

**The Canadian Arab Federation
(CAF)**

and

**Canadian Council on American-Islamic Relations
(CAIR-Can)**

POLICY REVIEW SUBMISSIONS

COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR

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A. INTRODUCTION

The Commissioner's mandate is double-barrelled: first, a Factual Inquiry into the Canadian response to the events surrounding Maher Arar and, second, a Policy Review focused on making recommendations as to an independent, arm's-length review mechanism for the RCMP's activities respecting national security. Following the release of a Consultation Paper and accompanying Background Papers devoted to Policy Review-related issues, the Commissioner invited written submissions relevant to this latter mandate. The submissions of the Canadian Arab Federation (CAF) and the Canadian Council on American-Islamic Relations (CAIR-Can) follow.

1. The Scope of Response

The CAF and CAIR-Can recognize that they possess no special expertise on national security, intelligence-led policing, inter-jurisdictional law enforcement, international tradecraft, or many of the other considerations that necessarily inform the Commissioner's discharge of his policy review mandate. CAF and CAIR-Can are public interest organizations dedicated to protecting and advancing the welfare of their respective constituencies, the approximately one million Canadians who are Arab and Muslim. The submissions of CAF and CAIR-Can flow from their intimate knowledge of these communities and, in particular, these communities' interactions with Canadian security agencies in the wake of 9/11.

The events of September 11th were globally traumatic. But it was the government's response to those events – the advent of the national security agenda and its sharp focus on Arabs and Muslims – that cast a deep and abiding chill over these communities. Raja Khouri, CAF's former president, spoke of the underlying sentiment at an Ottawa conference on "Policing in a Multicultural Society" in February, 2003:

We ought to have learned from past internment, ghettoization and marginalization. We should know that institutionalized discrimination leads to hate, that targeting every Arab or Muslim as a suspect is not only

degrading and unjust but dangerous for our society too. When *will* we start calculating the cost of eroding civil liberties and watering down of our democracy?

Fear has compelled our country to go against itself, destroying parts of what it had meticulously built over decades upon painstaking decades of democratic evolution.

Our country has effectively engaged in an exercise of self mutilation: stripping away civil liberties it holds dear, trampling on citizens' rights it had sworn to protect, and tearing away at its multicultural fabric.

2. The Content of the Response

As explained by the Commissioner, his determination of the most appropriate review mechanism requires the balancing of three objectives: (1) maintaining national security; (2) protecting rights and freedoms; and (3) ensuring accountability. CAF and CAIR-Can do not have the knowledge base or resources to speak authoritatively as to the first of these three objectives – other than to express their resistance to any absolutist posturing. CAF and CAIR-Can recognize that the ultimately-selected review mechanism must not be one that compromises “national security”, but they maintain that it is essential that all claims of compromise be closely scrutinized and that individual liberties must never be routinely sacrificed to them.

It is in regard to the latter two objectives – protecting rights and freedoms and accountability -- that CAF and CAIR-Can, drawing on the experience and concerns of the Canadian Arab and Muslim communities, hope to make a material contribution. Even here, however, any contribution is constrained by the nature of the Inquiry's proceedings. CAF and CAIR-Can do not have access to documents bearing on the execution of the RCMP's operational mandate; they are barred from *in camera* hearings at which critical questions are asked and, presumably, answered; they have no means of assessing the conduct of security services other than the experience of their own communities. It is this experience that informs these submissions.

“Protecting rights and freedoms” reflects the Mission Statements of both CAF and CAIR-CAN. Indeed, the concerns that motivated both organizations to participate in the Inquiry process are captured by this rubric: racial profiling; intimidatory and coercive field practices; stereotyping and discrimination; cultural and religious ignorance and disrespect; and reckless information sharing. These concerns – and this list is not exhaustive – must be recognized and addressed by any review mechanism if it is to enjoy the confidence of Arabs and Muslims in Canada. The position of CAF and CAIR-Can with regard to the protection of rights and freedoms is set out in Part “B”, below.

In Part “C”, CAF and CAIR-Can speak to the issue of “accountability”. In the current climate, Arab and Muslim Canadians are the cultural and religious groups most adversely impacted by the pursuit of a national security agenda. They need to be assured that the review mechanism is, among other virtues, accessible, responsive and effective.

B. RIGHTS AND FREEDOMS POST-9/11

1. Scope

The rights and freedoms of Canadian Arabs and Muslims have been abused by the post-9/11 security agenda. This Commission presents the first official opportunity for Canadians to start questioning how our singular obsession with security has negatively impacted the values that define us and the principles we hold dear: freedom, liberty, equality and the due process of law. It is the profound hope of Canadian Arabs and Muslims that the Commission will begin to right the wrongs done to them in recent years by advancing recommendations that redefine the security paradigm and reinvigorate civil rights and freedoms.

What follows are the life realities faced by Canadian Arabs and Muslims in the pre- and post-9/11 world. This paper describes the context within which RCMP abuses of rights and freedoms of Arab and Muslim communities have occurred, and provides recommendations on how such abuses may be curtailed. It also identifies three key

differences between national security and conventional policing with regard to their impact on rights and freedoms.

2. Context

(a) Life in Canada Pre-9/11

(i) *Social Context*

Canadians never quite got to know the one million or so Arabs and Muslims living among them. Pre-9/11, mainstream Canada did little to understand the concerns or interests of one of its fastest growing minorities. Much of what Canadians knew came from stereotypes. The Hollywood Arab – a bumbling idiot, the lascivious oil sheik, the savage terrorist – very much characterized the average Canadian's perception of an Arab or a Muslim.

The demographically average Canadian Mohammed or Fatima rarely made it into mainstream consciousness. An accountant, a dean of engineering or the head of cardiology was not the Canadian image of an Arab. The public perception of Arabs and Muslims had long been tainted by images of Mideast war and conflict: violence, killings and kidnappings. Even before Bin Laden, the prism through which Arabs and Muslims were viewed had a Khomeini, an Arafat and a Saddam in each of its corners.

A national survey of Canadian Arabs¹ conducted between November 2001 and February 2002 (capturing mainly pre-9/11 experiences) reflected the community's frustration with way it was perceived:

- 96% of the respondents felt that Canadians knew very little about their culture;
- 92% felt that what Canadians knew about their culture stemmed from myths and negative stereotypes;
- 91% thought the Canadian media negatively stereotyped them;

¹ Khouri, R., "Arabs in Canada: Proudly Canadian and Marginalized", Canadian Arab Federation, 2002.

- 84% felt that Canadians thought Muslims were violent;

The same study showed one in four respondents reporting they, or someone in their immediate family, had experienced racism firsthand. Examples included situations in schools, on public transportation, at the workplace, airports and border crossings and with neighbours and the police. Muslim women wearing headscarves were a routine target of racism.

This was the social setting in which 9/11 occurred.

(ii) *Political and Institutional Context*

Canadian Arabs and Muslims had long complained about their political disenfranchisement. Their access to the corridors of power was minimal and their influence on public policy largely negligible. Due in part to their own lack of mobilization and organization, these communities also faced indifference or, at best, lip service, from most official quarters especially at the federal level.

In his ten-year tenure, only once did former Prime Minister Jean Chretien agree to meet with a coalition of Canadian Arab and Muslim organizations. A cross-section of ministers in the Chretien government refused to acknowledge the interests of these communities on a host of issues ranging from immigration to justice, foreign affairs to international trade.

Not surprisingly, the same national survey reflected the Arab community's disappointment with their federal government: 86% did not feel the Canadian government was concerned with their needs, and only 3% agreed with its Mideast policy. The community's satisfaction with the concern of provincial governments in Arab issues was only marginally better at 23%.

The representation of Canadian Arabs and Muslims in public institutions, including the civil service and politically-appointed bodies, fell far short of demographic expectations. This may have contributed to the institutional discrimination faced by

these communities, as reported by the study: 28% of the respondents told of situations where Canadian institutions have been racist in their dealings with Canadian Arabs, and 21% spoke of situations where their rights were abused because they were Arab.

This was the political context from which the Canadian Arab and Muslim communities sought to combat the erosion of their civil liberties post-9/11

(b) Life in Canada Post-9/11

(i) *The Backlash*

September the 11th and its aftermath left Canadian Arabs and Muslims reeling with anxiety. Well-seeded sentiments of alienation, betrayal and disillusionment were further aggravated. There were many causes. But key among them was what, by Canadian standards, easily qualified as an excessive, overzealous security agenda.

The “backlash” to September the 11th started with acts of racism directed at Arab and Muslim Canadians on the streets of our cities, in schoolyards and workplaces. Neighbours joined strangers in expressions of hate. Vandals attacked places of worship. Next came state sponsored detentions of Arabs and Muslims, estimated to run into the thousands across the border, often under a cloak of secrecy.

Many in the media had a field day demonizing Arabs and Muslims, painting them with the bin Laden brush. The stereotypes and racist overtones of some mainstream media gave permission for others to single out Arabs and Muslims for suspicious treatment: they were guilty by association, suspect by nature of their ethnicity and religion, an acceptable target for hate.

By and large, Canadian Arabs and Muslims were left standing on their own, having to explain themselves and prove their loyalty; defend their religion and demonstrate its goodness; and too often hide their ethnicity and deny their heritage in a bid to escape state inquiry. Like their Japanese Canadian counterparts during World

War II, Arab and Muslim communities bear the brunt of unwarranted government scrutiny merely because of their ethnic and religious origin.

In a survey by CAIR-Can regarding the experiences of Canadian Muslims in the year following 9/11², about two-thirds of respondents stated that they experienced some form of discrimination. Other notable results from the survey include:

- A large number of respondents (82 percent) said they knew of a fellow Muslim who experienced discrimination;
- 33 percent of respondents said that their lives changed for the worse;
- Those who indicated that their lives changed for the worse felt disliked by fellow Canadians, were subjected to rude and hostile behaviour, faced emotional distress, and were concerned for their own and their families' safety.
- The most frequent forms of bias were verbal abuse, religious or ethnic profiling, and workplace discrimination.

The CAIR-Can survey also reported that Muslims expressed criticism of the federal government for its indifference toward the Muslim community and lack of clear action against the wave of anti-Muslim hatred.

(ii) *The Security Agenda*

When Bill C-36, the Anti-terrorism Act (ATA), became law in December 2001, it launched a post-9/11 security agenda that changed the landscape of our multicultural society. The notion of equality of rights, freedoms, privileges and opportunities inherent in a culturally pluralistic democracy has been profoundly compromised.

Changes to the Immigration Act of Canada (currently the Immigration and Refugee Protection Act – IRPA), the introduction of the Citizenship of Canada Act (C-18), and the inception of the Safe Third Country Agreement between Canada and the United States (which was ratified in January 2005) followed. The scope of the Security Certificates was expanded by IRPA to include landed immigrants. Eventually, the

² “Survey: More than Half of Canadian Muslims Suffered Post 9/11 Bias”, caircan.ca, September 5, 2002

security agenda encompassed the Public Safety Act, the U.S.– Canada Smart Border Declaration and Action Plan, Visa Harmonizing Process and Data Sharing with the U.S.

While the security agenda did not expressly single out Arabs and Muslims, the only possible outcome post-9/11 was that these communities would be targeted. For example, those subject to security certificates are overwhelmingly Arab Muslims, some of whom have been in solitary confinement for more than three years.

Canadian Arabs and Muslims, like many other Canadians, believed the intrusive powers ushered in by the security agenda were not necessary. A fear bordering on hysteria and the weight of political pressure appears to have compelled Canada to go against its own values of tolerance, equity and diversity. Many are convinced that the security agenda poses a bigger threat to the Canadian way of life than terrorism itself.

(iii) *Institutional Responses*

From the onset of Bill C-36, the federal government has consistently dismissed the profound concerns expressed by the Canadian Arab and Muslim communities and civil rights advocates as to the erosions of liberties and rights in the name of national security.

Repeated appeals to the ministers and departments of Justice and the Solicitor General³ to consider the impact of the “war on terrorism” fell on deaf ears. The initiatives proposed to these departments included:

- Monitoring and documenting the law enforcement use and possible abuse of the ATA and related legislation;
- Educating members of the affected communities on their rights and responsibilities in light of new security legislation;
- Educating members of law enforcement on the cultural and political context of the affected communities;

³ Now Department of Public Safety and Emergency Preparedness.

- Establishing reporting and appeal mechanisms and educating the affected communities on the need to report abuses by law enforcement;
- Re-assessing the qualifications of the government's cultural experts and advisors, and broadening the base of expertise;
- Installing oversight mechanisms to prevent the use of racial profiling and ensure the civil liberties of Canadian Arabs and Muslims.

Compounding their insensitivity, government departments took specific actions that further alienated and threatened these communities. Among them:

- The Solicitor General's office forced the cancellation of Air Canada's direct route between Montreal and Beirut on security grounds, despite prior route approval from Transportation Canada;
- The inclusion of a number of benevolent organizations under the ATA despite international recognition of them as legitimate charities;
- The Minister of Foreign Affairs lifted a travel advisory to the US when Arab and Muslim Canadians traveling there continued to face humiliation and treatment normally reserved for heinous criminals;
- The Ontario Public Safety Minister condoned the racial profiling taking place at the US border and hired a security consultant who openly condoned racial profiling;
- The Canadian Museum of Civilization, a Crown agency, cancelled an art exhibit by Canadian-Arab artists in the weeks following 9/11; while the exhibit was later re-instated due to public pressure, the whole Middle East program at the Museum was eventually closed;
- CSIS embarked on broad fishing expeditions, conducting intrusive interrogations and pressuring ordinary Canadian Arabs and Muslims in vulnerable situations to act as spies and inform on their friends and colleagues.

3. The RCMP and the Affected Communities

(a) Fait Accompli

Given the marginalization of Canadian Arabs and Muslims prior to 9/11, the ignorance of their culture and prevalent negative stereotypes, the effect of the events of

9/11 on the North American psyche, and the extraordinary police powers introduced through security-related legislation, what happened next was entirely predictable: the rights and freedoms of the Canadian Arabs and Muslims were abused.

An EKOS poll released a year following the events of 9/11 showed that a third of Canadians felt negatively towards Muslims, and that one in two felt that Canadian Arabs should receive special security treatment.⁴ The fear felt by the Canadian public and the security agenda introduced by the Canadian government fed off each other to produce an environment that rendered it permissible to abuse the rights of Arabs and Muslims.

Why would anyone expect members of the RCMP to act differently?

(b) Abuses of Rights and Freedoms

The profound anxiety prevalent in Canadian Arab and Muslim communities is rooted in real-world experience. No comprehensive surveys exist. The vast majority of interactions with security agents are neither documented or reported. Nonetheless, a reliable picture emerges, one drawn from anecdotal evidence submitted to the offices of CAF and CAIR-Can in recent years, from the findings of an informal survey of 40 lawyers conducted by the Canadian Muslim Lawyers Association (as part of a 2003 study by the International Civil Liberties Monitoring Group), and from a survey of Canadians Muslims conducted in recent months by CAIR-Can, the results of which will be published, and distributed to the Commission, in March of this year. The presentation of these data reflect the categories set out in the “Challenges in the Context of National Security” section to the Commission’s Background Paper titled “National Security and Rights and Freedoms”.

(i) *Extraordinary Powers and Anti-terrorism Offences*

There has been no reported use of the special power of preventive detention and only a single invocation of the investigative hearing powers. However, the threat to use

⁴ For a discussion of the poll, see O. Alghabra, “A Chance to Lift the Veil of Ignorance Towards Arabs”, Toronto Star, October 17, 2003.

these extraordinary powers has been frequently reported by Canadian Arabs and Muslims. Empowered by the ATA, RCMP agents threaten “consequences” should persons not cooperate, and use intimidating language such as “there are things we can do to you now”, “we can just arrest you, we don’t need a reason,” “you’d better be careful we’re watching you”.

(ii) *Exercise of Discretion*

As the Background Paper noted, there is no oversight of rights and freedoms in situations where activities of the RCMP are “not directly subject to legislation or regulation, consisting instead of discretionary decisions about what activities or persons to investigate and how to do so.” The Paper also recognizes that “where no charges are laid, the choice of investigative targets, and information collection, exchange and investigative methods will generally not be subject to judicial scrutiny, media coverage, or public debate.”

Such use, or abuse, of a discretionary decision-making power is evident in the many visitations to the homes or workplaces of Arabs and Muslims by Canadian security personnel. The CAIR-Can study shows a high incidence of these interactions with a troubling incidence of repeat or follow-up visits. These visits have proven problematic for a variety of reasons, including:

- Unannounced visits, sometimes at odd hours, take people by surprise and generally cause fear and apprehension;
- Talking to neighbours or co-workers and asking palpable security related questions stigmatize entire families or create work place suspicions of complicity in matters of national security that result in discrimination, inhospitable work environments, firings and wrongful dismissals;⁵
- A large percentage of those visited reported not knowing they had the right to have a lawyer present or that they could refuse to be interviewed.

⁵ One such prominent case was that of Mohamed Attiah who was fired from Atomic Energy of Canada following a visit to his workplace by CSIS and the RCMP. The effects of racial profiling in the Muslim and Arab communities are discussed in “Paying the Price: The Human Cost of Racial Profiling,” Ontario Human Rights Commission Inquiry Report, October 21, 2003.

- Some of those who knew enough to ask for a lawyer were often dissuaded by the RCMP from involving legal counsel; where counsel was to be included, the RCMP would sometimes cancel the visitation.

(iii) *International Cooperation*

Within the context of national security, international cooperation is a double-edged sword that can – and has – cut both ways.

First are the cases where Canadian law enforcement uses information provided by foreign governments to pursue local “persons of interest.” Given the questionable reliability of such information, this inevitably leads to some unwarranted intrusions, invasions of privacy or other abuses of the rights of innocent Canadian citizens or residents. In cases where the information had been extracted under duress (or, as is all too common, outright torture), its reliability is notoriously doubtful, and the ethical and legal implications of its use are geometrically compounded.

Then there are the cases where Canadian intelligence is provided to foreign governments which may end up subjecting “persons of interest” to egregious abuses, including torture, or outsourcing this “dirty work” to willing partners.⁶ The Maher Arar case is but one example. Canadian complicity in such excesses cannot be trivialized. What must be condemned is the ethic underlying the RCMP’s assertion that it is concerned about human rights yet cannot control what is done with information once it is shared with a foreign country.⁷

Take the case of Ahmed Abou El-Maati, which encapsulates the damage that can be done by both edges of the sword. After being repeatedly questioned by CSIS agents, Egyptian-Canadian El-Maati was arrested upon arrival in Syria in November 2001 while on a personal trip to join his wife. In an affidavit to the Arar Commission he claimed that CSIS agents “harassed and prodded me and made my life so miserable and made it clear my wife and I will never be together.” Under duress, El-Maati gave

⁶ See Mayer, J. “Outsourcing Torture: The secret history of America’s “extraordinary rendition” program,” *New Yorker*, February 8, 2005.

⁷ As reported in the *Vancouver Sun* on December 16, 2004, *per* RCMP spokesperson Monique Beauchamp.

the names of everyone he knew, including those of Canadians Abdullah Almalki and Maher Arar who, in turn, became “persons of interest” who received their own visits from Canadian security agents. They too ended up subject to torture in Syrian jails, with strong indications that their interrogators were armed with information provided by Canadian intelligence.

(iv) *Racial, Ethnic and Religious Profiling*

The fact that the ATA effectively requires law enforcement to inquire into the religious, political and ideological motivations of suspects makes intrusive investigations, including profiling, a matter of course for the police. In addition, the definition of “terrorism” is vague and overbroad, encompassing forms of dissent and/or violence that are not terrorism-related.⁸

Unsurprisingly, a broad definition of terrorism and broad powers of investigation have led to a broad application of the terrorism label. The political and religious drivers of the security agenda has meant that the label attaches to Arabs and Muslims. And questions by the RCMP as to how often a Muslim prays or goes to the mosque are obvious attempts at assessing how well the subject fits into a pre-determined profile. Religious observance thus becomes evidence of complicity in terrorist activity.

As former CSIS director Reid Morden warned in a presentation to the Canadian Journalism Foundation last spring, the ATA encourages law enforcement to engage in “ideological profiling, which can be just as insidious as racial profiling,” and that “once the terrorism label is fastened on an individual, an organization or suspect, then frankly the rules of procedural justice are so much more easily suspended.”⁹ While Muslims and Arabs are targeted today, who will be targeted in the future?

⁸ For example, the ATA was invoked to obtain a search warrant to raid the residence of native activists in Port Alberni, B.C.

⁹ Quoted in *Ottawa Citizen* series “A Question of Balance,” December 18, 2004.

“Project Thread” demonstrates the insidious effects of racial profiling. The 21 students and refugee claimants caught in its net in August 2003 and declared “suspected terrorists” were eventually freed without a single security-related charge. Acting under IRPA (the Immigration and Refugee Protection Act), these person were held for weeks without charge as a possible “threat to national security” based on nothing more than paper-thin circumstantial evidence. For the RCMP the key was that the detainees were Muslim men from “or have connections to the Punjab province in Pakistan that is noted for Sunni extremism.” Those detained continue to live with the terrorist label to this day in the home countries to which they were deported. That lives were destroyed, groups stigmatized, liberties denied, and due process circumvented appears of little concern to the RCMP.

The case of Kassim Mohamed offers yet another example of the misuse of racial profiling. After taking video pictures of the CN Tower and other Toronto landmarks in May 2004 Mohammed became a terror suspect placed under investigation by CSIS. Mohamed, a Canadian citizen, works in Toronto. The videos of Toronto landmarks were shot for his children who attended school in Egypt. The videos were confiscated by CSIS officials before he left Canada to visit his children. Mohamed was detained in Athens during a stopover and sent back to Toronto where CSIS officials questioned him about possible terrorist connections. After finally flying to Egypt, he was detained in a Cairo jail for a further two weeks.

Another consequence of racial profiling has been a climate of fear resulting from being connected to anything relating to national security and terrorism. Members of the Arab and Muslim communities refrain from reporting police abuses for fear of retaliation and the security-associated stigma. Infrequent reporting of abuses in turn leads to increased victimization and marginalization of these communities, while allowing the abuses to mushroom and the discriminatory behaviour to become institutionalized.

(v) *State Inquiry into Religious and Political Beliefs*

The targeting of places of worship by the security establishment is another state incursion on religious freedoms.

One such place is the Mosque at the Salaheddin Islamic Centre in Scarborough, Ontario, a place of worship for around 2,500 Muslims and a private elementary school for 215 students. Those who pray at the Salaheddin Mosque run the risk of receiving a visit from security agents. The imam, Aly Hindy, describes how his centre has become a subject of repeated interest by security services, both Canadian and foreign. And former CSIS agent Michel Juneau-Katsuya, as reported in the Toronto Star of February 29, 2004, confirmed that agents do monitor certain mosques, pay attention to what is being preached, and sometimes pass that information to foreign governments.

The Centre has attracted intense CSIS attention. Muayyed Nureddin, an Iraqi Canadian computer analyst, told of his torture in a Syrian jail by interrogators who wanted to know about what went on at the Salaheddin Centre. Nureddin reports that his Syrian captors asked him the same questions CSIS agents had asked him before he left Canada on a visit to Iraq.

Mahmoud Jaballah, detained in Canada without charge since August 2001 on a security certificate (his second, the first having been repealed by a federal judge due to lack of evidence), was a principal at the Salaheddin school before leaving to start his own Islamic school. Helmy Elsherief used to work at the Centre's bookshop before his 20-day detention in Egypt last year.

None of these men has been charged with, let alone convicted of, any crime. Accordingly, it is hard to tell whether the Salaheddin Centre is of interest to security agencies because of its association with suspect individuals, or whether these men became suspects because of their association with the mosque.

(vi) *Expression and Association*

The chilling effect of national security investigations has also had a significant impact on freedom of expression and association. A sharp decline in humanitarian contributions to regions where listed “terrorist entities” are known to operate (e.g., southern Lebanon, Afghanistan, Pakistan) has been noted by charitable organizations.

Many Canadian NGOs have had to curtail their operations in such countries for fear of being in violation of the ATA. This has meant the suspension of essential relief and development work in these locales.

Limitations on freedom of expression have become common in certain community quarters, especially among recent immigrants. Zai Sarkar, an Ottawa businessman and spokesperson for the Muslim Community Council of Ottawa Gatineau, was reported in the Ottawa Citizen on December 18, 2004, as saying that many people in the Muslim community no longer assert their “right to protest” for fear they may be filmed by the police and branded as terrorists, or be caught socializing with an acquaintance who turns out to be a “person of interest.”

Some people have reported being interrogated by the RCMP or CSIS based solely on their political views, sometimes expressed only privately. Such questioning can only intimidate communities and rob them of their right to free expression and a chance at civic or political participation.

(vii) *Privacy*

The Arab and Muslim communities share the same privacy concerns as do most other Canadians. The creation of an Advance Passenger Information/Passenger Name Record (API/PNR) data bank, the sharing of information on airline passengers with foreign governments, the introduction of identification documents with biometrics features, the creation of a No Fly List, proposals to implement systems for passenger screening relying on data mining of government and private sector databases, all pose

grave threats to conventional notions of privacy – threats that are magnified for Arab and Muslim travellers.

Threats to the privacy rights of Canadians are also aggravated by provisions of the U.S. Patriot Act that can force American-owned companies, and their Canadian subsidiaries, to hand over to US authorities any information on Canadians in their possession.

Information in such databases, especially when made accessible to other governments, have the potential to subject innocent persons to a broad range of rights abuses, ranging from being prevented from getting on flights (as US Senator Ted Kennedy has encountered on more than one occasion) to being thrown in jail for extended periods and subjected to torture, as Maher Arar and other Canadian detainees abroad can attest.

4. National Security Versus Traditional Policing

The position of CAF and CAIR-Can is that the RCMP's terrorism-related activities risk abusing rights and freedoms in ways traditional policing generally does not. Three key differences between national security and traditional policing are discussed below. Their implications for an appropriate review mechanism are addressed in the following section.

(a) Extraordinary Powers

The ATA granted national security police extraordinary powers such as investigative hearings, preventive detention and special search and surveillance powers. These extraordinary powers, through their direct use, discretionary action or the implied "spirit of enhanced jurisdiction", have led to the abuse of the rights and freedoms of Canadian Arabs and Muslims in ways that traditional policing could not have.

The experience of the Arab and Muslim communities shows that where there are discretionary investigative powers beyond the reach of judicial scrutiny, media coverage or public debate, and especially in the absence of specifically legislated measures to regulate and review respect for civil liberties during national security investigations, rights and freedoms can and will be abused.

(b) Introduction of Motive

Less obvious is the ATA's introduction of "motive" through requiring proof that the prohibited activity (terrorism) take place "in whole or in part for a political, religious or ideological purpose, objective or cause" – a departure from the traditional proposition in criminal law that motive is not a necessary element of a crime. The requirement of proof of motive effectively compels law enforcement to delve into a suspect's faith, political views and ideological convictions. This has resulted in the RCMP conducting clumsy, intrusive and often plainly offensive inquiries and investigations in an attempt to assess the extent of a person's religiosity. While most of those commonly described as Islamic terrorists have professed adherence to fundamentalist Islam, one cannot stigmatize an entire community of religious belief because of the actions of a few.

Likewise, ignorance of Islamic and Arabic culture, politics and history has not helped the RCMP frame intelligent or discriminating questions about political views or ideological leanings. For instance, the question "Do you know anyone from Hezbollah?", is forensically unhelpful. A dozen members of the Lebanese parliament are representatives of Hezbollah, and thousands work in the organization's extensive social service network. Knowing one or more of them has no bearing on a person's awareness of terrorist activity. Such questions – frequently posed by RCMP agents – generate no useful information while offending those being asked.

Given the multitude of assumptions that underlie a motive-directed line of inquiry, the potential for abuse of rights and freedoms in the case of national security is much greater than in the context of traditional law enforcement. An RCMP agent's

predisposition towards a cause, a people, their religion or culture has much more room for prejudicial impact in the course of national security investigations.

(c) Crime Prevention Versus Criminal Apprehension

Traditional policing largely focuses on apprehending those who have committed a crime, whereas national security investigations focus on preventing a crime from occurring, namely terrorism. The former, of necessity, is a deductive science, identifying and following a trail of evidence to the person who may have committed a detected crime. National security policing is a much more speculative enterprise. Agents must rely on assumptions and conjecture to build profiles of individuals who may engage in terrorist acts, thereby significantly increasing the margin of investigative error. In short – and as amply demonstrated by the Canadian record to date – many more innocent people are likely to get caught in the web of national security projects than in run-of-the-mill criminal investigations.

5. Suggested Remedies

The abuses that attend national security policing have alienated the very communities to whom security agencies most need to build bridges and from whom they could derive their most useful intelligence. Canadian Arabs or Muslims do not wish to be the target of a terrorist attack any more than other Canadians. In fact, these communities have a vested interest in preventing acts of violence for which they suffer an inevitable backlash.

The Canadian government and its security agencies missed the opportunity to reach out to the Arab and Muslim communities early on. More recently, the federal government has signalled its intent to correct its course by (a) launching the Arar Inquiry; (b) agreeing to a compressive, inclusive and open review of the ATA; (c) establishing parliamentary oversight of a broad security agenda; and (d) establishing the Cross-Cultural Roundtable on Security.

Here follows some suggested remedies to help the RCMP right the wrongs it has committed and minimize the potential for further abuses:

1. Establish an advisory body, drawn from the affected communities, that will assist the RCMP in putting in place the mechanisms and procedures required for it to conduct its complex national security activities within these communities in non-threatening or abusive ways;
2. Establish a code of conduct, with specific do's and don'ts, that minimizes the potential abuses of administrative discretion and investigative practice;
3. Articulate what constitutes racial, ethnic, religious or ideological profiling and proscribe ways for conducting investigations free of such profiling;
4. Declare and enforce a policy of zero tolerance towards racial profiling and the abuse of rights and freedoms;
5. Develop a public education campaign, in association with the affected communities, to ensure members of these communities are made aware of their legal rights and responsibilities in matters of national security investigations;
6. As part of this campaign, develop a "Know Your Rights card" for distribution to members of these communities;
7. Undertake extensive training of RCMP members who are specifically engaged in national security investigations within the affected communities on the cultural, religious, political and ideological complexities found within these communities;
8. Enforce strict protocols to safeguard information on individuals collected and stored in data bases, whether as information sources or as suspects, in relation to matters of national security;
9. Enforce strict protocols and oversight mechanisms to minimize the sharing of information on Canadian citizens with foreign governments, ensuring that only reliable information is shared or acted upon, and discontinue the sharing of information with governments that sanction or outsource torture and are known abusers of human rights.

C. ACCOUNTABILITY: THE RATIONALE AND GOVERNING PRINCIPLES FOR AN RCMP REVIEW MECHANISM

1. The Need For A New Review Mechanism For The RCMP

(a) The Inadequacy of Current Accountability Mechanisms

Current accountability mechanisms have proved inadequate and ineffective; the Arar Inquiry was called precisely because critical questions – many involving the conduct of the RCMP – surrounding Arar’s treatment remain unanswered

Current accountability mechanisms for the RCMP include ministerial oversight, judicial review, internal policies and protocols, and review by the Commission for Public Complaints Against the RCMP.

The Maher Arar case has demonstrated that these mechanisms are both inadequate and ineffective. The former Solicitor General, for example, was unable to provide meaningful answers in the Arar case and was accused by fellow Parliamentarians of “stonewalling”¹⁰. The Garvey Report noted that the RCMP breached its own internal protocols in passing information to the United States. And Shirley Heafey, head of the RCMP Public Complaints Commission, admitted that her agency simply does not have the capacity to investigate and resolve complaints.¹¹

The Arar Inquiry was called precisely because of mounting public concerns regarding the complicity of the Canadian security establishment in Arar’s detention, deportation and torture. Current accountability mechanisms did not answer the legitimate questions of the Canadian public.

(b) The Doctrine of Police Independence

The RCMP is now fully engaged in the business of national security investigations; the doctrine of police independence should not shield review of RCMP actions

¹⁰ “Solicitor General Easter Grilled over Arar Case”, CTV.ca, October 7, 2003.

¹¹ “RCMP Watchdog Wants Beefed up Powers” CBC.ca, January 27, 2004, “P.M. to U.S.: name Moles in Arar Case” Robert Fife, Ottawa Citizen, November 6, 2003, “What does Arar Case Say About Canada”, Haroon Siddiqui, Toronto Star, November 6, 2003

The RCMP is Canada's national police force. However, its functions have grown beyond those of a police force in the traditional understanding of the term. The RCMP is now fully engaged in the business of national security by virtue of the *Anti-terrorism Act* amendments to the Criminal Code, the *Security Offences Act* and other legislation. Many investigations relating to terrorism now fall squarely within the mandate of the RCMP, whose activities include intelligence gathering and analysis, information sharing, and the investigation and countering of national security crimes. Not surprisingly, staffing in the RCMP's National Security Investigations Branch has grown to 290 from 180 four years ago, an increase of 40 percent.

Since 9/11, police powers in many countries have been expanded to include national security investigations. The concomitant expansion of police powers has blurred the traditional definitions between criminal and security investigations. To hold these police services above review – given that many of their new powers are sweeping, intrusive and have an enhanced potential to violate cherished rights and freedoms – would violate core values such as transparency, accountability and the rule of law. Review of RCMP conduct should not be shielded by reference to a theory of police independence. Indeed, what Professor Kent Roach refers to as “the case for transparent and accountable domestic control and responsibility over policing” is particularly strong where, as here the risks of abuse are magnified and alternative means of scrutiny effectively unavailable.¹²

(c) The Risks Attending National Security Investigations

National security investigations, unlike traditional criminal investigations, pose a greater risk to rights and freedoms; improper investigations have had grave consequences for many Canadian Muslims and Arabs post-9/11

National security investigations are unlike traditional criminal investigations. As developed earlier, they pose a greater potential risk to rights and freedoms.

¹² Roach, K. “Four Models of Police-Government Relationships,”
<http://www.ipperwashinquiry.ca/policy/pdf/Roach.pdf>

Overbroad use of intrusive powers, little judicial oversight or public scrutiny, racial, ethnic and religious profiling and reliance on politicized and sometimes unreliable evidence are a few of the crucial distinctions that call for a review of national security investigations. Moreover, the human costs are often greater. As a Senate Committee noted, there is the potential for “severe consequences on a person’s life.” Basic constitutional norms like the right to life, liberty and security and freedom from torture may be violated.

The publicly recorded cases of Liban Hussein, Mohammed Attiah, Ahmed Shehab, Maher Arar, Abdalla Almalki and the two dozen victims of Operation Thread are all examples of Canadian situations where overzealous investigations have resulted in tragic human consequences and the compromise of basic human rights. There are cases of other Canadian citizens, yet uninvestigated by and inquiry, that contain alarming similarities to Arar’s case and raise deeply troubling concerns about the conduct of security and intelligence agencies. These include Muayyid Nurreddine, Ahmed Abou Elmati and Arwad alBouchi.

(d) Erosion of Confidence in the RCMP

The Arar case has eroded the legitimacy of the RCMP as a Canadian institution in the eyes of many Canadian Muslims and Arabs; the RCMP is seen as unaccountable and above the law

Any national police force must enjoy the confidence of Canadian citizens. All Canadians must feel that they are equally respected and protected by the RCMP. Before the Arar affair, many Canadian Muslims and Arabs were already critical of the RCMP’s conduct in numerous security investigations. The revelations in the Arar case have only deepened the feeling among Canadian Muslims and Arabs that they are subject to harsher, more critical standards than other Canadians. In particular, community members feel that the RCMP is not accountable for its conduct and that it operates above the law.

2. Principles To Govern A New Review Mechanism

(a) Review of Propriety

The experience of Canadian Muslims and Arabs highlights the need for a rigorous review mechanism of RCMP conduct. In the language of the Commission, what is required is accountability in reference to *propriety*: assurance that RCMP conduct conforms with legal and ethical norms such as that expressed in the *Canadian Charter of Rights and Freedoms* and human rights codes, including respect for the prohibition against discrimination on the grounds of religion and ethnicity. Any effective review mechanism must address all of the following historically-grounded criticisms of security service investigations of Canadian Muslims and Arabs:

- Improper or unduly intrusive tactics when visiting Canadian Muslims and Arabs, such as work visitations, discouraging individuals from having legal counsel present and inadequate identification by security service personnel;
- Investigations of individuals premised on racial profiling factors rather than probable cause;
- Information exchanges – with foreign or domestic agencies – without requisite verification and diligence and that risk the violation of basic human rights or subject individuals to unwarranted investigation;
- Complicity with foreign agencies that result in the outsourcing of abusive interrogations and torture;
- Unwarranted publishing of information that individuals or groups are terrorists or have terrorist ties.

(b) The Proposed Model

As said earlier, existing accountability mechanisms are inadequate to the task of reviewing the conduct of the RCMP. The Commissioner's Consultation Paper canvasses a number of review models. That urged by CAF and CAIR-Can involves the creation of a review body (hereafter "*board*") that incorporates many of the elements of SIRC while attempting to remedy some of its shortcomings; and, in addition, the

creation of a special parliamentary committee to review all Canadian national security and intelligence activities.

(c) The Board

Any board must be both effective and seen to be effective. To be effective, it must be independent in name and function. Its process must be transparent and it should itself be accountable to the public through Parliament. It must submit an annual report, and any special reports, to the minister, Parliament and the special committee created to review the government's conduct on national security. The board should have investigative, adjudicative, remedial and reporting functions, as developed below.

(i) *Investigative*

The board must be self-directed in ensuring accountability over the RCMP for propriety. The board must be able to fully review the functions or operations of the RCMP, including inquiries into any area where there are concerns as to the unreasonable or unnecessary exercise of power. This would include, but not be limited to, internal directions or policies, decisions about and conduct of specific investigations, all aspects relating to warrants, communication and transfer of information with foreign or domestic agencies, threat assessments and data compilation and analysis.

The board must have full access to RCMP documentation and the power to compel production.

The board should meet routinely with aggrieved communities, listen to their members' accounts and determine which, if any concerns, warrant board investigation. SIRC has similar powers of investigation, but resource constraints appear to prevent it from exercising its mandate in a pro-active manner. The RCMP review board must be adequately resourced to conduct its investigative function and, in particular, to be community-informed about the range of *systemic* concerns regarding RCMP conduct.

(ii) *Adjudicative*

The board must be able to investigate individual and group complaints relating to conduct of the RCMP. Once having cleared a preliminary threshold (so as to screen out frivolous complaints), the board would investigate the complaint, ultimately determining its validity and producing a written report of its conclusions and recommendations. When a complaint involves a hearing, there would be special rules to balance national security, procedural fairness and the strong interest in public accountability.

The board must have the power to summon witnesses, compel documents to be produced and listen to representations by the complainant.

Most aggrieved communities do not report complaints for a variety of reasons: lack of knowledge, confidentiality, fear of reprisal, safe space issues and, for far too many, a social culture that discounts the value of reporting. The complaints process must be well-publicized, accessible and welcoming to the broad range of minorities that comprise the Canadian Muslim and Arab family.

(iii) *Remedial*

The board must have the capacity to provide a broad variety of remedies, including compensation to individuals for the harm they have suffered. The range of remedies should also include written and/or public apologies, certification that the individual is not subject to investigation, erasure or rectification of erroneous files, and the issuance of corrective policy and practice directives.

Since 9/11, many members of the Arab and Muslim communities have been wrongly stigmatized as terrorists. Some, like Liban Hussein and Mohamed Attiah have since settled their complaints privately. The harm suffered by these persons as a result of improper investigations cannot be overestimated. We have heard their accounts of the grave consequences they and their families have endured; nor will they ever fully shake the debilitating stigma of being labelled a terrorist.

(iv) *Reporting*

The board must submit an annual report to the Minister, which will be laid before Parliament. The tabled report will be sanitized to protect national security concerns and personal privacy. The report will also be submitted to a parliamentary committee on national security, as discussed below.

(d) Parliamentary Committee

The McDonald Report recommended that a joint parliamentary committee on security and intelligence be established to examine the activities of CSIS. This proposal has never been adopted. A recent *ad hoc* committee of the House of Commons and the Senate proposed the creation of an investigative committee – the Parliamentary Intelligence Committee – to oversee all Canadian intelligence gathering. The *ad hoc* committee found substantial gaps in the oversight of Canada’s intelligence agencies, which include CSIS, the Canadian Security Establishment (CSE) and the RCMP. The committee also found the level of parliamentary oversight in Canadian intelligence matters to be “far behind” that of Australia, the United Kingdom and the United States.

The composition of the Parliamentary Security Intelligence Committee would reflect the partisan makeup of Parliament. It would have broad powers, including the ability to subpoena witnesses and compel testimony, and play both an investigative and advisory role. “Rather than delving into the minutiae of national security operations,” Ronald Atkey argues, “it would serve more as a sounding board or safety valve representing the public when things go awry and the public is demanding answers.”¹³

D. CONCLUSION

Accountability is essential to maintaining a balance between protecting national security and protecting individual rights and liberties. Regrettably, the experience of too many Canadians, primarily from the Muslim and Arab communities, is that the balance is askew, that their rights and freedoms have not been protected. The legislative

¹³ Ronald Atkey, “Opinion”, *The Globe and Mail*, January 21, 2005

response to 9/11 and related conduct of Canadian security forces go far beyond that necessary to maintain national security.

In summary, CAIR-Can and CAF note the following:

- The RCMP has progressed beyond its traditional role as a policing body and is now actively involved in intelligence gathering and the dissemination of information.
- The stereotyping of Muslims and Arabs has manifested itself in racism and racial profiling.
- There is a lack of awareness and concern for the Muslim and Arab communities at all levels of government.
- The event of 9/11 magnified the hate and racism directed at Muslims and Arabs.
- The *Anti-terrorism Act* and related legislation have created an environment in which Muslims and Arabs are singled out by Canadian security forces for differential treatment.
- The RCMP threaten the use of special powers to intimidate and coerce individuals.
- The imprudent sharing of information with foreign regimes has led to the incarceration, interrogation and torture of Canadian Muslims and Arabs. Canadian security officials have demonstrated a willingness to use foreign-sourced information of questionable reliability, some of which is extracted by torture.
- Racial profiling is an accepted tool of Canadian security forces.
- The RCMP investigates and monitors individuals and groups based on their faith.
- There is a chill in the Muslim and Arab communities that impairs their exercise of charity and freedoms of expression and association.
- There is no effective review of RCMP activities.

It is in this context that the recommendation for a review board is proposed, with its mandate to include:

- A broad range of powers including:
 - Investigation
 - Adjudication
 - Provision of remedies
 - Reporting
- Principles of independence, effectiveness, transparency and accountability.
- The ability to ensure the RCMP operates in compliance with the *Charter* and legal and ethical norms
- The investigation of historically-grounded complaints of affected groups. At present, the affected groups are primarily are Muslims and Arabs.
- The resources and production powers essential to conduct effective investigations of its own initiative.

In addition, a Parliamentary Security Intelligence Committee need be established.

No Canadian police force or domestic security service can function effectively without the trust of its citizenry. Rebuilding trust among the Muslim and Arab communities will depend on significant changes to the RCMP culture and operations and to the means by which these are monitored and reviewed. These changes must be reinforced through Commission recommendations that provide for principled and practical accountability that, ultimately, safeguards the rights and freedoms of everyone in Canada.