Ruling on Process and Procedural Issues

I held a public hearing on May 3, 2005 to address a number of process and procedural issues. The Notice of Hearing raised four issues. One other issue was raised by the intervenors during the course of the hearing. This is my ruling on four of the issues.

1. Mr. Arar's Testimony

The Notice of Hearing asked for submissions on what parts, if any, of Mr. Arar's potential testimony are essential to fulfilling my mandate, when his testimony should be heard and, importantly, how to minimize any potential unfairness to Mr. Arar arising from the fact that he does not have access to many documents and much of the *in camera* evidence relating to matters about which he would testify.

My mandate requires me to investigate and report on the actions of Canadian officials in relation to Mr. Arar, including with regard to:

- the detention of Mr. Arar in the United States;
- the deportation of Mr. Arar to Syria via Jordan;
- the imprisonment and treatment of Mr. Arar in Syria;
- the return of Mr. Arar to Canada; and
- any other circumstance directly related to Mr. Arar that I consider relevant to fulfilling this mandate.

The mandate does not direct me to investigate Mr. Arar. There are no allegations of wrongdoing made against Mr. Arar. That said, Mr. Arar is obviously a central figure in the events that I am directed to investigate and, absent problems related to fairness to Mr. Arar, there would be no question that he should testify and testify fully about events within his knowledge and relevant to the mandate.

Mr. Arar, through his counsel, submits that he should not be compelled to testify at this time and that the decision on whether he should testify should be deferred until the release of the interim report that has been discussed in a previous ruling. I agree with this submission. For reasons of minimizing the potential for unfairness to Mr. Arar, I think it prudent to delay the decision about Mr. Arar testifying until that time. I emphasize that this is not a decision that Mr. Arar will not testify nor that he will not be cross-examined at some point. This is a decision only to defer a ruling in that regard until a later point in time.

That said, I also wish to emphasize that Mr. Arar wants to testify. I have no doubt that this is a genuine wish. Indeed, were it not for the fairness concerns discussed here, Mr. Arar would insist on testifying as soon as possible. However, in the unusual circumstances of this Inquiry, I am satisfied that the fairness concerns inherent in the process justify his counsel's concerns.

The fairness concerns arise from two points. First, Mr. Arar has a strong reputational interest that may be affected by what happens at this Inquiry. Although Mr. Arar's actions are not the focus of the mandate, it would be naïve to suggest that his reputation is not, at least in the public's mind, an issue in this Inquiry. By that I mean, given the publicity that has surrounded the Inquiry, many in the public understandably question whether Mr. Arar is connected to terrorist activities or not. Rightly or wrongly, many in the public consider this to be one of the central issues for this Inquiry. Mr. Arar has a significant interest in this issue. I cannot ignore this reality in determining the issue of fairness as it relates to Mr. Arar.

Although Mr. Arar has not received a notice under section 13 of the *Inquiries Act*, there being no allegations of wrongdoing against him, I am satisfied that because of his reputational interest, he has a considerable stake in the way the proceedings are conducted and, likely, in the report as well. As a result, I am satisfied that I should

consider the issue of fairness to Mr. Arar should he testify. He is in a different position than most other witnesses, who give evidence about their knowledge of events, but do not bring to the witness stand the significant reputational interests that are present in the case of Mr. Arar. That said, I am not suggesting that Mr. Arar has anything to hide or that he has done anything wrong.

The second factor that relates to fairness for Mr. Arar arises from the unusual nature of this Inquiry. Because of National Security Confidentiality (NSC) claims, it is not possible to provide Mr. Arar with access to many of the documents and much of the *in camera* evidence relating to matters about which he could testify. Should he testify now, he would be unable to comment on those documents and that evidence.

As a matter of course, witnesses at this Inquiry have been given disclosure of and access to documents and evidence of other witnesses relating to matters about which they will testify. In this Inquiry, most of the government witnesses have had, or will have, this type of disclosure and access prior to testifying. This is possible because they have the appropriate security clearances. Mr. Arar does not. It is fair that witnesses, particularly those with a personal interest at stake in the outcome of a proceeding, be accorded as much access as possible to the information that may affect their interest before they testify. Further, if information is introduced into evidence after they testify that affects their interest they should be given an opportunity to respond to it.

Parties who have an interest in the outcome of legal proceedings generally are entitled to a broad range of discovery or disclosure about the matters in issue. Procedural fairness, in general terms at least, requires that parties (those who will be affected by the outcome) have access to information that may affect their interests so that they can adequately respond if necessary.

David J. Mullan, in his text *Administrative Law* (Irwin Law: Toronto, 2001) refers, at page 165, to the paradigmatic situation for the implication of procedural fairness as

being that described by Le Dain J. in *Cardinal v. Director of Kent Institution* [1985] 2 S.C.R. 643. At paragraph 14, Le Dain J. states that "as a general common law principle, a duty of procedural fairness [lies] in every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual." In my view, Mr. Arar's interests in this Inquiry come within this principle. Mr. Arar's situation is quite unique because of the enormous publicity about his circumstances and the questions in the public mind about what involvement, if any, he has had with terrorist activities. His reputational interests could be seriously affected by testifying in public and possibly also by my report.

In terms of the content of the duty of procedural fairness, I am satisfied that Mr. Arar should be provided with as much disclosure of information relevant to his proposed testimony as possible. At that time, a decision can be made whether he should testify or not. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Justice L'Heureux-Dubé listed several factors to consider in determining the content of procedural fairness. These include the nature of the decision being made, the precise statutory context (the absence of an appeal or an inability to otherwise seek reconsideration), the significance of the decision to those affected, and the legitimate expectations of a certain procedure. L'Heureux-Dubé also suggests in *Baker* that one should accord a certain degree of respect to the procedural choices of the administrative decision-maker: *Baker, supra* at paragraphs. 23-28.

I recognize that this Inquiry is not a civil or criminal proceeding and that Mr. Arar is not directly the focus of the mandate. However, as I said above, the reality is that his reputational interest could be significantly affected, positively or otherwise, both by the evidence called at the public hearings and possibly by my report.

With that in mind, I accept Ms. Edwardh's submission that the decision whether to call Mr. Arar as a witness should be deferred until there has been made available to him the

maximum amount of information relating to the matters about which he could testify. That situation will likely occur following the release of the interim report.

Delaying the decision about whether Mr. Arar should testify will not adversely affect the progress for this Inquiry, as I presently envision it. Mr. Arar's testimony, if and when I hear it, will have little to do with a large portion of my mandate. My mandate is to investigate and report on the actions of Canadian officials that relate to Mr. Arar. However, Mr. Arar has no direct knowledge about most of those actions. He was not involved and his testimony would add little, if anything, to my deliberations. Thus, deferring Mr. Arar's testimony as I discuss above should not adversely affect the progress of this Inquiry.

That said, there is one area about which Mr. Arar could provide information that, while not affecting Canadian officials, is nevertheless important for me to receive at this stage of the Inquiry. Here I refer to his treatment in Jordan and Syria. Ms. Edwardh submits, on behalf of Mr. Arar, and I agree, that were I to proceed even to the point of issuing an interim report without receiving information about Mr. Arar's treatment in Jordan and Syria directly from Mr. Arar, I would be leaving out important, even essential, background information. The reason this Inquiry was called was because of Mr. Arar's allegations of mistreatment. People are shocked and want to know if Canadian officials were in any way involved in what happened. Because Mr. Arar's allegations of mistreatment triggered this Inquiry, I think it is important that, at this stage, I receive information about Mr. Arar's treatment in Jordan and Syria and also about the effects of that treatment on him and his family.

No one, including the government, disagrees. The question then is how to receive that information. Importantly, in essence, the information that I am considering receiving at this stage does not involve allegations against Canadian officials. I realize that it may well be critical of Jordanian and Syrian officials. However, I invited Jordan and Syria to participate in this Inquiry and they declined. In these circumstances, I do not consider

the fact that the information sought may reflect unfavourably on Jordanian and Syrian officials is a reason not to receive it.

During the hearing, two options for receiving this information were discussed. First, Ms. Edwardh proposed that I appoint an independent fact finder to investigate Mr. Arar's treatment and its effect on him and his family and to report his or her findings to me. By analogy, Ms. Edwardh pointed to the practice of the United Nations Human Rights Commission using fact finders for collecting evidence of torture and other potential human rights violations.

The government, on the other hand, submitted that I need not appoint a fact finder because I am a fact finder and that I could do the same investigation as the fact finder, myself. Very fairly, the government took the position that so long as the information that Mr. Arar provides does not make allegations against Canadian officials, there would be no need for cross-examination. Indeed, the government accepted that the information may or may not be received under oath and that some of it might be heard in private because of the privacy interests of Mr. Arar and his family.

I would be amenable to adopting either model. From an evidentiary standpoint, the two proposals are similar. Both would provide a mechanism for me to receive the information without the legal requirements attendant on receiving evidence pursuant to the normal evidentiary model. Both avoid the potential procedural unfairness to Mr. Arar about which I spoke above. And both are able to protect the privacy interests of Mr. Arar and his family. In neither case would I receive information that constitutes an allegation against Canadian officials. Because of the lack of opportunity for officials who might be criticized to cross-examine Mr. Arar, it would be unfair to do so.

Mr. Arar prefers the fact finder approach and I am prepared to accede to that wish. As Ms. Edwardh fairly points out, the fact finder process will likely be more sensitive to the privacy and personal concerns of Mr. Arar and his family. One of the areas to be

covered is a description of the effect of Mr. Arar's treatment in Jordan and Syria on his family relations and his health. As the government noted, Mr. Arar is a victim. Evidentiary processes are often customized to protect victims. The use of a victim impact statement in criminal sentencing proceedings is one example. The United Nations Human Rights process is another. The fact finder will likely be able to explore these very private areas in Mr. Arar's case in a more sensitive manner than would be the case if the various individuals necessary to tell this story appeared before me.

I wish to repeat that using a fact finder is not designed to shield Mr. Arar from a cross-examination that he would otherwise face. The information he provides will be limited solely to his treatment in Jordan and Syria and the impact on him. As I said, none of the parties wish to cross-examine him on these matters.

Thus, I will appoint a fact finder. The mandate of the fact finder will be to investigate and report to me on Mr. Arar's treatment during his detention in Jordan and Syria and the effect of that on him and his family. I will ask my counsel to consult with Mr. Arar's counsel about suggestions for a suitable person to conduct the fact finding investigation. Given the nature of that mandate, I do not consider it necessary that the fact finder examine any documents over which the government claims NSC except, if the government agrees, the government's annual review of the legal, political and penal situation in Syria. The fact finder will have access to the public testimony about Mr. Arar's interactions with Canadian consular officials. The fact finder should interview Mr. Arar and others he or she considers necessary to fulfill the mandate. The fact finder may also wish to review publicly available information about detention and imprisonment conditions in Jordan and Syria and any other information that may be helpful to fulfilling the mandate.

The fact finder's report will be delivered to me and will be made available to the parties prior to its disclosure to the public. I will receive submissions from the parties and

intervenors, if they deem necessary, about any portions of the report that should not form part of the record of this Inquiry or should not be disclosed publicly.

I think that the fact finder approach to this delicate issue is a creative solution. I thank all counsel for their submissions in regard to minimizing the unfairness to Mr. Arar inherent in the process of this unique public inquiry.

2. The RCMP Testimony

Mr. Bayne, on behalf of members of Project AO Canada, submits that this Inquiry should not hear evidence from members of Project AO Canada in public. The government takes this submission one step further and submits that no RCMP evidence should be called in public. I will deal with their submissions in a separate ruling to be released shortly.

3. Conduct of Public Hearings

The issue is how the Inquiry should receive and address the government's objections to the introduction of evidence in the public hearings because of its NSC claims. The comments that follow relate to all of the public evidence other than the evidence of RCMP officers, should I rule that they be called. If necessary, in the ruling on RCMP testimony, I may address what limitations, if any, there would be on the matters about which RCMP officers will be required to testify.

As to the manner in which the government would raise its objections, there are two approaches put forward. The first, the government's preference, would have me rule in advance that questions not be asked in specified areas because of the government's NSC claims. Under the second, a more traditional approach, the government would

raise its objections during the hearing when questions were asked that it considered required an answer based on confidential information.

I prefer the second approach. Although the advance ruling approach may be intended to simplify the proceedings and to save time, I think it would probably have the opposite effect. It would be necessary first to agree upon the excluded areas and then to work out precise language that would cover all questions. The danger of casting the exclusionary net too broadly is significant. Moreover, experience in this Inquiry indicates that the government would take a broader view of what needs to be excluded because of NSC than I would. Finally, even if I did direct areas for exclusion, I can envision arguments from both sides about whether certain questions came within or fell outside the exclusionary direction. I do not think that the advance ruling approach will work very well.

As to the more traditional approach that requires an objecting party to raise an objection when a question is asked, I recognize that this could involve some exchanges where there are repeated objections. However, I expect that once it is clear that there will be objections to a certain line of questions, the line of questions may be dealt with by summarizing the line of questions rather than by asking each question individually. I will control the process so that the questions a party wishes to ask are recorded and, hopefully, so that there is not undue delay or waste of time.

The process will be as follows. When there is an objection to a question on NSC grounds, the question will be noted but not answered. I do not propose to rule on the validity of the government's objections to questions on the basis of NSC during the public hearings. To do so would likely raise all of the problems that led me to conclude that the summary process was unworkable. Instead, in my report, I will summarize at least in general terms the questions that were objected to.

Furthermore, if the questions have already been answered *in camera*, Commission counsel or I will indicate that this is the case. In some instances, it may be necessary to review the transcripts to be certain. If questions have not been asked *in camera*, and if the questions are relevant, Commission counsel will ask those questions at future *in camera* hearings. Thus, when the government objects to answering questions because of NSC concerns, assuming the questions are relevant, an assurance will be given that the questions either have been or will be asked *in camera*. I will include in my report the information received when the questions were answered *in camera*.

Having said all of the above, I encourage all counsel to approach this issue cooperatively. If Mr. Arar's counsel has questions to which they know the government will object, it will not be necessary to ask all of those questions. Rather, after discussions with Commission counsel, they could indicate on the record the nature of the questions and their wish to ensure those questions are asked *in camera*. Similarly, I would ask government counsel to not raise objections that are overly broad and to ensure that there is made available to the public as much information as possible during the public hearings. The fact that objections will result in answers not being given publicly should be an impetus to use the objection procedure only when necessary. It should never be used solely to shield potentially embarrassing evidence.

All told, I am satisfied that the above procedure will satisfy the obligation in the Terms of Reference to prevent disclosure of information that in my opinion would be injurious to international relations, national defence or national security.

4. The Role of *Amicus Curiae*

The Notice of Hearing for May 3rd, 2005 invited submissions on the role of the *amicus curiae*. Mr. Atkey, the *amicus*, and Mr. Gordon Cameron, who assists him, both attended the hearing. Mr. Atkey filed written submissions and made oral submissions. I

want to thank Mr. Atkey and Mr. Cameron for the work they have done to date and for their thoughtful submissions.

On page 7 of their written submissions, Mr. Atkey and Mr. Cameron set out their views on the role of the *amicus* for the balance of the Inquiry. They make seven points. They are as follows:

1. *Amicus curiae* will continue to familiarize itself with the transcripts of oral testimony and exhibits filed in *in camera* proceedings held during the months of September 2004 – April 2005 and will attend public hearings in May and June, 2005 so as to be in a position to test government claims to national security confidentiality and to participate in *in camera* proceedings that occur as a result.

2. *Amicus curiae* will prepare a written brief on August 19, 2005 containing submissions on the legal basis for national security confidentiality claims in practice and as set forth in the jurisprudence, and will also comment generally on the evidence adduced from witnesses representing CSIS, the RCMP, DFAIT and other Canadian agencies in relation to Maher Arar. However, *amicus curiae* in its written brief and oral submissions to follow will not make reference to specific pieces of evidence until it is determined later in the proceedings which evidence Commission counsel will be relying upon in his response to various submissions-in-chief, suggesting alternative findings or conclusions that are available to the Commissioner.

3. Until such time as the Commissioner makes findings of fact and conclusion in his interim report, all *amicus curiae* submissions related to evidence for which national security confidentiality is claimed should be received *in camera*.

4. *Amicus curiae* shall have an opportunity to file a written reply brief by August 26, 2005 commenting on various submissions-in-chief as may relate to issues of national security confidentiality.

5. In submitting any interim report to the government with findings of fact and conclusions, the Commissioner will consider the submissions of *amicus curiae* in expressing his opinion as to which parts of the interim report shall be disclosed to the public.

6. If there is a disagreement in relation to what parts of the interim report may be disclosed to the public, an NSC hearing will be conducted in accordance with Order-in-council P-C 2004-48 with full standing given to the *amicus curiae*.

7. Upon public disclosure of the interim report, if there are further witnesses to testify, *amicus curiae* will continue to participate in the proceedings and reserves the right to make submissions to the Commissioner respecting claims to national security confidentiality.

I agree with their submissions and would for clarity add the following comments.

I note that in paragraph 1 the *amicus* indicates that he will attend public hearings (for simplicity I will use the singular, however, in doing so I intend to refer to either Mr. Atkey or Mr. Cameron, or both). Currently it is expected that there will be some *in camera* hearings in late July and in early August. The *amicus* is welcome to attend those hearings as he sees fit having regard to his mandate.

A suggestion was made that the *amicus* not only deal with NSC issues, but that the *amicus* should also make submissions on the substance of the findings I will make in my report. The *amicus* has not suggested this role and I do not think it essential. Unlike many other types of proceedings, I have had the benefit of Commission counsel, whose

task has been to present all the evidence and to assist me as Commissioner in getting to the bottom of what occurred. That said, I would welcome any assistance or submissions the *amicus* sees fit to give in this regard, but I stop short of directing that the *amicus* must do so. It occurs to me, however, that if the *amicus*, as a result of his involvement, feels that there are useful submissions that he can make on some aspects of my mandate, he should feel free to do so. I would welcome such submissions.

Finally, as has been the practice throughout, all submissions received from the *amicus* will be disclosed to the government, and the government will be given an opportunity to reply.

5. Testimony of Messrs. El Maati, Almalki and Nurredin

This issue was not raised in the Notice of Hearing. In their written and oral submissions, the intervenors submitted that if I were to appoint a fact finder, as suggested by Mr. Arar's counsel, I should direct the fact finder to bring evidence from the above-named individuals, each of whom was detained in Syria in or about the same time as Mr. Arar. (They referred to the fact finder as a Rapporteur.)

The submissions of the intervenors suggest that the evidence of these three individuals could be of assistance to me in two ways. First, as all three were imprisoned in Syria, and all have alleged being tortured there, they would be able to provide evidence that will assist in understanding Mr. Arar's experience in Syria. Their evidence of mistreatment and torture would be helpful in evaluating Mr. Arar's evidence in this regard. Second, the intervenors suggest that the circumstances under which these individuals ended up in Syrian detention raise troubling questions about whether Canadian officials were complicit in their detention. The evidence of what happened to them could possibly show a pattern of misconduct by Canadian officials. If so, that pattern could shed light on what happened to Mr. Arar and could also help me in the Policy Review part of my mandate.

I will deal with Mr. Ahmed El Maati first. Through his counsel, he has indicated that he will not cooperate with this Inquiry. Mr. El Maati alleges that he was tortured in Syria. I do not intend, nor have I been asked, to compel anyone who alleges torture to give evidence or otherwise become involved in this Inquiry. Thus, I will not direct the fact finder to include Mr. El Maati in his investigation.

Mr. Abdullah Almalki is represented by counsel who has indicated to Commission counsel that his client would be prepared to cooperate with a fact finder, but I am told that he does not wish to give evidence, in the traditional manner, at this Inquiry.

As I said above, the intervenors seek to elicit information from these witnesses about two subjects: mistreatment in Syria and complicity of Canadian officials in their removal to Syria. In my view only the first subject - mistreatment in Syria - would be appropriate for investigation by a fact finder. I say this for the same reasons that I directed that, in regard to Mr. Arar, the fact finder should not look into any allegations of misconduct against Canadian officials. Information of that nature would have to be introduced through evidence at the Inquiry and be subject to cross-examination. It would be unfair to receive information for evidentiary purposes, alleging wrongdoing without giving those who are subject to the allegation an opportunity to directly challenge the evidence by way of cross-examination.

I do not know if what Mr. Almalki has to say about his detention in Syria will be helpful to me in assessing what happened to Mr. Arar. In any event, I do not see that there is prejudice to any Canadian official or institution if I direct the fact finder to interview Mr. Almalki and to report on matters relating to his treatment in Syria. The prejudice, if any, would be to Syrian officials. As I said above, Syrian officials were invited to participate in this Inquiry, but declined the invitation.

Further, I do not think that obtaining this information by way of the fact finder unduly expands my mandate. The fact finder process should not delay the progress of the Inquiry. Finally, when the fact finder report is received, it will be provided to the parties and, if necessary, submissions can be made about the use, if any, to be made of it.

Mr. Muayyed Nurredin was also detained in Syria and he alleges torture. For the same reasons that apply to Mr. Almalki, I will direct the fact finder to interview Mr. Nurredin and to report to me on his treatment. His lawyer also takes the position that he should not testify at the Inquiry.

I note that the reasons that Messrs. Almalki and Nurredin do not want to testify arise from concerns (similar to those that I discussed in relation to Mr. Arar) about lack of disclosure of information relating to those matters about which they could testify. The result is that I will direct the fact finder to interview Mr. Almalki and Mr. Nurredin about their treatment in Syria. I think that information is sufficiently related to the terms of my mandate to warrant gathering the information in this fashion, reserving a decision on its use until after the receipt of the fact finder report.

It is worth noting that the Commission has heard some *in camera* evidence about the circumstances of these three individuals that may be useful to my mandate. Because of NSC claims, I cannot disclose that evidence at this time. I will be hearing submissions *in camera* about what use, if any, I may make of the evidence relating to individuals other than Mr. Arar who were detained in Syria. In making these comments, however, I am not suggesting that I have conducted a full investigation into the cases of Messrs. El Maati, Almalki and Nurredin. To do so would be beyond my mandate and would add considerable time to the issuance of any report.

Finally, I have heard the submissions of the intervenors that complicity evidence would assist me in the Policy Review. If there were such evidence it would reveal the type of problem that a review process would need to address. However, it is important to bear

in mind that a new review process, if one is to be recommended, would have jurisdiction to address the types of problems that may occur in security intelligence activities generally. It would not be designed in response to a single problem or set of problems that may emerge for one or a few investigations. Clearly one of the types of problems that could be reviewed would be abuses of human rights that could take place in a variety of ways, including interactions with foreign governments. During the Policy Review, we have conducted research about the types of problems that may occur in security-related activities and the types of review mechanisms that are best suited to deal with them. I will consider this information in formulating my recommendations.

May 9, 2005

"Dennis O'Connor"

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Commissioner Dennis O'Connor