

Joint Submission for May 3, 2005 hearing on process and procedure

Preface

We have been asked to make submissions on issues related to the Public Hearings starting on May 9, 2005, and on issues which arise out of the changes to process and procedure outlined in the Commissioner's April 7, 2005 "Ruling on Summaries." The Commission has called for submissions on specific issues, and we address those below. We would, however, like to preface our submissions by emphasizing the concerns we raised with the Commission when we were consulted about the new process.

In his April 7, 2005 "Ruling on Summaries," the Commissioner said he had sought submissions from the parties and intervenors about discontinuing the summary process, and that while "Mr. Arar and the intervenors think it unfortunate that the summary process must be abandoned, they also accept that, in the circumstances, the new procedure that I set out below is the best way to proceed."

We stressed then that suspending the process of releasing summaries of *in-camera* evidence had very serious implications. This process was intended to maximize public disclosure of relevant information, and to compensate for the fact that the public, Intervening Organizations, and parties and their counsel, including Mr. Arar and his counsel, are excluded from the *in-camera* hearings, and without these summaries, have no access to the evidence heard *in-camera*. We concluded that by refusing to respect the Commission's ruling on the first summary of evidence heard *in-camera*, that the government was effectively using the threat of costly and time-consuming federal court litigation to limit public disclosure and undermine the Commission's work.

Given this context, the Intervening organizations felt we were left with no choice but to agree that suspending the summary process seemed to be the only possible option for moving forward. At the same time, however, we emphasized crucial concerns, many of which are addressed below. Given the significant detrimental impact of this change on the public nature of this public inquiry, we also highlighted that the Commission had a responsibility to ensure that the public was fully informed as to the reasons behind the procedural changes. We feel that by rendering the summary process unworkable, that the government has deliberately tried to turn this public process into a private, closed door investigation with minimal possibility for public engagement. We therefore preface our submission by urging the Commission to clearly communicate the reasons behind this new process to the public at the May 3 hearing.

Bringing evidence from Mr. Arar

What parts, if any, of Mr. Arar's potential testimony are essential in order for the Commissioner to fulfill his mandate; if he is to testify, when would it be most appropriate for Mr. Arar to testify: during the public hearings scheduled to commence in May, or after the release of a report by the Commissioner setting out the findings that he is able to make without hearing Mr. Arar's testimony. Such a report would likely provide the maximum amount of public disclosure of documents and in camera evidence that is possible, given the nature of this Inquiry. Is it desirable and feasible for Mr. Arar to testify about certain matters during the public hearings scheduled to commence in May, but to delay the decision about whether Mr. Arar should testify about other matters until the release of a report (such as is referred to in b) above), which would take into account the testimony Mr. Arar had already given?

It is the view of the Intervening Organizations that Mr. Arar's testimony is essential, but that this can only go forward in a way that has full regard for his rights, including his right to a fair hearing process that affords him the opportunity to know the nature and source of any allegations against him before he testifies. We note that the government, by blocking the release of summaries of the evidence heard in-camera, has made it almost impossible for the Commission to call Mr. Arar as a witness in a way that respects fundamental principles of fairness. Given this concern, and the failure by government to provide even a modicum of meaningful disclosure to Mr. Arar and his counsel, we fully understand that he may decide he is not able to testify at this time.

If so, we encourage the Commissioner to work with Mr. Arar and his counsel to explore alternative means by which he could provide evidence, such as through the appointment of a Special Rapporteur, who could interview Mr. Arar about his treatment in the United States, Jordan, Syria and Canada, particularly if it may have involved or led to violations of his fundamental rights, such as the right not to be tortured, the right not to be sent to a country where there was a serious risk of torture, the right not to be arbitrarily arrested or detained, and the right to due process.

Furthermore, we urge the Commission to ensure that it is able to hear this evidence in time to include it in its Interim Report of Findings, and, if necessary, to allow Mr. Arar the opportunity to testify about other matters after the release of the Interim Report.

Bringing evidence from others with respect to Mr. Arar's case

The Intervening Organizations also propose that this Special Rapporteur could assist the Commission in bringing evidence from Abdullah Almalki, Ahmed Abou El-Maati and Muayyed Nureddin.

We fully support, in fact insist upon, a sensitive and cautious approach to dealing with witnesses who have survived torture. However, finding a way to bring evidence from these men is crucial for two reasons. First, as all three were imprisoned in Syria, and all have alleged they were tortured there, these men will be able to provide evidence that will be valuable to understanding Mr. Arar's experience in Syria. Second, just as with Mr. Arar's case, in all three instances there are troubling, unanswered questions as to what role Canadian law enforcement or security agencies may have played, including information sharing and discussions with Syrian authorities. We feel it is crucial that the Commission investigate the possibility that what happened to Mr. Arar may not be an isolated case, and could instead be

part of a pattern of Canadian agencies being linked to the detentions, interrogation and torture of other Muslim Canadian citizens in Syria.

We therefore strongly urge the Commission to work creatively to ensure it is able to bring evidence from Abdullah Almalki, Ahmed Abou El-Maati and Muayyed Nureddin with respect to these issues. We propose that a Special Rapporteur, appointed by the Commission, could bring evidence from these men about these specific issues. We further urge that the Commission make it a priority to gather this evidence in time to include relevant findings in its Interim Report.

We have consulted with Counsel for Mr. Almalki and Mr. Nureddin, and both have informed us that their clients are eager to assist the Commission in fulfilling its mandate, and in principle, agree with this proposal, subject to a review of the terms of reference with respect to the Special Rapporteur. We understand that counsel for Mr. El Maati has earlier communicated that he is not prepared to participate in the Commission and understand that it may therefore not be feasible to bring evidence from him.

The question of fairness and RCMP witnesses

The Commission asks whether, given that the public has had almost no access to evidence heard in-camera, there is a potential for unfairness to RCMP or to RCMP witnesses when they testify at the public hearings. The Commission asks if it would be sufficient to refuse to permit questions relating to matters for which an RCMP witness would need to refer to information over which the government claims national security confidentiality in order to provide an adequate answer. The Commission also asks if there is there a danger, given the constraints of national security confidentiality, that the RCMP evidence that can be introduced in the public hearings could be misleading to the public, and if so, what steps can the Commissioner take to minimize the potential that the public will be misled.

The Intervening Organizations are opposed to any notion that any questions could be refused simply on the basis of a national security claim being made. The Commission has yet to rule on the enormous number of national security claims that have been made by the government, and has already made it clear that it disputes the validity of many of the national security claims that have been made by the government with respect to CSIS evidence. Indeed, it was that dispute that led to the suspension of the summary process, and the adoption of this new procedure. The public has a right to hear any question that the parties bring forward, and witnesses have the right to refuse to answer if they deem it necessary. We suggest below a process that we believe can ensure that answers to disputed questions of this nature are provisionally heard *in camera* with the possibility that it would later be disclosed to the public if the national security claim is ultimately rejected by the Commission.

The conduct of public hearings

The Commission invites submissions about the process that should be followed to ensure that the government's claims of national security confidentiality are appropriately addressed and to ensure that there is no disclosure of information over which the government claims national security confidentiality other than in accordance with the Terms of Reference. Further, the Commission requests submissions on the process to be followed when a witness testifying in the public hearing has previously testified in camera.

Once again, the Intervening Organizations point out that the Commissioner has yet to rule on the validity of the national security claims. The Commissioner has had access to all of the in-camera hearings and evidence, and is aware of the national security claims that have been made. The Intervening Organizations therefore propose the following if a witness is not prepared to answer a question because a related national security claim has been asserted:

If the Commissioner already knows the answer to the question, he should indicate that the answer, already known to him, is subject to an outstanding national security claim on which he has yet to issue a ruling. The hearing should then move on to the next question. When the Commissioner later, we assume in his interim report, rules on this particular national security claim he should disclose the answer if the claim is rejected. Parties should be afforded an opportunity to make further representations at that time. As the Commission has yet to hear the perspective of Mr. Arar and his counsel, it may well hear new questions in the public hearings which have not been asked in the in-camera hearings. If the disputed question is one to which the Commissioner does not know the answer, we propose that the Commissioner ensure that the answer is captured in a timely manner, perhaps through a limited *in camera* session at the end of the witness' testimony. Then, as above, the answer would be made public at a later date if the Commissioner does not accept the national security claim, with parties being given an opportunity to make any further related representations at that time.

The role of the Amicus Curiae

The Commission invites submissions about the role of the amicus curiae in light of the new procedure set out in the Commissioner's Ruling on Summaries. In particular, how does the role of amicus curiae differ, if at all, from that of Commission counsel, and how should submissions of the amicus curiae be received by the Commissioner?

The Intervening Organizations feel that to date, the Amicus Curiae's role has been under-utilized and under-resourced. We are disappointed that the Amicus Curiae has not been present at all of the in-camera hearings. We feel that the role of the Amicus Curiae should be strengthened, and that this role should be considered as independent from the Commission.

The role of the Amicus Curiae, as we understand it, is *inter alia* to vigorously test whether the public's right to know, and the public interest, outweighs national security claims. This role is particularly crucial given that almost all of the Inquiry has been held in-camera, and given the government's reluctance to allow for a reasonable level of public disclosure.

This role is particularly crucial given that the current Minister of Justice, Mr. Cotler, has recused himself from all matters related to Maher Arar's case, and has appointed an acting Minister of Justice for the purpose of this Commission, Minister of Fisheries and Ocean Geoff. Reagan. Minister Reagan has played no role with respect to the inquiry and has in fact written to one of the Intervenor's indicating that he is not involved in the process and that the lead for the government rests with Minister of Public Safety and Emergency Preparedness Anne McLellan. Ordinarily one would expect the Minister of Justice to play a central role in overseeing the government's involvement in a public inquiry of this nature. His absence here is further reason why the *amicus curiae* should be given a robust and independent role.

In practical terms, we feel that the Amicus Curiae should be able to:

- Be present during any and all public and *in camera* proceedings

- have access to all documentary evidence
- ask questions of witnesses
- make representations and assert positions with respect to the validity of national security claims and whether the public interest outweighs any such claims so as to favour disclosure
- play any further role that the Commissioner feels necessary.

This submission is being made jointly by the eighteen public interest organizations with Intervenor status at the Arar Commission. They are Amnesty International Canada, the British Columbia Civil Liberties Association, Canadian Arab Federation, Canadian Islamic Congress, Canadian Labour Congress, Council of Canadians, Council on American Islamic Relations (Canada), International Coalition Against Torture, International Civil Liberties Monitoring Group, Law Union of Ontario, Minority Advocacy Rights Council, Muslim Canadian Congress, Muslim Community Council of Ottawa-Gatineau, National Council on Canada-Arab Relations, Polaris Institute, and internationally the Redress Trust, Association for the Prevention of Torture and L'Organisation mondiale contre la torture.

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