RULING ON RCMP TESTIMONY

a) Overview

It is accepted that the RCMP, and particularly Project AO Canada, played a central role in the events giving rise to my mandate. The Inquiry has received virtually all of the relevant RCMP evidence *in camera*. Because of national security confidentiality (NSC) claims, some of the evidence cannot be disclosed in the public hearings.

Mr. Bayne, counsel on behalf of some members of AO Canada, and the government argue that because the evidence of RCMP officers that can be given in public will not be complete, individual officers and the RCMP itself could be unfairly prejudiced. The public, it is said, will only hear "half truths" and parts of the story, thus giving an incomplete and inaccurate picture of what occurred. RCMP witnesses will not be able to answer some questions because their answers would involve referring to information over which the government claims NSC. Moreover, Mr. Bayne and the government argue that RCMP witnesses will not be able to provide the proper context for all the RCMP evidence because of NSC claims. They also submit that if the RCMP evidence is called in public there is a concern that the public will be misled and draw unfair conclusions about the role of RCMP officers and the RCMP because they will not have heard the full story or seen the complete picture. The public should await my report and whatever disclosure of that report eventually takes place.

Mr. Bayne and the government therefore ask me to make what would in effect be a blanket ruling at this stage that no RCMP witness be called in the public portion of this Inquiry. They contend that I should make this blanket ruling without even attempting the public process to determine what problems may in fact arise.

I asked Mr. Bayne for specific examples of the problems he envisions. He said that he was unable to comment publicly. I convened an *in camera* hearing on Thursday, May 5, 2005 and have now heard those submissions. Because of the government's NSC claims, I can only comment in a general way on those submissions in this ruling.

I do not accept the submission that the Commission should not call any RCMP witnesses in the public hearings of this Inquiry. The government chose to call a public inquiry, not a private investigation. Implicit in the Terms of Reference is a direction that I maximize the disclosure of information to the public, not just in my report, but during the course of the hearings. The reason for that direction is consistent with what are now broadly accepted as two of the main purposes of public inquiries: to hear the evidence relating to the events in public so that the public can be informed directly about those events, and to provide those who are affected by the events an opportunity to participate in the inquiry process.

It has often been said that this is not a normal public inquiry, where it is possible to hear virtually all of the evidence in public. On the contrary, because of the NSC claims, only part of the evidence can be heard in public, only part of the story can be told. That is the reality. However, that reality does not mean that I should readily abandon the concept of public hearings for all or even part of the evidence that is not subject to NSC claims. I think it behooves me as Commissioner in a public inquiry to take reasonable steps to attempt to maximize, during the hearing stage of the Inquiry, the disclosure of information to the public. In addition, I should try to maximize, to the extent possible, the participation of the parties in the hearing process, particularly Mr. Arar.

That said, I readily accept that the public hearing process should be conducted in a way that avoids unfairness to individuals or institutions and also avoids

misleading the public about what in fact occurred. What I do not accept, at this point, is that RCMP evidence cannot be called in such a way as to avoid both of these unacceptable results.

Although some of the RCMP evidence cannot be disclosed publicly, much can and already has been. Commission counsel has prepared a timeline of events concerning RCMP witnesses and containing information over which the government does not claim NSC. This timeline is based entirely on information that is now in the public domain, which includes information in documents released by this Inquiry, information in reports of the Security Intelligence Review Committee and the Commission for Public Complaints against the RCMP and public statements by government officials. In this ruling, I refer in summary form to some of the types of information from that timeline that would form part of the examination of RCMP witnesses.

b) Advantages of Public RCMP Testimony

In my view, there are four advantages to having the RCMP evidence that can be heard publicly introduced in the public hearings of this Inquiry.

First, the information that is not subject to an NSC claim would provide an interesting and informative description about the way the RCMP at the relevant times was coping with national security investigations in the aftermath of 9/11. In particular, that evidence would provide a description about the way one investigation, Project AO Canada, was conducted. There would be evidence about the creation of Project AO Canada, its composition, the reporting structure under which it operated, its relationship with other sections of the RCMP and the way, in general terms at least, that it carried out a national security investigation. For example, the evidence, as I envision it, would describe how the RCMP worked in an integrated fashion with other domestic agencies, including CSIS,

the Ontario Provincial Police, and the Ottawa Police Service. It would also describe how Project AO Canada worked cooperatively with American agencies – a cooperative approach that is an important reality in the post 9/11 national security landscape. The evidence would describe, in general terms at least, the type of information that was provided to the American agencies, the importance of information sharing among agencies, and the policies of the RCMP that applied to those activities. There would also be evidence about what role the RCMP played in the Canadian efforts to have Mr. Arar returned from Syria.

While clearly some of the steps that were taken in the Project AO Canada investigation cannot be disclosed publicly, and many of the details or specifics of the investigation also cannot be disclosed, a good deal already has been. I believe that some of this information should be introduced into the public record of this Inquiry.

Thus, I am satisfied that the information that can be introduced in the public hearings would provide a useful and informative story for the public. Further, it would synthesize information already in the public domain in a more coherent and understandable fashion than is now the case. That in itself is a worthwhile exercise.

I do not accept the argument that because the description will not be complete it will necessarily be misleading. The public need not be misled into believing that they are hearing the entire story. I will make it clear at the outset that there are constraints on what evidence may be called, and I will repeat that explanation periodically as the Inquiry proceeds. I am confident that with clear instructions from me the public will be able to fully appreciate that there are areas of information, even some important ones, that can only be canvassed *in camera*.

The second advantage of calling RCMP evidence in public is to give the parties, particularly Mr. Arar, an opportunity to ask questions about this information. It is worth remembering that Mr. Arar was granted standing for a reason. Clearly, he has an interest in this Inquiry. He has been excluded from all of the *in camera* evidence. Although Mr. Arar's counsel have had an opportunity to suggest questions to Commission counsel to be asked *in camera*, the value of this opportunity is somewhat diluted because Mr. Arar's counsel have not heard any evidence before proposing questions. In my view, the opportunity to hear the evidence, as I envision it, and to pose questions directly, adds significant value to Mr. Arar's participation as a party in this Inquiry. Maximizing the participation of parties is a legitimate objective when considering what evidence should be called in the public hearings. Indeed, giving the opportunity to Mr. Arar and other parties to question the RCMP witnesses directly, from these parties' unique perspectives, maximizes the chance of a fuller picture emerging from this Inquiry.

The third advantage of calling RCMP evidence publicly relates to the Policy Review. The government joined the Factual Inquiry and the Policy Review in one mandate and appointed a single commissioner for both. The public has been invited to participate in the policy review process. The information that I envision being led through RCMP evidence will be helpful to those making submissions for the Policy Review. The descriptive type of information to which I referred above will provide a useful examination of a national security investigation and its place within the RCMP organization. This description will benefit those in the public who are participating in the policy review process.

As an aside, I note that I have been asked by some intervenors to defer receiving public submissions in the policy review process until after publication of my findings in the Factual Inquiry. To date, I have not accepted this suggestion. I am of the view that the decision whether a new review mechanism is required,

and, if so, what form it should take, should not be greatly influenced by what may or may not have gone wrong in a single investigation. More relevant to the Policy Review, in my view, is the type of evidence that I envision can be led from RCMP witnesses describing the RCMP organization for national security activities, the AO Canada investigation, and its relationship with other agencies, even if that description may have to be given in general terms in some areas. Thus, I think that the public RCMP evidence will be of assistance to the Policy Review part of my mandate.

The final advantage of calling RCMP evidence in public has to do with the credibility of this Inquiry. The RCMP played a central role in the events that gave rise to the Inquiry. If possible, this being a public inquiry, the public should hear evidence about the RCMP's involvement. It has been suggested that the public can wait for the publication of my report to be informed about the RCMP investigation activities, to the extent that this information can be made public at that time. The difficulty with this suggestion is that it ignores the fact that public inquiries are intended to be conducted in public and there is an advantage in doing so. This advantage was discussed by Justice Cory in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),* [1995] 2 S.C.R. 97 at paragraphs 60-63.

I recently read portions of the United States report on the events of 9/11 (the 9/11 Commission Report). I was impressed by the open way in which the Americans were able to conduct that Inquiry and the forthcoming way in which they made public so much of the information leading up to those tragic events, particularly when the information was critical of or embarrassing to individuals or agencies. As I read the report, it struck me that the openness of the 9/11 Commission's work fostered public confidence in the report. Indeed, in the long term it will foster public confidence in the institutions it investigated.

The reason I refer to the 9/11 Commission Report is to make the point that I believe that the public credibility of this Inquiry, and the government who called it, will be enhanced if we work together to make public as much information as possible during the public hearings.

b) Unfair Prejudice

I now turn to Mr. Bayne's and the government's arguments that calling RCMP evidence – any RCMP evidence – publicly will unfairly prejudice members of Project AO Canada and the RCMP itself.

Mr. Bayne argues that, if the senior officer of AO Canada is compelled to testify publicly, procedural fairness requires that he have an opportunity to tell the full story. In effect, Mr. Bayne is saying that, because NSC claims prevent the senior officer from telling the full story in public, procedural fairness requires that he not testify at all. I cannot accept this submission for the reasons that follow.

First, I agree with Mr. Bayne that the officer in charge of AO Canada has, like Mr. Arar, a reputational interest in the outcome of this Inquiry which requires that I reach my final conclusions through an "open and fair procedure … with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 22. To my mind, however, all RCMP officers affected by the Inquiry have had ample opportunity to be heard and present their views, including the senior officer from AO Canada. The RCMP and its officers have, through their counsel, been privy to nearly every step of this Inquiry, both *in camera* and in public. They have had full disclosure, and there have been many days of hearings during which RCMP officers presented their views. In this sense, the procedural rights of the RCMP and its officers have been protected, and will

continue to be protected. Should there be critical comment in my report, the RCMP and individual officers will have had an opportunity to be heard and to have been represented by counsel.

Mr. Bayne argues, though, that procedural fairness requires that his client be allowed to tell the full story, not just to me, but to the public at large. I am not satisfied that the content of procedural fairness can be stretched so far, especially when the ironic result of this argument would be that the public would hear nothing at all from the witness. It must also be remembered that *Baker, supra* at paragraph 22, stands for the proposition that the content of procedural fairness is "eminently variable" and its content should be "decided in the specific context of each case." The unusual nature of this Inquiry, in particular the NSC concerns, calls for a degree of flexibility.

I have emphasized time and again the importance of the public aspect of this Inquiry. I readily accept that the public hearing process should be conducted in a way that avoids unfairness to individuals or institutions, and avoids misleading the public about what in fact occurred. I think it is important to understand the process that I propose for calling RCMP evidence in public, as I think that process should address the concerns of unfair prejudice expressed by Mr. Bayne and government counsel.

To start, I will give a clear direction to the public and to the media that they should not draw conclusions adverse to any witness or to the RCMP from the evidence heard during the public hearings. I will point out that they have not heard the *in camera* evidence and, as a result, they should refrain from drawing conclusions at this point. I will also say that there may be *in camera* evidence that would provide an explanation or context for certain actions, making it unfair to form a judgement on the public evidence alone.

I will also indicate that my report will be based on all of the evidence, *in camera* and in public, and that the public should refrain from prematurely drawing conclusions critical to individuals and to the RCMP when they have not had the opportunity to hear all of the evidence. I will repeat this direction as I consider necessary throughout the RCMP evidence.

This direction is relatively straightforward and one that I think the public and the media are capable of understanding. Routinely, juries are asked to suspend judgement when they have heard only part of a case. My observation is that they are able to do so. In legal proceedings, not all of the evidence can be introduced at one time. It is not unusual to hear discussions in the media about cases that are in progress that emphasize that the other side of the story has yet to be heard – the full story has not yet emerged. I am confident that the public will understand my directions to keep an open mind and not to draw premature conclusions.

Next, I expect Commission counsel to lead the publicly available evidence in what I would describe as a primarily descriptive manner. Commission counsel will try to avoid questions to which the answers would require a witness to refer to information over which the government claims NSC. This will mean that in some areas Commission counsel will not be able to ask questions challenging the witness or suggesting something was not done in a proper fashion. In making this comment, I am not suggesting one way or the other whether there are such areas. I am simply indicating that Commission counsel's examination will be primarily directed at eliciting information. It will not be, to use Mr. Bayne's words, based on innuendo, insinuation, critical suggestions or other types of questions which the witness is unable to answer and that could reflect badly on the witness because of NSC claims. Thus, I do not foresee a problem of unfair prejudice to witnesses or the RCMP arising during the examination by Commission counsel.

The problem, if any, could arise in cross-examination. I am not suggesting that it will. Because of the limits on what can be publicly disclosed, it will not be possible for Mr. Arar's counsel to fully cross-examine the RCMP witnesses as they would in a normal case. The witnesses will not be able to answer some questions if those questions are directed towards the propriety of certain actions or the reasons why certain decisions were taken. If the answers to those questions require reference to information over which the government claims NSC, it would be unfair to require witnesses to answer the questions if they are unable to give a complete answer or in some cases the context within which an action or a decision was taken.

In general terms, these are the restrictions that must be placed on cross-examination. This, however, does not mean that there should be no cross-examination. There may be cross-examination for the purpose of clarifying evidence that has already been given. Moreover, there may be some areas in which a cross-examination, probing the reasons why actions were taken and challenging the basis for doing or not doing certain things, can be answered without reference to information over which the government claims NSC. It is difficult for me at this stage to foresee all of the possibilities.

I asked Mr. Bayne to give me examples of the types of issues that he considered would cause problems for examination in the public hearings. He gave me several. I do not think it useful to go into detail with regard to each of those examples. However, I will mention two to illustrate the point I am making.

The first relates to the reason why the Americans made the decision to deport Mr. Arar to Syria. This is obviously an important issue for me in this Inquiry. The difficulty is that the answer, if there is sufficient evidence to give one, will depend to a large extent on evidence heard *in camera*. It would not be

productive and would be potentially unfair to a witness to explore this issue in public. Thus, suggestions, insinuations or innuendos, again using Mr. Bayne's words, that one particular action or set of actions of the RCMP caused the United States to deport Mr. Arar would not be useful and could contribute to the type of problem Mr. Bayne raises.

Similarly, questions about the strength of the RCMP's investigations and the reasonableness of the bases for taking certain steps could lead to the same type of difficulty.

That said, I am reluctant to block out in advance areas of cross-examination that are off-limits. I think that the general directions that I have given in this ruling will suffice for the present time. During the course of the hearing, if problematic questions are asked, I will direct that they need not be answered and will explain why. It seems to me, at this stage at least, that objections can be dealt with on a question by question basis rather than in the abstract. As the hearing progresses, it may be possible to summarize lines of questions that cannot be answered.

It is worth noting that the Commission is currently scheduled to hear the evidence of a number of witnesses from the Department of Foreign Affairs. Some of the evidence will be heard in public and some has been or will be heard *in camera* because of NSC claims. To this point in time at least, there has been no objection to hearing this evidence in public, although the public will hear only some of the evidence. No one so far has raised issues of prejudice or misleading the public. What is contemplated is that, if concerns about prejudice or misleading arise from a particular question or line of questioning, objections will be made. I will direct that the questions not be answered and be set aside to be dealt with, as discussed in my ruling dated May 9, 2005. I am satisfied that the

same process that I envision for the Foreign Affairs evidence should be followed for the RCMP evidence.

In summary, it is my view that it is premature to abandon the efforts to call any RCMP evidence in the public hearings. The mandate to maximize public disclosure requires more. I am optimistic that if all counsel approach this matter in a spirit of cooperation with a view to maximizing public disclosure, this Inquiry should be able to hear some evidence from the RCMP without creating unfair prejudice or misleading the public.

d) The RCMP Witnesses

This brings me to the question of who should testify. Commission counsel has proposed calling two witnesses: the senior officer of Project AO Canada and Deputy Commissioner Garry Loeppky. There is good sense in this proposal.

In terms of the senior officer from AO Canada, the public will benefit from hearing from someone directly involved in Project AO Canada. That witness will have direct knowledge of many of the events that will form part of the public evidence. I agree with the government's submission that it makes little sense to call a third party who would inform himself or herself about those events in order to give evidence. I am confident that, if the introduction of the evidence is managed as I have set out above, the senior officer from Project AO Canada can give evidence without being judged unfairly by the public or in the media. I reject the suggestion that the officers should not be called because there is a danger that parties or intervenors in this Inquiry or others may, outside the hearing room, attempt to unfairly "spin" the evidence. This is mere speculation and I do not think that I should comment further on that prospect at this point.

As for Deputy Commissioner Loeppky, I also think it makes sense to call someone from RCMP headquarters who could speak with authority about the RCMP organization for dealing with national security investigations, the background for Project AO Canada and the way in which that project was managed from the perspective of headquarters.

In conclusion, I am directing that the officer in charge of Project AO Canada and Deputy Commissioner Garry Loeppky be called as witnesses in the public hearings for this Inquiry.

May 12, 2005

"Dennis O'Connor"

Commissioner