

## **From Cooperation, to Complicity, to Compensation: The War on Terror, Extraordinary Rendition, and the Cost of Torture**

**Audrey Macklin**

Faculty of Law, University of Toronto, Canada

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### **Abstract**

Attention has turned recently to the human rights implications of Western states' cooperation with the United States in the so-called War on Terror. This paper presents the ordeal of Canadian Maher Arar as a case-study in how one state responded to contentions of complicity in the extraordinary rendition of one of its nationals. Relying in part on faulty intelligence supplied by Canada, Arar was rendered by the United States to Syria. He was imprisoned and tortured for almost a year before Canada secured his release. Under considerable public pressure, the Canadian government appointed an independent public inquiry to examine the events surrounding his rendition. Following the release of the report and its recommendations, the Canadian government formally apologized to Arar and paid him substantial compensation. The author provides an account of the function performed by independent public inquiries in responding to public calls for government accountability in face of alleged wrongdoing. The paper describes the challenge posed by competing demands for publicity and secrecy in the particular context of controversial actions taken in the name of national security. Finally the author considers the precedential value of the Arar Inquiry for other jurisdictions that face similar allegations regarding complicity in human rights violations, as well as the task of devising a fair and reasonably open process against claims of national security confidentiality.

### **Keywords**

Keywords: terrorism; national security; extraordinary rendition; human rights; public inquiry; accountability; compensation; liability; complicity

It was almost surreal and almost funny, that is if your taste runs to black comedy. Canada recently hosted a conference of senior judges from around the world, including United States Supreme Court Justice Antonin Scalia. Not only do Canadian and US judges share a common border and a common law legal tradition, they apparently watch the same television show – a certain US programme called '24'. The show centres on maverick US security agent Jack Bauer, played by Canadian actor Kiefer Sutherland. Agent Bauer routinely draws on an arsenal of violent tactics, including torture, to save the United States from impending terrorist attack. The following exchange among participants was recounted by a Canadian journalist reporting on the conference:

Senior judges from North America and Europe were in the midst of a panel discussion about torture and terrorism law, when a Canadian judge's passing remark – “Thankfully, security agencies in all our countries do not subscribe to the mantra ‘What would Jack Bauer do?’” – got the legal bulldog in Judge Scalia barking.

The conservative jurist stuck up for Agent Bauer, arguing that fictional or not, federal agents require latitude in times of great crisis. “Jack Bauer saved Los Angeles. . . . He saved hundreds of thousands of lives,” Judge Scalia said. Then, recalling Season 2, where the agent's rough interrogation tactics saved California from a terrorist nuke, the Supreme Court judge etched a line in the sand.

“Are you going to convict Jack Bauer?”

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When the panel opened to questions and commentary from the floor, . . . the lawyer for the famously wronged engineer Maher Arar, emerged from the crowd to say that very little of the conversation sounded hypothetical to him.

Mr. Arar was among a series of Canadian Arabs who emerged from lengthy ordeals in Syrian jails to complain of torture. Their common complaint is that Syrian torture – including beatings with electric cables – flowed from a wrongly premised Canadian investigation after 9/11. A host of security agents, Mr. Waldman argued, acted with utmost urgency against innocents, after wrongly fearing a bomb plot was afoot.<sup>1</sup>

On ‘24’, Jack Bauer never tortures the wrong man, the information he extracts is always accurate, LA is inevitably saved from annihilation, and the end justifies the means. Life has not imitated art. In Maher Arar's real life story, the United States relied on false intelligence supplied by Canada in deciding to render Maher Arar to Syria, where he was imprisoned for almost a year and tortured until he signed a false confession. And no one was saved.<sup>2</sup>

The saga of Maher Arar illustrates how co-operation between states in the War on Terror can devolve into collusion in the violation of fundamental human rights. There is, however, another dimension to the case. Once Arar returned to Canada, sustained media attention generated public demand for answers about the role played by Canadian officials in Arar's ordeal. The government eventually capitulated by appointing a commission of inquiry. Based on the findings and recommendations of the report issued by the commissioner, the government apologized to Arar and paid him substantial monetary compensation. This response of the Canadian government provides one of the first instances of government accountability for the consequences of complicity in the US led ‘War on Terror’.

<sup>1</sup> “What Would Jack Bauer Do?: Canadian Jurist Prompts International Justice Panel to Debate TV Drama ‘24’s Use of Torture, *The Globe and Mail* (Toronto), 16 June 2007 <http://www.theglobeandmail.com/servlet/story/LAC.20070616.BAUER16/TPStory/TPNational/Television/>.

<sup>2</sup> Extraordinary rendition describes the United States' practice of transferring a person suspected of terrorist involvement to a location outside the territory of the fifty states to a location where the person faces interrogation in a form that would be illegal in the United States, namely physical and psychological torture, or cruel, inhuman, or degrading treatment. Destinations for extraordinary rendition include detention centres established in Poland, Romania, Afghanistan and elsewhere, as well as prisons in countries known to engage in torture and cruel, inhuman or degrading treatment. For scholarly commentary, see David Weissbrodt and Amy Bergquist, ‘Extraordinary Rendition and the Torture Convention’ (2007) 46 *Virginia Journal of International Law* 585; Margaret Satterthwaite, “Rendered Meaningless: Extraordinary Rendition and the Rule of Law”, (2007) 75 *George Washington L. Rev.* 1333.

I begin with a brief synopsis of events surrounding Maher Arar's rendition by the United States to Syria and eventual return to Canada. I turn next to the creation, conclusions, and consequences of the commission of inquiry appointed to investigate what happened. Neither the appointment of a commission of inquiry nor the payment of compensation were obvious or inevitable, and so I examine the political factors that contributed to these outcomes. I next address the public inquiry model as an instrument of governance and a policy generating instrument unto itself. Finally, I conclude by commenting on the reverberations and relevance of the inquiry in other jurisdictions.

In presenting the Canadian experience, I do not imply that Canada has definitively 'learned its lesson'. Nevertheless, the fact that the Canadian government publicly acknowledged its role in the wrongs committed against Maher Arar, and paid Mr. Arar substantial compensation, sets a remarkable precedent that warrants the attention of other states whose cooperation with the United States in extraordinary rendition might raise similar issues.

## Background

Maher Arar was born in Syria in 1970, immigrated to Canada at age seventeen, and naturalized as a Canadian citizen in 1991. He attended university in Canada, and trained as an engineer. He is a dual citizen of Syria and Canada. Although renunciation of Syrian citizenship is theoretically possible, in practice it is virtually impossible.<sup>3</sup> Dual nationality, often presumed to confer benefits on the holder, redounded to Arar's detriment in two ways: first, it operated as a legal hook upon which to hang a disclaimer of Arar's normative authenticity as a Canadian citizen, and his entitlement to consular assistance.<sup>4</sup> Secondly, it provided the United States with a pretext (albeit spurious) for making Syria the destination of his rendition.<sup>5</sup>

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<sup>3</sup> 'Citizenship Laws of the World', [http://www.multiplecitizenship.com/wscl/ws\\_SYRIA.html](http://www.multiplecitizenship.com/wscl/ws_SYRIA.html) (online resource).

<sup>4</sup> Canadians who are dual citizens are as entitled as single citizens to consular assistance and diplomatic protection from the Canadian government, even in the country of their other nationality. Article 4 of the 1930 Hague Convention on Certain Questions Relating to Conflicts of Nationality declares that "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." Canada is no longer a Party to the Convention. Nevertheless, the Canadian government cannot guarantee that the other state of nationality will respect Canada's assertion of assistance and protection.

<sup>5</sup> United States immigration policy is to regard an alien as a citizen of the state whose passport he presents when seeking admission to the United States. Arar presented his Canadian passport when entering the United States. Moreover, US law indicates that an alien dual national facing deportation from the United States can designate the country of removal. Immigration and Nationality Act, § 241(b), USC § 1231(b). Arar never wavered from his request to be removed to Canada. One can only speculate as to what the United States might have done had Arar been a citizen only of Canada. The United States has engaged in extraordinary rendition of individuals with single as well as dual citizenships to Guantánamo

As a wireless technology consultant, Maher Arar frequently traveled to and from the United States on business. In September 2002, he was returning to Canada from a family vacation in Tunisia, and disembarked at New York's JFK Airport to change planes. US officials detained him for twelve days and declared him inadmissible to the United States. They indicated Canada or Syria as possible destinations for deportation. Arar insisted that he wanted to go back to Canada, where he and his family lived, and expressed fear of torture if sent to Syria. He spoke with a Canadian consular official during this period, who assured him that despite suggestions to the contrary made by US officials, Arar would be returned to Canada. Maher Arar's fears were well-founded: US officials transferred Maher Arar to Syria, with stopovers in Italy and Jordan.

Arar was imprisoned in the notorious Palestine Branch of the Syrian prison network, which was noted by Amnesty International in its 2002 report as a location of torture and ill-treatment. He spent the next year of his life in a dank, 2m x 2m x 1m Syrian prison cell that he later called his grave. He was beaten, tortured, held in solitary confinement and compelled to sign a false confession of terrorist training in Afghanistan. Canadian consular officials and even two Members of Parliament visited Arar, but always met with him in the presence of Syrian officials. Meanwhile, his wife Monia Mazigh waged a public campaign in Canada to raise awareness of Arar's plight and to urge the government to secure his release. Finally, Canada obtained Arar's release and repatriated Arar to Canada in early October 2003.

Arar's ordeal quickly elicited equal shares of sympathy toward him and doubt about the integrity of the Canadian government's conduct: did Canadian police and intelligence officials (the RCMP and the Canadian Security Intelligence Service (CSIS)) furnish unsubstantiated and false information about Maher Arar's alleged terrorist connections to the United States and/or Syria? Did the Canadian government approve his deportation to Syria? Did Canadian diplomats in Syria fulfill their duty to provide him with consular assistance and to advocate for his release?

As media attention and public pressure on the government mounted, well-timed media leaks by 'unnamed government officials' attempted to discredit Arar and his wife, Monia Mazigh. Eventually, the government did what it often does in politically uncomfortable situations, and early in 2004 it appointed the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (hereafter 'Arar Inquiry'). By striking a public inquiry, the government was able to deflect further questions about the Maher affair until the inquiry was complete. The Arar Inquiry's dual mandate was "to investigate and report on the

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Bay, and to detention centres or prisons that are not in the individual's country of citizenship. See Olivier Dutheillet de Lamothe, 'Extraordinary Renditions: A European Perspective', European Commission for Democracy Through Law (Council of Europe Venice Commission), Opinion no. 363/2005, 11 October 2006, <http://www.statewatch.org/news/2006/nov/venice-commission-rendition-speech.pdf>.

actions of Canadian officials in relation to Maher Arar” (Phase 1) and “to recommend an arm’s length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security” (Phase 2).<sup>6</sup>

The government named Justice Dennis O’Connor, a highly-respected appellate judge, to lead the Arar Inquiry. One of Justice O’Connor’s challenges was to negotiate the intractable tension between the public mandate of the inquiry and government’s resistance to public disclosure of information in the name of national security. US and Syrian officials refused to participate in the inquiry, and could not be compelled to testify.

The Arar Inquiry elicited significant and sustained media attention, at least during the public hearings. The Inquiry commenced hearings in June 2004 and continued intermittently until November 2005. Despite the fact that much of the evidence was heard *in camera* (behind closed doors) owing to government assertions of national security confidentiality, some of the publicly reported testimony sparked unease. The Canadian Ambassador to Syria provoked considerable public disdain when, in response to questioning about the likelihood of torture in Syrian jails, he replied “I did not have any indication that there were serious human rights abuses committed that I could verify.”<sup>7</sup>

## The Report

In September 2006, Justice O’Connor released the Report of the Events Relating to Maher Arar: Analysis and Recommendations (“Factual Report”), which included two volumes of factual background. Justice O’Connor was able to arrive at several damaging (if not damning) conclusions about Canada’s involvement in Maher Arar’s rendition. First, “there is nothing to indicate that Mr. Arar committed an offence or that his activities constitute a threat to the security of Canada”.<sup>8</sup> Secondly, the RCMP provided US officials with information about Mr. Arar that was inaccurate and prejudicial, including a depiction of Arar and Mazigh as “Islamic extremist individuals suspected of being linked to the Al Qaeda terrorist movement”.<sup>9</sup> Third, the RCMP violated their own protocol by supplying information to the United States and Syria without attaching any conditions on how the information would be used. Although Justice O’Connor found no evidence that

<sup>6</sup> “Deputy Prime Minister Issues Terms of Reference for the Public Inquiry into the Maher Arar Matter”, 5 February 2004, [http://www.ararcommission.ca/eng/Terms\\_of\\_Reference.pdf](http://www.ararcommission.ca/eng/Terms_of_Reference.pdf), at 2.

<sup>7</sup> Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, “Report of the Events Relating to Maher Arar: Factual Background, Volume 1, 18 September 2006, at 239. (<http://www.ararcommission.ca/eng/26.htm>).

<sup>8</sup> Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, “Report of the Events Relating to Maher Arar: Analysis and Recommendations”, 18 September 2006 at 1 (<http://www.ararcommission.ca/eng/26.htm>).

<sup>9</sup> *Ibid.*, at 13.

Canada knew or acquiesced to Arar's extraordinary rendition to Syria, he concluded that American authorities probably relied on the false and incriminating RCMP information as the basis for their actions.

Next, "[w]hile in Syria, Mr. Arar was interrogated, tortured and held in degrading and inhumane conditions".<sup>10</sup> Justice O'Connor reviewed the actions of the Canadian government while Arar was in Syrian custody, and found that Arar's 'confession' to Syrian authorities was passed on to Canadian officials and circulated to the RCMP and the Canadian Security Intelligence Service (CSIS) with no caveat that the statement may have been extracted through torture. Indeed, the government even furnished Syrian authorities with questions to pose to another Canadian also in Syrian custody. The various government departments involved in Arar's case could not even agree to ask Syria to release and return Mr. Arar to Canada. Finally, Canadian officials deliberately leaked confidential and sometimes false information to the media "for the purpose of damaging Mr. Arar's reputation or protecting their self-interests or government interests".<sup>11</sup>

The findings contained in the Factual Report ground the recommendations concerning how the Department of Foreign Affairs and International Trade (DFAIT), the RCMP, the Canadian Security Intelligence Service (CSIS) and embassy officials should engage with one another and with foreign governments when gathering and sharing of intelligence, and when dealing with a citizen detained abroad on security-related matters. With respect to Arar himself, the Factual Report recommends that the Government of Canada register a formal objection with the United States Government regarding the rendition of Arar, recognizing that an objection would be largely symbolic.

Justice O'Connor is diffident on the matter of remedy, given the limits of his mandate. He declines to make any recommendations regarding discipline of government actors, averring that "those responsible for discipline will have my report. They can take my findings and decide what steps, if any, need to be taken".<sup>12</sup> While reiterating that he is "specifically precluded from making any findings (or even assessments) as to whether the Government of Canada would be civilly liable to Mr. Arar",<sup>13</sup> Justice O'Connor offers the following suggestions on the matter of compensation:

First, in addressing the issue of compensation, the Government of Canada should avoid applying a strictly legal assessment to its potential liability. It should recognize the suffering that Mr. Arar has experienced, even since his return to Canada. Among other things, after his return, he was subjected to several very improper and unfair leaks of information that damaged his reputation, caused him enormous personal suffering and may have contributed to the difficulties this well-educated Canadian man has experienced in finding employment in his chosen field of computer engineering.

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<sup>10</sup> *Ibid.*, at 1.

<sup>11</sup> *Ibid.*, at 16.

<sup>12</sup> *Ibid.*, at 363.

<sup>13</sup> *Ibid.*, at 362.

Mr. Arar's inability to obtain employment has had a devastating economic and psychological impact on both him and his family. In addition, as the Inquiry has proceeded, some of the mental suffering that Mr. Arar experienced in Syria has re-surfaced. Based on the assumption that holding a public inquiry has served the public interest, Mr. Arar's role in it and the additional suffering he has experienced because of it should be recognized as a relevant factor in deciding whether compensation is warranted.

The only other observation that I wish to make is that, if the Government of Canada chooses to negotiate with Mr. Arar, negotiated arrangements can be more creative than a mere damage award. A compensation agreement could involve anything from an apology to an offer of employment or assistance in obtaining employment.<sup>14</sup>

By the time the Factual Report appeared in September 2006, the governing Liberal Party had been replaced by a Conservative government led by Prime Minister Stephen Harper. The new government entered into negotiations with Mr. Arar in order to settle the lawsuit that Mr. Arar had earlier initiated against the Canadian government. On January 26, 2007, the government announced a monetary settlement with Arar of approximately € 7 million. The government also issued a formal apology to Arar and his family for "any role Canadian officials may have played in the terrible ordeal that all of you experienced in 2002 and 2003". The Canadian government did lodge a formal objection with the United States, to no particular effect.<sup>15</sup> No disciplinary proceedings against any Canadian officials have been initiated, although RCMP Commissioner Giuliano Zaccardelli was forced to resign after giving contradictory testimony to committees of the House of Commons about the RCMP's role in the Arar affair.

The second phase of the Arar Inquiry mandate was fulfilled in December 2006 with the release of the "A New Review Mechanism for the RCMP's National Security Activities"<sup>16</sup> (hereafter "Policy Report"). The Policy Report recommended a new independent review agency for the RCMP and a review process for other agencies involved in national security. The proposed agency would receive complaints and initiate its own inquiry into the RCMP's "compliance with laws, policies, ministerial directives and international obligations, as well as for standards of propriety that are expected in Canadian society."<sup>17</sup> As Justice O'Connor states in his Policy Report,

<sup>14</sup> *Ibid.*, at 363.

<sup>15</sup> In February 2007, US Secretary of State Condoleezza Rice reaffirmed that Maher Arar would not be removed from the US 'watch list', despite his exoneration by the Arar Inquiry: "We respect the Canadian government concerning Mr. Arar. The United States, of course, makes decisions based on information that we have and based on our own assessment of the situation". "Arar Divisive Issue as N. American Officials Meet", CTVNewsnet, 23 February 2007, [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070222/rice\\_mackay\\_070223/20070223?hub=Canada](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070222/rice_mackay_070223/20070223?hub=Canada).

<sup>16</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 'A New Review Mechanism for the RCMP's National Security Activities', 12 December 2006, <http://www.arar-commission.ca/eng/EnglishReportDec122006.pdf>.

<sup>17</sup> *Ibid.*, at 18.

[t]he need for self-initiated reviews stems from the fact that most of the RCMP's national security activities are conducted in secret and receive little, if any, judicial scrutiny, yet have the potential to significantly affect individual rights and freedoms. It is vital that those within the Force involved in national security activities be held accountable for such activities by a body that is independent of the RCMP and government.<sup>18</sup>

The Factual Report is forensic and retrospective, insofar as it deals with past events specifically relating to Maher Arar, while the Policy Report is prospective. It remains to be seen if, when, and to what extent the policy recommendations will be implemented. One might anticipate that the large settlement paid by the government to Mr. Arar could exert some deterrent effect on security officials in the future. However, the Report makes it clear that wrongful actions by Canadian state actors could not properly be ascribed simply to aberrant behaviour by rogue individuals, but rather were enabled by institutional, cultural, and administrative defects in the Canadian security establishment. Given the structural causes of the debacle, the deterrent effect of monetary penalties alone could not produce the changes necessary to prevent similar failures in the future.

That the Canadian government appointed an independent and public inquiry into the conduct of its security establishment is remarkable in itself.<sup>19</sup> The quality and depth of the Inquiry and the final Report reflects the diligence, expertise and dedication of Justice O'Connor and his staff. The celerity with which the government responded to the Factual Report and issued a public apology, also deserves commendation.<sup>20</sup> Finally, the government's decision to compensate Arar almost € 7 million without dragging the matter through litigation sets a remarkable precedent which merits the attention of all states who have become implicated in extraordinary rendition. With that in mind, I turn now to considering aspects of the Arar case that may be relevant in other legal contexts and in other jurisdictions.

### Political Contingencies

Apart from any principled commitment to discerning the truth about Canada's role in Mr. Arar's ordeal, various factors led the Canadian government to appoint the Arar Inquiry and to compensate Arar. Maher Arar was not the only Canadian imprisoned in Syria for alleged terrorist connections, but he was the only one

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<sup>18</sup> *Ibid.*, at 18.

<sup>19</sup> In fact, the Arar Inquiry is the second public inquiry into Canada's security establishment. In 1977, the government responded to widespread allegations of illegal conduct by the RCMP by appointing a Royal Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police. As a result of the Royal Commission's 1981 report, a civilian security agency, the Canadian Security and Intelligence Service (CSIS) was created.

<sup>20</sup> The fact-finding Report was issued in September 2006 and the apology and settlement announced in January 2007.

who was rendered by the US to Syria. The other three traveled to Syria of their own volition. Unlike the family members of other detainees, Maher Arar's spouse, Monia Mazigh, decided to 'go public' about her husband's ordeal and launched a high-profile campaign to proclaim Arar's innocence, attract attention to his ongoing detention, and to urge the government to intercede on her husband's behalf. Dr. Mazigh, a hijab-wearing Muslim woman with a PhD in finance, was composed, articulate and earnest. She was often accompanied in press conferences and other public events by the Secretary-General Amnesty International Canada, Alex Neve. Once he returned to Canada, Arar met with media in carefully controlled settings where he was flanked by his wife, Amnesty International's Alex Neve, and a well-respected immigration lawyer, Lorne Waldman. Arar spoke briefly, but eloquently, about his gratitude to his wife and his supporters, his relief at being reunited with his family in Canada, and his profound desire to clear his name.

The media may have had another motive for keeping Arar in the public eye and endorsing the call for a public inquiry. After Arar's release and return to Canada, anonymous government officials leaked false, damaging and allegedly classified information about Arar to an Ottawa journalist in order to counteract the generally positive publicity Arar had received in the media. When Arar and his lawyers complained about this apparent disclosure of classified information by someone in government within the government, the RCMP responded by treating the leak as a criminal breach of national security. In furtherance of their investigation, the RCMP executed a search warrant at the home of the journalist who was the recipient of the leak, searched her house, and seized her computer hard drive in order to discover the identity of her informant.<sup>21</sup> The media was outraged by the RCMP's attempt to violate the confidentiality of journalistic sources, and some speculate that this provided a self-interested motive for the vocal support for an inquiry into the conduct of Canadian security officials – including the RCMP – with respect to Mr. Arar. It is ironic, of course, that the media's indignation over the conduct of an investigation into media leaks that smeared Arar's reputation would translate into support of Arar's call for a public inquiry.

The speedy response of the government to the Factual Report of the Arar Inquiry must also be read in light of the fact that the party in power when the Report was issued was in opposition when the events precipitating the inquiry occurred. The formal apology from Prime Minister Stephen Harper does not pass

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<sup>21</sup>) The Ontario Superior Court ultimately quashed the warrants against the journalist, ordered the return of the seized materials, and ruled that the provisions of the Security of Information Act R.S.C. 1985, c. O-5, as amended, that purported to authorize the seizure were unconstitutionally vague and violated freedom of expression. See *O'Neill v. Canada (Attorney General)*, *O'Neill v. Canada (Attorney General)*, 2006 CanLII 35004 (ON S.C.), <http://www.canlii.org/en/on/onsc/doc/2006/2006canlii35004/2006canlii35004.html>.

up the opportunity to draw attention to this fact: “Although these events occurred under the last government, please rest assured that this government will do everything in its power to ensure that the issues raised by Commissioner O’Connor are addressed”.<sup>22</sup>

Finally, a crucial factor in the decision to appoint an inquiry was the widely (though not universally) shared impression that Arar was an innocent man who was wrongly labeled an extremist and terrorist affiliate. In legal terms, the truth of the allegations against him is irrelevant to whether his fundamental rights were violated by extraordinary rendition, imprisonment and torture; in political terms however, it was probably dispositive. To appreciate its significance, one need only compare Arar to Omar Khadr, a Canadian citizen captured in 2002 by US forces and detained in Guantánamo Bay ever since. He was fifteen years old when captured, and has spent a quarter of his life in Guantánamo Bay, much of it in solitary confinement without charge. The most serious allegation against him is that he killed a US soldier during battle. Omar Khadr, however, is a son of the notorious Ahmed Said Khadr, a cohort of Osama bin Laden.<sup>23</sup> Khadr senior was killed in a firefight with Pakistani forces in October 2003. Omar Khadr’s mother and sister continue to unabashedly propound their extremist beliefs to the media, and the Khadr family has been dubbed “Canada’s first family of terror”. Omar Khadr is the only person detained in Guantánamo Bay for alleged offences committed as a minor. He is also the only remaining citizen of a Western nation detained in Guantánamo Bay. The Governments of the UK, France, Germany and Australia each sought and obtained the release and return of their citizens. Despite widespread international criticism of Guantánamo Bay as a legal ‘black hole’ and an affront to the rule of law, and notwithstanding uncontradicted claims that Omar has been subject to abuse and torture, successive Canadian governments have reiterated their faith in the United States’ assurance that Omar has been, is and will be treated fairly. At the time of writing, Omar Khadr faces trial before a United States Military Commission established to try detainees. The government has not sought his repatriation to Canada.

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<sup>22</sup> Government of Canada, “Prime Minister releases letter of apology to Maher Arar and his family and announces completion of mediation process”, 26 January 2007, <http://www.pm.gc.ca/eng/media.asp?category=1&cid=1509>.

<sup>23</sup> Ahmed Said Khadr was arrested and detained by Pakistani authorities in 1996 on suspicion of financing a terrorist bombing. Canadian Prime Minister Jean Chrétien successfully interceded with Pakistani Prime Minister Benazir Bhutto and Khadr was released without charge. After September 11, 2001, it became clear that Khadr was indeed engaged in terrorist activities, and Chrétien’s earlier intervention was a source of major political embarrassment to the Liberal government. The reluctance of the Canadian government to protest or intervene in subsequent cases involving Canadian citizens abroad accused of terrorist activities was dubbed the ‘Khadr effect’.

## Public Inquiry Model

As a mechanism for addressing allegations of wrongful acts by public officials, the public inquiry lies somewhere between the internal government investigation and the trial. The appointment of a commission of inquiry is a purely discretionary executive act. The commission of inquiry is independent of government in the sense that it operates from arms-length. Judges are frequently appointed as Commissioners, and their judicial independence and expertise is meant to add credibility to the independence. An inquiry is not a trial, however. The commissioner is empowered to compel production of documents and testimony of witnesses, including witnesses who might be subject to criminal investigation and prosecution.<sup>24</sup> In contrast to the conventionally passive role played by common-law judges, commissioners of inquiry are authorized to investigate as well as to find facts. A commission of inquiry may mandate both fact-finding in respect of particular events, as well as the formulation of broad policy recommendations to improve governance in a sphere of public regulation, such as the coordination and oversight of security and intelligence agencies. But unlike a judge presiding at trial, a commissioner of inquiry makes no determination of criminal or civil liability, nor can a commissioner impose punishment or compensation. The Arar Inquiry Terms of Reference specifically provide that,

(o) the Commissioner be directed to perform his duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization and to ensure that the conduct of the inquiry does not jeopardize any ongoing criminal investigation or criminal proceedings.

To a large extent, the task of blaming and shaming falls to the court of public opinion. The reception of the report by the public and the media in turn dictates whether the government will respond with a remedy for wronged individuals or otherwise implement a commissioner's recommendations. Fact-finding in litigation is a means toward the end of affixing liability and ordering a remedy or punishment. Opening trials to the public advances the principles that justice must not only be done, but must be *seen* to be done. In a commission of inquiry, conducting fact-finding in public is both means and end. As Cory J explained in the 1995 Supreme Court of Canada judgment in *Phillips v. Nova Scotia*,

One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are,

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<sup>24</sup>) The concern that compelled testimony may violate a witness' constitutional right against self-incrimination has not been addressed in a majority judgment of the Supreme Court of Canada. At present, dicta by a minority of the Court upholding compellability (subject to narrow limitations) is generally regarded as a statement of Canadian law. See *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, per Cory J.

like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.<sup>25</sup>

The factual context of the Arar case brought the value of publicity, which is at the core of an inquiry's social function, into direct confrontation with the competing claim of confidentiality in the name of national security. The Terms of Reference directed the Commissioner to "maximize disclosure to the public of relevant information" while preventing disclosure to the public of information that could be detrimental to "national defense, international relations or national security".<sup>26</sup> The Terms of Reference granted the Commissioner the power to grant, or limit public disclosure according to a subjective standard, meaning that whether disclosure would be injurious to security interests depended on "the opinion of the Commissioner".<sup>27</sup> Where the government invoked national security confidentiality, the hearings were held *in camera*, and Commissioner O'Connor could subsequently determine whether to publicly disclose some or all of the evidence, or a summary of it.

It quickly became apparent that government, in its conduct before the Inquiry itself, did not share the bias in favour of public disclosure, or the confidence in

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<sup>25</sup> Phillips, *supra* at para. 62.

<sup>26</sup> "Deputy Prime Minister Issues Terms of Reference for the Public Inquiry into the Maher Arar Matter", 5 February 2004, [http://www.ararcommission.ca/eng/Terms\\_of\\_Reference.pdf](http://www.ararcommission.ca/eng/Terms_of_Reference.pdf), at 3.

<sup>27</sup> Justice O'Connor indicates in his report that public disclosure of national security information does not necessarily or always pose a risk: "For example, confidential sources of information (informers) and details of ongoing national security investigations that might compromise those investigations may not be disclosed publicly. Similarly, information received from foreign governments, particularly when provided in confidence, often may not be revealed. Information sharing among governments is crucial to conducting national security investigations, and respecting the confidence of those who provide information is essential. On the other hand, a good deal of information relating to national security investigations may be disclosed without causing injury. For example, there will often be no harm in divulging information about a completed investigation, particularly if the fact of and circumstances relating to it are already in the public domain. Moreover, many of the investigative steps taken by a law enforcement agency such as the RCMP in a national security investigation may safely be revealed. Unquestionably, there are borderline areas where judgments must be made. It is important to note that both the *Canada Evidence Act* and the Order in Council establishing the Inquiry provide for a means whereby information that may potentially be injurious to NSC may be disclosed if the public interest in disclosure outweighs the potential injury". Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, "Report of the Events Relating to Maher Arar: Analysis and Recommendations", 18 September 2006 at 283–4 (<http://www.ararcommission.ca/eng/26.htm>).

Justice O'Connor's judgement, ostensibly conveyed by government in the Terms of Reference. Government lawyers at the Arar Inquiry assiduously attempted to suppress public disclosure of more information than Justice O'Connor thought necessary, and the Arar Inquiry was beset with lengthy and time-consuming applications by government to prevent disclosure on grounds of national security confidentiality.<sup>28</sup> Justice O'Connor bluntly described the constraints impeding the exercise of his authority over disclosure in matters regarding assertions of national security confidentiality (NSC):

However, when the NSC mandate is stripped to the essentials, there are two points that are critical: on the one hand, the mandate required me to form opinions about what information could or should be disclosed to the public; on the other hand, my decisions in this respect were subject to challenge by the Attorney General of Canada in the Federal Court, under the legislative scheme in section 38.01 of the Canada Evidence Act. Thus, my authority with respect to NSC was seriously attenuated.<sup>29</sup>

Anytime that government asserted national security confidentiality, the disputed evidence had to be heard *in camera*. Next, government lawyers objected to the summary of *in camera* evidence that Justice O'Connor proposed to release publicly. Out of a concern that implacable government resistance would delay or even halt the Inquiry, Justice O'Connor abandoned his attempt to release summaries of evidence while the hearing process was ongoing. Instead, he drafted his Factual Report in which he disclosed evidence that, in his opinion, did not breach national security confidentiality. Where counsel for the government raised objections to parts of the text on grounds of national security confidentiality, the Factual Report was redacted to 'black out' the contested text while the government sought a ruling from a judge of the Federal Court of Canada on whether the text was protected by NSC.

Thus, the Inquiry was able to complete the fact-finding process and issue the redacted Factual Report in September 2006. What was gained in (relative) efficiency was lost in real-time publicity: The Inquiry held 45 days of hearings in public and 75 days *in camera*.

Another aspect of the clash between openness and national security confidentiality related to the participation of Mr. Arar himself in the Inquiry. Despite his obvious personal and reputational stake in the process, the cloak of national security confidentiality also excluded Mr. Arar. He did not have national security clearance and could not attend the *in camera* hearings or view classified documents. His lawyers might have qualified for national security clearance but did

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<sup>28</sup>) See Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, 'Report of the Events Relating to Maher Arar: Analysis and Recommendations', 18 September 2006 at 1 (<http://www.ararcommission.ca/eng/26.htm>), Chapter VII.

<sup>29</sup>) *Ibid.*, at 284.

not seek it. As Justice O'Connor commented, counsels' decision seemed reasonable, because "had they obtained clearance, they would not have been able to discuss information that was subject to NSC claims with their client and would not have been able to obtain informed instructions on how to proceed on many issues".<sup>30</sup>

Arar was not called to testify as a witness, although he had standing and was represented by counsel. He was interviewed by Professor Stephen Toope, an international legal expert in arbitrary detention and torture. Professor Toope prepared a report based on the interview that validated Arar's claims of torture and mistreatment in Syrian prison, and the consequences for his physical and emotional health. Based on this report and other evidence, Justice O'Connor concluded that Arar had indeed been tortured by his Syrian captors. In his Factual Report, Justice O'Connor stated that

I am satisfied that it was not necessary for Mr. Arar to testify in order for me to answer the questions raised by the mandate. That said, Mr. Arar has a strong reputational interest that is affected by the Inquiry. However, he has not had access to many of the documents or to a good deal of the *in camera* evidence relating to matters about which he could testify. Consequently, I have directed that Mr. Arar's decision as to whether or not he wishes to testify be deferred until after public disclosure of this report, the idea being that he will then likely have as much information as he is ever going to have about the matters on which he might testify. If Mr. Arar wishes to testify, he may bring a motion and, if I consider it appropriate, I will hear his evidence.<sup>31</sup>

Arar could not hear the government's evidence against him. The task of testing that evidence thus fell to Commission counsel, lawyers appointed by the Commission to assist Justice O'Connor in the conduct of the Arar Inquiry. In many cases, the only other counsel present at *in camera* hearings were government lawyers or lawyers representing individuals whose interests coincided with those of government. Moreover, the government chose to represent all departments with a single team of lawyers, such that potential inter-agency discrepancies and divergences were never explored by government counsel. In short, the Arar Inquiry faced the challenge that now besets virtually all post-9/11 legal and quasi-legal processes involving issues of terrorism and national security: how can one fairly assess evidence divulged *in camera* that is not disclosed to the person most affected or subject to cross-examination by counsel for that person? The UK Special Advocate system, Canada's security certificate process under immigration law, and the United States' Military Commissions at Guantánamo Bay represent three contemporary experiments in attempting to reconcile the most basic of procedural entitlements – the right to know and to respond to the case against you – with competing claims of national security.

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<sup>30</sup>) *Ibid.*, at 286

<sup>31</sup>) *Ibid.*, at 296.

For purposes of the Inquiry, Justice O'Connor reconfigured the role of Commission counsel in order to bridge the fairness gap that lies between national security confidentiality and fulfillment of the fact-finding duty of a commission of inquiry. Commission counsel assumed an active role in cross-examining witnesses, including witnesses called by the Commission. In order to prepare for the task, Commission counsel met periodically with Arar and his counsel, as well as intervenors, in order to canvass possible areas of cross-examination. This required considerable delicacy, since Commission counsel could not divulge the testimony or evidence disclosed *in camera*. Thus, they had to probe Arar and others in a manner that could elicit information of possible relevance to cross-examination of a witness, without revealing what the witness had said. Justice O'Connor emphasized how having "Commission counsel incorporate into witness examinations the perspectives of those who had an interest, but could not take part in the proceedings, helped to address the substantial shortcoming in the process resulting from the exclusion of those parties".<sup>32</sup>

In the closing paragraphs of his Factual Report, Justice O'Connor criticized the obstructive deployment of national security confidentiality by the government, and its impact on fulfillment of the Inquiry mandate.

The Inquiry is now complete and I am comfortable that, in the end, I was able to get to the bottom of the issues raised by the mandate, as I had access to all of the relevant material, regardless of any NSC claims. . . . The Inquiry has already taken longer than it need have. I am raising the issue of the Government's overly broad NSC claims in the hope that the experience in this inquiry may provide some guidance for other proceedings. In legal and administrative proceedings where the Government makes NSC claims over some information, the single most important factor in trying to ensure public accountability and fairness is for the Government to limit, from the outset, the breadth of those claims to what is truly necessary. Litigating questionable NSC claims is in nobody's interest. Although government agencies may be tempted to make NSC claims to shield certain information from public scrutiny and avoid potential embarrassment, that temptation should always be resisted.<sup>33</sup>

It seems ironic that the government of Canada appointed a public inquiry, only to cast a wide and heavy blanket of national security confidentiality over the process. One might read into this a reminder that the state is not monolithic and is not animated by a singular rationality. Differences in institutional culture, ethos and mandate mean that different organs, agencies, actors and departments act according to divergent motives. A more cynical interpretation would be that the government was content to give the appearance of openness by appointing a public inquiry, while zealously pursuing the objective of minimizing disclosure through the legal position adopted by counsel during the inquiry itself.

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<sup>32</sup>) Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, 'Report of the Events Relating to Maher Arar: Analysis and Recommendations', 18 September 2006, at 292.

<sup>33</sup>) *Ibid.*, at 304.

In the end, about 1500 words in the public report were redacted due to government counsel's objections. In late July 2007, the Federal Court issued its ruling on whether national security confidentiality justified non-disclosure.<sup>34</sup> Noel J. ordered disclosure of approximately 1,000 words of the redacted text. The newly disclosed material was released on 9 August 2007. Much of the disclosure seemed relatively banal, and simply named the US security agency (FBI or CIA) with whom Canadian officials communicated or traded intelligence. It also confirmed what anyone who read the redacted report would have deduced anyway, namely that the CIA made the decision to render Arar to Syria. However, one excerpt – which put the Arar Inquiry back on the front pages of Canadian newspapers – recounted that on 11 October 2002, a CSIS Security Liaison Officer in Washington D.C. reported to his superiors

a trend they had noted lately that when the CIA or FBI cannot legally hold a terrorist subject, or wish a target questioned in a firm manner, they have them rendered to countries willing to fulfill that role. He said Mr. Arar was a case in point. On October 10, 2002, Mr. Hooper stated in a memorandum: 'I think the U.S. would like to get Arar to Jordan where they can have their way with him.'<sup>35</sup>

In other words, Canadian officials realized immediately upon Arar's rendition that he was at risk of being "questioned in a firm manner" (read: tortured) and, indeed, that this was the very purpose of rendition. Another disclosed excerpt revealed that in September 2002, prior to his rendition, the RCMP sought and obtained telephone warrants against Arar based on a confession extracted from another Syrian Canadian detained in the Palestine Branch of the Syrian prison. The RCMP failed to disclose to the presiding judge, *inter alia*, anything about the human rights record of Syria or the particular reputation of the Palestine Branch. Through these omissions, RCMP officers effectively misled a court about the nature and reliability of the evidence upon which they relied for a warrant authorizing them to intensify surveillance of Arar.

The contents of the disclosed information were not the only – or even most – disturbing aspect of the revelations. Indeed, few were surprised to learn that CSIS knew from the outset that Arar would likely be treated very harshly, or that the RCMP bent rules to suit their ends. However, the fact that the government attempted to conceal what could only be characterized as politically embarrassing information under the cloak of national security confidentiality elicited scathing criticism. One newspaper columnist expressed his disdain bluntly:

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<sup>34</sup>) *Canada v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar and Maher Arar*, 2007 FC 766 (Noel J.).

<sup>35</sup>) Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar: Addendum, Disclosure of information authorized by the Federal Court of Canada in accordance with Sections 38.04 and 38.06 of the Canada Evidence Act, 9 August 2007, at 245.

It is ludicrous to suppose that Canadian-American relations have been damaged because the CIA has been outed by the O'Connor report. That troubled American intelligence service already has enough on its plate right now.

The only real damage the federal government has done, through both Liberal and Conservative administrations, is to itself. There are things about the Arar affair that you can't be told, our government informed us, for reasons of national security.

National security my ass. Foreign Affairs, CSIS and especially the RCMP were simply trying to keep hidden their incompetent, duplicitous, disgraceful handling of the Arar file. And they're still at it. Why should anyone trust anything that our government says about Maher Arar any more?<sup>36</sup>

## Conclusion

Canada and the United States vaunt their co-operation in prosecuting the 'war on terror. This collegiality shows signs of strain, however, when the matter turns to complicity in human rights violations committed in the course of waging that war. Despite the exoneration of Maher Arar and the apology and compensation paid to him in Canada, the United States' government has not resiled from its official position that Maher Arar is a security risk. He remains on the United States' "watch list" south of the border, which means he cannot enter the United States. About 30% of states take the US ban into account, which constrains Arar's mobility even further.<sup>37</sup> One can only speculate about what, if any, information the United States possesses about Maher Arar that it did not obtain from Canada, apart from the false confession extracted by Syria through torture from Arar by his Syrian captors.

In early 2004, Arar launched an American lawsuit against the United States government seeking damages arising from his extraordinary rendition. He is represented by the New York-based Center for Constitutional Rights (CCR), a domestic human rights advocacy organization. The suit was dismissed by the US District Court (Eastern District of New York) on grounds that national security and foreign policy considerations precluded the court from trying the case. The dismissal is presently on appeal to the US Court of Appeals (Second Circuit).<sup>38</sup> It is possible that as long as litigation continues, the United States government is unwilling to make any statements or take any action that might connote an admission of culpability with respect to Arar.

In arguing the appeal before the Second Circuit, the CCR sought judicial notice of the Factual Report of the Arar Inquiry with respect to the fact that it made

<sup>36</sup> John Ibbitson, 'Ottawa Sacrificed Arar to Save Face with US, Syria', *The Globe and Mail*, 10 August 2007, A1.

<sup>37</sup> 'Exoneration and an Apology, but US Won't Budge on Ban', *The Globe and Mail*, 27 January 2007 (online edition). [www.theglobeandmail.com](http://www.theglobeandmail.com).

<sup>38</sup> *Arar v. Ashcroft*, 414 F.Supp.2d 250 (E.D.N.Y. 2006) (order granting motion to dismiss) appeal argued 9 November 2007 (Second Circuit Court of Appeals).

findings regarding the role of various state actors. Although the truth of the contents of the Factual Report cannot be a matter of judicial notice, the CCR contends that the Factual Report's existence is relevant to the issue of whether foreign policy and national security considerations preclude the possibility of a civil trial. In effect, the CCR is using the Arar Inquiry to demonstrate the legitimacy and feasibility of subjecting the practice of extraordinary rendition to independent legal scrutiny, albeit that the Arar Inquiry was not a trial.<sup>39</sup> The US government defendants strenuously object to the recognition of the Factual Report for these purposes.<sup>40</sup>

In early 2007, the European Parliament adopted a resolution declaring that it “deeply regrets” that Italy permitted the United States to use Rome airport as a stopover on the flight that rendered Arar to Syria. It also urges speedy compensation for all persons whose rendition was facilitated by European states.<sup>41</sup> To date, no apology or compensation have issued from Italy to Arar.

Meanwhile, in Canada, another inquiry is underway. Arar was not the only Canadian citizen detained in Syria on allegations of terrorist associations. Abdullah Almalki, Ahmad Abou-El-Maati and Muayyed Nureddin were also detained, interrogated and tortured by Syrian authorities around the same time as Maher Arar.<sup>42</sup> Almalki and El-Maati were also subjects of the same RCMP investigation as Arar in Canada. The three men had standing as interveners at the Arar Inquiry, but were not the subject of the inquiry and Justice O'Connor hesitated to make any findings in relation to them. Instead, he agreed that the “cases of each of the other three men – Almalki, El Maati and Nureddin – raise troubling questions about what role Canadian officials may have played in the events that befell them”.<sup>43</sup> He recommended the initiation of a separate, independent process to answer those questions. He cautioned against another full-scale public inquiry, observing that “a public inquiry in cases such as these can be a tortuous, time-consuming and expensive exercise. . . . That said, I have heard enough evidence about the cases of Messrs. Almalki, El Maati and Nureddin to observe that these cases should be reviewed and that the reviews should be done through an inde-

<sup>39</sup> See *Arar v. Ashcroft*, Reply Memorandum in Support of Plaintiff-Appellant Maher Arar's Petition for Judicial Notice, United States Court of Appeals (Second Circuit) 06-4216-cv, 16 January 2007. <http://ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft> (last accessed 3 March 2008).

<sup>40</sup> See the various responses to the judicial notice motion, available at <http://ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft> (last accessed 3 March 2008).

<sup>41</sup> European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, P6\_TA-PROV(2007)0032, 14 February 2007, paras. 66, 192, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0032+0+DOC+XML+V0//EN>.

<sup>42</sup> See Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, “Report of the Events Relating to Maher Arar: Analysis and Recommendations”, 18 September 2006, at 275–276. El Maati was also detained and tortured in Egypt.

<sup>43</sup> *Ibid.*, at 276.

pendent and credible process that is able to address the integrated nature of the underlying investigations”.<sup>44</sup>

On 11 December 2006, the Government appointed retired Supreme Court of Canada Justice Frank Iacobucci to lead the Internal Inquiry into the Actions of Canadian Officials in Relation to Adbullah Almalki, Ahmed El Maati and Muayyed Nurreidin (hereafter “Iacobucci Inquiry”).<sup>45</sup> As the Iacobucci Inquiry’s official title denotes, this is emphatically *not* a public inquiry. Justice Iacobucci is directed to “take all steps necessary to ensure that the inquiry is conducted in private” with the proviso that specific portions of the inquiry may be held in public only if “he is satisfied that it is essential to ensure the effective conduct of the Inquiry”.<sup>46</sup>

Not only is the presumptive forum for the inquiry reversed from public to private, but the commissioner no longer has sole discretion to determine whether public disclosure may be injurious to national security. Rather, he shares that discretion with the “Minister responsible for the department or government institution in which the information was produced or, if not produced by the government, in which it was first received”. For practical purposes, this furnishes the government with a veto over public disclosure during the course of the inquiry. Justice Iacobucci is directed to produce two reports, one for public consumption and one for government eyes only. Vetting of the former report for purposes of national security confidentiality will also be subject to the joint discretion of Justice Iacobucci and the various Ministers involved. The ultimate effect of these procedural modifications is to formalize and extend the arrangement that the government secured through aggressive and time-consuming assertions of national security confidentiality at the Arar Inquiry. The Iacobucci Inquiry will be removed from the glare of public scrutiny until the report is issued, and any disagreement between Justice Iacobucci and the government about what ought to be disclosed in the public report will have to be litigated before the report is issued, or after release of a redacted version of the public report.

The terms of reference for the Iacobucci Inquiry convey a somewhat disappointing message about the lessons learned by the government from the Arar Inquiry about the virtues of public inquiries and government accountability. The lesson seems to be that the best way to avoid conflict (and political embarrassment) over public disclosure is to conduct the inquiry behind closed doors. However, it may also be contended that having ventilated the issues as thoroughly and as publicly as possible in the Arar Inquiry, publicity can now cede to celerity. A speedy

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<sup>44</sup> *Ibid.*, at 277–78.

<sup>45</sup> See Internal Inquiry into the Actions of Canadian Officials in Relation to Adbullah Almalki, Ahmed El Maati and Muayyed Nurreidin, <http://www.iacobucciinquiry.ca/en/home.htm>.

<sup>46</sup> *Ibid.*, at Terms of Reference, paras. d and e.

investigation also confers certain benefits on the three men most affected by the Iacobucci Inquiry. The Iacobucci Inquiry is scheduled to report early in 2008.

A related area in which the Arar Inquiry might exert a positive influence is in the search for procedures that respect the genuine need for national security confidentiality while ensuring that persons implicated in security or terrorist-related matters can answer the accusations made against them. The innovative use of commission counsel at the Arar Inquiry warrants closer study. Recently, the Supreme Court of Canada ruled that the process involved in reviewing security certificates against non-citizens on grounds of terrorism did not meet the requirements of fundamental justice under s. 7 of the Canadian Charter of Rights and Freedoms. In the course of its judgment in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, the Court gestured favourably toward the UK Special Advocate model as a possible alternative.<sup>47</sup> The Special Advocate system in the UK guarantees access to confidential information to specially designated barristers representing persons suspected of security related offences. However, once the Special Advocate has accessed the confidential material, he or she is denied the opportunity to meet with the client thereafter. This restriction can cripple the Special Advocate's capacity to effectively represent the client. Under the model devised by the Arar Inquiry, commission counsel could meet with Arar and his lawyer while *in camera* evidence was being heard, with the obvious proviso that Commission counsel could not disclose any confidential information to Arar or to his counsel. The opportunity to meet with Arar and pose questions to him, even if obliquely, was invaluable to Commission counsel in preparing to cross-examine witnesses in the *in camera* hearing. This limited case study may not suffice to draw definitive conclusions about the viability of the model in a criminal or deportation context, but it certainly deserves further exploration.<sup>48</sup>

The saga of Maher Arar is more compelling and more disturbing than the antics of any fictional security agent on prime time television. The price that governments pay in dollars, in public confidence, and in reputation, for complicity in egregious violations of fundamental human rights, operates as one measure of democratic accountability. As states slowly begin to sober up from the security mania that gripped them post 9/11, there is also a growing awareness that some injuries can and must be compensated, even as others remain incalculable.

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<sup>47</sup>) [2007] 1 SCR 350, at para. 80–84.

<sup>48</sup>) In *Charkaoui*, para. 79, the Supreme Court of Canada refers to the Arar Inquiry, but arguably misrepresents the role of commission counsel. For a recent comparative study of the UK Special Advocate Model, the New Zealand regime, and the process used in the Arar Inquiry, see Craig Forcese and Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings* (Study commissioned by the Canadian Centre for Intelligence and Security Studies, with the financial support of the Courts Administration Service, Federal Courts of Canada) (August 2007), [http://www.commonlaw.uottawa.ca/index.php?option=com\\_content&task=view&id=2131&contact\\_id=38&lang=en](http://www.commonlaw.uottawa.ca/index.php?option=com_content&task=view&id=2131&contact_id=38&lang=en).