RULING ON CONFIDENTIALITY

I. INTRODUCTION

I have been appointed by Order in Council P.C. 2004-48 (the Terms of Reference) to investigate and report on the actions of Canadian officials in relation to Mr. Maher Arar and to make recommendations on an independent arm's length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security.

The final Rules of the Inquiry have now been finalized and copies circulated to parties and intervenors. The Rules have been posted on the Commission website.

I have received submissions with respect to national security confidentiality from many of the parties and intervenors. These submissions have proven to be very helpful and they have assisted me in designing what I think will be the most effective process for addressing national security confidentiality in a way that is thorough, fair and consistent, as well as expeditious.

This ruling concerns matters relating to the public disclosure of information that is subject to a claim of national security confidentiality (NSC); that is, a claim that disclosure of the information would be injurious to international relations, national defence or national security. The ruling deals with the motion by counsel for Mr. Arar that information over which the Attorney General of Canada has claimed NSC, but which is in the public domain, be disclosed. The ruling also deals with questions of interpretation arising from sections (k)(i) and (k)(iii) of the Inquiry Terms of Reference and from the *Canada Evidence Act*, R.S.C. 1 985, c. C-5, s. 38 and Schedule. Finally, the ruling outlines how the Inquiry process will proceed with respect to the information and evidence that is subject to an NSC claim.

Legal background

My mandate, as provided for in the Terms of Reference, is as follows:

> (a) to investigate and report on the actions of Canadian officials in relation to Maher Arar, including with regard to:
>
> (i) the detention of Mr. Arar in the United States,

(ii) the deportation of Mr. Arar to Syria via Jordan,

(iii) the imprisonment and treatment of Mr. Arar in Syria,

(iv) the return of Mr. Arar to Canada, and

(v) any other circumstances directly related to Mr. Arar that the Commissioner considers relevant to fulfilling this mandate.

The Terms of Reference also contain provisions with respect to information which, if disclosed, would be injurious to international relations, national defence or national security. In particular, I am directed as follows:

....

(k) ... in conducting the inquiry, to take all steps necessary to prevent disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security and, where applicable, to conduct the proceedings in accordance with the following procedures, namely,

(i) on the request of the Attorney General of Canada, the Commissioner shall receive information *in camera* and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information would be injurious to international relations, national defence or national security,

(ii) in order to maximize disclosure to the public of relevant information, the Commissioner may release a part or a summary of the information received *in camera* and shall provide the Attorney General of Canada with an opportunity to comment prior to its release, and

(iii) if the Commissioner is of the opinion that the release of a part or a summary of the information received *in camera* would provide insufficient disclosure to the public, he may advise the Attorney General of Canada, which advice shall constitute notice under section 38.01 of the *Canada Evidence Act*.

....

(m) nothing in this Order shall be construed as limiting the application of the provisions of the *Canada Evidence Act*.

The provisions of the *Canada Evidence Act* which are relevant to issues addressed in this ruling are appended as Appendix "A".

II. THE MOTION FOR DISCLOSURE

Counsel for Mr. Arar filed a motion, dated May 30, 2004, for disclosure of records in the possession of the government that contain or relate to information that is already in the public domain. The motion is supported by a number of the intervenors. Counsel for the Attorney General responded to the motion in writing; those submissions were supported by the Ontario Provincial Police. Oral submissions by counsel for Mr. Arar and the Attorney General were heard at a hearing on July 5, 2004. Mr. Ronald Atkey, *amicus curiae* for matters of national security confidentiality, also made submissions at the hearing.

A. The nature of the motion

Counsel for Mr. Arar sought orders that the government disclose all records that contain information that is in the public domain or that becomes public during the Inquiry or that is subsumed or made obvious by information in the public domain, and records that contain information emanating from Mr. Arar or his counsel or that were disclosed to Mr. Arar by officials in the United States and Syria. This motion included requests for any information disclosed:

- to and by Mr. Arar during questioning in the U.S. and Syria;
- to and by Mr. Arar's counsel, Mr. Michael Edelson and Mr. James Lockyer;
- to and by Ms. Monia Mazigh during questioning in Tunisia;
- as a result of the release of files to Ms. Juliet O'Neill of the Ottawa Citizen;
- by Canadian government officials in Hansard, in appearances before parliamentary committees, to the media, and under the *Access to Information Act* and *Privacy Act*;
- by U.S. government officials to the media;

- by Syrian government officials to the media; and
- by unnamed media sources.

Counsel for Mr. Arar submitted a detailed compendium of public information relating to Mr. Arar, collected from official sources and from media reports. Counsel sought disclosure of specific documents that she was able to identify, including an unedited version of the U.S. order removing Mr. Arar to Syria and the decision of the regional director, both dated October 7, 2004, copies of Mr. Arar's statements to U.S. and Syrian authorities, contents of a "JSTF file" that was reportedly the basis for Ms. Juliet O'Neill's article of November 8, 2003 in the Ottawa Citizen, contents of a "Syrian file" on Mr. Arar that was reportedly given to the Canadian government, contents of a "Tunisian file" that was allegedly shown to Ms. Mazigh during questioning in Tunisia, and a copy of Mr. Edelson's statement to Superintendent Garvie during the investigation into Mr. Arar's case by the RCMP Complaints Commissioner.

Counsel also sought disclosure of information concerning certain events or matters relating to Mr. Arar, such as investigations into suspected terrorist activities in Canada and the U.S. in the period preceding Mr. Arar's detention, information-sharing between Canada and the U.S., communications between police and Mr. Edelson, the government practice of extraordinary rendition, and alleged "leaks" about Mr. Arar before and after his return to Canada.

B. The submissions of the parties

1. Mr. Arar

The essence of Mr. Arar's motion is the submission that no valid NSC claim can be made over information that is in the public domain. Thus, all relevant government documents that contain information that is in the public domain should be publicly disclosed. Counsel for Mr. Arar offered two arguments to support this submission. The first was that, in the context of a public inquiry, information that is in the public domain simply cannot be privileged. Therefore, section (k) of the Inquiry Terms of Reference does not apply to documents that contain such information. As such, I have the discretion to reject an NSC claim that relates to information in the public domain on the ground that the claim is an abuse of the government's authority to make NSC claims.

Alternatively, Mr. Arar's counsel argued that, if section (k) does apply to the Attorney General's claims of NSC, then the fact that information is already in the public domain means that the disclosure of documents containing such information would not be injurious to international relations, national defence or national security (the elements of NSC) since whatever injury would be caused by disclosure has already occurred.

2. The Attorney General

Counsel for the Attorney General submitted that the motion by counsel for Mr. Arar was both improper and premature. The motion was improper because, in the context of an inquiry, a party receives information from the commission of inquiry, not from other parties to the inquiry. It is therefore beyond my jurisdiction to make an order, as sought by Mr. Arar, for the government to produce information either to Mr. Arar or to the public.

Counsel for the Attorney General submitted that the motion was premature because, in considering the government's NSC claims, it is necessary for me to hear the evidence that informs such claims with respect to specific documents and information. It would be inappropriate for me to rule on NSC claims in the abstract without having heard the underlying evidence that gives rise to the claim. That underlying evidence will become known to me at the Inquiry's *in camera* hearings.

Counsel for the Attorney General also argued that information reported in the media might not be legitimately in the public domain. Media reports could be inaccurate. Where disclosure was unauthorized or otherwise illegitimate, media reports should not trigger the disclosure of the documents that verify or dispute that information.

On the other hand, counsel for the Attorney General characterized the fact that information was legitimately in the public domain as a strong factor in the determination of whether the information should be heard in public. Further, it was accepted that the objective of the Attorney General at the Inquiry is to maximize the public disclosure of relevant information.

Finally, counsel for the Attorney General dealt with a number of the specific documents referred to in the submissions of counsel for Mr. Arar. With respect to the U.S. deportation documents of October 7, 2004, counsel indicated that the government does not have an unredacted copy of those documents to produce. Counsel also indicated that the government has no information about information disclosed to Ms. Mazigh in Tunisia. With respect to Mr. Edelson's statement to Superintendent Garvie, that statement has been produced to the Commission and, like other documents over which the government has made no NSC claim, it can be disclosed. In the case of Ms. O'Neill's article of November 8, 2003, counsel submitted that the Inquiry should await the determination of matters of confidentiality in the ongoing proceedings before Ratushny J. of the Superior Court.

C. The submissions of Mr. Atkey

Mr. Atkey submitted that, in his view, the motion was not premature and raised important issues concerning the disclosure of information that is relevant to the Inquiry. What might be premature would be an immediate decision on my part to grant the order without further review, at an *in camera* hearing, of the specific documents that relate to information that is in the public domain. In this regard, the motion record would be extremely helpful.

Mr. Atkey also submitted that the issue whether information is legitimately in the public domain appears to go to the core of the mandate of the Inquiry to determine whether the conduct of government officials was improper because, for example, unauthorized disclosures might have taken place in order to harm Mr. Arar's reputation.

D. Resolution

The government's argument that the motion was improper because it seeks disclosure from the government rather than the Commission is technically correct but of no consequence. I will deal with the motion as if it sought disclosure from the Commission.

I agree with Mr. Atkey that the motion was not premature and that it has been a useful exercise. The motion has raised important issues concerning not only the disclosure of information that is already public but also the authority and process of this Commission

generally, in relation to the disclosure of other relevant information. Nevertheless, I am not presently in a position to rule on the release of specific documents because I have not heard evidence about the circumstances surrounding the government's production or receipt of such documents. Further, I have not heard the evidence that the Attorney General may wish to call to support its NSC claims.

I have reviewed a summary of a number of documents, subject to an NSC claim, that appear to relate to information that is in the public domain. I did so in order to make a preliminary assessment of whether it would be possible for me, at this stage, to form an opinion whether disclosure of such documents would be injurious to any of the elements of NSC. In almost every case, I find it necessary to hear further evidence before making that decision. This is especially so in the case of documents received from foreign governments and in the case of documents relating to alleged "leaks" by Canadian government officials to the media.

Moreover, in the case of many of the NSC claims, I will be better able to evaluate the significance of the claim when it can be put in the context of the overall body of evidence over which NSC is claimed.

That said, I think that it is useful in this ruling to address several matters that were raised in argument.

First, counsel for the Attorney General, in her submissions, indicated that the government would make its best efforts to limit its NSC claims wherever possible. She also agreed that it would be inappropriate for the Attorney General to make NSC claims that were overinclusive, as a "first cut" for later negotiations with Commission counsel regarding the validity of such claims. I commend her for taking that approach. In my view that is the proper approach and counsel for the Attorney General should do everything she can to ensure that it is followed.

In her submissions, counsel for Mr. Arar submitted that I may reject an NSC claim by the Attorney General on the basis that it is improper because the information is already in the public domain. In such a case she argues that I need not consider the test in section (k) of the Terms of Reference as to whether disclosure would be injurious to NSC. I do not accept that argument. No such authority is expressly granted to me in the

Terms of Reference. More importantly, the language of section (k)(i) supports the contrary view. It states that, on the request of the Attorney General, I "shall" receive information in an *in camera* hearing if I am of the opinion that disclosure of the information would be injurious to any of the elements of NSC. It follows that, to reject an NSC claim, I must first decide that disclosure would not be injurious.

In her submissions, counsel for Mr. Arar made reference to a number of cases regarding claims of privilege over information that is already in the public domain, including the decision in *Babcock* v. *Canada (Attorney General)*, [2002] 3 S.C.R. 3. In that case, the Supreme Court of Canada rejected a claim of cabinet privilege by the government, acting as the defendant in a civil lawsuit, over documents that had been previously disclosed to the plaintiffs. The reasoning in *Babcock* appears highly relevant to a determination under section (k)(i) with respect to information that the government has previously made public. However, the issue of whether section (k)(i) applies at all turns on the language of the Terms of Reference and I do not think that *Babcock* or the other case law helps to resolve that issue.

Counsel's second argument is that the fact that information is in the public domain means that disclosure would not be injurious to international relations, national defence or national security. I agree that the fact that information contained in a document is in the public domain is an important factor in the assessment of whether disclosure of that document would itself be injurious to the elements of NSC. In other instances where privilege is sought, such as solicitor-client privilege and cabinet privilege, the fact of previous disclosure removes the privilege. That said, I do not think that the fact that information is in the public domain is necessarily conclusive of the issue under section (k)(i). Ultimately, the test is always whether disclosure would be injurious to an element of NSC; however, it is a matter of common sense that previous disclosure will tend to significantly weaken if not defeat the claim that further disclosure would be injurious.

Finally, it may be useful if I offer comments on some of the specific documents that were discussed during argument of the motion.

The Commission is not aware of the government having produced to the Inquiry documents originating in a "Tunisian file" on Mr. Arar and counsel for the Attorney General has indicated that the government has no information on such a file.

NSC claims over information about Mr. Arar that was provided to the Canadian government by U.S. or Syrian authorities generally implicate assurances provided by the Canadian government to those states with respect to information sharing. On reviewing a number of such documents, I find it necessary to hear further evidence before forming an opinion on NSC.

A copy of Mr. Edelson's statement to Superintendent Garvie was provided to counsel for Mr. Arar, in order to prepare for Mr. Edelson's testimony.

Commission counsel has requested that the Attorney General reconsider NSC claims with respect to a number of specific documents including certain documents that relate to police communications with Mr. Edelson and with family members of Mr. Arar. Commission counsel has also requested the Attorney General to reconsider NSC claims over certain documents that originate in Canada and that were allegedly shown to Mr. Arar during his detention in the U.S. I will consider whether to issue a ruling concerning those documents once the Attorney General has responded to these requests.

Finally, I agree with the submissions of counsel for the Attorney General that documents that relate to Ms. O'Neill's article of November 8, 2003 should not be disclosed until Ratushny J. has resolved matters of confidentiality presently before her, unless an application is brought before her by a party to the Inquiry.

III. SECTION (k)(i) OF THE TERMS OF REFERENCE

On June 24, 2004, the Commission sent two questions to counsel for Mr. Arar and the Attorney General. The questions are attached as Appendix "B".

The questions were sent in order to invite further submissions on specific issues that arose in the context of my consideration of matters of confidentiality and the overall Inquiry process. They did not reflect any determination by me.

The first question raised the issue of the procedural steps that follow a decision by me under section (k)(i) that the disclosure of information that is subject to an NSC claim would not be injurious to any of the elements of NSC. In the event of my reaching such

a decision, the question was framed to suggest that such information could be released to the public after a period of 10 days following the Attorney General's receipt of my decision, unless the Attorney General notified the Commission within that period that he would apply to Federal Court for an order to prohibit release under s. 38 of the *Canada Evidence Act*. The Attorney General objected to this interpretation of section (k)(i) on the basis that it was contrary to the *Canada Evidence Act*.

A. The submissions of the parties

1. The Attorney General

Counsel for the Attorney General submitted that, despite a decision by me under section (k)(i) of the Terms of Reference that disclosure of information would not be injurious to international relations, national defence or national security, such information remains "potentially injurious information" and "sensitive information" under s. 38 of the *Canada Evidence Act*. The provisions of s. 38 apply generally to the process of the Inquiry and are not modified by the Inquiry Terms of Reference. Indeed, section (m) of the Terms of Reference expressly states that those Terms must not be construed so as to limit the application of the provisions of the *Canada Evidence Act*.

Therefore, the Commission may not disclose information that is subject to an NSC claim, even after I have decided that disclosure would not be injurious to any of the elements of NSC, unless the Attorney General authorizes its release under s. 38.03 or s. 38.031 of the *Canada Evidence Act* or unless a Federal Court judge authorizes disclosure under s. 38.06(1) or (2). If the Commission wishes to disclose such information without authorization by the Attorney General, and if the Attorney General does not bring an application in the Federal Court, the Commission may apply to Federal Court, under s. 38.04(2)(c), for a judicial order authorizing disclosure. The Commission may do so after a period of 10 days following the Attorney General's receipt of my decision that disclosure would not be injurious to any of the elements of NSC.

The Commission is listed as a designated entity under the Schedule to the *Canada Evidence Act*. The purpose of this designation, according to counsel for the Attorney General, was to enable the government to produce potentially injurious and sensitive information to the Commission without triggering the application of s. 38.01(1) to (4)

and the resulting procedural regime. However, the designation of the Commission in the Schedule does not allow the Commission to publicly release information, the disclosure of which I have decided would not be injurious, absent authorization by the Attorney General or a Federal Court judge. This is supported by the inclusion of the words "except where the hearing is in public" in the designation of the Commission in the Schedule.

Further, counsel for the Attorney General submits that s. 38.02(1.1) does not authorize the Commissioner to publicly release information, the disclosure of which I have decided would not be injurious to any of the elements of NSC, absent authorization by the Attorney General or a Federal Court judge. This section reads as follows:

> "(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given."

This section requires the entity not to disclose potentially injurious or sensitive information that is contained in a decision until after a period of 10 days following the Attorney General's receipt of notice of the decision. Counsel for the Attorney General pointed out that this section is silent with respect to what happens after notice is given to the Attorney General. As such, the section does not expressly oblige the Attorney General to respond in any way to a decision by a designated entity. For this reason, and in light of section (m) of the Terms of Reference, s. 38.02(1.1) does not authorize the Commission to publicly release information, disclosure of which I have decided would not be injurious to any of the elements of NSC, absent authorization by the Attorney General or a Federal Court judge.

Finally, I note that the Attorney General's submissions were consistent with a supplementary request by the government, received by the Commission on June 22,

2004, to amend Rule 50(b), Rule 55, and Rule 56 of the Inquiry Rules of Procedure and Practice.

2. Mr. Arar

Counsel for Mr. Arar submitted that the Commission may disclose information once I have decided that disclosure would not be injurious to any of the elements of NSC, unless the Attorney General takes positive steps to prevent such disclosure. Section 38.01 of the *Canada Evidence Act* does not apply to the Commission because the Schedule lists the Commission as a designated entity "for the purposes of the inquiry". In the listing in the Schedule, the inclusion of the words "except where the hearing is in public" is intended to require me to form my opinion whether disclosure would be injurious at an *in camera* hearing, not to prevent the public disclosure of information once I have decided that its disclosure would not be injurious.

Further, it is not logical for the Inquiry to go through the time-consuming and expensive activity of reaching a decision on an NSC claim by the Attorney General, as contemplated by section (k)(i) of the Terms of Reference, if that decision did not take precedence over the Attorney General's initial NSC claim. Where the government objects to disclosure by the Commission, following a decision by me, the option that is available to the Attorney General is to issue a certificate under s. 38.13 that prohibits disclosure. This interpretation is consistent with the *Canada Evidence Act* and has the benefit of maximizing and facilitating disclosure in the context of a public inquiry.

B. Resolution

The issue is whether under the provisions of s. 38 of the *Canada Evidence Act* I am prohibited from disclosing information, the disclosure of which I have decided would not be injurious to international relations, national defence or national security, once 10 days have elapsed from the date on which notice of my decision was given to the Attorney General, in circumstances where the Attorney General has neither agreed to the disclosure nor applied to the Federal Court to prohibit disclosure. If I am prohibited from disclosing such information, the only recourse open to me would be to bring an application to the Federal Court to authorize the disclosure.

The provisions of s. 38 of the *Canada Evidence Act* were enacted in December, 2001 as part of Bill C-36, the government's anti-terrorism legislation. I was not referred to any cases in which the question of the interpretation of the subsections in issue here have been considered by a court.

Unfortunately, the provisions of s. 38 do not provide a clear answer to the question. It is difficult to fit decisions made by listed entities referred to in s. 38.02(1.1) into the statutory scheme that applies when notice is given to the Attorney General under s. 38.01. It is clear, however, that whatever interpretation of s. 38 is adopted, the Attorney General must be given notice of a decision by a listed entity that would result in disclosure of such information, and, in my view, the Attorney General has the means to challenge such a decision either in the Federal Court or by issuing a certificate under s. 38.13.

The Commission raised this issue relating to section (k)(i) in the hope of resolving a potential procedural problem at an early stage in order to avoid delay later in the process. However, I have concluded that it does not make sense for me to opine on this issue at this stage. As I have said, the answer is far from clear. Moreover, the issue may never actually arise in the context of the Inquiry. The Attorney General may not disagree with my disclosure decisions or, if he does, he may bring an application to have the decisions reviewed in the Federal Court. It would only be in the situation where the Attorney General remains silent for 10 days after receiving notice of my decision that I would have to confront the issue at hand. It is my hope that this situation will not arise.

Let me add a few observations. Whatever interpretation one adopts, it seems to me that it would be unusual to require the entities listed in the Schedule to the *Canada Evidence Act* to bring applications to a Federal Court judge for disclosure of the information contained in their decisions. This would be particularly unusual given that many of the listed entities are Federal Court judges. I am not aware of any procedural regime requiring one judge to bring an application before another. A more common approach, of course, is that where a person, such as the Attorney General wishes to challenge a decision, then that person is required to bring an application to seek judicial review. In any event, I leave the resolution of this issue for another day and, preferably, for another listed entity or a court.

Finally, I address the submission of Mr. Arar's counsel as to the options available to the Attorney General if he objects to disclosure within the 10 day period. Depending on the resolution of the issue discussed above, the Attorney General may have the option of doing nothing. Counsel for Mr. Arar submitted that the only option that is available to the Attorney General at this stage is to issue a certificate under s. 38.13. The other possibility is that the Attorney General could apply to the Federal Court pursuant to s. 38.04(1) for an order prohibiting the disclosure of information about which I have made a decision under section (k)(i).

I am satisfied that both of these options are available to the Attorney General. If, on receiving notice of a decision referred to in s. 38.02(1.1) it is necessary for there to be a s. 38.01 notice to the Attorney General in order for the Attorney General to bring an application under s. 38.04(1), I am satisfied that it is open to those involved in the Inquiry proceedings on behalf of the government to give notice to the Attorney General under s. 38.01(1) to (4) that sensitive or potentially injurious information could be disclosed.

In particular, s. 38.01(2) requires any "participant" in a proceeding "who believes that sensitive information or potentially injurious information is about to be disclosed" to raise the matters with the person presiding at the proceeding and to notify the Attorney General. Section 38.01(3) and (4) authorize an "official" to notify the Attorney General or to raise the matter with the person presiding at the proceeding in similar circumstances. In the context of this Inquiry, if a matter of this nature is raised with me then I, as the person presiding, must "ensure that the information is not disclosed other than in accordance with this Act". Finally, s. 38.04(1) authorizes the Attorney General to apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under s. 38.01. In light of these provisions, I do not think that the Attorney General's options to respond to a decision under section (k)(i) are limited to the issuance of a certificate under s. 38.13.

IV. SECTION (k)(iii) OF THE TERMS OF REFERENCE

The Inquiry Terms of Reference contemplate that I will make two types of decisions with respect to information, the disclosure which the Attorney General claims would be injurious to international relations, national defence or national security. Under section

(k)(i) I am directed to hear information *in camera* on the request of the Attorney General if I am of the opinion that disclosure of that information would be injurious to any of the elements of NSC. The second type of decision I am required to make relates to the public interest. The combined effect of sections (k)(ii) and (k)(iii) of the Terms of Reference is that if, after hearing information *in camera*, I am of the opinion that the summary of that information that is acceptable to the Attorney General provides inadequate disclosure to the public, then I may so advise the Attorney General and this advice constitutes notice under s. 38.01 of the *Canada Evidence Act*. Thus, if I am of the opinion that partial or non-disclosure of relevant information – the disclosure of which, I have previously concluded, would be injurious to any of the elements of NSC – is inadequate, then I may so advise the Attorney General. That notice triggers the process found in s. 38.01 and after of the *Canada Evidence Act*.

To the extent that counsel for Mr. Arar or the Attorney General made submissions on the operation of section (k)(iii), those submissions related to matters of disclosure that are dealt with in part V of this ruling. Here, I will briefly indicate my interpretation of section (k)(iii).

Although what constitutes "inadequate disclosure to the public" is not defined in the Terms of Reference, I am of the view that the process set out in the Terms of Reference contemplates that I should, at this stage, apply the same test that a reviewing judge would apply under s. 38.06(2) of the *Canada Evidence Act*. That section reads as follows:

> "(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information."

The result of deeming my advice that there is inadequate disclosure to the public to be notice under s. 38.01 would, if the matter runs its course, lead to a determination by a Federal Court judge under s. 38.06(2) of the *Canada Evidence Act*. If the opinion I reach under section (k)(iii) of the Terms of Reference is to be reviewed on the basis of the test in s. 38.06(2) then it is logical that my opinion should be based upon the same test. The reviewing court should have the benefit of my views on the same public interest balancing test that it will be called upon to apply.

In summary, the Terms of Reference call for two decisions: would release of the information be injurious to international relations, national defence or national security and, if so, would it nonetheless be in the public interest to release such information. The Terms of Reference make clear that the second decision can only be made after the evidence in issue has been heard *in camera*.

If I decide, under section (k)(iii), that the release of a part or a summary of the information received *in camera* would provide insufficient disclosure to the public, then I am required to advise the Attorney General, and such advice constitutes notice under s. 38.01 of the *Canada Evidence Act*. Once notice is given, pursuant to section (k)(iii), the Commission is required not to disclose the information to which my decision relates without authorization or agreement by the Attorney General or an order by a Federal Court judge.

V. DISCLOSURE PROVISIONS OF THE *CANADA EVIDENCE ACT*

The questions posed by the Commission to counsel for Mr. Arar and the Attorney General implied that the Commission is subject to the non-disclosure provisions found in s. 38.02(1)(a) to (d) of the *Canada Evidence Act*. Those provisions prohibit, not only the disclosure of information about which notice has been given under s. 38.01 [subsection (a)], but also the fact that notice has been given to the Attorney General [subsection (b)], the fact that an application or appeal is underway in the Federal Court [subsection (c)], and the fact that an agreement has been reached with the Attorney General to disclose certain information [subsection (d)]. An issue that arises in this Inquiry, therefore, is whether subsections (b), (c) and (d) apply to decisions under sections (k)(i) and (k)(iii) of the Terms of Reference.

A. The submissions of the parties

1. The Attorney General

The Attorney General submitted that the language of s. 38.02(1) makes clear that the Commission is bound by all of the subsections in s. 38.02(1).

2. Mr. Arar

Counsel for Mr. Arar submitted that s. 38.02(1)(b), (c) and (d) are unconstitutional. In effect, these provisions place an arbitrary publication ban on the process by which NSC claims are resolved at the Inquiry. The view that the provisions are unconstitutional is supported, in particular, by the open court principle as applied by the Supreme Court of Canada in *Re Vancouver Sun* (2004), SCC 43. Counsel indicated that she did not have sufficient opportunity to prepare a detailed challenge to the constitutionality of the *Canada Evidence Act* in this respect but indicated that she was prepared to do so if necessary.

B. Resolution

The provisions of s. 38.02(1)(b), (c) and (d) are clear and in my view apply to my decisions if a notice has been given under s. 38.01(1) to (4). A decision under section (k)(iii) is deemed to constitute notice under s. 38.01 of the *Canada Evidence Act*. Subsections 38.02(1)(b), (c) and (d) expressly prohibit the Commission from disclosing the fact that notice has been given to the Attorney General, the fact that an application has been made or the fact that an agreement has been reached, unless the Attorney General or a Federal Court judge authorizes disclosure.

On their face, the breadth of these provisions clearly detracts from the transparency of the Inquiry. Indeed, the provisions do not appear to sit well with the whole idea of a public inquiry. That said, I have not heard sufficient argument on the constitutionality of s. 38.02(1)(b), (c) and (d) to decide the issue. Further, I do not propose to request submissions at this stage. While it is open to Mr. Arar to initiate a constitutional challenge to these provisions, I do not propose to launch such a challenge at present.

The reason that I am not pursuing the issue now is because this is only a potential problem and one that may never need to be resolved in the context of the Inquiry. I have asked Commission counsel to request the Attorney General to agree to a blanket waiver of s. 38.02(1)(b), (c) and (d) with respect to this Inquiry. Failing an agreement, should a situation arise that in my view warrants disclosure of facts that would contravene s. 38.02(1)(b), (c) or (d), I will instruct my counsel to apply to Federal Court under s. 38.02(2)(b) to permit such disclosure.

VI. THE PROCESS

The final question that the Commission put to counsel for Mr. Arar and the Attorney General, before the hearing of July 5, 2003, asked whether it would be best for all matters concerning the disclosure of information, about which the Attorney General claims NSC, to be dealt with after all the relevant evidence has been received *in camera*. Following the *in camera* hearing, it was suggested, I would be in a position to issue an omnibus ruling dealing with my decisions under sections (k)(i) and (k)(iii). Further, it was asked whether, as a practical matter, all of the information relating to NSC claims should be dealt with in a single sequence of *in camera* hearings rather than by switching back and forth between *in camera* and public hearings.

Speaking generally, counsel for the Attorney General did not object to this way of proceeding with respect to NSC claims. On the other hand, counsel for Mr. Arar raised the concern that holding a single sequence of *in camera* hearings would prevent the public from knowing about the Attorney General's objections to the public disclosure of particular evidence. For this reason, counsel for Mr. Arar favoured a process in which the introduction of the evidence would switch back and forth between *in camera* and public hearings.

The concern raised by Mr. Arar's counsel is legitimate and one that I think should be kept in mind. However, I think that there is considerable benefit to holding an *in camera* hearing that would receive, in sequence, much of the NSC evidence. Moreover, as I point out below, there are ways of addressing, to some extent at least, the concern of Mr. Arar's counsel. The government has claimed NSC for a substantial portion, although not all, of the RCMP and CSIS factual evidence. There are five significant advantages to

hearing this evidence *in camera* before I decide what portion may be made public, either by way of testimony in a public hearing or by way of releasing a part or a summary of some of the information heard *in camera*.

First, I will be in a better position to evaluate the Attorney General's NSC claim as well as the public interest in disclosure after I have heard all of the *in camera* evidence. At that point, I will be better able to appreciate the significance of different pieces of evidence in the overall context of what happened. Probably, I will also be better able to evaluate the extent of the injury, if any, to the elements of NSC from the release of evidence to the public when I am in a position to understand where a particular piece of evidence fits into the chronology of events and how that evidence relates to other evidence.

Second, the two decisions that I am called upon to make – NSC and the balancing of the public interest – are not unconnected. In making a decision with respect to the public interest, the degree of the alleged injury to the elements of NSC will undoubtedly be relevant. It seems to me sensible in most instances to address those two decisions at the same time. Notably, as a matter of general principle, the submissions which I received from many parties and intervenors did just that; they addressed the issue of injury to the elements of NSC and the issue of the public interest in disclosure interchangeably.

Third, I consider it very important to hear all of the factual evidence of the RCMP and CSIS in one sequence, uninterrupted by shifting back and forth between *in camera* and public hearings. The opportunity to hear all of the evidence in its normal sequence will make it easier for me to understand and evaluate the events relating to Mr. Arar.

Fourth, I am satisfied that hearing all of the RCMP and CSIS factual evidence *in camera* is the most efficient way to deal with what could become a very complex process. After the evidence has been heard *in camera* I will rule on both NSC and the balancing of the public interest. I recognize that, subject to challenges in court, it may become necessary to hear some of the evidence again in the public hearings. However, it may be possible in some instances to simply introduce the transcript of evidence heard *in camera* and to provide the opportunity for cross-examination in the public hearings. Even though there

will be some duplication of evidence heard *in camera*, I am satisfied that on balance the process that I am adopting will enable us to proceed as expeditiously as possible.

In addition, the process will result in one main ruling on what information, for which NSC is claimed, can be heard in public. Court challenges are one of the main causes for delays in public inquiries. Although I am obviously not encouraging court challenges, I am aware of the possibility. I expect that the process that I describe in this ruling will reduce the potential for multiple court challenges on these issues. It is in everyone's interest that the Inquiry be completed as quickly as possible and, if there is to be a court challenge to any of the rulings I make with respect to *in camera* hearings, it is preferable that there be only one such challenge.

Finally, everyone including the Attorney General has submitted that I should make public as much evidence as is permitted under the Terms of Reference. It seems to me that I will be best able to fulfill that objective by way of a process that enables me to make decisions after hearing all of the factual *in camera* evidence and to put that evidence in its proper context. I also think that this process will lead to more sensible and manageable disclosure for the parties and intervenors.

All of that said, I am not foreclosing the possibility that I may release rulings with respect to some of the Attorney General's NSC claims before all of the evidence has been heard *in camera*. Neither this ruling nor the question that was put to counsel for Mr. Arar and the Attorney General should be interpreted as foreclosing that possibility. In particular, I may choose to make such a ruling if I come to the conclusion that I have heard sufficient information to decide, under section (k)(i), that disclosure of particular information would not be injurious to any of the elements of NSC.

As discussed, counsel for Mr. Arar expressed the concern that holding a single sequence of private hearings will limit the ability of the public to know when the government was objecting to disclosure of information. No doubt this is true. However, this concern is mitigated by a number of factors. First, pursuant to Rule 54, prior to an *in camera* hearing, Commission counsel will advise the parties and intervenors of the information and evidence that will be introduced at the hearing. The parties and intervenors are invited to raise with Commission counsel areas for questioning. In the process that I have described above, I contemplate that Commission counsel will periodically make

available to parties and intervenors a brief summary of the evidence that will be heard *in camera* before the evidence is heard. It may become obvious from the advice of counsel, or the summaries of evidence, what evidence the Attorney General claims is subject to NSC.

Also, I will produce a summary of the evidence that is heard *in camera* which will provide the public with an indication of the evidence over which the Attorney General claimed NSC. If circumstances permit, I may produce a summary of evidence heard *in camera* before all of the *in camera* hearings have been completed. Finally, I can make additional rulings with respect to NSC claims, if the need arises, in the course of the *in camera* hearings.

I am satisfied that the process described above is consistent with the Terms of Reference and with the Rules of Practice and Procedure and, at this stage, I think that is the best way to proceed. However, because of the special problems related to NSC claims, this Inquiry presents more than its fair share of procedural difficulties. We at the Commission are doing our best to design and draft a process that is thorough, fair and as expeditious as possible. It may be that as other issues arise further adjustments to the process and to the schedule will need to be made. I appreciate the cooperation and assistance that we have been receiving from the parties and intervenors to date and look forward to that continuing as we proceed.

I have not included the DFAIT evidence in the process described above. The Attorney General does not claim NSC over DFAIT evidence to the same extent as the RCMP and CSIS factual evidence. I am advised by Commission counsel that we should be able to proceed with a sufficient amount of the DFAIT evidence in the public hearing in a way that will make it understandable and useful to the parties, the intervenors and the public.

We will hear those portions of the DFAIT evidence for which the Attorney General claims NSC during the *in camera* hearings that address the RCMP and CSIS factual evidence. In my omnibus ruling with respect to the matters of confidentiality, I will include my rulings concerning the DFAIT evidence heard *in camera*.

There may be NSC claims with respect to other government departments and agencies. I will address the appropriate process for addressing those claims if and when they arise.

After completing the *in camera* hearings, I will prepare an omnibus ruling addressing the two issues: NSC and the balancing of the public interest. In doing so, I will have regard to the submissions received from the parties and intervenors on the principles that apply to the question of national security confidentiality, the submissions made on July 5 on the motion by counsel for Mr. Arar, and the submissions of counsel for the Attorney General and Mr. Atkey with respect to specific *in camera* evidence. This ruling will address all of the evidence heard *in camera* and it will include the rulings that are contemplated by Rules 50 and 56.

I anticipate that the omnibus ruling will include:

a) a brief description of the relevant evidence for which no NSC claim is made. That evidence will be introduced in a public hearing.

b) subject to a challenge by the Attorney General, a summary of evidence for which the Attorney General claims NSC but which I consider is not injurious to any of the elements of NSC. That evidence will either be introduced at a public hearing or filed as a transcript of the *in camera* evidence. The parties will then have an opportunity at the public hearing to cross-examine on the evidence so disclosed.

c) subject to a challenge by the Attorney General, a summary of evidence which I consider is subject to NSC but which I am nonetheless of the opinion should be made public in the public interest. That evidence will be dealt with in the same manner as the evidence referred to in paragraph b) above.

d) subject to Rule 55, a summary of evidence heard *in camera* which I conclude should not be made public as contemplated by section (k)(ii) of the Terms of Reference.

Date released

July 19, 2004

"Dennis O'Connor"

Commissioner Dennis O'Connor

Appendix "A"

Relevant provisions of the *Canada Evidence Act*, R.S.C. 1985, c. C-5

The following provisions of s. 38 of the *Canada Evidence Act* are relevant to this ruling:

> **38.** The following definitions apply in this section and in sections 38.01 to 38.15.
>
> ....
>
> "participant" means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information.
>
> "potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.
>
> ....
>
> "sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.
>
> **38.01** (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.
>
> (2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given

under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

....

(6) This section does not apply when

....

(*c*) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or

(*d*) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

....

(8) The Governor in Council may, by order, add to or delete from the schedule a

reference to any entity or purpose, or amend such a reference.

38.02 (1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding

(*a*) information about which notice is given under any of subsections 38.01(1) to (4);

(*b*) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);

(*c*) the fact that an application is made to the Federal Court under section 38.04 or that an appeal or review of an order made under any of subsections 38.06(1) to (3) in connection with the application is instituted; or

(*d*) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).

(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

(*a*) the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or

(*b*) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

38.03 (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

....

(3) The Attorney General of Canada shall, within 10 days after the day on which he or she first receives a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under section 38.01 about that information of his or her decision with respect to disclosure of the information.
2001, c. 41, s. 43.

38.031 (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(*b*) to (*d*) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under paragraph 38.04(2)(*c*), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

(2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under paragraph 38.04(2)(*c*) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).
2001, c. 41, ss. 43, 141.

38.04 (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).

(2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section 38.031, authorizes the disclosure of only part of the information or disclosure subject to any conditions,

> (*a*) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;
>
> (*b*) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and
>
> (*c*) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

(3) A person who applies to the Federal Court under paragraph (2)(*b*) or (*c*) shall provide notice of the application to the Attorney General of Canada.

(4) An application under this section is confidential. Subject to section 38.12, the Chief Administrator of the Courts Administration Service may take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

(5) As soon as the Federal Court is seized of an application under this section, the judge

(*a*) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;

(*b*) shall decide whether it is necessary to hold any hearing of the matter;

(*c*) if he or she decides that a hearing should be held, shall

(i) determine who should be given notice of the hearing,

(ii) order the Attorney General of Canada to notify those persons, and

(iii) determine the content and form of the notice; and

(*d*) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

(6) After the Federal Court is seized of an application made under paragraph (2)(*c*) or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,

(*a*) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(*b*) to (*d*) or part of the information or disclosure of the facts or information subject to conditions; and

(*b*) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.

(7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.

....

38.06 (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.

(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.

....

38.07 The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.

38.08 If the judge determines that a party to the proceeding whose interests are adversely affected by an order made under any of subsections 38.06(1) to (3) was not given the opportunity to make representations under paragraph 38.04(5)(*d*), the judge shall refer the order to the Federal Court of Appeal for review.

....

38.13 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

....

The Schedule to the *Canada Evidence Act*, as amended by Order in Council P.C. 2004-73, provides:

DESIGNATED ENTITIES

....

19. The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, for the purposes of that inquiry, except where the hearing is in public.

Appendix "B"

Questions of interpretation and process

With a view to eliciting further submissions about the public disclosure of information at the Inquiry, the Commission sent the following questions to the parties for their consideration:

1. Does section (k) entail the following two stage process?

    a. Decision under section (k)(i):

    The Commissioner is authorized to decide, under s. (k)(i), whether the public disclosure of information relevant to the Inquiry would be injurious to international relations, national defence or national security (National Security Confidentiality – NSC). This decision will follow a claim by the Attorney General or any other person that relevant information is subject to NSC.

    If the Commissioner decides that disclosure would not be injurious to NSC, the Commission may disclose the information after a period of 10 days following receipt of the Commissioner's decision by the Attorney General unless the Attorney General has notified the Commission within that period that he intends to apply to the Federal Court for a determination under s. 38.04(1) of the *Canada Evidence Act*.

    b. Decision under section (k)(iii):

    Following his decision under s. (k)(i) that disclosure would be injurious to NSC, the Commissioner is authorized to decide, under s. (k)(iii), whether the release of a part or a summary of the information, after the information has been received *in camera*, would provide insufficient disclosure to the public.

If the Commissioner decides that such partial disclosure would provide insufficient disclosure, he may advise the Attorney General, which advice shall constitute notice under s. 38.01 of the *Canada Evidence Act*. The Commissioner may also apply to the Federal Court for an order under s. 38.06 with respect to disclosure of the information.

Under s. 38.02(1) and (2) of the *Canada Evidence Act*, the Commission may not disclose the information, the fact of the Commissioner's decision under s. (k)(iii), the fact that an application has been made to the Federal Court, or the fact that an agreement regarding disclosure has been entered into with the Attorney General, unless the Attorney General authorizes such disclosure in writing or by agreement, or a judge authorizes such disclosure in a final order under s. 38.06.

Thus, absent authorization or agreement by the Attorney General, or a final order by a Federal Court judge, the Commission may not disclose information that the Commissioner has decided should be disclosed, in the public interest, under section (k)(iii).

2. Would it be best for all matters concerning the disclosure of information, with respect to which the Attorney General claims NSC, to be dealt with after all of the information has been received *in camera*, following which the Commissioner will issue a ruling or rulings dealing with his decisions under s. (k)(i) and s. (k)(iii)? As a practical matter, would it be best to hear all of the information, with respect to which the Attorney General claims NSC, by holding one sequence of *in camera* hearings rather than by switching back and forth between *in camera* and public hearings?