

**The “Internal Inquiry” process:
Fostering a culture of impunity**

October 17, 2008

Amnesty International, the Canadian Arab Federation, the Canadian Council on American Islamic Relations, the Canadian Muslim Civil Liberties Association and the International Civil Liberties Monitoring Group, organizations with Intervenor Status at the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin.

Many of our organizations began in 2005 to call for an Inquiry or credible review process to examine the very serious and troubling questions that arise in the cases of Ahmad El Maati, Abdullah Almalki and Muayyed Nureddin. We were encouraged when, in the Arar Inquiry report, Justice O'Connor recommended further review of these three cases. While he suggested that it would likely not be advisable to do so through a "full-scale public Inquiry" he did highlight that no matter what process was adopted, "it should be one that is able to investigate the matters fully and, in the end, inspire public confidence in the outcome."¹

We welcomed the December 2006 announcement that there would be a further Inquiry into these three cases. We were pleased that someone of the reputation and accomplishment of former Supreme Court of Canada Justice Frank Iacobucci was appointed Commissioner. We expressed deep concern and disappointment, however, that the restrictive Terms of Reference set by the government pointed to the likelihood that the three men themselves and the wider public would be excluded from participating in the overwhelming majority of the Inquiry's proceedings. We therefore urged the Commissioner to interpret the Terms of Reference consistent with principles of fairness, recognizing the crucial importance of public access to and engagement with Commissions of Inquiry.

At various stages over the past twenty-two months we have called on the government to ease the restrictions in the Terms of Reference. We have repeatedly made submissions to the Commissioner requesting more meaningful opportunities for the three men to participate in key aspects of the process and for there to be a greater degree of access for intervening organizations and the public. We called on the government to support that position. All of those requests were turned down.

We come to the end of this "Internal Inquiry" deeply disappointed that the process has not fulfilled the vision first described by Justice O'Connor: inspiring public confidence in the outcome. Instead, it has been our experience that the imperatives of secrecy, efficiency and expeditiousness have dominated at every turn. The process has not been fair to the men, has failed from our perspective to fully investigate the matters at the heart of the Inquiry, and has excluded the public from being able to follow the progress of the Inquiry even minimally.

The federal government set up this process, and imposed exceptionally restrictive terms of reference, seemingly designed to keep the process, and the issues before it, out of the public domain. Commissioner Iacobucci, in turn, interpreted those terms of reference and his mandate in the narrowest terms possible.

¹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, p. 278.

The result has been a process that has been by any measure deeply unfair to the three men at the centre of this Inquiry. We continue to hope and expect that the findings of the Inquiry will shed light on the very serious human rights concerns at the heart of these three cases. But we must, even now, before we have seen the report, stress that this Inquiry has been so lacking in procedural fairness, narrowly focused, and lacking in transparency, that we, as human rights and civil liberties organizations, feel it is imperative to emphasize that no matter its outcome, this “Internal Inquiry” model must never be repeated.

The following is not, by any means, an exhaustive account of what went wrong with this process. Indeed, so much of what occurred cannot be shared, as we, as Parties, were told that many of our discussions with the Inquiry —about procedural concerns, not issues over which national security claims could be claimed — were “off the record” – and could not be publicly disclosed.

Undue secrecy

According to data available from the Office of the Privy Council and accessible websites of Commissions of Inquiry, of the nineteen Inquiries convened under Part I of the *Inquiries Act* in the last twenty years, four had terms of reference noting the necessity of protecting information relating to national security:

- Commission of Inquiry into the Deployment of Canadian Forces to Somalia (March 20, 1995)
- Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (February 5, 2004)
- Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (May 1, 2006)
- Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (December 11, 2006)

Of those four, only the Iacobucci Inquiry had a mandate requiring that it be conducted in private.

At the Arar Inquiry we saw what Justice O’Connor would later refer to as the government’s “overclaiming” of National Security Confidentiality over documentary evidence and testimony. It turned out that many of these claims were not about safeguarding national security, but about shielding agencies and officials from embarrassment and public accountability. Indeed, much of the information that the government wanted secret pertained to the pattern behind Mr. Arar’s case — specifically, to the cases of *Messrs.* El Maati, Almalki and Nureddin.

This just underscored the need for the Iacobucci Inquiry process to be conducted in a manner that truly engaged the public and inspired public confidence, by permitting public participation by key Intervenor Organizations who represent the public interest and by ensuring frequent and meaningful public and media access to the process.

But the government's Terms of Reference required the Commissioner take "all steps necessary to ensure that the Inquiry is conducted in private." We held out some hope because the Terms of Reference did, nonetheless, authorize the Commissioner "to conduct specific portions of the Inquiry in public if he is satisfied that it is essential to ensure the effective conduct of the Inquiry." The men, their Counsel, and our organizations therefore repeatedly pressed the Inquiry for disclosure of documents and evidence not subject to valid National Security Confidentiality claims. We argued that for the process to be credible and fair that the three Canadians at the heart of the process needed to have maximum participation rights and access to the evidence; their Counsel had to have the ability to test the government's evidence; and there needed to be a mechanism for addressing national security claims, such as, for example, by granting Counsel security clearance as was done in the Air India trial.

But throughout the process, on every occasion that the men and their Counsel, and we, as Intervenors, pressed for this reasonable disclosure, it was denied. The result has been a total absence of meaningful and effective participation. Throughout this process, the men, their Counsel, the Intervenors and the public have had:

- no opportunity to see or test any of the documentary evidence filed at this Inquiry;
- no opportunity to attend any hearings or interviews with Canadian officials, or to test the evidence provided orally in these hearings or interviews;
- no opportunity to read the transcripts of interviews or hearings that took place, and therefore no way of knowing what questions have been asked and how they were answered;
- no access to information that would have informed our ability to suggest lines of questioning for Canadian officials;
- no information about the number of interviews or hearings that took place and with which Canadian officials; and
- no confirmation of the number of hearings over which the Commissioner himself presided.

This lack of disclosure fundamentally undermined the ability of the men, their Counsel and Intervening Organizations to meaningfully participate in the development of the evidence before the Commissioner. It has also undermined our ability to have confidence in the accuracy of the evidence before the Commissioner, the level or quality of any cross-examination by Commission Counsel; or the level or accuracy of disclosure on the part of the government agencies and officials.

“Draft Factual Narrative”

At the end of May 2008, once hearings and interviews with Canadian officials had, for the most part, concluded, Counsel for the men and Intervenors were given a limited number of days to view, in facilities provided by the Commission, a "draft factual narrative" – a summary of the evidence heard by the Commission *against which no national security confidentiality claims had been filed*. We were advised that Counsel were not permitted to discuss the draft factual narrative with their clients, and that further, Counsel would not be permitted to make copies, or remove it from the secure viewing

facilities.

We'd first learned about this "Draft Factual Narrative" in a November 6, 2007 ruling denying one of our motions for disclosure. In it, the Commissioner said that the "draft factual narrative" would be provided to Counsel for the men and Intervenors "to take into account their comments and suggestions" and to "provide Participants and Intervenors with another important opportunity for an effective contribution to the Inquiry's process."

This "opportunity for an effective contribution to the process" was severely impaired by the fact that Counsel for the men were prohibited from sharing or discussing the content of the document with their clients – the men at the heart of this Inquiry whose input would most assuredly best inform any contribution. Counsel for the Intervenors were also prohibited from discussing the content of the document with their clients — the organizations with expertise that could have also been of great assistance to the Commission. The men, their Counsel and the Intervenors applied twice to ask the Commissioner to reconsider his decision, highlighting that it limited their ability to make meaningful and detailed submissions; was not required by the Terms of Reference; and led to the further isolation of the men themselves from a process they'd so far been almost entirely excluded from.

The Commissioner denied those requests, saying on May 23, 2007 that there was a need to keep the draft narrative confidential, that lawyers are "in a position to give professional undertakings [...] that ensure the maintenance of confidentiality," and second, that "the three men might be called as witnesses at a later date, and having access "could affect or be seen to affect their evidence."

In denying the second application, the Commissioner said that he would not reconsider his decision, and that because there was a possibility that the men or other witnesses (Canadian officials) might still be asked to provide evidence, that the draft narratives were not being disclosed to anyone but Counsel. But on September 9, 2008 Commission Counsel informed Counsel for the men that "a copy of the draft factual narrative" may have been shared with two Canadian officials who were witnesses at the Inquiry. It turns out that Counsel for these witnesses, unlike Counsel for the men, were not required to sign an undertaking to maintain the confidentiality of the draft factual narrative.

Meanwhile, without the benefit of frank consultation with their clients, in the space of about one month, Counsel were forced to submit detailed submissions on the draft narrative, final submissions, and reply submissions (to the government's submissions).

The men at the heart of this process – the men in whose name the Inquiry was set up – were entirely isolated from the Inquiry, and their own Counsel, and denied access to their own final submissions (which necessarily referred to the draft factual narrative); the Attorney General's final submissions; and reply submissions.

On September 15, 2008, we were informed by Commission Counsel of the existence of an “amended draft narrative,” which contained additional evidence obtained from Canadian officials following the first draft. Counsel asked for access to it and were denied. It isn’t known whether the witnesses who may have seen the draft narrative had subsequently provided more evidence.

Lack of public hearings

Paragraph (e) of the Terms of Reference for this Inquiry authorized the Commissioner to hold sessions in public when he believed it was essential for the effective conduct of the Inquiry. On several occasions, in meetings, correspondence, and formal applications, the men, their Counsel, and the Intervening Organizations urged the Commissioner to hold public hearings. At the outset, we wanted hearings to hear from witnesses. As time went on, and we realized that this would not be granted, we asked for hearings where we could argue, publicly for the need for more disclosure. At the end of the process, we argued for the need for a public hearing for final submissions. Those applications were made on October 2, 2007 (denied November 6, 2007); July 8, 2008 (denied July 22, 2008); and September 26, 2008 (denied October 8, 2008).

In the end, there was just:

- One day of hearings on Participation and Funding (March 21, 2007);
- One half-day hearing on Terms of Reference and Rules of Procedure (April 17, 2007);
- One and a half days of hearings on “Standards of Conduct” (January 8 and 9, 2008);
- No hearings in which Canadian officials appeared as witnesses;
- No public hearings on closing submissions; and
- No public hearings to address serious procedural issues as they arose.

As a result, it wasn’t just the men at the heart of the process who were isolated from it, but the public too was entirely denied any opportunity to follow and engage with the proceedings while they were underway. There is considerable public concern about the issues that were before this Inquiry. Public trust in Canadian security agencies has been shaken by revelations of mistakes and wrongdoing that have been masked by unfounded claims of national security confidentiality. One critical means of restoring that faith would have been to ensure that concerns receive public and transparent attention.

Narrowing the mandate

This process was borne out of a recommendation by Justice O’Connor in the Arar Report. He called for an independent and credible process for reviewing these three cases – one that would look at the integrated nature of the underlying investigations. While he did not recommend a full-blown public Inquiry, he did emphasize that “whatever process is

adopted, it should be one that is *able to investigate the matters fully* and, in the end, inspire public confidence in the outcome [emphasis added].”

On numerous occasions in this process, we have learned, often quite by accident, that the Commission did not appear to consider it essential to examine certain witnesses. Early on, for example, we learned that the Commission did not consider it essential to interview or otherwise examine former RCMP Commissioner Guiliano Zaccardelli, former Public Safety Minister Anne McLellan, former Solicitor General Wayne Easter, former Deputy Prime Minister John Manley and others. The identities of many of the people ultimately interviewed have been classified as secret and have not been shared with the men, the Intervenor organizations or the public. Several witnesses proposed by the men themselves – such as family members and witnesses with important information for the Inquiry – were never interviewed or otherwise examined.

We’ve also been alarmed to learn throughout the process about issues of grave concern that the Commissioner appears to consider outside of his mandate. These issues include whether there was any basis for labeling the men as terrorists in communications with foreign governments and the media; the media leaks themselves; and the conduct of Canadian consular officials during the period between when the men were released from prison and when they were permitted to return home to Canada.

Labeling

The Commission has indicated that it may not consider it within its mandate to determine, like the Arar Commission did for Maher Arar, whether these officials had any basis for labeling these men in the way they did. We disagree, and hope that the Commissioner will address this issue in his report. Labeling these men as linked to terrorism would most certainly constitute a deficiency directly related to at least two key dimensions of the Commission’s mandate: their detention and their mistreatment abroad.

Leaks

Justice O'Connor found in his report that "over a period of time, Government of Canada officials intentionally released selected classified information about Mr. Arar or his case to the media...Typically, the leaked information was attributed to an unnamed government official, an official closely involved in the case, or some similar source...Several of the leaks were inaccurate, unsupported by the information available from the investigations, and grossly unfair to Mr. Arar" (Analysis and Recommendations, pages 46-7). Canadian officials also leaked information to the media about Mr. El Maati and Mr. Almalki, publicly characterizing them as linked to al Qaeda, and implicating them in terrorist plots. Unnamed intelligence officials told the media that Mr. Nureddin was suspected of having served as a “courier of money and information for an organization.” Yet, in meetings with the Commission, the Intervenors were told that the Commission does not intend to address the issue of “leaks” of classified information and innuendo about these men to the media.

How these individuals were described in the media by Canadian officials (and, as above,

in discussions and documents exchanged with foreign governments) would have inevitably had very serious consequences — in addition to the harm done to their reputations, the impact on their treatment in detention, the impact on efforts to secure their release, and the impact on their own psychological well being and that of their families, there are broader public consequences. If the evidentiary basis is deficient we are faced with the implication that these agencies may have inappropriately and unnecessarily increased public anxiety and fear about terrorist threats in Canada. In addition, these leaks may have been strategically timed to detract from increasing public and media scrutiny about the potential complicity of Canadian agencies in the detention and torture of these men.

Post-release, pre-return period

The men, their Counsel and the Intervenors were surprised to learn in a September 23, 2008 email from Commission Counsel that the Commissioner did not intend to make any findings related to the provision of consular services, or lack thereof, in the period between when the men were released from prison and able to return to Canada, a period that for two of the men spanned many months. We filed an application on September 26, 2008, expressing our surprise and emphasizing that this time period must be examined. We highlighted that the men continued to face onerous and very frightening restrictions on their liberty throughout this period, including frequent court appearances, interviews with security officials and reporting to prison officials. We referred to Canadian court decisions that supported our position that such restrictions should be considered to constitute ‘detention.’

We recalled how once Mr. El Maati was released from prison, he was ordered by officials to report to Egyptian security services every four to five days, and was forced to remain in the country for approximately ten weeks during which time his liberty and freedom of movement were severely restricted. After Mr. Almalki was released from Syrian prison, his court case was repeatedly delayed, and, he was summoned for more interrogation at the Palestine Branch. He was forced by government officials to remain in the country for over four months during which time he had no choice but to acquiesce to the demands and directions of officials. We argued that the Commission must examine, among other issues that arise during this period, whether Canadian officials put Mr. Almalki or Mr. El Maati at risk of re-detention or further torture, or impeded their ability to leave those countries, through direct or indirect communications with Egyptian or Syrian authorities after their release.

We also recalled how after being released from prison, Mr. Almalki sought, and was denied, refuge in the Canadian embassy in Damascus. Canadian embassy officials accompanied Mr. Arar and Mr. Nureddin home. We argued that the Commission must examine, among other issues that arise during this period, why Canadian officials refused to do the same for Mr. El Maati and Mr. Almalki when they were released, and what more Canadian officials and agencies could have done to ensure their prompt and safe return to Canada.

We were deeply dismayed with the Commissioner's response in his ruling of October 8, 2008. In it, he wrote:

Subparagraph (a)(ii) of the Terms of Reference requires that I assess whether there were deficiencies in the actions taken by Canadian officials to provide consular services to the Applicants "while they were detained in Syria and Egypt". The Applicants and Amnesty International submit that I should assess the consular services provided by Canadian officials to the Applicants after they were released from prison, because their freedom of movement was still effectively restricted up to the time they left Syria and, in Mr. Elmaati's case, Egypt. The Shorter Oxford English Dictionary (6th ed., 2007) defines "detained" to mean "place or keep in confinement; keep as a prisoner, esp. without charge". In my view, in the context of the Terms of Reference, there is no reason to depart from the ordinary dictionary definition of the word "detained" in interpreting the scope of my mandate. The words "while they were detained in Syria and Egypt" are in my view clear and unambiguous, and preclude me from assessing whether there were deficiencies in the consular services provided to the Applicants after they had been released from prison.²

This decision was all the more harsh because it ignored the definitions of "detained" established by Canadian case law that we had presented in our submissions, taking instead the Shorter Oxford English Dictionary definition.³

The terrible toll for the men at the heart of this process

The issues before the Iacobucci Inquiry are of grave public consequence. Whether our government, law enforcement and security agencies countenanced torture as a means of safeguarding national security is a very serious issue, and one that deserves thorough, publicly accountable and accessible investigation that all Canadians can have confidence in. At stake are the principles at the very heart of Canadian democracy – that all Canadians are equal before the law, and that the perpetrators of injustice will be held accountable.

² Internal Inquiry into the Actions of Canadian officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, "Ruling on Application made by Notice of Application dated September 26, 2008," October 8, 2008, page 2.

³ The Supreme Court of Canada has identified three situations that give rise to a detention: (1) where there is a deprivation of liberty by physical constraint; (2) when the police assume control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to Counsel; and (3) in situations where the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist (*i.e.* psychological detention) (*R. v. Therens* [1985] 1 S.C.R. 613, *R. v. Thomsen* [1988] 1 S.C.R. 640, affirmed in *R v Pomeroy 2008 ONCA 521* at 23, *R. v. Rajaratnam 2006 ABCA 333*)

But also at stake are the futures of three men – three torture survivors whose lives, and whose families’ lives, have been irreparably shattered. Their physical and psychological health has been forever compromised, and their reputations, social networks and careers destroyed. In Mr. El Maati’s case, a marriage was ruined and two years, two months and two days of his life stolen. Mr. Almalki was plucked from the lives of his wife and five young children for almost two years. Mr. Nureddin, who had fled to Canada in search of democracy after escaping Saddam Hussein’s Iraq, found himself in graver danger as a result of the actions of Canadian security agencies.

It is because of the decision by these men to publicly demand answers that this Inquiry — the Internal Inquiry into the Actions of Canadian officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin – exists. It is their reputations and well-being that are directly implicated by these proceedings. And yet throughout this process, whenever the men and their Counsel have pushed for more meaningful participation, for more transparency, and for evidence of a more thorough investigation, the response from the Commission has been to isolate them from the process — to treat the men as if this Inquiry has nothing to do with them at all.

For these men, for the Intervenors, and for the public, this process has been unacceptable, and, no matter what the outcome, has fostered a culture of impunity. As Commissioner Iacobucci has said himself, “it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental.”⁴

⁴ Justice Frank Iacobucci, *Sierra Club v. Canada* (Minister of Finance), [2002] 2 S.C.R. 522 at para. 52.