as such, a "political prisoner", and was being held by the SMI at its Palestine Branch, factors that commonly entered into the Syrian pattern of inflicting torture
- Mr. Arar had been held incommunicado for close to two weeks at the beginning of his imprisonment. According to reports on Syria's human rights practices, the reason for holding detainees incommunicado was to conduct interrogations accompanied by torture.
- In August 2002, Canadian officials had been informed that Ahmad El Maati had alleged that he had been tortured while in Syrian custody.
- DFAIT officials were alive to and had raised the prospect of physical abuse in Syrian prisons on a number of occasions before the first consular visit.[212]

[209] Arar Report, *Analysis and Recommendations*, pp. 179-182.
[210] Ibid. at p. 180.
[211] Ibid.

112. Identical facts exist in the cases of Messrs. Almalki, El Maati and Nureddin:

- The Syrian human rights record was replete with examples of the torture of political prisoners, particularly at Military Intelligence Branches.[213]

- All three men were being held because they had been branded "terrorism suspects", and as such were "political prisoners".

- All three men were held incommunicado, to varying degrees. Canadian officials were aware of Mr. El Maati's Syrian detention within a few days of it happening yet never saw him while he was there. Once in Egypt, it was months – from January to August 2002 – before he received a consular visit. If it is true that Canadian officials did not learn of Mr. Almalki's detention until May 31, 2002,[214] then they knew he had been interrogated and held incommunicado for four weeks at that point in time. He remained, in effect, incommunicado because no Canadian official ever saw him *for 22 months*. It appears from the draft narrative that Canadian officials, namely CSIS, first received confirmation that Mr. Nureddin was in Syrian detention in early January 2004.[215] On this basis, he was held incommunicado for more than 3 weeks however he received no consular access during his 33 days of detention.

- Mr. El Maati's description of the torture he had suffered in Syria, communicated to Canadian officials in August 2002, is relevant to the approach officials ought to have taken with Mr. Almalki and Mr. Nureddin.

- DFAIT officials were alive to the danger of torture. Saunders and Gould expressed concern about the possibility of sending questions to Mr. Almalki because they had no way of knowing what interrogation techniques would be employed. Saunders told the RCMP that "Syria had a reputation for being fairly brutal with prisoners."[216] That reputation was not limited, of course, to situations where questions were sent by a foreign agency. Saunders wrote a memo on August 6, 2002 in which he noted that there was a danger Syrians would employ "rougher interrogation techniques" – a statement Gar Pardy understood to mean torture.[217]

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[212] Ibid. at 188-189.
[213] "Numerous reports and recent news confirmed that torture and maltreatment of detainees remain common practice in all detention centres and prisons, particular [sic] Palestine Branch for Military Interrogation." See "Torture and Abuse: Oppressive Methods to Punish Dissidents", available online at http://www.shrc.org/data/aspx/ANNUALREPORT 2003.aspx. See also authorities cited in Amnesty International's Submissions (January 25, 2008) at pp. 27-29.
[214] Almalki Draft Narrative, para. 29 ff.
[215] Nureddin Draft Narrative, para. 27 - 36
[216] Ibid., para. 88
[217] Ibid., para. 91

113. Messrs. Almalki, El Maati and Nureddin describe both physical and psychological torture. The fact that they were not subjected to physical beating during every interrogation session is not relevant. For example, that Mr. Almalki was not physically tortured during the January 16, 2003 interrogation session (when the questions sent by Canadian officials were put to him) does not absolve Canadian officials of wrongdoing. Although Mr. Almalki was not beaten on that day, his interrogator would leave the room periodically and go to adjacent rooms to interrogate and torture other prisoners. Mr. Almalki could hear the screams of the prisoners being tortured, and the sound of slaps and the cable hitting their flesh. Similarly, Mr. Nureddin describes how he was constantly threatened with increasingly sever torture if he did not come up with new information. This, too, constitutes torture.[218] According to the Istanbul Protocol, torture need not leave any visible scars or marks.[219]

114. Moreover, the facts known to Canadian officials both about the length and nature of Mr. Almalki's detention, where he was detained, the communication of the results of his interrogations to Pillarella and others, and the publicly known information about Syria's treatment of prisoners, all should have put the high probability of torture at the forefront of

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[218] CAT clearly states that torture includes both physical and psychological torture. The Istanbul Protocol includes a definition of torture followed by an explanation that torture need not leave physical scars, that threatening one's family, conditions of detention, etc. can all constitute torture and ill-treatment. The Protocol was developed by the leading experts and organizations working on torture prevention and with torture survivors. The *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1999, Physicians for Human Rights* (available online at http://physiciansforhumanrights.org/library/istanbul-protocol.html)

[219] *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1999, Physicians for Human Rights*; see also: H. Keyes, "The worst scars are in the mind: psychological torture", *International Review of the Red Cross*, Vol. 89, No. 867 (Sept. 2007) 591 at 600

their approach to the case. Instead, for some officials the risk of torture was, incredibly, 'not even on the radar screen'.[220]

115. Willful blindness to a material or real risk of torture can amount to complicity in torture.[221] The Committee Against Torture in its first General Comment noted that the risk does not have to meet the test of being "highly probable". Rather, Canadian officials should not engage in activity where there are substantial grounds for believing that as a result of their actions, an individual would be in danger of being torture or cruel, inhuman and degrading treatment.[222]

116. Sharing inaccurate, irrelevant, inflammatory and misleading information about the three men with American agencies in 2001-2004, without caveats, created material and unacceptable risks of indefinite detention. Sharing the same information with Syrian authorities in this time period also created material and unacceptable risks of indefinite detention. The Americans had signaled as early as September 23, 2001 an intent to have terrorist suspects or their associates detained for questioning. Canadian information caused Mr. Arar to be subjected to U.S. rendition leading ot his detention in Syria. Canadian information caused Messrs. Almalki, El Maati and Nureddin to be detained in Syria and for Mr. El Maati also in Syria – these were each cases of opportunistic rendition. With detention in Syria and Egypt comes the serious possibility of torture. This, too, was foreseeable, if not expected.

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[220] Almalki Draft Narrative, paras. 56, 122
[221] Testimony of Peter Burns, Arar Commission, Transcripts, pp. 5889-5892.
[222] Committee Against Torture, "General Comment No. 1," 21 November 1997, A/53/44.

117. Canadian officials cannot claim a lack of knowledge of human rights abuses perpetrated by officials, particularly military intelligence officials, in Egypt and Syria. If this were an ancient era, when communication was limited or severely delayed this claim might be given weight. However, in a world, reduced in size through instant communications, officials cannot be absolved by remaining willfully blind to torture. The Federal Court recently condemned a similar form of wilful blindness on the part of Canadian officials in relation to Egypt and this Commission ought to do the same.[223]

CONCLUSION

118. On the basis of the foregoing submissions, it is respectfully requested that the Commissioner find as follows:

- Messrs. Almalki, El Maati and Nureddin were subjected to torture and other cruel, degrading and dehumanizing treatment while detained in Syria and/or Egypt;

- Despite extensive investigative efforts by RCMP and CSIS, Messrs. Almalki, El Maati and Nureddin have never been charged with any offence and are, therefore, presumed innocent;

[223] Mahjoub v M.C.I., [2006] F.C.J. Noo. 1862, at para. 90-97

- There is no evidence to indicate that Messrs. Almalki, El Maati or Nureddin committed any offence or that their activities constitute (or ever constituted) a threat to national security;

- The labels attached to Messrs Almalki, El Maati and Nureddin by Canadian officials were grossly inaccurate, unfair, misleading, and inflammatory and thereby created a serious risk that they would be detained, interrogated and tortured abroad;

- Canadian officials shared misleading, inaccurate and incomplete information with "foreign agencies" about Messrs. Almalki, El Maati and Nureddin which created a serious risk that they would be detained, interrogated and tortured abroad;

- The actions of Canadian consular officials were deficient and led to the prolonged detention and mistreatment of Messrs Almalki, El Maati and Nureddin in Syria and/or Egypt; and

- Mixed messages sent to the Syrian officials in respect of Messrs. Almalki, El Maati and Nureddin likely resulted in his further detention and mistreatment.

119. These submissions were prepared without any foreknowledge of the government's position on any of the legal or factual issues addressed. The Participants reserve the right to make further and different submissions in reply to the government submissions.

All of which is respectfully submitted this 20th day of June, 2008.

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