

April 2, 2007

RULING ON PARTICIPATION AND FUNDING

INTRODUCTION

Pursuant to Order in Council P.C. 2006-1526 of December 11, 2006, I was appointed Commissioner under Part 1 of the *Inquiries Act* to conduct an internal inquiry into actions of Canadian officials in relation to Mr. Abdullah Almalki, Mr. Ahmad Abou-Elmaati and Mr. Muayyed Nureddin to determine the following:

- (a) whether the detention of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances,
- (b) whether there were deficiencies in the actions taken by Canadian officials to provide consular services to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin while they were detained in Syria or Egypt, and
- (c) whether any mistreatment of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances.

This ruling deals with applications for participation in the Inquiry and recommendations for funding. The Terms of Reference for the Inquiry relevant to the ruling

- (d) authorize the Commissioner to adopt any procedures and methods that he considers expedient for the proper conduct of the Inquiry, while taking all steps necessary to ensure that the Inquiry is conducted in private;
- (e) despite paragraph (d), 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;
- (f) authorize the Commissioner to grant to any person who satisfies him that they have a substantial and direct interest in the subject-matter of the Inquiry an opportunity for appropriate participation in it;
- (g) authorize the Commissioner to recommend to the Clerk of the Privy Council that funding be provided, in accordance with approved guidelines respecting rates of remuneration and reimbursement and the assessment of

accounts, to ensure the appropriate participation of any party granted standing under paragraph (f), to the extent of the party's interest, where in the Commissioner's view the party would not otherwise be able to participate in the Inquiry;

Also relevant are the Rules of Procedure and Practice Respecting Participation and Funding which have been adopted and published on the Inquiry's website. Rule 7 provides that in addition to granting an opportunity to participate in the Inquiry to those who establish they have substantial and direct interest in the subject matter of the Inquiry ("Participants"), the Commissioner may grant an opportunity to participate to those who establish that they have a genuine concern about the subject matter of the Inquiry and have a particular perspective or expertise that may assist the Commissioner ("Intervenors").

At the outset, I wish to point out that I will be asking those persons and organizations who are granted participation for their views on interpretative questions arising from the Terms of Reference and the General Rules of Procedure and Practice that I propose to adopt. However, it is important to note that it appears that, consistent with the Terms of Reference, much of the Inquiry's work will be done internally or in private, in part to ensure the protection of national security confidentiality. Yet the Terms of Reference do contemplate portions of the Inquiry may be held in public if it is essential to ensure the effective conduct of the Inquiry. As mentioned, I will be looking for guidance from those granted participation rights on the meaning of these and other provisions of the Terms of Reference.

All this means that my ruling on participation and funding will necessarily be preliminary until those interpretive questions on the Terms of Reference are answered and the Inquiry's General Rules are finalized. This ruling will also have to be tentative because the Inquiry is still in the process of receiving and beginning to review the voluminous material being provided by the Attorney General of Canada in response to the Inquiry's request for production, so at this point the exact nature and extent of the documentation and information that will be before the Inquiry is not known.

All of the foregoing leads me to state that it may be necessary to return to various aspects of this ruling as events unfold. However, I am able to make specific decisions on participation and funding recommendations at this time and will now proceed to do so.

RULING ON PARTICIPATION AND FUNDING

A. Introduction

The Commission published a Notice of Hearing in 35 newspapers across Canada in late February and early March 2007 inviting participation and funding applications. The Notice was also posted on the Inquiry's website. I received 15 applications in total (one made jointly by two organizations) before March 21, 2007, when oral submissions in support of the applications were heard in Ottawa. One application was incomplete as of that date and another was submitted after March 21, 2007.

As I stated in the public session in Ottawa on March 21, 2007, I am committed to ensuring that the Inquiry is independent, fair, thorough, and expeditious. I will consider all relevant information relating to the issues expressed in the Terms of Reference. Of special importance is the requirement in the Terms of Reference that I submit my report by January 31, 2008 in two official languages so time is of the essence.

The hearing scheduled for April 17, 2007 will provide all participants with an opportunity to express their views on the Terms of Reference as well as on the process that the Commission should follow, subject, of course, to the provisions of the *Inquiries Act* and the Terms of Reference.

Although mandated to be in private, the Terms of Reference do permit portions of the Inquiry to be in public and as I previously stated I intend to take that provision seriously. I say that because transparency and openness generally are valued principles in the work of the courts, tribunals, and inquiries. Their advantages are obvious and of fundamental importance to ensure accountability of decision makers and to inspire public confidence in the conclusions reached. In this connection, draft Rules of Procedure for this Inquiry have been prepared and published for comment.

I wish to emphasize that the Inquiry is an investigative and inquisitorial proceeding, not a judicial or adversarial one. As a result, I will rely on Inquiry counsel to assist me throughout the Inquiry. In ensuring the orderly and efficient conduct of the Inquiry, they also have primary responsibility to represent the public interest and not any particular interest or point of view.

As reflected in the Rules of Procedure and Practice Respecting Participation and Funding, two classes of participation are envisioned:

- (a) Participants: those who have a substantial and direct interest in the subject matter of the Inquiry; and
- (b) Intervenors: those who have a genuine concern about the subject matter of the Inquiry and have a particular perspective or expertise that may assist the Commissioner.

The exact roles of Participants and Intervenors, as already noted, will await further events and further information in the hands of the Inquiry. In making this ruling, I do not find it necessary to refer to the jurisprudence or practice of other inquiries on standing or participation or funding but I acknowledge the guidance received from those sources.

I have interpreted the criteria for participation broadly bearing in mind the mandate of the Inquiry, each applicant's interest and circumstances and the consequences to each applicant of the findings of the Inquiry among other factors. It is difficult to give an exhaustive definition of "substantial or direct interest" nor do I believe it necessary or desirable to do so.

By similar reasoning, the intervenor class should not be rigidly determined, especially since the Rules of Procedure and Practice on Participation and Funding are expressed in general terms that give me discretion to decide whether Intervenors will be able to assist me in the carrying out of my mandate.

In granting Participant and Intervenor status, I at this time will not be differentiating much on their respective roles as this will await submissions to be heard on April 17, 2007. However, I will recommend that Participants and Intervenors form, where appropriate, coalitions of groups having similar perspectives or a coordinated approach to their participation or involvement in the Inquiry. This will save time and expense and I would appreciate the cooperation of all concerned in this respect.

With this in mind, I have concluded at this stage that both Participants and Intervenors will be entitled to:

- (a) make submissions to the Commission on the (1) Terms of Reference of the Inquiry and (2) the proper process for the Inquiry to follow in light of the Terms of Reference;
- (b) make opening and closing submissions to the Inquiry; and
- (c) submit background documents, including analyses or studies, on issues of relevance to the mandate of the Inquiry.

Further participation and involvement may arise as events unfold.

Mindful of these considerations, I make the following rulings on specific applications for participation and funding.

With respect to funding, I understand that the approved guidelines referred to in paragraph (g) of the Terms of Reference require that I recommend the specific number of hours of counsel time for which in my view reimbursement should be provided. I will defer making my recommendations in this regard until after I have considered the submissions to be heard on April 17, 2007.

B. Rulings on Specific Applications for Participation and Funding

1. Participants: Persons with substantial and direct interest

(a) Abdullah Almalki

Mr. Abdullah Almalki seeks “the broadest of participation rights” before this Inquiry. This Inquiry is about whether the detention, and any mistreatment, of Mr. Almalki in Syria resulted, directly or indirectly, from actions of Canadian officials and whether those actions were deficient in the circumstances. Mr. Almalki therefore seeks standing on the basis that: (i) he has “a direct and substantial interest in the determination of this factual inquiry” as it relates directly

to him; (ii) he has “important information” to provide to the Commission on these issues; and (iii) he wishes to be given an opportunity to clear his name. Mr. Almalki seeks funding for five lawyers. In addition, Mr. Almalki seeks funding for the rental of office space in Ottawa.

Without commenting on all of the three specific grounds for his application that he has put forward, I am satisfied that Mr. Almalki has a substantial and direct interest and should be permitted to participate as a Participant in the Inquiry as outlined above. Any further rights of participation will await future events. As for funding, I recommend at this time funding two lawyers, one senior and one junior, as for Mr. Elmaati and Mr. Nureddin, with effect from January 1, 2007. I will defer a decision on office space.

(b) Ahmad Abou-Elmaati

Mr. Ahmad Abou-Elmaati also seeks “full participation rights” before this Inquiry. Like Mr. Almalki, the facts surrounding Mr. Elmaati’s detention and treatment in Syria and Egypt form the subject matter of this Inquiry. He therefore seeks standing on the basis that: (i) he has a “direct and substantial interest in the determination of this factual inquiry” as it relates directly to him; (ii) he has “important information” to provide to the Commission on these issues; and (iii) he wishes to be given an opportunity to clear his name.

In his written material, Mr. Elmaati sought funding for five lawyers. However, in the hearing before me, counsel for Mr. Elmaati amended that request to funding for two lawyers, at least at this time. Mr. Elmaati also seeks funding for the rental of office space in Ottawa and for the travel expenses he will incur to attend hearings in Ottawa.

Without, again, commenting on all of the grounds that he has put forward, I am satisfied that Mr. Elmaati has a substantial and direct interest and should be permitted to participate as a Participant in the Inquiry as outlined above. Any further rights of participation will await future events. As for funding, I recommend funding for two lawyers, one senior and one junior, as for Mr. Almalki, with effect from January 1, 2007. I also recommend that Mr. Elmaati receive reimbursement for reasonable travel and accommodation expenses from January 1, 2007 for travel to and from Ottawa for the purpose of attending hearings of the Inquiry, in accordance with Treasury Board Travel Guidelines. I will defer a decision on office space.

(c) Muayyed Nureddin

Mr. Muayyed Nureddin seeks “full participation rights” before this Commission. Like Mr. Almalki and Mr. Elmaati, the facts surrounding Mr. Nureddin’s detention and treatment in Syria form the subject matter of this Inquiry. He therefore seeks standing on the basis that: (i) he has a “direct and substantial interest in the determination of this factual inquiry” as it relates directly to him; (ii) he has “important information” to provide to the Commission on these issues; and (iii) he wishes to be given an opportunity to clear his name.

In his written material, Mr. Nureddin sought funding for five lawyers. However, in the hearing before me, counsel for Mr. Nureddin endorsed the submissions of counsel for

Mr. Elmaati, thereby amending the request for funding at this time for two lawyers, office space in Ottawa, and travel expenses to attend hearings in Ottawa.

I am satisfied that, on the same basis as Mr. Almalki and Mr. Elmaati, Mr. Nureddin has a substantial and direct interest and should be permitted to participate as a Participant in the Inquiry as outlined above. Any further rights of participation will await future events. As for funding, I recommend funding two lawyers, one senior and one junior, as for Mr. Almalki and Mr. Elmaati. I will defer a decision on office space.

(d) *Attorney General of Canada*

The Attorney General of Canada seeks full participation in this Inquiry. The Attorney General submits that by virtue of the Terms of Reference, this is “an internal inquiry into the actions of Canadian Officials and no one else”. The Attorney General asserts a substantial and direct interest in this Inquiry on the basis that: (i) it is the government and certain of its agencies and departments that are directly affected by the results of this Inquiry; (ii) the Attorney General must be able to protect National Security Confidential Information; and (iii) the Attorney General has valuable information to provide as the majority of the documents relevant to the Inquiry’s mandate are within the control of the government of Canada. The Attorney General does not seek funding.

I accept the submission of the Attorney General of Canada and grant the Attorney General Participant status.

(e) *Maher Arar*

Mr. Maher Arar filed an application for “party status” before the Commission on the grounds that: (i) evidence may be adduced during the Inquiry that will affect his reputation and his right to hold those responsible for his detention accountable; and (ii) the Commission may “shed further light on the conduct of Canadian officials with respect to his detention in Syria”. Mr. Arar did not seek funding.

Prior to the March 21, 2007 hearing, Mr. Arar’s counsel withdrew his request to make oral submissions in support of the application. On March 27, 2007, Mr. Arar withdrew his application for participation.

(f) *Benamar Benatta*

Mr. Benamar Benatta is an Algerian citizen who is claiming refugee status in Canada. Mr. Benatta alleges that he was first detained in Canada upon entry from the United States on a false document and then sent back to the United States where he was detained, tortured and abused for a period of five years based on information provided by Canadian officials. Mr. Benatta believes that his experiences are “uniquely similar to the experiences of Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin”. He submits that he should be granted standing to participate as a party, or in the alternative as an intervenor, on the basis that he has a direct interest in “the development of mechanisms that will ensure accountability

and monitoring of Canadian security”, in seeing that “human rights are balanced against national security”, and “in the elimination of racial profiling and systemic racism as part of the Canadian intelligence regime”. Mr. Benatta seeks funding for counsel.

With respect, I do not accept the submission of Mr. Benatta’s counsel. To provide participation for Mr. Benatta would in my opinion in effect add a fourth name to those of Mr. Almalki, Mr. Elmaati and Mr. Nureddin in the Terms of Reference. This would contravene the Terms of Reference and consequently participation is denied.

(g) *Mohamed Omary*

Mr. Mohamed Omary is a resident of Montreal who has applied for standing on the grounds that he has a substantial and direct interest in this Inquiry. Mr. Omary alleges that he was detained in Morocco for a period of two years as a result of information provided by Canadian agencies. Mr. Omary submits that he has an interest in the practices of Canadian intelligence services as they relate to naturalized citizens. Mr. Omary seeks funding for counsel.

For the reasons given relating to Mr. Benatta, I would deny the application for participation.

(h) *Ontario Provincial Police*

The Ontario Provincial Police (OPP) seeks full standing and “all privileges and rights of participation” in relation to the Inquiry, in particular the right to attend the proceedings of the Inquiry and, if necessary, give evidence and/or cross examine witnesses on matters relevant to the OPP. The OPP submits that it has a direct and substantial interest in this Inquiry because: (i) the OPP and its current and former officers participated in the investigation about which this Inquiry is focused; (ii) the Inquiry’s findings and recommendations may impact the OPP, its employees, and its future role in national security investigations; (iii) the OPP officers whose actions are the subject of this Inquiry have knowledge of the facts, events, policies and procedures that may be relevant to the Commission; and (iv) the OPP has expertise with investigations of national security and information sharing that may be helpful to the Commission. The OPP does not seek funding.

I accept the submission of counsel for the OPP and grant Participant status to the OPP.

(i) *Ottawa Police Service*

In its submissions, the Ottawa Police Service did not explicitly assert a “direct and substantial interest” claim; however it appears that this is its submission. The OPS submits that: (i) the OPS and its officers participated in the investigation about which this Inquiry is focused; and (ii) the Inquiry’s findings and recommendations may impact the OPS, its employees, and its future role and contribution in national security investigations.

The OPS seeks to participate in the Inquiry by monitoring the proceedings, assisting counsel with evidence and information, and, if necessary, presenting evidence relevant to issues

which may arise. The OPS is not, at this time, seeking participatory rights for individual OPS police officers. The OPS does not seek funding.

I grant Participant status to the OPS.

**2. Persons with a Genuine Concern and Particular Perspective or Expertise:
Intervenors**

(a) *Amnesty International*

Amnesty International Canadian Section (English Branch) (“Amnesty”) has applied for participation as an Intervenor. Amnesty claims a genuine concern in the subject matter of the Inquiry based on its extensive involvement in the cases of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin. Amnesty also claims a particular expertise on the subject matter of this Inquiry based on its long-standing work in the area of human rights and security.

Amnesty would like to participate in the Inquiry by making opening written and/or oral submissions, observing proceedings open to it and making further submissions on occasion, making oral and written submissions on procedure and making oral and written submissions at the close of the Inquiry. Amnesty does not seek funding.

I grant Amnesty Intervenor status to participate as an Intervenor as outlined above in this ruling.

(b) *Human Rights Watch*

Human Rights Watch (“HRW”) has also applied to participate as an Intervenor. HRW claims a genuine concern in the subject matter of the Inquiry, demonstrated by the particular perspective and expertise HRW has developed on the issues that are the subject matter of the Inquiry. HRW has expertise in the areas of international human rights law, torture, rendition, diplomatic assurances against torture, and policies and practices in Egypt and Syria. HRW submits that this expertise will contribute to the Commissioner’s ability to conduct a thorough examination of what happened to Mr. Almalki, Mr. Elmaati and Mr. Nureddin from an individual, organizational and systemic perspective.

HRW seeks to participate by providing information and expertise and by making submissions at the request of the Inquiry or the Commissioner. HRW is prepared to cooperate with like-minded groups as part of a coalition of intervenors.

HRW does not seek funding, but has requested reimbursement of its reasonable disbursements in the course of its participation as an Intervenor.

I grant HRW Intervenor status to participate as outlined above in this ruling and recommend funding for reasonable disbursements (including travel) incurred as an Intervenor.

(c) Canadian Council for American Islamic Relations and Canadian Muslim Civil Liberties Association

The Canadian Council for American Islamic Relations (CAIR-CAN) and the Canadian Muslim Civil Liberties Association (CMCLA), acting jointly, have applied for participation as an intervenor. The organizations claim a genuine concern about the subject matter of the Inquiry based on the constituencies that they represent, the effect of the subject matter of the Inquiry on these constituencies, and their interest in pursuing the recommendations of the Arar Inquiry. CAIR-CAN and CMCLA also claim expertise and historical experience in the areas of national security and civil liberties, intelligence tactics and strategies used within the Muslim and Arab communities, and the impact of national security and anti-terrorism legislation and practices on Muslims.

CAIR-CAN and CMCLA seek extensive participation rights, including the right to access documents, to make oral submissions; to examine witnesses, and “to a seat at the counsel table”. In the alternative, the organizations seek “standing to participate in this Inquiry to a lesser degree as deemed appropriate by the Commission.” CAIR-CAN and CMCLA seek funding for counsel fees and disbursements.

Because of the perspective of CAIR-CAN and CMCLA, which could be of assistance to me, I grant Intervenor status to CAIR-CAN and CMCLA jointly. Participation would be as outlined above on this ruling. As for funding, I recommend funding for one lawyer who could also act for the Canadian Arab Federation, as discussed below.

(d) B.C. Civil Liberties Association

The B.C. Civil Liberties Association (“BCCLA”) has applied for participation as an intervenor. The BCCLA claims a genuine concern in the subject matter of the Inquiry, and specifically a concern and interest in protecting civil liberties in the context of Canada’s national security activities, prevention of torture, and accountability of government officials for violations of civil liberties. The BCCLA also submits that it has relevant and useful expertise, developed through its work on national security and civil liberties and through its work as an intervenor at the Arar Inquiry.

The BCCLA proposes to work jointly with the International Civil Liberties Monitoring Group (“ICLMG”), and the two groups seek joint funding for legal counsel. The BCCLA also seeks funding for an “Intervenor Coordinator” who, it is proposed, would “make it possible to ensure effective coordination of the intervenors’ submissions and participation” at the Inquiry.

I grant Intervenor status to BCCLA to participate as outlined above in this ruling and recommend funding for one lawyer to be shared with ICLMG as proposed.

In view of the relatively limited number of intervenors and my disposition of the applications for funding, I am not satisfied at this stage of the Inquiry that funding for a separate Intervenor Coordinator is necessary. However, I am prepared to consider a further request to recommend funding for this position if, following my rulings on the matters to be addressed at

the April 17 hearing and as the Inquiry proceeds, the BCCLA or other intervenors consider the position essential to their effective participation.

(e) *International Civil Liberties Monitoring Group*

The International Civil Liberties Monitoring Group (“ICLMG”) has applied for participation as an intervenor. The ICLMG is a pan-Canadian coalition of civil society organizations that was established in the aftermath of the September 11, 2001 terrorist attack. Three of the ICLMG’s member organizations have also separately applied to participate as intervenors in this inquiry -- Amnesty International, Canadian Arab Federation and CAIR-CAN.

The ICLMG claims a genuine concern in the subject matter of the Inquiry, demonstrated by its representative position and its extensive role in the Arar Inquiry. ICLMG also claims to have a particular perspective or expertise that may assist the Commissioner, derived from the expertise of its member organizations in the areas of human rights, anti-terrorism legislation, refugee protection, racism, political dissent, international cooperation and humanitarian assistance. As discussed above, the ICLMG and the BCCLA seek funding for joint legal counsel.

I grant ICLMG Intervenor status to participate as outlined above in this ruling and recommend funding for one lawyer to be shared with BCCLA as proposed.

(f) *Canadian Arab Federation*

In its written and oral submissions to the Commission, the Canadian Arab Federation (“CAF”) asserted both a direct and substantial interest *and* a genuine concern in the subject matter of the Inquiry. The CAF submits that, as the representative of the Arab Canadian community, it has a genuine concern in the Inquiry. It also submits that the issues covered by the Inquiry have a direct and unique impact on the Arab Canadian community. Specifically, the CAF claims that the impact of Canada’s security measures and security relations with foreign governments amount to a pattern of human rights abuse directly affecting Arab Canadians as a class. The CAF claims that its expertise in the areas of anti-racism and human rights, as well as its special knowledge of the Arab World, will be of benefit to the Commission. The CAF seeks funding for one lawyer.

Because of the perspective of CAF, which could be of assistance to me, I grant Intervenor status to CAF and recommend funding for one lawyer to be shared with CAIR-CAN and CMCLA. Participation would be as described above in this ruling.

(g) *Canadian Coalition for Democracies*

In an application submitted after the March 21, 2007 hearing, the Canadian Coalition for Democracies (“CCD”), which describes itself as a non-partisan, multi-ethnic, multi-religious organization of concerned Canadians dedicated to the protection and promotion of democracy at home and abroad, asserts that it has a perspective essential to the Commission’s mandate through CCD’s study of and related activities concerning issues of intelligence, terrorism and national

security. CCD, which has been granted intervenor status in the Air India Inquiry, seeks participation as an Intervenor in the Inquiry and funding for counsel fees and necessary disbursements.

Although the materials filed appear to be oriented towards a more policy-based intervention, I am prepared to accept that the expertise and perspective of CCD could be of some assistance to me in deciding the questions that I have been asked to determine. I grant Intervenor status to CCD and recommend funding for one lawyer. Participation would be as described above.



To repeat, I would encourage the Intervenors to cooperate with each other as much as possible and more specifically I would ask Amnesty, HRW, BCCLA and ICLMG as a group to coordinate and collaborate their efforts to reduce costs and time spent by all concerned. I would ask CAIR-CAN and CMCLA and CAF to do the same.

Frank Iacobucci
Commissioner

April 2, 2007