Ruling on Jurisdictional Issue

Counsel for a recipient of a notice given under s. 13 of the *Inquiries Act*[1] (the "Applicant") filed a motion, alleging in part that the Commission lacks jurisdiction to inquire into the actions of Canadian officials in relation to Maher Arar. On the motion's return date, August 9, 2005, the Commission was engaged in *in camera* proceedings. Because the jurisdictional issue affected all participants in the factual inquiry, I directed that submissions on this issue be made in closing argument, that they be distributed to other participants and that other participants be given an opportunity to make submissions. Consequently, in making this ruling, I have the benefit of submissions from the Applicant and from counsel for the Attorney General of Canada and Mr. Arar, both of whom oppose the Applicant's request for a declaration that the Commission is improperly constituted and that the section 13 notice issued to the Applicant is of no force and effect.

The Applicant contended that the *Inquiries Act* (the "*Act*") contemplates Part I public inquiries and Part II departmental investigations, but does not contemplate a hybrid of the two. The Applicant submitted that Order-in-Council PC 2004-48 (the "Order-in-Council") creates such a hybrid by using the phrase "to investigate and report on" the actions of Canadian officials in relation to Mr. Arar in regard to the matters identified in subparagraphs (a)(i) through (v). This was said to track the language used in Part II of the *Act*. The Applicant contrasted this language with that used in the orders-in-council that created the Somalia Inquiry and the Inquiry into the Blood System. It was also argued that the manner in which the Commission was established (on the recommendation of the Minister of Public Safety and Emergency Preparedness), receipt of substantial portions of testimony *in camera* and Mr. Arar's examination by a fact finder correspond more closely with a departmental investigation under Part II of the *Act* than they do to a public inquiry.

For the reasons set out below, I reject these arguments and decline to grant the declaration sought by the Applicant.

Structure and Scheme of the Inquiries Act

The *Inquiries Act* (long title: "An Act respecting public and departmental inquiries") is comprised of four parts: Part I (consisting of ss. 2 through 5), which bears the heading, "Public Inquiries"; Part II (ss. 6 through 10), "Departmental Investigations"; Part III,

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1 Section 13 of the *Inquiries Act*, R.S.C. 1985, c. I-11 provides as follows:

> **13.** No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

"General" (ss. 11 through 13); and Part IV (s. 14), "International Commissions and Tribunals".

Section 2 of the *Act* provides that a Part I inquiry may be established "whenever the Governor in Council deems it expedient (to) cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof." This may be contrasted with the power to establish departmental investigations under s. 6, which empowers the minister presiding over any federal government department to appoint a commissioner to investigate and report on the state and management of the business of the department, either in the inside or outside service thereof, and the conduct of any person in that service. While made by the minister pursuant to s. 6, such appointments are under the authority of the Governor in Council.

Although it is accompanied by a heading that refers to public inquiries, Part I does not require that an inquiry be conducted exclusively in public, nor does it purport to abrogate confidentiality or privilege. In fact, it makes no mention of the inquiry being held in public at all. This is consistent with the flexibility that public inquiries must possess in order to be fair and efficient. Correspondingly, Part II contains no requirement that departmental investigations be conducted in private.

Moreover, giving the *Act* the fair, large and liberal construction that s. 12 of the *Interpretation Act*[2] requires, I conclude that the circumstances in which a Part I inquiry or a Part II investigation may be created are not mutually exclusive. Had Parliament intended otherwise, it would have said so in clear and unambiguous terms.

I conclude that the specific power in Part II of the *Inquiries Act* to "investigate and report on the state and management of the business of the department", does not diminish the power of the Governor in Council to establish a public inquiry under Part I to investigate and report on the actions of Canadian officials in relation to Mr. Arar. Finally, I note that where the Executive has more than one power to establish an inquiry, it may choose one or the other freely.[3]

Mandate Conferred by Order-in-Council PC 2004-48

I accept the Attorney General's submission that provided that the intention of the Governor-in-Council is readily discernible, no specific language is necessary for an order-in-council to be valid. This submission is borne out by a comparison of the words used in the Order-in-Council with those used in orders-in-council establishing other commissions.[4] I also accept that the words, "investigate and report on" do not

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2 R.S.C. 1985, c. I-21

3 *Wagstaff v. Secretary of State for Health*, [2001] 1 W.L.R. 292; [2000] E.W.J. No. 4098 (Q.B.) at para. 49.

4 For example, the operative words in the federal order-in-council establishing the Commission of Inquiry into the Contamination of the Blood System (1993) were "review and report on": see P.C. 1993-1879, October 4, 1993. P.C. 1995-442, the federal order-in-council establishing the Commission of inquiry into the Canadian Forces' Deployment to Somalia (1995) used the words "inquire into

necessarily connote a Part II departmental investigation rather than a Part I public inquiry.

Referring to remarks made in the House of Commons by the Minister of Public Safety and Emergency Preparedness,[5] the Applicant submitted that the fact that I was consulted regarding the Commission's terms of reference was significant in that it pointed to an intention to create a departmental investigation and was, in an unspecified way, "unfair to all participants". I disagree. In my view, there is no significance to the fact that I reviewed the terms of reference before Order-in-Council PC 2004-48 was finalized. This was done as part of a practice that has evolved when governments ask someone to undertake the task of being a commissioner. Adherence to this practice is not unfair, nor does it create an appearance of unfairness.

Counsel for Mr. Arar points out that the mandate for the Commission's factual inquiry is to "investigate and report on the actions of Canadian officials in relation to Maher Arar" including having regard to his detention in the U.S., his deportation to Syria via Jordan, his imprisonment and treatment in Syria, his return to Canada, and any other circumstance directly related to Mr. Arar that I consider relevant to fulfilling this mandate. The Commission's terms of reference are not limited to investigating and reporting on the state and management of the business of any particular department of the federal government, nor even to federal government employees. A departmental investigation could not be convened in relation to the Prime Minister's office, the offices of ministers of the Crown or the Privy Council Office, because these parts of the executive branch of government are not departments. In addition, whether CSIS employees or RCMP officers could be the subject of departmental investigations may be open to debate. Of course, municipal and provincial police officers who were seconded to Project AO Canada were not employees of a federal government department. Yet all are Canadian officials for the purposes of the mandate conferred upon this Commission.

I conclude that the Commission's terms of reference do not confine this inquiry to a departmental investigation of employees of federal government departments because such a limit would be inconsistent with the very nature of the inquiry that I have been asked to undertake.

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and report on". The provincial order-in-council establishing what became known as the Walkerton Inquiry (2000) used the words "inquire into": see O.C. 1170-2000. Like the present commission, P.C. 2004-110, the federal order-in-council creating the Commission of Inquiry into the Sponsorship Program and Advertising Activities (2004) used the words "investigate and report on."

5 See *Commons Debates*, 37th Parliament, 3rd Session, 56 (2:1420)

Significance of Minister's Recommendation to the Governor in Council

In support of the submission that the establishment of this commission followed processes expected in departmental investigations created under Part II of the *Act*, the Applicant pointed to the Order-in-Council's reference to "the recommendation of the Solicitor General of Canada styled Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness". The Applicant submitted that this was consistent with creation of a departmental investigation, under section 6 of the *Act*, which empowers the minister presiding over a department of the federal public service appoint a commissioner or commissioners to investigate and report on the state and management of the department's business. That provision can be compared to section 2 of the *Act*, which provides that the Governor in Council may cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of its public business.

However, every order-in-council must be recommended by a Minister of the Crown. Although orders-in-council establishing commissions of inquiry are commonly issued on the Prime Minister's recommendation, this practice is not invariable.[6] I conclude that the Order-in-Council's reference to the recommending minister does not change the legal character of this public inquiry.

Does Receiving Testimony in camera *Change the Legal Character of a Public Inquiry?*

The Applicant has submitted that paragraph (k) of the Order-in-Council is contrary to the purpose and spirit of a public inquiry set up under Part I of the *Act*. Paragraph (k) requires me to take all steps necessary to prevent public disclosure of information that would, in my opinion, be injurious to international relations, national defence or national security. On the Attorney General's request and where in my opinion such disclosure would be injurious to international relations, national defence or national security, it compels me to receive information *in camera* and in the absence of any party and their counsel. This resulted in a significant portion of the evidence being heard *in camera*, at least in the first instance.

I disagree with the Applicant's submission that paragraph (k) gives me "absolute discretion" to hear testimony *in camera*. It is an express direction to me to receive information *in camera* in the circumstances that it describes. Because of this requirement's impact on the commission's hearing process, I appointed *amicus curiae* with the mandate of testing the government's requests that evidence be heard *in camera*. In determining whether to receive information *in camera* and in the absence of parties and their counsel, I have derived very substantial assistance from the involvement of *amicus curiae*.

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6 For example, the order-in-council establishing the Commission of inquiry into the Canadian Forces' Deployment to Somalia was issued on the recommendation of the Minister of National Defence: see P.C. 1995-442, March 20, 1995.

The Applicant's submission leaves unanswered the question of how national security confidentiality – or, for that matter, any kind of confidentiality – can be accommodated in a public inquiry process. My review of the *Inquiries Act* discloses that in no respect does the *Act* purport to take precedence over other federal statutes. It establishes no hierarchy. For that reason, it is essential that any commission's hearing process accommodate national security confidentiality, and all forms of privilege.

The English Court of Queen's Bench has recognized that there will be circumstances in which public inquiries will be compelled to conduct some portion of their proceedings in private:

> No one doubts that there are circumstances when freedom to receive information or freedom of expression may have to be curtailed in the public interest ... The same may apply in relation to national security, medical records or disciplinary proceedings, but where these freedoms are to be curtailed the case for restriction must be strictly proved.[7]

I conclude that my compliance with the requirements of paragraph (k) of the Order-in-Council has not deprived this commission of its jurisdiction to inquire into the actions of Canadian officials in relation to Mr. Arar.

Does Appointment of the Fact Finder Change the Legal Character of a Public Inquiry?

I do not accept the Applicant's contention that "the manner of Mr. Arar's examination" – that is, through the fact finder appointed under my ruling of May 9, 2005 –"has corresponded with the procedure set out in ... Part II of the *Inquiries Act*." In making this submission, the Applicant has referred to s. 9 of the *Act*, which enables commissioners conducting departmental investigations to authorize someone to take evidence and report it to the commissioners.

Section 11 of the *Act* (which is in Part III, applicable to both public inquiries and departmental investigations) empowers a commissioner, whether appointed under Part I or Part II if authorized by the commission issued in the case, to engage the services of experts and assistants as deemed necessary, and experts "or any other qualified persons" may "inquire into any matter within the scope of the commission" as the commissioner may direct.[8] Paragraph (j) of the Order-in-Council provides that "the Commissioner be authorized to engage the services of any experts and other persons referred to in section 11 of the Inquiries Act ..."

In addition, paragraph (e) empowers me to adopt any procedures and methods that I consider expedient for the proper conduct of the inquiry. The flexibility provided by that paragraph is consistent with the Supreme Court of Canada's description of commissions of inquiry as "unconnected to normal legal criteria" and based upon and

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7 *Wagstaff*, *supra*, note 3 at para. 99

8 S-s. 11(2).

flowing from "a procedure which is not bound by the evidentiary or procedural rules of a courtroom".[9]

I have stressed that any decision as to whether Mr. Arar will testify before the Commission and be subject to cross-examination has been deferred until release of the interim report.[10]

I conclude that appointment of the fact finder to examine Mr. Arar is authorized by s. 11 of the *Inquiries Act* and the terms of reference for this commission, and does not change the legal character of this inquiry.

Conclusion

The motion for a declaration that the commission is improperly constituted and that the notice issued to the Applicant pursuant to s. 13 of the *Inquiries Act* is of no force and effect is dismissed.

January 3, 2006

Commissioner Justice Dennis O'Connor

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9 *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 at para. 34

10 *Ruling on Process and Procedural Issues*, May 9, 2005, p. 2