

AFGHAN DETAINEE DOCUMENT REVIEW:

REPORT BY THE PANEL OF ARBITERS

ON ITS WORK AND METHODOLOGY FOR DETERMINING WHAT

REDACTED INFORMATION CAN BE DISCLOSED

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TABLE OF CONTENTS

PREFACE	I
I. INTRODUCTION	1
II. WORK ASSIGNED TO THE PANEL BY THE MOU	3
III. THE PANEL’S APPROACH AND WORK IN REVIEWING NSC REDACTIONS	6
A. Introduction.....	6
B. Relevant Case Law.....	7
C. The Panel’s Approach to Reviewing NSC Redactions	10
Overall Approach.....	10
Detainee Information.....	11
Confidential Communications with Foreign Officials and Organizations	12
Criticism of Foreign (primarily Afghan) Institutions and Officials.....	13
Information about or from the ICRC	15
Third party Information.....	17
Names of Afghan Officials	17
Information relating to Special Forces	17
Information about Gun Shot Residue Testing	18
D. Status of the Panel’s Review of NSC Information	18
IV. PANEL’S APPROACH AND WORK IN REVIEWING INFORMATION SUBJECT TO CLAIMS OF SOLICITOR-CLIENT PRIVILEGE AND CABINET CONFIDENTIALITY	19
A. Introduction.....	19
B. Solicitor-Client Privilege.....	20
Legal Requirements	20
Status of the Panel’s Review of Solicitor-Client Privilege Claims.....	21
C. Cabinet Confidentiality	22
Legal Requirements	22
Status of the Panel’s Review of Cabinet Confidentiality Claims	23

APPENDIX: Memorandum of Understanding dated June 15, 2010

PREFACE

It is with heavy hearts that we write these words in tribute to our colleague on the Panel of arbiters, the Honourable Donald I. Brenner, former Chief Justice of the Supreme Court of British Columbia. An outstanding lawyer, jurist and reformer, Don contributed greatly to our work under the Memorandum of Understanding. As recently as two days before his sudden passing, we and Don met all day, and made great progress, aided by Don's typically insightful comments and collegial approach.

Although he is, tragically, no longer with us, we can say that this report reflects Don's views, and for that we are deeply grateful. We offer his family our profound condolences.



Claire L'Heureux-Dubé



Frank Iacobucci

I. INTRODUCTION

1. On June 15, 2010, the Right Honourable Stephen Harper, Prime Minister, the Honourable Michael Ignatieff, Leader of the Official Opposition, and Mr. Gilles Duceppe, Leader of the Bloc Québécois, entered into a Memorandum of Understanding (the “MOU”) in order to resolve a dispute respecting the disclosure of government documents relating to the transfer of Afghan detainees from Canadian Forces to Afghan authorities.

2. The MOU, a copy of which is an Appendix to this report, provided for the appointment of an Ad Hoc Committee of Parliamentarians, composed of one member and one alternate member from each of the parties whose leaders executed the MOU, and a three-member Panel of Arbiters, which it stated was to comprise “three eminent jurists, who shall have judicial expertise.” The MOU gave to the Committee the task of reviewing the information in the documents that had been redacted by the government for reasons of national security, national defence and international relations and referring to the Panel the redacted information the Committee decided should be disclosed because it is relevant and necessary for holding the government to account. The MOU gave to the Panel the role of determining how the information referred to it may be made available to Members of Parliament and the public without compromising the interests the redactions are intended to protect.

3. The Honourable Stéphane Dion, Mr. Luc Desnoyers, Mr. Laurie Hawn, Mr. Pierre Lemieux, Mr. Richard Nadeau, and the Honourable Bryon Wilfert were appointed as the members of the Ad Hoc Committee. We, together with the Honourable Donald I. Brenner, were appointed as the three members of the Panel. Following our appointment, and with the assistance of our staff, we worked in conjunction with the Committee, the Privy Council Office, and the Department of Justice to carry out the tasks assigned to us by the MOU.

4. Tragically, on March 12, 2011, Donald Brenner passed away suddenly. Before his death he made a significant contribution to the approach taken by the Panel and the preparation of this report, and he participated fully in the determinations made by the Panel up to his untimely death.

5. The purpose of this report is to explain how we have carried out the tasks assigned to us by the MOU, and in particular the methodology we have used for assessing whether and, if so, how redacted information referred to us by the Committee can be disclosed. The report describes:

- (a) the work assigned to us by the MOU, its relationship to the work carried out by the Committee and by government officials, and the steps we have taken to carry it out;
- (b) our approach to reviewing redactions made by the government on grounds of national security, national defence or international relations;
- (c) our approach to reviewing redactions made by the government on grounds of solicitor-client privilege and Cabinet confidentiality; and
- (d) the status of our work.

6. Together with this report, we had planned to deliver to the Committee the first set of documents that we have reviewed in accordance with our mandate under the MOU and that are ready for release. Our intention was to continue to deliver documents to the Committee as we completed our review of them and they became ready for release.

7. As the Committee members and the government officials who have been involved in this document review process are aware, this is the first time that a mechanism like that set out in the MOU has been adopted in Canada or perhaps anywhere else. Carrying out the complex tasks assigned to us by the MOU has called for difficult judgments. In making those judgments we have been mindful of the high importance of the interests at stake in this process. We have also had to consider and weigh a variety of factors, circumstances, and potential consequences. We recognize that at the margins informed decision-makers can differ on these judgments. However, we can say that what follows in this report and in our determinations reflects our collective best efforts to arrive at our decisions through collaborative discussion and careful evaluation to reach conclusions that we believe are faithful to the letter and spirit of the MOU.

8. We are grateful for the cooperation and assistance we have received from the Committee members and government officials in working through these issues and developing solutions for these novel problems. Our discussions with the Committee members have been constructive and professional. The Committee members have been conscientious and committed in carrying out the role assigned to them in this process.

9. We also wish to recognize the ongoing contribution of our staff, both in providing us with the information, analysis, and support necessary to enable us to make our determinations, and in the painstaking and time-consuming process of implementing our decisions that we describe below. Their insights and their hard work have been invaluable.

II. WORK ASSIGNED TO THE PANEL BY THE MOU

10. The Panel's work, like that of the Committee and the government in relation to this process, is governed by the terms of the MOU, which was entered into in order to resolve a dispute that arose between the House of Commons and the government.

11. On December 10, 2009, the House of Commons adopted an order for the production of government documents related to the transfer of Afghan detainees from the Canadian Forces to Afghan authorities. As the signatories to the MOU have acknowledged, these documents contain information the disclosure of which would be injurious to national defence, international relations or national security if publicly released. The order made no provision for confidential treatment of this information.

12. On April 27, 2010, the Speaker of the House of Commons concluded that it was within the powers of the House of Commons to ask for the documents sought in the order. However, the Speaker suggested that a mechanism be put in place by which these documents could be made available to the House without compromising the security and confidentiality of the information they contain. In accordance with the Speaker's suggestion, all parties reached an Agreement in Principle on May 14, 2010 to establish a mechanism of this kind. The MOU, which was intended to implement the Agreement in Principle, was subsequently executed by the leaders of all parties except the New Democratic Party.

13. The MOU provided for the establishment of the Committee and the Panel. It granted to the Committee access to all documents listed in the December 10, 2009 House order, including all relevant documents related to the transfer of Afghan detainees from the period 2001 to 2005 in order to understand the transfer arrangements post-2005, subject to strict confidentiality measures. It provided for the Committee to receive these documents in a manner that would disclose to Committee members the information redacted by the government on grounds of national security, national defence or international relations. It also established two distinct processes for reviewing redactions that the government had made to the documents:

- (a) *an NSC information process* – for documents containing information the government has redacted on grounds of national security confidentiality, national defence or international relations (which we refer to together as “NSC”); and
- (b) *a privileged / confidential information process* – for documents containing information the government has redacted on grounds of solicitor-client privilege or Cabinet confidentiality.

14. Paragraphs 5 and 6 of the MOU set out the process for reviewing redactions made on grounds of national security, national defence or international relations. That process calls for the Committee to determine the information that is relevant and necessary to disclose, and the Panel to determine how the relevant and necessary information will be made available without compromising national security, national defence or international relations.

15. Paragraph 5 states:

With respect to every document that has been redacted, the *ad hoc* committee will determine whether the information therein is relevant to matters of importance to Members of Parliament, particularly as it relates to the ongoing study on the transfer of Afghan detainees currently under way at the House of Commons Special Committee on the Canadian Mission in Afghanistan, and whether the use of such information is necessary for the purpose of holding the government to account. The decisions of the *ad hoc* committee related to relevance shall be final and unreviewable.

16. Paragraph 6 states:

Where the *ad hoc* committee determines that information is both relevant and necessary, or upon the request of any Member of the *ad hoc* committee, it will refer the disputed information to a Panel of Arbiters, who will determine how the relevant and necessary information will be made available to Members of Parliament and the public without compromising national security, national defence or international relations – either by redaction or the writing of summaries or such techniques as the Panel may find appropriate, bearing in mind the basic objective of maximizing disclosure and transparency. The Panel of Arbiters should regularly consult with the Members of the *ad hoc* committee to better understand what information the Members believe to be relevant and the reason why. The decisions of the Panel of Arbiters with respect to disclosure shall be final and unreviewable.

17. As the terms of these paragraphs demonstrate, the MOU grants to the Committee the sole responsibility for deciding what information redacted on national security, national defence or international relations grounds is relevant and necessary to disclose, and to the Panel the sole responsibility for determining how information will be disclosed without compromising national security, national defence or international relations. Paragraph 6 states that the Panel should regularly consult with the Committee members to better understand what information the members believe to be relevant and why. But the Panel makes the final decisions with respect to disclosure independently not only of the Committee but also of the government.

18. Paragraph 7 of the MOU sets out the process for the review of information that the government believes should not be disclosed on grounds of solicitor-client privilege or Cabinet confidentiality. Paragraph 7 states:

The Panel of Arbiters can determine, at the request of the government, that certain information should not be disclosed due to the solicitor-client privilege. The Panel of Arbiters, after consultation with the Clerk of the Privy Council, can also determine, at the request of the government, that information constituting Cabinet confidences should not be disclosed. In both such cases, the Panel of Arbiters shall determine how information contained in the documents may be made available to Members of Parliament and the public without compromising

the solicitor-client privilege or the principle of Cabinet confidentiality, by such techniques as the Panel may find appropriate, bearing in mind the basic objective of maximizing disclosure and transparency. Should the Panel of Arbiters decide that certain information should not be disclosed, the Panel will provide the rationale for its decisions to the *ad hoc* committee.

III. THE PANEL'S APPROACH AND WORK IN REVIEWING NSC REDACTIONS

A. Introduction

19. The Panel's first and primary task under the MOU is to review the NSC redactions – information redacted by the government on the grounds of national security, national defence or international relations which has been referred to the Panel by the Committee. As discussed below, this review has been complex and challenging, requiring the review of many thousands of pages of documents and numerous meetings between the Panel and its staff and the Committee, as well as meetings and communications with government officials. One of the main complications has been the technological and security issues involved in reviewing these documents and preparing them in a form that is acceptable for disclosure. This process requires not only that the Panel and its staff review and assess all redactions referred to it by the Committee but also that the Panel's decisions then be implemented by preparing each document using software that permits the “lifting” of redactions of information that the Panel has determined can be disclosed or the summarizing of information in a form that is useful for the purposes of disclosure but that does not compromise national security, national defence or international relations.

20. In carrying out its review of NSC redactions, the Panel has taken into account the case law that has been developed by the courts in determining, under section 38 of the *Canada Evidence Act*,¹ claims that information should not be disclosed on the grounds that disclosure would injure international relations, national defence or national security. Although, as discussed below, the *Canada Evidence Act* does not apply to the Panel's work, and there are significant differences in wording between section 38 and the MOU, the section 38 case law

¹ R.S.C. 1985, c. C-5.

has been helpful to the Panel in developing its approach to reviewing NSC documents. The Panel has also benefitted from briefings that it and its staff have received from government officials, who have explained how and why in their view the disclosure of the redacted information would compromise national security, national defence or international relations.

B. Relevant Case Law

21. “National security” has been defined in a leading case as “at minimum the preservation of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms in Canada.”² Courts have identified the types of information that might be injurious to national security as including information that would identify or tend to identify human sources and technical sources, identify or tend to identify targets of surveillance, identify or tend to identify methods of operations and operational and administrative policies, or jeopardize or tend to jeopardize the security of telecommunications systems.³

22. “National defence” has been defined in the same case using the following broad definition, taken from *Black’s Law Dictionary*: “1. All measures taken by a nation to protect itself against its enemies. A nation’s protection of its collective ideals and values is included in the concept of national defence. 2. A national’s military establishment”.⁴ In another case, a judge found that the disclosure of a videotape and transcripts relating to the Bosnia conflict would be injurious to national defence and international relations. The videotape depicted aerial bombing carried out by NATO-led forces in Bosnia. The transcripts contained information “respecting intelligence, intelligence capabilities, command and command structure of the various forces in the Bosnian theatre of war, policies relating to the conduct of military operations, military operations, the role and conduct of certain participants in the Bosnian theatre and the identity and sources of targets.” The judge found that disclosure of some portions of the information would, among other things, undermine the trust necessary to

² *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, 2007 FC 766 at para. 68 (T.D.).

³ *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 FC 229 at paras. 29-31 (T.D.), aff’d [1992] F.C.J. No. 100 (C.A.); *Canada (Attorney General) v. Kempo*, [2004] FC 1678 at paras. 89-92 (T.D.); *Singh v. Canada* (2000), 186 F.T.R. 1 at para. 32 (T.D.).

⁴ *Arar*, note 2 at para. 62.

make NATO effective, compromise Canada's role as a member of NATO, make Canada's allies reluctant to share intelligence in the future (denying Canada access to information necessary to protect civilians and troops) and compromise NATO's and Canada's ability to conduct future military operations.⁵

23. The Panel also notes that section 15 of the *Access to Information Act*,⁶ which provides for the non-disclosure of records containing information the disclosure of which would be injurious to "the defence of Canada," includes as examples information relating to military tactics or strategy or relating to military exercises or operations; information relating to the quantity, characteristics, capabilities or deployment of weapons or other defence equipment; information relating to the characteristics, capabilities, performance, potential deployment, functions or role of any defence establishment, military force or unit; and information obtained or prepared for the purpose of intelligence relating to the defence of Canada or an allied state.

24. "International relations" has been recognized in the case law as raising important interests for several reasons. Among the most important, Canada is a net intelligence importer, and therefore has an interest in maintaining reciprocal relationships with the policy, intelligence and security agencies of other nations, particularly those of its closest allies.⁷ As well, Canada relies on its relationships with foreign nations to pursue its foreign policy objectives, and promote human rights democracy and good governance abroad.⁸ Among the information most frequently engaged by the international relations interests is information protected by the "third party" rule and criticisms of foreign countries or governments. The third party rule states that communications and documents obtained in confidence from third parties, generally allied states, should not be disclosed without the prior consent of the

⁵ *Ribic v. Canada (Attorney General)*, 2003 FCT 10 at paras. 14-18 (T.D.); *Canada (Attorney General) v. Ribic*, 2003 FCT 43 at paras. 14-15 (T.D.); aff'd, *Canada (Attorney General) v. Ribic*, 2003 FCA 246.

⁶ R.S.C., 1985, c. A-1.

⁷ *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 68; *Khadr v. Canada (Attorney General)*, 2008 FC 549 at para. 93 (T.D.); *Arar*, note 2 at paras. 77-78, 80.

⁸ *Khadr*, note 7 at para. 74; *Arar*, note 2 at paras. 85-90

providing third party.⁹ Criticisms by Canada of foreign governments may be protected by the international relations interests, but not where the Canadian government's sole or primary purpose for seeking non-disclosure is to shield itself from criticism or embarrassment.¹⁰

25. In determining possible injury, courts applying section 38 have considered the perspective of the "informed reader" and the principle of the "mosaic effect." This requires consideration of whether a person who is "both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada" could piece together items of information that might seem innocuous in isolation to arrive at damaging deductions.¹¹ The courts have cautioned, however, that this principle should not be over-extended – there must be some genuine basis for concern based on the particular facts.¹²

26. The section 38 case law has established that information that has made its way into the public domain will generally not be protected from disclosure. However, the courts have recognized exceptions to this general rule where only a limited part of the information was disclosed to the public, where the information is not widely known or accessible, where the authenticity of the information is neither confirmed nor denied, and where the information was inadvertently disclosed.¹³

27. Although we have taken account of this section 38 case law, neither it nor the process for its application has any direct application to our work under the MOU. Section 38 applies only in "a proceeding before a court, person or body with jurisdiction to compel the production of information," a description that does not apply to the Panel. In addition, the language of section 38 is different from the language used in the MOU in a number of

⁹ *Canada (Attorney General) v. Khawaja*, 2007 FC 490 at para. 139 (T.D.). The Federal Court has set out three caveats to this rule: (1) Canada must attempt to obtain consent to disclosure before it can rely on the third party rule; (2) the rule does not apply when a Canadian agency was aware of the information before having received it from a foreign agency; and (3) the rule does not protect the mere existence of a relationship between Canada and a foreign state, absent the exchange of information in a given case: *Khawaja* at paras. 146-148.

¹⁰ *Arar*, note 2 at paras. 82-84

¹¹ *Henrie*, note 3 at para. 30

¹² *Khadr*, note 7 at paras. 74-77; *Arar*, note 2 at para. 84

¹³ *Arar*, note 2 at para. 56.

important respects. Among other things, paragraph 6 of the MOU requires the Panel in making its determinations to bear in mind “the basic objective of maximizing disclosure and transparency,” without, at the same time, “compromising national security, national defence or international relations.”

C. The Panel’s Approach to Reviewing NSC Redactions

Overall Approach

28. Taking into account all of these considerations, we have adopted the following approach in reviewing the NSC redactions referred to us by the Committee. We emphasize that we have not dealt with any redactions in portions of documents that were not referred to us.

- (a) First, we begin our review of every redaction with the presumption that the information that has been redacted should be disclosed, consistent with the MOU’s “basic objective of maximizing disclosure and transparency.”
- (b) Second, we ask ourselves whether the presumption is rebutted because disclosure would compromise national security, national defence or international relations.
- (c) Third, if the presumption is rebutted, we assess whether the redacted information can be summarized for disclosure purposes without compromising national security, national defence or international relations. Only if it cannot does the information remain undisclosed.

29. We have found that the NSC redactions referred to us by the Committee tend to fall within the following categories: (1) detainee information, (2) confidential communications with foreign officials and organizations, (3) criticism of foreign (primarily Afghan) institutions and officials, (4) information about or from the International Committee of the Red Cross (“ICRC”), (5) third party information, (6) names of Afghan officials, (7) information relating to Canada’s Special Forces, and (8) information about gun shot residue testing. We set out below the approaches that we have developed for each of these categories. We have done our best to apply these approaches consistently. However, as we found in

reviewing redactions made by government officials, this is very much a human process, and it is inevitable that there will be some inconsistencies despite the best-intentioned efforts to avoid them.

Detainee Information

30. Certain documents referred by the Committee contain information about detainees captured and in most cases transferred by Canadian Forces. The information contained in these documents includes the exact date of capture and/or transfer; the location of capture; the number of detainees captured or involved in a particular incident; the gender, age, name, nationality, tribe and date of birth of detainees captured or involved in a particular incident; and the identity of the country or entity to which certain detainees were transferred.

31. Our approach with these documents is to disclose only information that will not, either by itself or in conjunction with other information, reveal the identity of, or permit identification of, detainees. We have adopted this approach in large part because we accept the concern expressed to us by government officials that detainees and their families face a real and continuing threat from enemy forces of retaliation and serious physical harm. Our approach is to disclose the following information: the month and year of capture, transfer, or release, but not the date or time; an approximation of the number of detainees captured, transferred or released in a particular operation (e.g., “fewer than 20”), but not the exact number; and general information about physical condition, but not information about specific ailments or diagnoses. We leave redacted information disclosing gender; age (unless the detainee is under the age of 18, in which case we will disclose that the detainee is a “minor” (as defined by the *Convention on the Rights of the Child*¹⁴)); name (including father’s name and grandfather’s name); identification number; nationality; place of capture; and tribe/region.

32. Certain of the documents referred to us by the Committee contain redactions that refer to the length of delay between the transfer and the request for notification to the ICRC. We discuss the ICRC and its role in Afghanistan below. Government officials have advised us that, in some cases, the release of this information could lead a reader to determine the precise

¹⁴ Can. T.S. 1992 No. 3.

date of capture, and thereby gain insight into the pace of Canadian Forces' operations. To avoid the compromise of national defence that this would entail, we have substituted the exact length of delay with an approximation.

Confidential Communications with Foreign Officials and Organizations

33. Certain documents referred by the Committee contain information about the substance of communications between Canadian officials and officials from foreign governments (primarily Afghanistan) or national/international organizations, such as the ICRC and the Afghanistan Independent Human Rights Commission ("AIHRC"). We have addressed communications with the ICRC as a separate category, below. Also addressed below as a separate category are diplomatic communications that amount to criticism by Canada of Afghan institutions or officials.

34. Government officials expressed serious concern about the disclosure of intergovernmental communications. They told us that all diplomatic communication is undertaken with the expectation of confidentiality, and that disclosure of confidential communications would cause serious harm, regardless of the substance of the communication, and whether the "speaker" is Canada or a foreign government. They emphasized that the chilling effect of disclosure of confidential intergovernmental communications cannot be underestimated. They also emphasized that even in circumstances in which some communications have been disclosed, further disclosures would cause incremental harm. The government officials also raised a specific concern about the substance of demarches, which are official diplomatic communications, often intended to be and regarded by the recipient as very serious. Government officials told us that their ability to effectively deliver these demarches, and the willingness of foreign officials to respond candidly and usefully, depends on confidentiality.

35. Bearing in mind the government's concerns, but also the primary objective under the MOU of disclosure and transparency, our approach is generally to summarize these communications, using wording appropriate to the context to avoid comprising national security, national defence or international relations. There are instances in which information can be or has been publicly disclosed in a certain context (e.g., as a statement of Canada's

position on an issue), but we have summarized the same or similar information when it appears in a formal or informal diplomatic communication. This is because the concern about disclosure generally relates to the fact that the communications are diplomatic communications, and to preserving the trust and confidentiality inherent in those communications, more than to the substance of the communications, save for certain cases. However, where information has been disclosed in another document in a similar context, we have disclosed it.

36. With respect to these and other categories of documents, our staff have, to the extent possible and feasible, carried out regular reviews of credible media reporting, government reports and reports of international organizations to assess whether the redacted information is in the public domain. If it is, we have generally disclosed it.

Criticism of Foreign (primarily Afghan) Institutions and Officials

37. Certain documents referred by the Committee contain Canadian criticism of, or candid negative commentary about, Afghan institutions or officials. Some documents also contain Canadian reporting about criticism by one Afghan institution or official of another. The main concern with releasing this information is that doing so could undermine Canada's relationship with officials in the government and justice sector. This could in turn impair Canada's ability to continue to train and build the capacity of these officials and their institutions and jeopardize the reforms that Canada has been able to achieve to date.

38. Taking into account these concerns, and considering the different types of documents referred to us, we have adopted the following approach to documents containing candid criticisms and assessments by Canada, based on our assessment of the extent to which disclosure of the redacted information would compromise national security, national defence or international relations.

- (a) If the assessment can fairly be attributed to Canada, the Canadian government, a department of the government, or a very senior official of the government, we generally summarize it. The level of detail in each summary will depend on how specific and how critical the assessment is, and who is the object of the criticism, and what adverse impact might therefore flow from disclosure.

- (b) If the assessment appears to be merely speculation by a non-senior Canadian official, we generally either leave it redacted or summarize it at a very high level, making it clear in doing so that the assessment is the view of the individual, and not the government of Canada.
- (c) If it is in the public domain (in media reporting for example) that Canada or Canadian officials hold a particular view or have arrived at a particular assessment, we generally disclose that view or assessment. If the assessment or view simply appears in media reporting, but without any indication that it is Canada's view or assessment, we generally summarize rather than disclose it.

39. Where we encounter criticism originating not from Canada but from a foreign government or institution, we take a slightly different approach, on the basis that criticism of one foreign institution by another, while it might be relevant and important, is not Canada's information to disclose. This rationale flows from the third party rule, which, as described above, provides that intelligence and information received from a foreign government, as well as the source of that intelligence or information, should not be disclosed without permission. If the source of the criticism is revealed by name or position, we generally leave the criticism redacted. If the source of the criticism is not disclosed (even if the originating institution is disclosed), we generally provide a high-level summary of that criticism.

40. We exercise our judgment in each case to decide whether the information at issue is truly critical, and therefore would be harmful if released. We are less concerned about disclosing information that is not obviously critical, and more concerned about disclosing information that is highly critical or expressed in very inflammatory language. The object of the criticism and the specificity with which it is expressed are also taken into account.

41. Finally, we note that one type of commentary that arises frequently in the documents is Canadian assessments about mistreatment and/or torture in certain Afghan facilities. In view of the importance of the issue of mistreatment, our general approach, depending on the language used, is to release, rather than summarize, these assessments.

Information about or from the ICRC

42. Certain documents referred by the Committee contain information about or from the ICRC. Information relating to the ICRC falls within a unique category to which we have given careful consideration. In addition to obtaining briefings from government officials about ICRC information, our staff discussed the ICRC's role and its concerns respecting the confidentiality of its information directly with ICRC officials.

43. The ICRC is an independent, neutral and impartial humanitarian organization headquartered in Geneva, Switzerland. The ICRC has described its role in Afghanistan as including protecting detainees, helping them to maintain contact with their families, monitoring the conduct of hostilities and acts to prevent international human rights law violations and assisting the wounded and disabled.¹⁵

44. The ICRC's mandate is expressly provided for in the 1949 Geneva Conventions, the 1977 Additional Protocols to the Conventions, as well as its Statutes, those of the International Red Cross and Red Crescent Movement, and the resolutions of the International Conferences of the Red Cross and Red Crescent. The ICRC operates in approximately 80 countries and deploys over 12,000 staff worldwide. In order to carry out its work in a neutral and impartial manner, it has a long-standing policy and practice of confidentiality. The ICRC requires confidential bilateral communications with the authorities with which it deals and expects such authorities to respect and protect the confidential nature of its communications. The confidential nature of the ICRC's communications is essential, among other things, to enable the ICRC to conduct a dialogue with states or organized armed groups involved in armed conflicts, to persuade the parties to an armed conflict to allow it to exercise its right of access to conflict areas, and to protect ICRC staff in the field.

45. The unique role of the ICRC and the confidentiality of its working methods have been recognized by international tribunals. The ICRC's claim to confidentiality was initially upheld in a decision of the International Criminal Tribunal for the former Yugoslavia involving a case in which the Prosecutor intended to call a former ICRC employee to testify. The Tribunal

¹⁵ "The ICRC in Afghanistan," online at <http://www.icrc.org/eng/where-we-work/asia-pacific/afghanistan/index.jsp>.

determined that the ICRC has an absolute privilege to decline to provide evidence in connection with judicial proceedings as a matter of both international treaty and customary law.¹⁶ This decision has been followed by the Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia, as well as the International Criminal Tribunal for Rwanda.¹⁷ The privilege over ICRC communications has also been incorporated into the Rules of Procedure and Evidence of the International Criminal Court.¹⁸

46. Mindful of the ICRC's concerns, considering its important mandate and taking into account our staff's discussions with ICRC officials, we have adopted the following approach to reviewing redactions respecting information about or from the ICRC.

- (a) We disclose the fact of any discussions or meetings with the ICRC. The ICRC advised our staff that it is publicly known and expected, by virtue of the ICRC's mandate under the Geneva Convention, that the ICRC meets with state authorities to remind them of their international obligations.
- (b) Generally speaking, we do not disclose any information or communications flowing from Canada to the ICRC. There may be instances in which we disclose in summary form information communicated by Canada to the ICRC on issues that are peripheral to the detainee issue.
- (c) We do not disclose any information, even in summary form, about or from the ICRC that is directly attributed to the ICRC or that it can be inferred comes from the ICRC, unless it has already been publicly disclosed. We may disclose the substance of information, likely by way of summary, communicated by the ICRC, where it is not attributed to the ICRC directly and it is not otherwise apparent that it comes from the ICRC. Given the ICRC's role and privileged access to information about detainees, it will be obvious in many cases, even

¹⁶ *Prosecutor v. Simic*, Case No. IT-95-9, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

¹⁷ *Prosecutor v. Brdjanin*, Appeals Chamber, Case No. IT-99-36, Decision on Interlocutory Appeals, 11 December 2002, para. 32; *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55, Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ, 15 July 2005, paras. 14-16.

¹⁸ Rule 73, Rules of Procedure and Evidence of the International Criminal Court.

where information is not attributed to the ICRC, that the ICRC is the source of this information. Where that is the case, we leave the information redacted.

47. This approach applies to all information flowing between Canada and the ICRC, whether it is information about or assessments of Canadian procedures or information about or assessments of Afghan facilities and national authorities. From the ICRC's perspective there is no basis on which to distinguish these types of information.

Third party Information

48. Certain documents referred by the Committee contain information from third parties, such as foreign governments or intergovernmental organizations like NATO or NATO's International Security Assistance Force. In accordance with the third party information rule, described in paragraph 24 above, our approach is to not disclose or summarize third party information, unless it has already been publicly disclosed.

Names of Afghan Officials

49. Certain documents referred by the Committee contain the names of Afghan officials, including senior Afghan officials. Our approach is not to disclose these names except where the information, including the name, has already been widely disclosed. As is the case with the names of Afghan detainees, there are in many cases serious risks that an Afghan official referred to in the documents may be subject to retaliation or serious harm if the Afghan official's name is identified. In addition, there are risks that disclosure will compromise Canada's relationship with the Afghan government. We have summarized information where it can be summarized without identifying the Afghan official involved.

Information relating to Special Forces

50. Certain documents referred by the Committee contain information about Canada's Special Forces in Afghanistan. In view of the nature of their mission, information about the activities of Special Forces is not ordinarily publicly available. Recognizing the operational security issues involved, our approach is not to disclose or summarize information about Special Forces activities except where it has already been disclosed. The information that

appears to have been publicly disclosed includes the following: (a) the presence of Special Forces in Afghanistan; and (b) the general nature of the role of Special Forces in Afghanistan.

Information about Gun Shot Residue Testing

51. Certain documents referred by the Committee contain information about the use of gunshot residue (“GSR”) testing in Afghanistan. The government has publicly acknowledged that the GSR test is used by Canadian Forces. Our approach is to disclose information in documents relating to the use of the test and results obtained in particular circumstances, but leave redacted other information to avoid compromising national defence.

D. Status of the Panel’s Review of NSC Information

52. As a result of its review of the documents it has received from the government, the Committee, has referred approximately 2300 pages of documents to the Panel for its consideration. In some instances the Committee has referred entire documents to the Panel; in other instances only particular pages, paragraphs or passages have been referred.

53. In October 2010, to facilitate the Panel’s work and enable it to begin to release the results of its NSC determinations without waiting until it had completed its review of all of the documents referred to it, the Panel invited the Committee to identify documents from among those referred to it that the Panel would review on a priority basis. The Committee initially identified a priority subset of documents in October 2010, supplemented its list of these documents in mid-December 2010, and further refined the list in March 2011. The subset comprises some 1450 pages of documents.

54. The Panel has completed its review and determinations in respect of the priority subset of documents identified by the Committee, and also reviewed and made determinations with respect to a number of documents on the longer list of documents referred by the Committee to the Panel. Where only a portion of a document has been referred to the Panel, the Panel’s determinations relate only to redactions that appeared in the referred portion of the document; again, we have not dealt with any redactions in portions of the document that were not referred to us.

55. A long and complex process must be completed in order to implement the Panel's decisions. This implementation work is carried out by a specialized unit within the Department of Justice, which has the technology and resources to carry out these tasks, using special secure software so that redactions can be "lifted" or the information in them summarized in a form that is useful for the purposes of disclosure but that does not compromise national security, national defence or international relations. Once the Panel's decisions have been implemented, the documents are given to us and our staff for a final review before they are ready for release. The process is painstaking and time-consuming, though that is a necessary corollary of the sensitive and confidential nature of the task.

56. As a result of the need to undertake this process, while the Panel has completed its review of the priority subset of documents, those documents are not all yet ready for release. However, at the Committee's suggestion, we have further prioritized 113 of these documents. They comprise the first set of documents that we have reviewed in accordance with our mandate under the MOU and that are ready for release. A set of these 113 documents, reflecting the results of our review, is available for provision along with this report. The table of contents of this set of documents specifies the portions of the documents referred to us by the Committee. We had contemplated that we would continue to deliver further sets of documents to the Committee as they became ready for release.

IV. PANEL'S APPROACH AND WORK IN REVIEWING INFORMATION SUBJECT TO CLAIMS OF SOLICITOR-CLIENT PRIVILEGE AND CABINET CONFIDENTIALITY

A. Introduction

57. The Panel's second task under the MOU is to review the government's redactions on grounds of solicitor-client privilege and Cabinet confidentiality. This is the process described in paragraph 7 of the MOU. In contrast to the NSC process, the Committee has no ability to refer redactions of these classes of information to the Panel. Indeed, in contrast to NSC redactions, the Committee does not see redacted information that is subject to these claims unless the Panel decides to "lift" the redactions or summarize the redacted information.

58. The MOU includes among its recitals the following statement:

Recognizing that Cabinet confidences and information subject to solicitor-client privilege are classes of information that the Parliament of Canada has long recognized are sensitive and may require protection from disclosure.

59. As set out above, paragraph 7 of the MOU states:

The Panel of Arbiters can determine, at the request of the government, that certain information should not be disclosed due to the solicitor-client privilege. The Panel of Arbiters, after consultation with the Clerk of the Privy Council, can also determine, at the request of the government, that information constituting Cabinet confidences should not be disclosed. In both such cases, the Panel of Arbiters shall determine how information contained in the documents may be made to Members of Parliament and the public without compromising the solicitor-client privilege or the principle of Cabinet confidentiality, by such techniques as the Panel may find appropriate, bearing in mind the basic objective of maximizing disclosure and transparency. Should the Panel of Arbiters decide that certain information should not be disclosed, the Panel will provide the rationale for its decisions to the *ad hoc* committee.

60. In carrying out its tasks under paragraph 7 of the MOU, the Panel's approach is to apply the law of solicitor-client privilege and Cabinet confidentiality, keeping in mind the basic objective of maximizing disclosure and transparency to which the paragraph refers. Our methodology entails (1) applying legal requirements to determine whether the claim of privilege or confidentiality is validly made, (2) if it is, determining whether the information subject to the claim can be made available in summary form without compromising the privilege or confidentiality, (3) if this is possible, determining an appropriate summary, and (4) if this is not possible, maintaining the redaction.

B. Solicitor-Client Privilege

Legal Requirements

61. Under Canadian law, solicitor-client privilege is close to absolute. Courts in Canada have held that solicitor-client privilege is a substantive legal and constitutional right that is

fundamental to the proper functioning of our legal system.¹⁹ It applies broadly to all interactions between client and lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity. It extends to communications between government officials and government lawyers just as it does to any other lawyer-client communications.²⁰

62. There are four basic prerequisites for solicitor-client privilege to apply: (1) there must be a communication between the lawyer and client; (2) the communication must be for the purpose of giving or receiving legal advice; (3) the communication must have been made in confidence with an expectation of confidentiality; and (4) the communication must be based on the lawyer's professional legal expertise. Unless it is waived by the client, solicitor-client privilege generally lasts forever.²¹

Status of the Panel's Review of Solicitor-Client Privilege Claims

63. The Panel has completed its review of the majority of the redactions from documents provided to the Committee to date that are based on claims of solicitor-client privilege. As part of this review, the Panel instructed its staff to seek further information from government officials so that it could be satisfied of the basis for the claims. In the course of this process a number of claims of privilege were withdrawn, in whole or in part.

64. Applying the relevant law, the Panel determined that with limited exceptions, the claims of solicitor-client privilege were well founded: the large majority of the claims met the four prerequisites for privilege set out above.

65. In cases in which we determined that these prerequisites were met, so that the claim of solicitor-client privilege is properly made, we considered, in accordance with our mandate in the MOU and our methodology, whether summaries of the redacted passages – or at a minimum the facts which they contain – could be provided without compromising the solicitor-client privilege. In our judgment this has not been possible. First, to do so would

¹⁹ *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860.

²⁰ *Pritchard v. Ontario (Human Rights Commission)* (2003), 63 O.R. (3d) 97 (C.A.).

²¹ *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319.

disclose the subject matter of a request for legal advice, and thus compromise the privilege. Second, to do so would be inconsistent with the rejection by the Supreme Court of Canada of a distinction, in determining whether privilege is made out, between legal advice and an account of the underlying facts.²² Both are presumptively protected by privilege.

66. We have prepared for transmission to the Committee along with this report a list setting out (1) the documents in relation to which claims of solicitor-client privilege have been withdrawn, in whole or in part, (2) the documents that are the subject of claims of solicitor-client privilege that the Panel has determined to be well-founded, and (3) the documents that are the subject of claims of solicitor-client privilege that the Panel has determined not to be well-founded.

67. We have also arranged for transmission to the Committee along with this report fresh copies of the documents that were the subject of solicitor-client privilege claims that have been withdrawn or have been determined by the Panel not to be well-founded. In these versions of the documents the redactions made on the basis of these claims have been lifted.

C. Cabinet Confidentiality

Legal Requirements

68. In contrast to the law of solicitor-client privilege, the common law respecting Cabinet confidences, which applies to the documents reviewed by the Panel under the MOU, does not provide for an absolute privilege from disclosure. The Supreme Court of Canada has held instead that, as a matter of common law, Cabinet confidences should be disclosed, unless disclosure would interfere with the public interest.²³ However, the Court stated that because Cabinet documents can concern the decision-making process at the highest level, courts must proceed with caution in ordering their disclosure.

69. The Court set out a number of considerations that are relevant in determining whether disclosure would interfere with the public interest. These include the level of decision-making to which the information relates; the nature of the policy concerned (e.g., documents relating

²² *Maranda v. Québec (Juge de la Cour du Québec)*, [2003] 3 S.C.R. 193.

²³ *Carey v. Ontario*, [1986] 2 S.C.R. 637.

to national security or national defence might be treated differently than documents relating to tourism policy); the particular contents of the documents; whether the information relates to allegations of government wrong-doing, so that disclosure may be necessary to ensure the proper functioning of government; the date of the documents or information and whether the policy-making process to which it relates is still ongoing; and the importance of producing the documents in the interests of the administration of justice, having regard to the importance of the case and the need or desirability of producing the documents to ensure that it can be adequately and fairly presented. Cabinet confidentiality may extend beyond Cabinet documents *per se*; it may, for example, apply to communications between or involving Ministers.

70. The common law of Cabinet confidentiality has been largely superseded at the federal level by section 39 of the *Canada Evidence Act*, which creates an absolute bar to disclosure where Cabinet confidentiality is properly claimed under that section. However, section 39 applies only where the issue of disclosure arises before a court, person or body with jurisdiction to compel the production of information. Because the Panel does not meet this description, section 39 is inapplicable to the determinations the Panel must make as to whether Cabinet confidences should be disclosed.

Status of the Panel's Review of Cabinet Confidentiality Claims

71. The government provided the Panel only recently with its claims of Cabinet confidences in relation to the documents provided by the government to date. The Panel's intent has been to complete its review of the redactions based on these claims as expeditiously as possible.



Claire L'Heureux-Dubé



Frank Iacobucci

APPENDIX

Memorandum Of Understanding Dated June 15, 2010

Memorandum of Understanding

between

The Right Honourable Stephen Harper, Prime Minister

and

The Honourable Michael Ignatieff, Leader of the Official Opposition

and

Gilles Duceppe, Leader of the Bloc Québécois

- I. Recognizing that the House of Commons adopted an Order on December 10, 2009 for the production of Government documents related to the transfer of Afghan detainees from the Canadian Forces to Afghan authorities which contain information the disclosure of which would be injurious to national defence, international relations or national security if publicly released and which made no provision for confidential treatment of the material.
- II. Recognizing that the Speaker of the House of Commons, in his ruling of April 27, 2010, concluded that it is within the powers of the House of Commons to ask for the documents sought in that Order and suggested that a mechanism be put in place by which these documents could be made available to the House without compromising the security and confidentiality of the information they contain.
- III. Recognizing that the Speaker stated in his ruling that: "the House and the government have, essentially, an unbroken record of some 140 years of collaboration and accommodation in cases of this kind" and further that "The House has long understood the role of the government as 'defender of the realm' and its heavy responsibilities in matters of security, national defence and international relations. Similarly, the government understands the House's undoubted role as the 'grand inquest of the nation' and its need for complete and accurate information in order to fulfil its duty of holding the government to account."
- IV. Recognizing that Cabinet confidences and information subject to solicitor-client privilege are classes of information that the Parliament of Canada has long recognized are sensitive and may require protection from disclosure.

In order to comply with the Order of the House of Commons from December 10, 2009, and further to the Agreement in Principle reached by all parties on May 14, 2010, the parties agree as follows:

1. An *ad hoc* committee of parliamentarians will be established external to the House of Commons and consisting of ~~four members~~ ^{being} one Member of Parliament designated by the leaders of the governing party and each opposition party with recognized status in the House of Commons. Each party may designate one alternate Member of Parliament who may act as a replacement of a member of the *ad hoc* committee when that member is absent; no more than one Member from each party can participate in the *ad hoc* committee at a given time.
2. The *ad hoc* committee will have access to all documents listed in the House Order of December 10, 2009 including all relevant documents related to the transfer of Afghan detainees from the period 2001 to 2005 in order to understand the transfer arrangements post-2005, pursuant to the following confidentiality measures:
 - a. access to the documents is conditional on each Member signing a confidentiality undertaking and taking an oath of confidentiality, as prescribed hereinafter;
 - b. each Member, before receiving access to documents, will obtain a security clearance at the "Secret" level;
 - c. access to documents shall take place at a secure location under the control of the Government of Canada, subject to the following security conditions on access to, and the handling of, classified materials:
 - Members of the *ad hoc* committee will be required to provide identification;
 - no staff of the Members are to be included;
 - no electronic, photographic, cellular or recording devices are permitted;
 - no materials are to be removed from the designated location;
 - no copies of materials are permitted to be made;
 - no notes are permitted to be removed from the location at any time; and
 - any notes made by Members of the *ad hoc* committee may only be accessed by the author of those notes or his or her alternate and any such notes shall be destroyed six months after the completion of the review of documents;
 - d. the review of documents is to take place with all the procedural protections normally accorded to *in camera* proceedings, including a ban on the publication of the proceedings and on the disclosure, directly or indirectly, of any information which is protected from disclosure; and

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signatory


- e. any Member violating the confidentiality of the information will be immediately expelled from the *ad hoc* committee by the Panel of Arbiters established in paragraph 6, with no other Member of Parliament permitted to be substituted in the place of that expelled Member.
3. In order to understand what information has been protected from disclosure for the purpose of national security, national defence and international relations and shall not be disclosed by Members, the Members will be provided access to documents in both redacted and non-redacted form.
4. Any support required by the *ad hoc* committee will be provided by an ongoing group of public servants with the appropriate security clearances and subject-matter expertise. The group of public servants, from the relevant departments, will provide briefings and contextual information initially, and then as necessary, to the *ad hoc* committee to assist Members in carrying out their work and to understand the security implications and reasons for protecting certain information from disclosure.
5. With respect to every document that has been redacted, the *ad hoc* committee will determine whether the information therein is relevant to matters of importance to Members of Parliament, particularly as it relates to the ongoing study on the transfer of Afghan detainees currently under way at the House of Commons Special Committee on the Canadian Mission in Afghanistan, and whether the use of such information is necessary for the purpose of holding the government to account. The decisions of the *ad hoc* committee related to relevance shall be final and unreviewable.
6. Where the *ad hoc* committee determines that information is both relevant and necessary, or upon the request of any Member of the *ad hoc* committee, it will refer the disputed information to a Panel of Arbiters, who will determine how that relevant and necessary information will be made available to Members of Parliament and the public without compromising national security, national defence or international relations – either by redaction or the writing of summaries or such techniques as the Panel may find appropriate, bearing in mind the basic objective of maximizing disclosure and transparency. The Panel of Arbiters should regularly consult with the Members of the *ad hoc* committee to better understand what information the Members believe to be relevant and the reason why. The decisions of the Panel of Arbiters with respect to disclosure shall be final and unreviewable.
7. The Panel of Arbiters can determine, at the request of the government, that certain information should not be disclosed due to the solicitor-client privilege. The Panel of Arbiters, after consultation with the Clerk of the Privy Council, can also determine, at the request of the government, that information constituting Cabinet confidences should not be disclosed. In both such cases, the Panel of Arbiters shall determine how information contained in the documents may be made available to Members of Parliament and the public without compromising the solicitor-client privilege or the principle of Cabinet confidentiality, by such

techniques as the Panel may find appropriate, bearing in mind the basic objective of maximizing disclosure and transparency. Should the Panel of Arbiters decide that certain information should not be disclosed, the Panel will provide the rationale for its decisions to the *ad hoc* committee.

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8. The Panel of Arbiters will be composed of three eminent jurists, who shall have judicial expertise. Composition of the Panel must be agreed upon by both the Government and the Opposition. *signatories*

9. The *ad hoc* committee may produce a report at the end of the review of documents, outlining the methodology, practices and procedures used and containing any recommendations for improvements to the process of review. Should the *ad hoc* committee deem that circumstances warrant, it may also produce an interim report at any time before the production of a final report. Before any report is finalized, it shall be submitted to the Panel of Arbiters for decision regarding disclosure to ensure that the information in the report does not compromise national security, national defence or international relations, taking into consideration the factors outlined in paragraph 6.

10. This Memorandum of Understanding survives a dissolution of Parliament provided that the leaders of the governing party and each opposition party with recognized status in the House of Commons following a general election sign a Memorandum in the same terms in the next Parliament.

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11. The ~~Government~~ documents mentioned above will continue to be tabled in the House of Commons as they become available.

12. Before receiving access to the aforementioned documents, each Member (including alternates) shall take the following oath:

I, ..., swear (or solemnly affirm) that I will be faithful and bear true loyalty to Canada and to its people, whose democratic beliefs I share, whose rights and freedoms I respect and whose laws I will uphold and obey. I further swear (or solemnly affirm) that I will not communicate or use without due authority any information obtained in confidence during the review of documentation.

13. Before receiving access to the aforementioned documents, each Member (including alternates) shall sign the following binding undertaking of confidentiality:

The House of Commons adopted an Order, on December 10, 2009, for the production of Government documents related to the transfer of Afghan detainees from the Canadian Forces to Afghan authorities which contain information the disclosure of which would be injurious to national defence, international relations or national security if publicly released.

While Members of the House of Commons need to obtain the information that is necessary to hold the Government to account, such disclosure must be balanced by the Government's obligations to protect information, including information that would be injurious to national defence, international relations or national security if publicly released.

In recognition of the above concerns, I, _____, therefore undertake as follows:

1. I will take the prescribed oath before obtaining access to any confidential information, which is defined as information that the Government of Canada has identified as being protected from disclosure and that the Panel of Arbiters has not determined can be disclosed without compromising national security, national defence or international relations.
2. I will obtain a security clearance at the "Secret" level before obtaining access to the information described in paragraph 1.
3. I will treat all information described in paragraph 1 as strictly confidential.
4. I will not use or communicate, directly or indirectly, any of the information described in paragraph 1, including in parliamentary proceedings, to any other individuals, including to other Members of Parliament or to my staff.
5. I will take best efforts to ensure that there is no inadvertent disclosure of the information described in paragraph 1.
6. I will not remove any of the documents that include information described in paragraph 1 from a secure Government of Canada facility.
7. I will not make any copies of the information described in paragraph 1; any notes will not be removed from the secure Government of Canada facility and will be destroyed six months following the completion of the review of documents.
8. I understand that this undertaking is a continuing obligation, which survives the dissolution of this Parliament.

Date: _____ Signature: _____

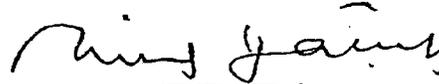
Memorandum of Understanding signed at Ottawa, Ontario, June 15, 2010

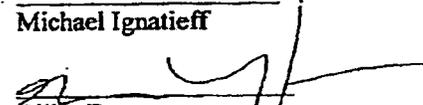
For the Government of Canada:



Stephen Harper

For the Opposition in the
House of Commons:



Michael Ignatieff

Gilles Duceppe