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Canada

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# APPENDIX A

## ORDER IN COUNCIL P.C. 2006-1526, AMENDMENT P.C. 2008-31, AMENDMENT P.C. 2008-1489

CANADA

PRIVY COUNCIL • CONSEIL PRIVÉ

**P. C. 2006-1526**
**December 11, 2006**

Whereas the *Report of the Events Relating to Maher Arar* of September 18, 2006 recommends that the cases of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin should be reviewed and that the review should be done through an independent and credible process that is able to address the integrated nature of the underlying investigations and inspires public confidence in the outcome;

Whereas that report states that there are more appropriate ways than a full-scale public inquiry to investigate and report on cases where national security confidentiality must play a prominent role;

And whereas the Government of Canada, the Commissioner of the Royal Canadian Mounted Police, the Director of the Canadian Security Intelligence Service and the Deputy Minister of Foreign Affairs have committed to full cooperation with the review process;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Public Safety and Emergency Preparedness, hereby directs that a Commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Frank Iacobucci as Commissioner to conduct an internal inquiry into the actions of Canadian officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (the "Inquiry"), which Commission shall

(*a*) direct the Commissioner to conduct the Inquiry in order to determine the following:

(i) 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,

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(ii) 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

(iii) 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;

(*b*) direct the Commissioner to conduct the Inquiry as he considers appropriate with respect to accepting as conclusive, or giving weight to, the findings of other examinations that may have been conducted into the actions of Canadian officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin;

(*c*) direct the Commissioner to conduct the Inquiry under the name of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin;

(*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;

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(*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;

(*h*) authorize the Commissioner to rent any space and facilities that may be required for the purposes of the Inquiry, in accordance with Treasury Board policies;

(*i*) authorize the Commissioner to engage the services of any experts and other persons referred to in section 11 of the *Inquiries Act*, at rates of remuneration and reimbursement approved by the Treasury Board;

(*j*) direct the Commissioner to use the automated document management program specified by the Attorney General of Canada and to consult with records management officials within the Privy Council Office on the use of standards and systems that are specifically designed for the purpose of managing records;

(*k*) direct the Commissioner, in conducting the Inquiry, to take all steps necessary to prevent the disclosure of information to persons or bodies other than the Government of Canada that, if it were disclosed to those persons or bodies, would be injurious to international relations, national defence, national security, or the conduct of any investigation or proceeding, if the information, in the opinion of any of the following persons, falls into that category:

(i) the Commissioner, or

(ii) the Minister responsible for the department or government institution in which the information was produced or, if not produced by the government, in which it was first received;

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(*l*) direct the Commissioner that, if he disagrees with the opinion of the Minister referred to in subparagraph (*k*)(ii) that the disclosure of the information would be injurious to international relations, national defence or national security, he shall, without adjudicating the matter, so notify the Attorney General of Canada, which notice shall constitute notice under section 38.01 of the *Canada Evidence Act*;

(*m*) direct the Commissioner to submit, on or before January 31, 2008, both a confidential report and a separate report that is suitable for disclosure to the public simultaneously in both official languages to the Governor in Council;

(*n*) direct the Commissioner, in preparing the separate report, to take all steps necessary to prevent the disclosure of information that, if it were disclosed to the public, would be injurious to international relations, national defence, national security or the conduct of any investigation or proceeding, if the information, in the opinion of any of the following persons, falls into that category:

(i) the Commissioner, or

(ii) the Minister responsible for the department or government institution in which the information was produced or, if not produced by the government, in which it was first received;

(*o*) direct the Commissioner that, if he disagrees with the opinion of the Minister referred to in subparagraph (*n*)(ii) that the disclosure of the information would be injurious to international relations, national defence or national security, he shall, without adjudicating the matter, so notify the Attorney General of Canada, which notice shall constitute notice under section 38.01 of the *Canada Evidence Act*;

(*p*) direct that nothing in the Commission shall be construed as limiting the application of the provisions of the *Canada Evidence Act*;

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(*q*) direct the Commissioner to follow established security procedures, including the requirements of the Government Security Policy, with respect to persons engaged under section 11 of the *Inquiries Act* and the handling of information at all stages of the Inquiry;

(*r*) direct the Commissioner to perform his duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization;

(*s*) direct the Commissioner to perform his duties in such a way as to ensure that the conduct of the Inquiry does not jeopardize any ongoing investigation or criminal proceeding, and to consult with the government institution responsible for any ongoing investigation or proceedings about any jeopardy that could result from the conduct of the Inquiry;

(*t*) direct the Commissioner to file the papers and records of the Inquiry with the Clerk of the Privy Council as soon as reasonably possible after the conclusion of the Inquiry; and

(*u*) direct the Commissioner, in respect of any portion of the Inquiry conducted in public under paragraph (*e*), to ensure that members of the public can, simultaneously in both official languages, communicate with the Commission, and obtain from it services including any transcripts of proceedings that have been made available to the public.

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CLERK OF THE PRIVY COUNCIL–LE GREFFIER DU CONSEIL PRIVÉ

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**P.C. 2008-31**
**January 23, 2008**

Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, hereby directs that a commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada amending the commission in relation to the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, issued pursuant to Order in Council P.C. 2006-1526 of December 11, 2006, by replacing paragraph *(m)* with the following:

> *(m)* Our Commissioner to submit, on or before September 2, 2008, both a confidential report and a separate report that is suitable for disclosure to the public simultaneously in both official languages to the Governor in Council.

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CLERK OF THE PRIVY COUNCIL–LE GREFFIER DU CONSEIL PRIVÉ

CANADA
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**P.C. 2008-1489**
**August 8, 2008**

Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, hereby directs that a commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada amending the commission in relation to the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, issued pursuant to Order in Council P.C. 2006-1526 of December 11, 2006 and amended pursuant to Order in Council P.C. 2008-31 of January 23, 2008, by replacing paragraph *(m)* with the following:

> *(m)* Our Commissioner to submit, on or before October 20, 2008, both a confidential report and a separate report that is suitable for disclosure to the public simultaneously in both official languages to the Governor in Council.

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CLERK OF THE PRIVY COUNCIL–LE GREFFIER DU CONSEIL PRIVÉ

# APPENDIX B

## RULING ON PARTICIPATING AND FUNDING, DATED APRIL 2, 2007

Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

Enquête interne sur les actions des responsables canadiens relativement à Abdullah Almalki, Ahmad Abou-Elmaati et Muayyed Nureddin

**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;

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(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***

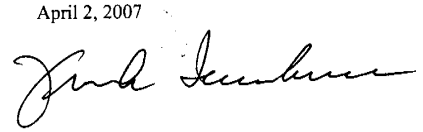
In an application submitted after the March 21, 2007 hearing, the Canadian Coalition for Democracies ("CCD"), which describes itself as a non-partisan, multi-ethnic, multi-religious organization of concerned Canadians dedicated to the protection and promotion of democracy at home and abroad, asserts 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



# APPENDIX C

## RULING ON TERMS OF REFERENCE AND PROCEDURE, DATED MAY 31, 2007

Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

Enquête interne sur les actions des responsables canadiens relativement à Abdullah Almalki, Ahmad Abou-Elmaati et Muayyed Nureddin

May 31, 2007

**RULING ON TERMS OF REFERENCE AND PROCEDURE**

**I. INTRODUCTION**

[1] By Supplementary Notice of Hearing dated March 27, 2007, I directed a public hearing that was held on April 17, 2007 to receive submissions from those granted an opportunity to participate in the Inquiry concerning the procedures and methods to be followed in the conduct of the Inquiry.

[2] More specifically, submissions were requested concerning the following questions arising from the Inquiry's Terms of Reference:

1. What is the meaning of the phrase "any mistreatment" as it appears in paragraph (a)(iii) of the Terms of Reference?
2. Is it necessary, in order for the Commissioner to determine the matters that paragraph (a) of the Terms of Reference mandate him to determine, for him to decide whether, and the extent to which, Mr. Almalki, Mr. Elmaati and Mr. Nureddin were tortured in Syria and Egypt?
3. What does paragraph (d) of the Terms of Reference mean in requiring the Commissioner, subject to paragraph (e), to take all steps necessary to ensure that the Inquiry is conducted in private? In particular, who should be entitled to attend any hearing conducted in private?
4. If the Commissioner decides that some participants are not entitled to attend a hearing conducted in private, what if any steps should he take to ensure that those participants can participate appropriately in the Inquiry's process?

5. What considerations should the Commissioner take into account in determining, in accordance with paragraph (e) of the Terms of Reference, whether he is satisfied that it is essential to ensure the effective conduct of the Inquiry that specific portions of the Inquiry be conducted in public?

[3] A sixth question was also asked inviting submissions relating to any aspects of the Inquiry's Draft General Rules of Procedure and Practice that might be of concern to the participants. The Draft General Rules are posted on the Inquiry's website, www.iacobucciinquiry.ca, but for convenience are attached to this ruling as Appendix A.

[4] In dealing with the above questions, certain background considerations must be borne in mind. At the outset, the Inquiry is subject to the provisions of the *Inquiries Act* and must observe the dictates of the Act as interpreted by the courts relating to the conduct of this Inquiry. In addition, the Inquiry is subject to its Terms of Reference, which are contained in P.C. 2006-1526 of December 11, 2006. The Terms of Reference are attached to this ruling as Appendix B.

[5] Also of application is the jurisprudence surrounding the conduct of inquiries in general and rulings of commissions of inquiry that provide guidance in answering the above questions. In this respect, I have benefited greatly from views expressed and opinions rendered in the Arar Inquiry, the Air India Inquiry, and the Walkerton Inquiry, as well as others.

[6] In this ruling, I will first set out a summary of the views submitted by participants and intervenors on the above questions. I will then discuss some informing principles and factors that are important to consider in formulating my ruling on these questions. Next I will discuss the disposition of the questions and end with some concluding observations.

## II. SUBMISSIONS OF PARTICIPANTS AND INTERVENORS ON QUESTIONS ASKED

### *1. The meaning of "mistreatment" (Question One)*

[7] Paragraph (a)(iii) of the Terms of Reference directs the Commissioner to determine "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...and, if so, whether those actions were deficient in the circumstances...".

[8] Participants and intervenors were asked to make submissions on the meaning of "any mistreatment" in this context. Specifically, they were asked:

> What is the meaning of the phrase "any mistreatment" as it appears in paragraph (a)(iii) of the Terms of Reference?

[9] The Attorney General of Canada submits that "any mistreatment" is a low threshold, one that refers to treatment that is clearly less severe than either "torture" or "cruel, inhuman or degrading treatment or punishment". The Attorney General acknowledges, for the purposes of this Inquiry, that the conditions under which Messrs. Almalki, Elmaati and Nureddin were detained meet this threshold.

[10] In their written submissions, the Ottawa Police Service ("OPS") and Ontario Provincial Police ("OPP") declined to take a position on the meaning of "mistreatment". However, in oral submissions before me the OPS and OPP agreed with the Attorney General's submissions on the meaning of "mistreatment".

[11] Messrs. Almalki, Elmaati and Nureddin submit that "mistreatment" should be interpreted broadly to include arbitrary, discriminatory and indefinite detention; physical and psychological torture; denial of diplomatic assistance and consular access; extended separation from family;

harm to reputation; intrusions on privacy; the refusal of a safe haven at the Canadian Embassy; and media leaks.

[12] The definitions of "mistreatment" advanced by the intervenors Amnesty International, International Civil Liberties Monitoring Group ("ICLMG"), the B.C. Civil Liberties Association ("BCCLA"), Canadian Arab Federation ("CAF") and the Canadian Coalition for Democracies ("CCD") are generally in accord with that advanced by Messrs. Almalki, Elmaati and Nureddin. The organizations support a broad interpretation of mistreatment.

### 2. *Investigation of Torture (Question Two)*

[13] Participants and intervenors were also asked:

> Is it necessary, in order for the Commissioner to determine the matters that paragraph (a) of the Terms of Reference mandate him to determine, for him to decide whether, and the extent to which, Mr. Almalki, Mr. Elmaati and Mr. Nureddin were tortured in Syria and Egypt?

[14] In the Arar Inquiry, Justice O'Connor appointed Professor Stephen Toope as a fact-finder to "investigate and report to the Commission on Mr. Maher Arar's treatment during his detention in Jordan and Syria and its effects upon him and his family".[1] In the course of his fact-finding and to better assess the credibility of Mr. Arar's story, Professor Toope interviewed Messrs. Almalki, Elmaati and Nureddin. Professor Toope found the three men's accounts of what happened to them in Syria to be credible.[2] He found that they "suffered severe physical and psychological trauma while in detention in Syria".[3]

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1 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Factual Background, Volume II* (2006) at 790

2 *Ibid.* at 805

3 *Ibid.*

[15] Messrs. Almalki, Elmaati and Nureddin submit that this Inquiry should adopt Professor Toope's report as conclusive evidence of their torture in Syria, subject to three caveats. First, they submit that, if Government officials dispute their torture claims, this Inquiry should appoint Professor Toope or another fact-finder with the same mandate as that conferred on Professor Toope with respect to Mr. Arar. Second, Mr. Elmaati seeks the appointment of a fact-finder to examine his claims of torture in Egypt, a subject that was not examined by Professor Toope for the Arar Commission. Third, Mr. Almalki submits that, if the Commissioner adopts a broad definition of "mistreatment", a fact-finder should be appointed to report on the physical, psychological, family and economic effects of torture.

[16] Counsel for Messrs. Almalki, Elmaati and Nureddin also submit that any fact-finding investigation into the men's allegations of torture be conducted in private owing to the sensitive nature of the subject matter. They do not, however, object to this fact-finding, to the extent that it is required, being conducted by the Commissioner and Inquiry counsel, rather than by an external fact-finder.

[17] The Attorney General submits that, since the Terms of Reference refer to "any mistreatment" and not to "torture", there is no need to determine whether Messrs. Almalki, Elmaati and Nureddin were subjected to torture. The Attorney General acknowledges that the men suffered "mistreatment" in Syria and Egypt and therefore submits that additional fact-finding, whether by the Commissioner or a separate fact-finder, is unnecessary. As for the Toope report, the Attorney General describes it as "rife with frailties" and submits that it should not be used as a basis for this Inquiry's findings. The OPP and the OPS agree with the position taken by the Attorney General.

[18] The organizations with intervenor status submit that examining the nature and extent of the torture suffered by Messrs. Almalki, Elmaati and Nureddin is essential, and a number of them propose that a fact-finder be appointed to this end.

### *3. Public vs. Private (Questions Three, Four and Five)*

[19] Paragraph (d) of the Terms of Reference directs the Commissioner to "take all steps necessary to ensure that the Inquiry is conducted in private". Paragraph (d) is subject to paragraph (e), which authorizes 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".

[20] Participants and intervenors were asked to provide submissions on how these paragraphs should be interpreted. Specifically, they were asked:

> What does paragraph (d) of the Terms of Reference mean in requiring the Commissioner, subject to paragraph (e), to take all steps necessary to ensure that the Inquiry is conducted in private? In particular, who should be entitled to attend any hearing conducted in private?
> If the Commissioner decides that some participants are not entitled to attend a hearing conducted in private, what if any steps should he take to ensure that those participants can participate appropriately in the Inquiry's process?
> What considerations should the Commissioner take into account in determining, in accordance with paragraph (e) of the Terms of Reference, whether he is satisfied that it is essential to ensure the effective conduct of the Inquiry that specific portions of the Inquiry be conducted in public?

[21] The Attorney General submits that, for reasons of national security confidentiality and expedition, "private" must be interpreted to mean *in camera* and *ex parte*. Under this interpretation, the Inquiry's hearings would be open to counsel for the Attorney General and witnesses permitted by the Commissioner, and closed to the public, participants and intervenors and their counsel.

[22] While the Attorney General proposes that participants not be permitted to attend the Inquiry's hearings, he submits that the role of Inquiry counsel will ensure that these participants can participate appropriately in the Inquiry's process. He suggests that participants could be given the opportunity to raise with Inquiry counsel specific areas for questioning and documents to be put to witnesses.

[23] The Attorney General submits that the threshold for holding hearings in public, pursuant to paragraph (e) of the Terms of Reference, is a high one that will not be easily met. In the Attorney General's view, the standard imposed by paragraph (e) is not mere possibility or desirability; the Commissioner must be satisfied that holding a hearing in public is essential and necessary. He suggests that to introduce a lower standard risks delaying the completion of the Inquiry or introducing a "tortuous, time-consuming and expensive exercise", the very problems that calling an internal inquiry was intended to avoid.

[24] The OPP and OPS submissions on the interpretation of paragraphs (d) and (e) of the Terms of Reference are generally in accord with the Attorney General's submissions. They agree that these paragraphs mandate the Commissioner to conduct a presumptively private inquiry. The OPP and OPS add, however, that security cleared counsel for the OPP and OPS should be permitted to attend any hearing conducted in private.

[25] Mr. Almalki, Mr. Elmaati, Mr. Nureddin and the majority of the intervenors, on the other hand, envision a much more public process, one that entails a much more robust role for the participants, the intervenors and their counsel. They argue that the Commission must conduct as much of its business as possible in public. In support of this argument, they invoke the constitutional principle of openness, the decision of the Supreme Court of Canada in

*Charkaoui*,[4] the language of the *Inquiries Act* (which provides, they say, that all inquiries are public unless they are departmental ones set up under section 6 of the *Inquiries Act)* and the need to inspire public confidence in the outcome of the Inquiry referred to in the Terms of Reference.

[26] Messrs. Almalki, Elmaati and Nureddin submit that the Inquiry's hearings should only be conducted in private where national security confidentiality claims are made, and then only after and to the extent that evidence that might engage national security confidentiality is tested and it is determined that the evidence does indeed engage national security confidentiality. They also ask that their counsel be security-cleared and, upon giving an undertaking not to disclose information that engages national security confidentiality to their clients, permitted to attend and cross-examine at any private hearings. Depending on the extent of the evidence called in private hearings, the three individuals propose that the Commissioner consider making available to the public one or more of summaries of the evidence, expurgated transcripts and redacted documents.

[27] Messrs. Almalki, Elmaati and Nureddin submit that, at minimum, all evidence relevant to the following issues must be called in public hearings: (a) embassy and consular conduct; (b) the Canadian government's practice and policy on torture; (c) information sharing with foreign regimes; and (d) requests by Canadian officials to secure information from the three men while they were in detention.

[28] The submissions of the organizations with intervenor status, with the exception of the CCD, generally accord with those of Messrs. Almalki, Elmaati and Nureddin. Amnesty

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[4] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9

International, the ICLMG, the BCCLA and the CAF argue in favour of a presumptively public process, with private hearings held only where legitimate national security confidentiality matters arise. Amnesty International and the CAF endorse the proposal by the three individuals that their counsel be security-cleared and able to fully participate in all private sessions of the inquiry. The ICLMG and BCCLA also propose a number of steps that the Commission could take to ensure that participants not entitled to attend private hearings can participate appropriately. These include providing participants with the names of witnesses, copies of documents, descriptions of documents subject to national security confidentiality, periodic updates on the status of the Inquiry and the right to recommend questions for examination and cross-examination.

[29] The CCD submits that paragraphs (d) and (e) of the Terms of Reference establish a presumptively private process. The CCD argues that, since the proceedings of the Inquiry are not in the nature of criminal or civil law matters, they do not attract the same obligation of openness. The CCD proposes that the Inquiry make redacted transcripts available to those who are not permitted to attend private hearings.

***4. Draft General Rules of Procedure and Practice***

[30] Finally, participants were invited to make submissions relating to any aspects of the Inquiry's Draft General Rules of Procedure and Practice that might be of concern to them.

[31] A number of submissions are related to the participants' arguments regarding the public or private nature of the Inquiry. In this respect, Messrs. Almalki, Elmaati and Nureddin , ICMLG and BCCLA argue that Rule 11 of the Draft Rules, which specifies that the Inquiry shall be conducted in private, must be interpreted in a manner that is consistent with their

perspective on the need for public hearings. Conversely, the Attorney General of Canada submits that the same Rule must be amended so as to make clear that every aspect of the Inquiry, including the interviews, shall be conducted in private. Furthermore, the Attorney General of Canada requests an amendment that would ensure that all interested participants be notified and be given an opportunity to make representations on NSC claims, before I make a determination under Rule 12(a) that a portion of the Inquiry be conducted in public.

[32] Other submissions relate to opportunities for participants to contribute to or call into question the evidence that will be received and the findings that will be made in the course of the Inquiry. Messrs. Almalki, Elmaati and Nureddin, and Amnesty International, propose amendments to Rule 13 and Rule 21, so as to provide participants with opportunities to test the evidence that will be received and to review and challenge the proposed findings of the Inquiry. ICMLG and BCCLA propose further amendments to Rules 20, 28 and 33 which would enable a broader range of participants to receive copies of the statement of the evidence to be given by a person who is to be called as a witness, as well as transcripts, redacted where appropriate, of any portion of the Inquiry conducted in private. For his part, the Attorney General of Canada proposes amendments to Rule 18 that would give his counsel advance notice of the documents to be discussed during an interview, as well as an opportunity to put questions to a person interviewed by Inquiry counsel. The Attorney General of Canada also requests a number of amendments to Rules 21, 22 and 23, so as to be provided with notice of proposed findings for which notice may not be required under section 13 of the *Inquiries Act*. In addition, the Attorney General of Canada seeks a clarification of the same rules to ensure that adverse findings against a witness will be based on the record of a formal hearing, and will

not be made strictly on the basis of an interview. OPP and OPS seek opportunities to test and challenge the findings that might be made on the basis of interviews.

[33] A few additional submissions raise more specific concerns with the Draft Rules. The Attorney General of Canada proposes a few amendments of this nature: an amendment to Rule 7 to clarify the scope of the duty of confidentiality to which participants, witnesses and their counsel are subject; an amendment to Rule 17, limiting the circumstances in which documents over which a claim of solicitor-client privilege is asserted can be disclosed and reviewed; and an amendment to Rule 18, specifying the degree of formality of interviews. OPP and OPS propose an additional rule giving notice to a participant that one of its current or former employees is to be interviewed, so as to provide an opportunity for this person to be represented by the participant's counsel. ICMLG and BCCLA point out what they see as a contradiction between Rules 31 and 32 (c), and seek a clarification of the role of counsel for a witness. Messrs. Almalki, Elmaati and Nureddin and Amnesty International propose an amendment to Rule 13 so as to clarify that the Inquiry may not accept evidence obtained under torture.

[34] Finally, many participants propose amendments to the Rules that are essentially stylistic and do not change the substantive import of the Rules, but might be considered to provide greater clarity or certainty.

## III. INFORMING PRINCIPLES AND CONTEXTUAL FACTORS

[35] Before providing my ruling on the specific questions asked of the participants and intervenors, I think it is helpful to reflect on the informing principles and contextual factors that should be kept in mind in answering the specific questions. In discussing these principles and

factors, I am obviously mindful of the provisions of the *Inquiries Act* and of the Terms of Reference as well as the jurisprudence and practices of commissions that have been held in our country over recent years. At the same time, I must keep in mind the context of this Inquiry and the specific mandate given as well as the deadline for submission of its reports.

[36] At the outset, it is important to note, as I mentioned in my Ruling on Participation and Funding (a copy of which is attached hereto as Appendix C), that this Inquiry is inquisitorial, investigative or fact-finding in nature and not an adversarial proceeding. There is no one charged, no one is on trial, and no one has a case to meet. What is at issue is the conduct of Canadian officials regarding three individuals, and I am directed to ensure that the serious concerns that are raised by the Terms of Reference are dealt with effectively, comprehensively and independently. Consequently, many of the attributes of protection and process that criminal or other adversarial proceedings engage do not apply in the context of this Inquiry. In this respect, I find it very helpful to cite Chief Justice McLachlin in the *Charkaoui* decision:

> There are two types of judicial systems, and they ensure that the full case is placed before the judge in two different ways. In inquisitorial systems, as in Continental Europe, the judge takes charge of the gathering of evidence in an independent and impartial way. By contrast, an adversarial system, which is the norm in Canada, relies on the parties – who are entitled to disclosure of the case to meet, and to full participation in open proceedings – to produce the relevant evidence....
>
> The judge [under the *IRPA*] is not afforded the power to independently investigate all relevant facts that true inquisitorial judges enjoy. At the same time, since the named person is not given a full picture of the case to meet, the judge cannot rely on the parties to present missing evidence. The result is that, at the end of the day, one cannot be sure that the judge has been exposed to the whole factual picture.[5]

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[5] *Ibid.* at paras. 50-51

[37] In this Inquiry, as in the inquisitorial proceedings to which the Chief Justice refers, I am mandated to "[take] charge of the gathering of evidence in an independent and impartial way." Consequently, the ordinary features of an adversarial proceeding are not in play.

[38] It might be helpful to elaborate in this respect on my role as Commissioner and the role of Inquiry counsel. Firstly, the Commissioner is appointed as an independent investigator who is obliged to pursue the terms of his mandate to the best of his ability and to ensure that the process is fair, effective and expeditious. And most importantly, the Commissioner, through his or her role as an independent investigator, represents the public interest.

[39] Also playing a key role in this respect is Inquiry counsel. On this topic, several commissioners and commentators have made guiding comments about the role of commission counsel in the public inquiry context. Recent comments made by the Honourable John Major in an Air India Inquiry ruling are particularly apposite.

[40] In that Inquiry, the Air India Victims Families Association (AIVFA) brought a "Request for Directions" asking that their security-cleared counsel be admitted to in camera hearings and be granted access to unredacted documents. AIVFA argued that this access would ensure that AIVFA would be engaged as a full contributor to the Commission's work while increasing the confidence and trust of family members in the Inquiry itself.

[41] Commissioner Major dismissed AIVFA's motion for directions and provided several reasons why it was appropriate to exclude AIVFA's counsel from in camera hearings and deny them access to unredacted documents. Among these reasons was the role of commission counsel in protecting the public interest. Commissioner Major wrote:

21. It is important the public interest (which includes the interest of the families) with respect to a full exploration of all the facts is not left unguarded. At the restricted *in camera* hearing and/or the redaction of document [*sic*] it is the responsibility of the Commission and the role of Commission counsel to protect that public interest. As noted by Mr. Justice Dennis O'Connor, Commissioner at the Arar Inquiry, in his non-judicial article, "The Role of Commission Counsel in a Public Inquiry":

> "...commission counsel's role is not to advance any particular point of view, but rather to investigate and lead evidence in a thorough, but completely impartial and balanced manner. In this way, the commissioner will have the benefit of hearing all the relevant evidence unvarnished by the prospective of someone with an interest in a particular outcome." (2003), 22 Advocates Soc. J. No. 1, at para. 12.

22. As also noted by Justice O'Connor, where a public inquiry does hear evidence *in camera*, the role of Commission counsel in representing the public interest allows Commission counsel to depart somewhat from his or her normal role and to engage in pointed cross-examination where necessary, so as to ensure that evidence heard *in camera* is thoroughly tested – a procedure intended to be followed by this Commission.[6]

[42] Justice O'Connor also made some helpful comments about the role of commission counsel in the Report of the Walkerton Inquiry:

> Commission counsel play a special role in a public inquiry. Their primary responsibility is to represent the public interest at the inquiry. They have the duty to ensure that all issues bearing on the public interest are brought to the Commissioner's attention. Commission counsel do not represent any particular interest or point of view, and their role is neither adversarial nor partisan.[7]

[43] Finally, Edward Greenspan, Q.C., in his article "The Royal Commission: History, Powers and Functions, and the Role of Counsel" wrote:

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[6] Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Reasons for Decision with respect to the AIVFA'S Request for Directions regarding Access to Unredacted Documents and In Camera and Ex Parte Hearings* (January 3, 2007), http://www.majorcomm.ca/en/reasonsfordecision_aivfa_request/index.asp

[7] The Honourable Dennis R. O'Connor, *Part One, Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues* (2002) at 479

> If the inquiry is investigatory, commission counsel serves as an independent legal adviser to the commission and is subject to the direction of the commissioner. He assists the commission in the adoption of procedures, examines and cross-examines witnesses called by the inquiry, and assists in the preparation of its report. He is, as indicated by his title, the commissioner's counsel and his conduct, therefore, must always be governed with this in mind. He must guard against becoming the advocate exclusively for one point, but rather must strive to ensure that all of the evidence necessary for a proper investigation is presented to the commission.[8]

[44] As I stated in the Ruling on Participation and Funding, as a general matter, it is preferable that both adversarial and inquisitorial proceedings be open and public. I do not resile from that comment but I do note that it reflected a general preference that was subject to the specific terms of reference of the inquiry in question and the context that surrounds the inquiry. Here there is no doubt the Terms of Reference emphasize the internal or private nature of the Inquiry and that national security confidentiality is a very important consideration. Paragraph (k) of the Terms of Reference expressly directs me, in conducting the Inquiry,

> to take all steps necessary to prevent the disclosure of information to persons or bodies other than the Government of Canada that, if it were disclosed to those persons or bodies, would be injurious to international relations, national defense, national security, or the conduct of any investigation or proceeding

if the information, in my opinion or the opinion of the Minister responsible, falls into that category.

[45] Even apart from the requirements of the Terms of Reference, one must be extremely cautious when delving into questions that involve considerations of national security confidentiality. The security of the country depends on the efforts of our various agencies to protect the Canadian public in a world that is increasingly tense and concerned about terrorism

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[8] Edward L. Greenspan, Q.C., "The Royal Commission: History, Powers and Functions, and the Role of Counsel" in *Administrative Tribunals* (F. Moskoff Q.C. ed. 1989) 327 at 345

and threats to national security. Human lives are often at risk when individuals serve our country's security and intelligence efforts, and a breach of confidentiality could have serious repercussions for those individuals that all of us would wish to avoid. At the same time, the Inquiry will be sensitive to the potential for overbroad assertions of national security confidentiality and not let that become a shield to prevent the Inquiry from doing the necessary work to fulfill its mandate.

[46] It is also significant to note that the agencies whose conduct is implicated by the Terms of Reference, CSIS, the RCMP and DFAIT, have pledged to co-operate fully with the Inquiry, and that the Attorney General has agreed with the Commission to full production of documents without any redactions at this stage for national security confidentiality. As a final resort the Inquiry has the power to subpoena witnesses and documents to obtain relevant information. Moreover, the requirement in the Terms of Reference for a report on the completion of the work of the Inquiry operates to ensure that the Commissioner is accountable to review all the relevant evidence and to arrive at conclusions that are based on that evidence in order to successfully complete the role that has been assigned to the Inquiry.

[47] There is another principle that I believe is important to note in interpreting and applying the Terms of Reference of this Inquiry. I would like to call this the "principle of workability".

[48] This concept appears to me to capture what Justice O'Connor had in mind in the Arar Commission report, where he stated: "[C]onducting a public inquiry in cases such as these can be a tortuous, time-consuming and expensive exercise.... [t]here are more appropriate ways than a full-scale public inquiry to investigate and report on cases where national security

confidentiality must play such a prominent role."[9] It also seems to me to be what counsel for the Attorney General was referring to when he submitted:

> This should not become an exercise in redaction, redaction for national security confidentiality and other privileges. This should not become a process in which hearings are held in private and then recreated in public.
>
> This should not be a process – and I think this is perhaps the most important point – that takes two and a half years to complete. That is in no one's interest, certainly not at this stage.[10]

[49] Even where the "open court" principle is applicable, "workability" has been cited as a factor that may militate against public access. For example, in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, Justice La Forest stated:

> [T]his Court has noted on previous occasions that public access to certain judicial processes would render the administration of justice unworkable.... The importance of ensuring that the administration of justice is not rendered unworkable provides a palpable reason for prohibiting public access.... Indeed, as we have seen in the case, the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable.[11]

[50] The concept has also figured in decisions about access to proceedings more like this one – proceedings of boards of inquiry appointed under the *National Defence Act*.

[51] In *Travers v. Canada (Chief of Defence Staff)*,[12] representatives of the media brought an application challenging on *Charter* grounds a decision by the Chief of Defence Staff that the proceedings of a board of inquiry on the subject of the Canadian Airborne Regiment Battle Group not be open to the public. The board had been established to investigate the

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9 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* (2006) at 277-278

10 *Transcript of Proceedings on April 17, 2007* at 66-67

11 [1996] 3 S.C.R. 480 at para. 29

12 [1993] 3 F.C. 528 (T.D.)

leadership, discipline, operations, actions and procedures of the Canadian Airborne Regiment Battle Group during its deployment in Somalia. The regulations under the Act provided that a board of inquiry should meet in private unless the convening authority otherwise directs.

[52] Justice Joyal determined that the board of inquiry was conducting an internal inquiry, rather than a judicial or quasi-judicial proceeding of the kind that engaged the "open court" principle. In the course of his discussion of the nature of the board's proceedings, he also commented on certain practical consequences of opening up its proceedings. Though he did not use the term "workability", he was certainly cognizant of the potential impact on the board's work of allowing public access. He observed:

> It is clear on the evidence before me that the mandate given to the Board must be exercised within a very short time. When first established on April 28, 1993, it was given a 90-day life span. Yet it was bestowed with a wide generic field of enquiry, which would necessarily involve in its proceedings the kind of communication which might be classified or might be prejudicial to any one or more of the named accused, or which might otherwise be contrary to public interest to disclose or which would constrain the proper exercise of Canada's international peacekeeping role. No serious observer would conclude that these are not at least plausible grounds for a discreet approach. As elaborated by the respondent, Major-General deFaye, in the course of his cross-examination by the applicants, an open policy would have required a series of *voir dire* on what evidence was to be adduced, on what was classified or not, on what was directly or by implication prejudicial to individuals. These *voir dire* would of course have had to be conducted behind closed doors, otherwise the whole purpose of the enquiry within the enquiry would have been aborted.[13]

He also noted that the report of the board of inquiry would be made public, subject to certain constraints in the board's terms of reference and imposed by law.

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[13] *Ibid.* at 534-535

[53] The Federal Court of Appeal expressed its general agreement with his reasons in dismissing an appeal from his decision.[14]

[54] In *Gordon v. Canada (Minister of National Defence)*,[15] Justice Harrington of the Federal Court dismissed an application for judicial review of a decision of another board of inquiry to deny access to its proceedings to the media. The board of inquiry had been struck under the *National Defence Act* to investigate and report on fires that occurred in the HMCS Chicoutimi, resulting in the death of a crew member and injury to others. The terms of reference of the board of inquiry provided that the president of the board was to

> ensure that the proceedings and activities of the BOI are conducted in such a manner as to strike the appropriate balance between the interest of the public in being informed of the BOI's progress, and the public's interest in ensuring that security, privacy, operational and international relations requirements, is achieved. This direction is to ensure that as much information as is appropriate and reasonable is publicly available and disclosed.

[55] In denying a request by the media for access to the hearings of the board, the president observed among other things that

- the board had been convened as an internal administrative investigation, and was not a judicial or quasi-judicial proceeding or a public inquiry under the *Inquiries Act*;
- the board's mandate must be exercised within a very short time, and public access would cause delays, because he had to be mindful of the release of information that could compromise security, operational and international relations, and public access "would require [him] to take additional steps to ascertain when witnesses and information could be heard in the presence of the public"; and
- under the terms of reference he was directed to ensure that information be publicly available and disclosed, which he had done by posting information on a

[14] (1994), 171 N.R. 158

[15] 2005 F.C. 335

national defence website, granting interviews with the media and distributing printed material.

[56] Justice Harrington agreed that the proceedings were not judicial or quasi-judicial in nature, and that the "open court" principle did not apply. He also agreed that the decision to exclude the press was reasonable. While he recognized that the president could have decided to give the press access subject to exclusion depending on the topic being discussed, he accepted that there was force in the president's comment that "public access would cause delays as it would require me to take additional steps to ascertain when witnesses and information could be heard in the presence of the public."[16] The decision thus represents another invocation of the concept of "workability".

[57] Closely related to "workability" is practicality. By that I mean that, in carrying out my work, I must consider the most practical means to accomplish the Inquiry's objectives. For example, as I noted above, counsel for Messrs. Almalki, Elmaati and Nureddin have suggested that a counsel representing their interests be security-cleared and, upon giving an undertaking not to disclose information that engages national security confidentiality to their clients, permitted to attend and cross-examine at these private hearings. Even if the necessary security clearance could be obtained within the time frame of the Inquiry's work, I am not convinced as a practical matter that this arrangement would assist Messrs. Almalki, Elmaati and Nureddin or the Inquiry in carrying out its work.

[58] Counsel for Messrs. Almalki, Elmaati and Nureddin acknowledge that the security-cleared counsel would not be able to disclose national security information to his or her non-security-cleared colleagues or to their clients. Indeed, given the extraordinary sensitivity of

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[16] *Ibid.* at para. 45

the matters pertaining to national security confidentiality under discussion, the security-cleared counsel would as a practical matter be unable to communicate *at all* with his or her colleagues and clients about the matters at issue in this Inquiry. Even something as innocuous as a request for a document or for clarification of a fact could trigger questions from colleagues and clients that might result in disclosure of information subject to national security confidentiality. In these circumstances, given the mandate of Inquiry counsel to vigorously test the evidence of all the witnesses that will be interviewed or examined in private, I do not see how the presence of a security-cleared counsel for Messrs. Almalki, Elmaati and Nureddin will as a practical matter assist the Inquiry or these individuals. As Commission Major noted in denying a similar request from the families of the Air India victims, "it is impossible to see how access to *in camera* hearings or unredacted documents would add to the families' 'opportunity to explore the cause' or allow them 'to be satisfied that they know what happened.' Counsel themselves might believe that they had more information about what happened, but they could not communicate that information to their clients."[17]

[59] In my view, a far more practical and effective way for counsel for Messrs. Almalki, Elmaati and Nureddin to have genuine input into this Inquiry is for them to consult with Inquiry counsel, as was done in the Arar Inquiry, prior to the interviews and examinations of witnesses by Inquiry counsel. Through this process, Inquiry counsel can obtain input from the entire counsel group with respect to witnesses to be examined, lines of questioning to be pursued, and documents and other facts to be put to witnesses. The Arar Inquiry process has

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[17] Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Reasons for Decision with respect to the AIVFA'S Request for Directions regarding Access to Unredacted Documents and In Camera and Ex Parte Hearings* (January 3, 2007), http://www.majorcomm.ca/en/reasonsfordecision_aivfa_request/index.asp

demonstrated that this consultation can be done in a manner that allows for effective input into the Inquiry process while protecting nationality security confidentiality.

[60] Thus I conclude that the appropriate process for this Inquiry is one that should not only reflect its inquisitorial nature and the sensitive context in which the questions that I must determine arise, but also respect the workability and practicality principles that have been endorsed judicially and sensibly so in my view. It would serve no one's interest if the process of the Inquiry impeded it from an expeditious determination of the questions that I have been mandated to pursue.

[61] Having said that, I also believe that, as the Inquiry is beginning its review of evidence, one should be mindful of the importance of being flexible. Once a fuller understanding of that evidence has been obtained it may be necessary to modify the approach of the Commission in doing its work. Principles are important to provide a forest before the work of tree analysis is done, but the Commission should be prepared to adapt appropriately to the circumstances as they become more fully understood.

[62] In a similar way, one should not be rigid in one's approach to the mandate of the Inquiry and if there are ways to balance interests in a more transparent way every effort should be made to do so without violating the Terms of Reference or the interests that must be properly acknowledged.

## IV. DISPOSITION ON THE QUESTIONS ASKED

### *1. The Meaning of Mistreatment*

[63] I agree with the views expressed that the words "any mistreatment" are to be interpreted broadly and to include any treatment that is arbitrary or discriminatory or resulted in physical or

psychological harm, as well as denial of properly entitled assistance and other forms of treatment that would normally be included in the meaning of mistreatment.

[64] Although the Attorney General of Canada acknowledged that any mistreatment is a low threshold, his counsel went on to assert that a detention would be included in the meaning of the phrase. However, since detention is expressly referred to in paragraph (a)(i) it would presumably not be included as a separate heading under mistreatment. By like reasoning, the denial of consular access would not be dealt with under the heading of mistreatment since it is also dealt with separately in paragraph (a)(ii) of the Terms of Reference.

[65] Having said all that, it is also my view that the Terms of Reference are not aimed at trivial matters so that mistreatment should be regarded as something more than trivial; but to repeat, mistreatment is very broad in its meaning.

***2. Torture***

[66] I am of the view that it is proper and appropriate for the Inquiry to ascertain whether the three individuals were tortured as a specific aspect of their alleged mistreatment. I say this because whether there were deficiencies in the provision of consular services, or indeed other possible deficiencies referred to in the Terms of Reference, may well be related to the nature of the treatment or mistreatment that the individuals received. Put another way, the services provided by Canadian diplomatic officials and the conduct of other Canadian officials should have some relationship to the treatment or lack of treatment accorded to Canadian citizens abroad. On a common sense reading of the Terms of Reference, the nature and extent of any mistreatment, and whether that mistreatment amounted to torture, may at a minimum be relevant to whether there were deficiencies in the actions of government officials, or whether

their actions were "deficient in the circumstances". This is especially so when Canada is privy to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and there are other international instruments and standards of conduct that refer to or may turn on the existence of torture.

[67] I also believe that, from another standpoint, namely, that of the public interest, it is important to ascertain whether these individuals suffered torture. As already mentioned, Canada is a party to the UN Convention Against Torture and the Canadian public no doubt has an interest not just in knowing whether a mistreatment has occurred but also whether that mistreatment amounted to torture. If the conduct of Canadian officials was deficient in this connection, they would wish to be apprised of what actually occurred.

[68] This means, depending how events unfold, that it will likely be necessary to do follow-up work on and further investigation of some of the matters addressed in the fact-finding report of Professor Toope. For the purposes of this Inquiry it will be important both not to ignore what Professor Toope concluded and the reliance that Justice O'Connor placed on his conclusions, and to consider what further investigation may be required and how best to carry it out. The Inquiry will also have to examine the allegations of mistreatment of Mr. Elmaati not just in Syria, but also in Egypt. I have instructed Inquiry counsel to consult with counsel for participants concerning the most appropriate means of inquiring into the allegations of torture.

### *3. Public vs. Private*

[69] As noted, there were many submissions made on the approach to the private vs. public nature of the Inquiry. At the outset, an argument was raised that the *Inquiries Act* prevents the holding of a private inquiry unless it is pursuant to a departmental investigation under section 6

of the *Inquiries Act*. In dealing with this argument, I am guided by the ruling that Mr. Justice O'Connor made in the Arar Inquiry.

[70] Commissioner O'Connor had before him a motion by a recipient of a notice under section 13 of the *Inquiries Act* alleging that the Commission lacked jurisdiction to inquire into the actions of Canadian officials. It was argued that the manner in which the Commission was established , the fact that evidence was received in camera and by a fact finder corresponded more closely to a Part II Investigation than to a public Inquiry. Commissioner O'Connor rejected the motion on January 3, 2006 for the following reasons:

> Section 2 of the Act provides that a Part I inquiry may be established "whenever the Governor in Council deems it expedient (to) cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof." This may be contrasted with the power to establish departmental investigations under s. 6, which empowers the minister presiding over any federal government department to appoint a commissioner to investigate and report on the state and management of the business of the department, either in the inside or outside service thereof, and the conduct of any person in that service. While made by the minister pursuant to s. 6, such appointments are under the authority of the Governor in Council.
>
> Although it is accompanied by a heading that refers to public inquiries, Part I does not require that an inquiry be conducted exclusively in public, nor does it purport to abrogate confidentiality or privilege. In fact, it makes no mention of the inquiry being held in public at all. This is consistent with the flexibility that public inquiries must possess in order to be fair and efficient. Correspondingly, Part II contains no requirement that departmental investigations be conducted in private.
>
> Moreover, giving the Act the fair, large and liberal construction that s. 12 of the *Interpretation Act* requires, I conclude that the circumstances in which a Part I inquiry or a Part II investigation may

> be created are not mutually exclusive. Had Parliament intended otherwise, it would have said so in clear and unambiguous terms.[18]

[71] Although Justice O'Connor was dealing with section 13 of the *Inquiries Act*, I agree with his views on the public-private nature of inquiries set up under the Act. The difference between Part I and II seems to be the subject matter of the Inquiry. While Part I refers to "good government and public business" Part II refers to "state and management of the business of the department". In my view, there is nothing in the Act to prevent a public inquiry being held in part or all in private.

[72] In looking at the Terms of Reference and the principles and factors that I outlined in the previous section relating to the nature of the hearing being inquisitorial and not adversarial, the sensitivity to national security confidentiality, the importance of an independent, fair and thorough hearing, and the workability and practicality considerations, I conclude as follows on the submissions made by the participants on the questions relating to public vs. private hearings.

1. Although the Terms of Reference admit of a public hearing they emphasize the presumptively private nature of the hearings, among other things to respect national security confidentiality.

2. Unless I specifically direct otherwise, the formal hearings conducted as part of this Inquiry will be conducted in private, a term that I interpret to mean, in this context, *in camera* and *ex parte*. Further details concerning the manner in which

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[18] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Factual Background, Volume II* (2006) at 587

the hearings will proceed are set out in the Inquiry's Rules of Procedure and Practice.

3. Because there is a great importance attached to public hearings, Inquiry counsel and I will be continually sensitive to having public hearings when they can be held with the proper respect for the Terms of Reference and the underlying national security confidentiality concerns. I intend to interpret the words, "essential to the effective conduct of the Inquiry", as not being totally restrictive, since they reflect an intention that holding some aspects of this Inquiry can contribute to the effective conduct of the Inquiry. In other words, it is my opinion that "to ensure the effective conduct of the Inquiry" means holding portions of the Inquiry in public to ensure that goal as circumstances may warrant. This will be ultimately a discretionary decision, to be made on a case-by-case basis, influenced by the need for a blending of efficiency and transparency dictated by the circumstances and the context.

4. As I stated above, I wish to ensure that the Inquiry benefits from the perspective and information that the participants can provide. I have instructed Inquiry counsel to maintain regular contact with counsel for the participants, and especially counsel for the three individuals, so that Inquiry counsel are apprised of information that is relevant and helpful from the participants' perspective. I also encourage the counsel for the individuals, in particular, to suggest questions and lines of inquiry to pursue in interviews and hearings that are held in private.

5. I do not believe that this mode of proceeding will relegate counsel for the individuals to a passive or ineffective role. On the contrary, I would invite them to co-operate as fully as they can with Inquiry counsel to ensure that we are not leaving any stone unturned as we pursue our mandate.

6. I do not find it workable or in many ways practical for the counsel for the individuals or the individuals themselves to receive security clearance or to be present at all of the inquiries that my counsel or I will be making. This would unnecessarily prolong the Inquiry and make it unworkable. In saying this I am not elevating the workability principle to a unjustifiable degree, but simply recognizing that, for example, to encourage arguments over material that would be presented and whether it would be cleared for release or for redaction purposes and the like would, as experience in the Arar Inquiry demonstrated, cause significant delay and complexity.

7. Nor do I see the need for an *amicus* to be appointed. The role of the *amicus* in the Arar Inquiry was to assist the Commissioner in making determinations of national security confidentiality. The Terms of Reference of this Inquiry, unlike those of the Arar Inquiry, do not give me a decision-making role on these matters, but leave them to determination in accordance with the *Canada Evidence* Act. As I have outlined above my role and that of my counsel are to represent the public interest and I would hope that our vigilance and commitment to conducting the Inquiry to reflect an objective and independent view would permit our handling the matters with the proper sensitivity and objectivity that are required.

*4.* ***Draft Rules of Procedure and Practice***

[73] In light of my ruling on the extent to which the Inquiry will be conducted in public and in private, I find it unnecessary to modify the Rules so as to specifically extend opportunities for participants to be apprised of the content of portions of the Inquiry that will be conducted in private, as well as to expand the role of participants in relation to interviews of individuals and examination of witnesses. This said, I accept the submission of the Attorney General of Canada that interested participants should be notified before I make a determination under Rule 12(a) that a portion of the Inquiry must be conducted in public, and this rule will be modified accordingly.

[74] I have reviewed the submissions that focus on the clarity and wording of the Rules and find, with two exceptions, that amendments are not necessary in this respect. I accept, first, the suggestion of the Attorney General of Canada that Rule 7 be clarified so as to indicate that where participants and witnesses and their counsel have received information and documents that have not been disclosed in the public report or in a public portion of the Inquiry, this information and those documents shall be kept confidential. Rule 7 is amended accordingly.

[75] The second clarification which is necessary in my view relates to the discrepancy between Rule 31 and Rule 32(c), which was identified by ICLMG and BCCLA. I agree that there is an ambiguity in the Draft Rules, and have introduced an amendment to Rule 31 (now Rule 32) to clarify the scope of the role of counsel for a witness during an examination.

[76] In every other respect, in my view, the Rules have been drafted with sufficient precision and flexibility to enable me to conduct the Inquiry in accordance with the applicable law and the Terms of Reference. In particular, I find it unnecessary to stipulate that the Inquiry will not

accept evidence obtained under torture, and equally unnecessary to specify that adverse findings against a witness cannot be made strictly on the basis of an interview. As to the first point, assuming (without of course deciding at this stage) that one or more of the three individuals suffered torture, what was said or not said under torture, and what use was made of this information, might well be relevant to the determinations that I must make. My receiving this kind of evidence for the purposes of the Inquiry does not in my view engage the concerns underlying the submissions that I received on this issue. As to the second point, in my view the provisions of the Rules and the *Inquiries Act* provide appropriate and adequate safeguards. Similarly, the desire of the Attorney General of Canada to obtain broader disclosure regarding non-adverse findings made on the basis of an interview, to prepare more adequately for responding to any notices under section 13 of the *Inquiries Act*, can be accommodated as issues arise, without any need to amend the Rules.

[77] As described above, the Attorney General submits that Rule 17 should be amended to prohibit Inquiry counsel from reviewing documents over which solicitor-client privilege is asserted and to allow the Commissioner to review such documents only where absolutely necessary. The Attorney General's submission is contrary to the established case law on this issue, which has confirmed the right of Commission counsel as agents of the Commissioner to review documents over which solicitor-client privilege is asserted. In *Lyons v. Toronto Computer Leasing Inquiry*,[19] the Divisional Court upheld Commissioner Bellamy's ruling that Commission counsel be entitled to screen documents over which privilege had been asserted to determine whether they were privileged. Madam Justice Swinton, writing for the Court, emphasized the unique role of Commission counsel, who have an obligation of impartiality and

[19] (2004), 70 O.R. (3d) 39

do not have an adversarial relationship to the other participants in an inquiry.[20] Commissioner O'Connor adopted a similar approach in the Walkerton Inquiry. The parties agreed that Commission counsel would inspect documents before any assertion of privilege, with a procedure for resolving issues of privilege before any document was put into evidence.[21].

[78] The Attorney General's submission is based on the Supreme Court of Canada's decision in *Goodis v. Ontario (Ministry of Correctional Services)*,[22] denying a request by counsel for one party to view the solicitor-client privileged documents of another party. As the Divisional Court in *Lyons* had earlier recognized, that circumstance is very different from the review of documents by Commission counsel. I see nothing in the Supreme Court's decision in *Goodis* that would cause me to depart from well-established practice of previous Commissions of Inquiry.

[79] In any event, as was conceded orally by counsel for the Attorney General of Canada, "it may be in some respects a tempest in a teapot because it is not anticipated that this is going to be a matter of conflict or dispute".[23]

[80] Finally, I accept the suggestion of OPP and OPS that a rule be added to create an opportunity, where appropriate, for participants to offer the services of their counsel to an employee or former employee who is to be interviewed. I have inserted a new Rule to address this issue, which is now Rule 19. Subsequent Rules have been renumbered accordingly. As

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[20] *Ibid.* at paras. 38-39

[21] The Honourable Dennis R. O'Connor, *Part One, Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues* (2002) at 486-487

[22] [2006] 2 S.C.R. 32

[23] *Transcript of Proceedings on April 17, 2007* at 78

indicated earlier, a revised version of the Rules is attached to this Ruling as Appendix D, and will also be made available on the website of the Inquiry, www.iacobucciinquiry.ca.

[81] As for the other suggestions to add or replace words, most of them put forward out of stylistic concerns or abundance of caution, I have considered them but do not regard them as either desirable or necessary.

## V. CONCLUSION

[82] By way of concluding remarks, I wish to reiterate the points made earlier that the Commission is still in the process of receiving and digesting a great deal of information so that the dispositions made in this ruling should not be cast in stone. If a fuller understanding of the facts and background information calls for modification of a part or parts of this ruling, this will be done and, if appropriate, upon proper notice to the participants and intervenors with an opportunity for their input.

[83] Finally, I wish to thank counsel for the participants and intervenors for their cooperation in providing me with their submissions which I found to be very helpful.

# APPENDIX D

## General Rules of Procedure and Practice

Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

Enquête interne sur les actions des responsables canadiens relativement à Abdullah Almalki, Ahmad Abou-Elmaati et Muayyed Nureddin

**General Rules of Procedure and Practice**

**Definitions**

1. In these Rules, unless otherwise provided or the context otherwise requires, the following definitions apply:

   (a) Commissioner: the Honourable Frank Iacobucci, Q.C., appointed by Order-in-Council P.C. 2006-1526;

   (b) Documents: records made or stored in physical or electronic form, including written, electronic, audiotape, videotape, digital reproduction, photography, maps, graphs, microfiche or any other data and information recorded or shared by means of any device;

   (c) Inquiry: the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, established by Order-in-Council P.C. 2006-1526;

   (d) Inquiry Counsel: counsel engaged to assist the Commissioner with the Inquiry;

   (e) Inquiry Office: mailing address P.O. Box 1208, Station B, Ottawa, Ontario K1P 5R3, e-mail address inquiry.admin@bellnet.ca, fax number 613-992-2366;

   (f) National Security Confidentiality: the confidentiality of information that, if it were disclosed to persons or bodies other than the Government of Canada, would be injurious to international relations, national defence, national security, or the conduct of any investigation or proceeding;

   (g) Participant: a person granted an opportunity to participate in the Inquiry in accordance with the Terms of Reference and the Inquiry's Rules of Procedure and Practice Respecting Participation and Funding;

   (h) Person: an individual, group, government, agency or any other entity;

   (i) Terms of Reference: the terms of reference of the Inquiry set out in Order-in-Council P.C. 2006-1526.

**General**

2. The Commissioner may amend or dispense with compliance with these Rules as he considers necessary to ensure that the Inquiry is thorough, expeditious and fair.

3. Participants and witnesses and their counsel are deemed to undertake to adhere to these Rules, and may raise any issue of non-compliance with the Commissioner.

4. The Commissioner may deal with a breach of these Rules or a breach of appropriate decorum as he sees fit, including by revoking or limiting the opportunity of a participant or counsel to participate in the Inquiry.

5. Subject to the *Inquiries Act*, the Terms of Reference and these Rules, including Rule 2, the conduct of and the procedure to be followed in the Inquiry are in the control and discretion of the Commissioner.

6. These Rules shall be interpreted and applied in a manner that ensures the protection of National Security Confidentiality.

7. Participants and witnesses and their counsel are deemed to undertake that any information and documents that they receive in the course of the Inquiry, except information and documents that have been disclosed in a portion of the Inquiry that the Commissioner has determined should be conducted in public or in the Commissioner's separate public report, will be kept confidential and used solely for the purpose of the Inquiry.

**Applications**

8. Except in exigent circumstances, applications to the Commissioner shall, unless the Commissioner directs otherwise, be made in writing on adequate notice to all participants with an interest in the subject matter of the application, and filed with the Inquiry Office. In the ordinary course at least seven days' notice should be provided. The Commissioner may determine the adequacy of notice.

9. A participant wishing to receive notice of applications shall provide the Inquiry Office with an e-mail address. Participants' e-mail addresses will be posted on the Inquiry website. Notice will be effective if given by e-mail to the posted e-mail address.

10. The Commissioner or Inquiry Counsel may require that an application be supported by affidavit.

**Conduct of the Inquiry in Private**

11. In accordance with the Terms of Reference, the Inquiry, including the review of documents and the taking of oral evidence, shall be conducted in private, except

where the Commissioner is satisfied that it is essential to ensure the effective conduct of the Inquiry that specific portions of the Inquiry be conducted in public.

12. The Commissioner may make a determination that it is essential to ensure the effective conduct of the Inquiry that specific portions of the Inquiry be conducted in public

    (a) on his own motion, with adequate notice to all participants with an interest in the matter;

    (b) on application by Inquiry Counsel; or

    (c) on application by a participant or other interested person.

**Evidence**

13. The Commissioner may receive any evidence or information that he considers to be relevant to the mandate of the Inquiry whether or not the evidence or information would be admissible in court.

14. Participants are requested to advise Inquiry Counsel as soon as possible of the name of and contact information for any person who may have information relevant to the mandate of the Inquiry and, if possible, to provide summaries of the information relevant to the mandate of the Inquiry that the person may have.

**Documents**

15. While the Commissioner may as he considers appropriate require the production of documents, all participants are requested to provide to the Inquiry, as soon as possible and through Inquiry Counsel, all documents in their possession, power or control that are relevant to the mandate of the Inquiry.

16. Where the Commissioner requires the production of documents, copies of documents may be produced unless Inquiry Counsel request original documents, in which case originals shall be produced.

17. Unless a different procedure is set out in the *Canada Evidence Act*, the Terms of Reference or an agreement between the Commissioner and a participant, where the Commissioner requires the production of documents and the person to whom the requirement is directed objects to the production of any document on the ground of privilege,

    (a) the person shall specify the privilege claimed and the basis for the claim;

    (b) the document shall be produced in unredacted form to Inquiry Counsel;

    (c) the production of the document will not constitute a waiver of any applicable privilege;

(d) Inquiry Counsel shall inspect the document, in the presence of the person or the person's counsel if the person wishes to be present personally or by counsel, and advise the person of their view as to the validity of the claim; and

(e) if the person does not accept the view of Inquiry Counsel, the person may apply to the Commissioner for a ruling; and

(f) the Commissioner may if necessary inspect the document and may rule on the claim, or refer the matter to the Federal Court for determination.

**Interviews**

18. Inquiry Counsel may interview any person who may have information or documents relevant to the mandate of the Inquiry.

19. If a person to be interviewed by Inquiry Counsel is or was employed by a participant, Inquiry Counsel shall notify counsel for the participant of the proposed interview, unless the person to be interviewed has advised Inquiry Counsel that he or she does not wish counsel for the participant to be notified.

20. A person interviewed by Inquiry Counsel is entitled to have counsel present at the interview, and counsel may offer assistance to Inquiry Counsel in eliciting information or documents relevant to the mandate of the Inquiry.

21. If Inquiry Counsel determine that a person interviewed will be called as a witness, Inquiry Counsel will prepare a statement of the witness' anticipated evidence, and, subject to protecting National Security Confidentiality, provide a copy of the statement to the witness for review before the witness testifies.

**Proposed Findings**

22. To facilitate the expeditious conduct of the Inquiry, Inquiry Counsel may prepare proposed findings for the Commissioner's consideration based on documents, interviews and the findings of other examinations that may have been conducted into the actions of Canadian officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin.

23. The proposed findings shall set out with reasonable particularity the basis for the findings that are proposed.

24. After considering the proposed findings and any other information that he considers relevant, the Commissioner may, subject to section 13 of the *Inquiries Act*, adopt the proposed findings as his findings.

**Calling of Witnesses**

25. In the ordinary course Inquiry Counsel will call the witnesses who give oral evidence in the Inquiry. Inquiry Counsel have a discretion to refuse to call or present evidence. A witness may be called more than once.

26. A participant may apply to the Commissioner for a direction that a witness be called.

27. Inquiry Counsel may issue and serve a subpoena or summons requiring that a person give evidence.

28. Before a witness testifies, the Commissioner shall determine which participants are entitled to be present when the witness testifies.

**Pre-examination Disclosure of Anticipated Evidence and Documents**

29. Before a witness testifies, Inquiry Counsel shall where practicable, subject to protecting National Security Confidentiality, provide to counsel for any participants entitled to be present when the witness testifies a statement of the witness' anticipated evidence and the documents to which Inquiry Counsel intend to refer in examination in chief.

30. Any participants entitled to be present when a witness testifies shall at the earliest opportunity, and in any event no later than two business days before the testimony of the witness begins, provide copies of any documents that they propose to file as exhibits or to which they otherwise intend to refer during the examination of the witness to Inquiry Counsel and, subject to National Security Confidentiality, to other participants entitled to be present.

**Examination of Witnesses**

31. Witnesses will testify under oath or affirmation unless the Commissioner directs otherwise.

32. Witnesses are entitled to have counsel present while they testify, subject to protecting National Security Confidentiality. Unless the Commissioner directs otherwise, the participation of counsel for a witness will be limited to making any appropriate objections and to examining the witness in accordance with Rule 33 (c).

33. Unless the Commissioner directs otherwise, the examination of a witness will be conducted as follows:

    (a) Inquiry Counsel will lead the witness' evidence in chief and may ask both leading and non-leading questions;

(b) participants may then cross-examine the witness to the extent of their interest, in the order agreed by the participants and Inquiry Counsel or, if they are unable to reach agreement, by the Commissioner;

(c) after cross-examinations, counsel for a witness may examine the witness, and may ask both leading and non-leading questions; and

(d) Inquiry Counsel may then re-examine.

**Access to Transcripts**

34. The transcript of any portion of the Inquiry conducted in private will be accessible only to persons authorized in writing by or on behalf of the Commissioner. Authorization may be provided generally or to particular transcripts or portions of transcripts.

35. The transcript of any portion of the Inquiry conducted in public will be posted on the Inquiry's website. A hard copy will also be accessible at the Inquiry Office.

**Submissions**

36. The Commissioner may give directions or issue further rules relating to submissions by participants and Inquiry Counsel.

# APPENDIX E

## DOCUMENT REQUEST TO THE ATTORNEY GENERAL OF CANADA, DATED MARCH 6, 2007

Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

Enquête interne sur les actions des responsables canadiens relativement à Abdullah Almalki, Ahmad Abou-Elmaati et Muayyed Nureddin

March 6, 2007

Michael Peirce
Lead Counsel, Government of Canada
Department of Justice Canada
234 Wellington Street
East Tower - Room 1208
Ottawa, ON K1A 0H8

**Re: Attorney General of Canada – Document Request No. 1**

Dear Mr. Peirce:

Please find enclosed Document Request No. 1 directed to the Attorney General of Canada. We have set out the documents that we require the government and its agents, servants, contractors, agencies, boards, commissions and Crown corporations to produce. The document request is directed to the Attorney General of Canada rather than being separately directed to each of the departments, agents, servants, contractors, agencies, boards, commissions and Crown corporations that may have possession, custody or control of relevant documents. We understand that, for the purposes of this document request, the Attorney General is deemed to have possession, custody or control of all documents under the possession, custody or control of each of the departments, agents, servants, contractors, agencies, boards, commissions and Crown corporations referred to in the document request.

In addition, please note the following:

1. We understand that the Attorney General will provide all documents requested for review by Inquiry counsel without any redactions that would restrict the ability of Inquiry Counsel to view the documents electronically in whole or in part, including any redactions on grounds of privilege or confidentiality, with the exception of redactions of information that might disclose the name of a foreign individual source.

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2. In including item 3 in the request, the formal record of the Arar Commission, we have been mindful of the observations in your letter of March 5, 2007. However, we remain of the view that access to the record will facilitate and expedite the work of the Inquiry. Needless to say, the focus of our review of the record will be the documents or portions of transcripts that bear on the mandate of the Inquiry. We appreciate that the Arar Inquiry did not fully examine the circumstances relating to Messrs. Almalki, Abou-Elmaati and Nureddin, and fully expect that other documents and information will put in fuller context the portions of the record that relate to them.

3. The production of documents will be governed by the Protocol for the Protection of Privileged and Immune Information as between the Government of Canada and the Internal Inquiry.

4. The Attorney General may provide copies of all documents, and may provide electronic copies of all documents, although the Inquiry may require originals to be produced upon request.

5. Your letter of February 7, 2007, reflects our agreement on the treatment of disaster recovery and back-up systems. As a result, as set out in item 6 of the list of exceptions, we are content to exclude from this document request documents contained in disaster recovery and back-up systems.

6. The documents should be provided to the Inquiry in groupings as they become available, rather than waiting until all document searches have been completed. This is important to eliminate any delays in the Inquiry process.

7. The document request is a continuing request. The obligation to produce thus extends to documents created after the date of the document request that come within the scope of the requested production.

8. Inquiry counsel may make supplementary document requests.

9. The Commissioner will require, prior to the time he delivers his report, that the Attorney General of Canada complete a certificate of production of documents. The certificate must confirm that the Attorney General directed the government and its agents, servants, contractors, agencies, boards,

.../3

commissions and Crown corporations that might reasonably be expected to have documents relevant to the Commission's Terms of Reference (contained in Order in Council P.C. 2006-1526) to conduct a diligent search for the documents related to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin and the actions of Canadian officials as set out in the document request(s); that he established a system to ensure that the document request(s) were acted upon appropriately; and that he is fully satisfied that all documents requested in the document request(s) have been produced to the Inquiry.

Thank you for your cooperation in this matter. Please do not hesitate to contact me should you have any questions or comments.

Yours truly,

John B. Laskin
Lead Counsel

Enclosures

Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

Enquête interne sur les actions des responsables canadiens relativement à Abdullah Almalki, Ahmad Abou-Elmaati et Muayyed Nureddin

The Honourable Frank Iacobucci, Q.C.
Commissioner

L'honorable Frank Iacobucci, c.r.
Commissaire

March 6, 2007

**A.G. (Canada) Document Request**

**TO:** The Attorney General of Canada

**A. DEFINITIONS**

"**document**" refers to records made or stored in physical or electronic form, including written, electronic, audiotape, videotape, digital reproduction, photography, maps, graphs, microfiche or any other data and information recorded or shared by means of any device, in the possession, custody or control of the Government or any of its agents, servants, contractors, agencies, boards, commissions and Crown corporations, anywhere in the world, including material in off-site storage or which has been archived, in relation to the matters set out below.

"**Government**" means the Government of Canada, including its agents, servants or contractors, agencies, boards or commissions, including all Crown corporations, unless otherwise specified.

**B. TIME FRAME**

In this request, unless otherwise specified, production is requested for all documents created or collected in the period from January 1, 2000 to December 11, 2006, unless the Government has knowledge of documents specific to Messrs. Almalki, Abou-Elmaati and Nureddin which were created prior to January 1, 2000, or subsequent to December 11, 2006, which are directly relevant to the specific events set out in paragraphs 1(i), (ii) or (iii) below in which case production is also requested of those documents.

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**C. DOCUMENT REQUEST**

The Government is requested to produce all documents related to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin and actions of Canadian officials in relation to the following:

(i) whether the detention of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nurredin 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,

(ii) whether there were deficiencies in the actions 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

(iii) 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,

that are within the possession, custody or control of the Government, including, without limitation, the following Departments and agencies:

a) the Department of Foreign Affairs and International Trade;
b) the Department of National Defence;
c) Public Safety and Emergency Preparedness Canada;
d) the Department of Justice;
e) the Privy Council Office;
f) Citizenship and Immigration Canada;
g) the Royal Canadian Mounted Police;
h) the Financial Transactions and Reports Analysis Centre of Canada;
i) the Canadian Security Intelligence Service;
j) the Canadian Border Service Agency;
k) the Canada Revenue Agency; and
l) the Communications Security Establishment.

2. All reports or other documents that contain the findings of other examinations that may have been conducted into the actions of Canadian officials in relation to Messrs. Almalki, Abou-Elmaati and Nureddin relevant to paragraphs 1(i)-(iii) above.

3. The formal record of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, including confidential transcripts and documents.

.../3

**D. Destruction/Loss of Control**

If the Government has knowledge of any documents responsive to this document request that (a) were in its possession, custody or control but are no longer, or (b) have been destroyed, the Government is to identify the documents and explain the circumstances leading to loss of possession, custody or control or the destruction.

**E. Exceptions**

The Government is not required to produce:

1. documents relating to the establishment or conduct of the Internal Inquiry;
2. work product generated by the Government in anticipation of and following the establishment of the Internal Inquiry, including work product that may be subject to claims of litigation privilege;
3. documents relating to existing litigation involving or naming Messrs. Almalki, Elmaati or Nureddin including work product generated in anticipation of and following the litigation and work product that may be subject to claims of litigation privilege;
4. responses made in respect of requests under the *Access to Information Act* or *Privacy Act* in relation to Messrs. Almalki, Elmaati or Nureddin;
5. media reports involving or naming Messrs. Almalki, Elmaati and Nureddin that are otherwise in the public domain; or,
6. documents contained in disaster recovery and back-up systems as outlined in the Government's letter to Inquiry Counsel dated February 7, 2007.

Sincerely,

Frank Iacobucci

# APPENDIX F

## PROTOCOL FOR THE PROTECTION OF PRIVILEGED AND IMMUNE INFORMATION

### PROTOCOL FOR THE PROTECTION OF PRIVILEGED AND IMMUNE INFORMATION AS BETWEEN:

THE GOVERNMENT OF CANADA

- AND -

THE INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND MUAYYED NUREDDIN

**I. Statement of Intent**

1. This protocol is intended to facilitate the timely production of documents in the possession of the Government of Canada that are relevant to the mandate of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin ("Internal Inquiry" or the "Commission").

2. The Government of Canada is committed to assisting the Commissioner to fulfil his mandate, as set out in Order in Council P.C. 2006-1526, in an effective and expeditious manner without compromising, international relations, national defence or national security (collectively referred to as National Security Confidentiality or NSC), confidences of the Queen's Privy Council for Canada, any ongoing investigations, solicitor-client relations or the functioning of the Government's law enforcement and intelligence apparatus.

3. The Commission recognizes that to avoid delay in the Inquiry process documents will be provided to the Internal Inquiry in groupings as they become available, rather than waiting until all document searches have been completed.

4. Paragraph (d) of the Terms of Reference direct the Commissioner to take all steps necessary to ensure that the Inquiry is conducted in private. The disclosure of Government documents to the public by the Commission, or their

contents, is not contemplated save and except through paragraph (m) of the Terms of Reference (a separate report that is suitable for disclosure to the public) or paragraph (e) of the Terms of Reference (where the Commissioner determines that it is essential to ensure the effective conduct of the Internal Inquiry).

## II. Scope of the Protocol

5. The parties agree that the ability of the Government of Canada to produce documents is subject to limitations imposed by law. Consequently, the Commission agrees not to call for the production of the following immune or privileged information:

a) Documents that the Attorney General asserts contain confidences of the Queen's Privy Council for Canada (The parties agree that such claims will be dealt with in accordance with s. 39 of the *Canada Evidence Act*); and

b) Tax payer information covered by s. 241 of the *Income Tax Act* or confidential information covered by s. 295 of the *Excise Tax Act*. (Any disclosure of taxpayer information must be done following consultation with the relevant departments and in accordance with the Acts).

## III. Production to the Commission

6. Production of documents is conditional upon the issuance, by the Commission, of as many orders for production as the Commission deems appropriate.

7. The Attorney General will not challenge the power of the Commission to issue an order calling for the production of documents solely on the basis that the order does not compel a witness to testify.[1]

[1] *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724

8. To facilitate the work of the Commission, and in light of the deadline imposed in paragraph (m) of the Terms of Reference, the parties agree that the Attorney General will produce documents relevant to the Commission's mandate, as requested by Commission counsel and as set out in the Terms of Reference, subject to the following terms:

a) The Attorney General will produce documents that may not in all instances have been reviewed for any applicable privilege or immunity, including but not limited to confidences of the Queen's Privy Council for Canada, National Security Confidentiality, solicitor-client privilege, litigation privilege, informer privilege, investigative techniques privilege, ongoing investigation privilege, protection of human sources, personal information, etc.

b) The production of documents by the Attorney General does not constitute a waiver of any applicable privilege or immunity.

c) The production of documents will be governed by the express limitations discussed below in the section entitled "Specific Protocols for the Protection of Information".

d) Any issues of privilege or immunity will be dealt with at a subsequent time as may be necessary, and in accordance with the Terms of Reference, to ensure the efficient and orderly process of the Internal Inquiry.

9. This protocol applies to all Government documents and information produced to this Commission by the Government of Canada, even if forwarded without a "caveat letter" setting out reservations on the document's subsequent disclosure.

## IV. Specific Protocols for the Protection of Information

10. Given that documents will be produced to the Commission that may not have been reviewed for any applicable privilege or immunity, and in light of the obligations imposed upon both parties to protect information subject to National Security Confidentiality, the Commission agrees to:

a) Allow limitations to be imposed on the electronic document management system (Ringtail) such that every page printed by the Commission contains a watermark feature clearly stating on every page "Do Not Disclose".

b) Remove the Commission's ability to export any documents from the Ringtail database without the interaction of a DOJ technical resource in the presence of a Commission technical staff. Sufficient notice and an explanation of the reasons underlying the request will be discussed by the parties. (This provision does not apply to the use of Tempest laptops within a secure facility by the Commission).

c) Allow all upgrades and transfers of documents to the Commission's Ringtail database to be completed by a DOJ technical resource in the presence of Commission technical staff. (No CDs, DVDS or hard drives will be left with the Commission).

d) Limit the use to be made of the documents, or the information they contain, in any manner other than for the purposes of internal review by persons retained by the Inquiry who have obtained appropriate security clearances.

e) Limit any printing from, and access to, the Ringtail database to Commission staff who have obtained appropriate security clearances; such staff to be identified by Commission Counsel and forwarded to the Attorney General.

11. Given that the Attorney General may produce documents to the Commission that may not have been reviewed for privileges and immunities, the Commission agrees not to disclose any documents, or any information contained therein, to anyone, other than to Commission staff or persons retained by the Commission who have obtained appropriate security clearances, without the express prior written consent of the Attorney General. This will allow the Attorney General to discharge his responsibility to identify and protect sensitive information including by asserting any privileges and immunities. Nevertheless, the Attorney General will approach the giving of consent with a view to facilitating the ability of the Commission to fulfil its mandate within the timeline set out in paragraph (m) of the Terms of Reference.

**V. Disclosure by the Commission**

12. The protocol for disclosure of Government documents by the Commission is intended to follow and clarify paragraphs (k), (l), (n) and (o) of the Terms of Reference. It is also meant to ensure that the immunities mentioned in sections 37 to 39 of the *Canada Evidence Act* are adequately protected and that the obligations imposed upon the parties by the *Security of Information* Act are respected.

13. After the Attorney General has had the opportunity to assert any privileges and immunities as referred to in paragraph 10(f)* and before the Commission discloses any Government of Canada document (or the content of a document) to any persons or bodies (including those that have a substantial and direct interest in the subject matter of the Inquiry) or before the Commission makes such document or such content public in any manner whatsoever, the Commission agrees to identify the information it seeks to disclose and the parties agree to engage in timely and ongoing discussions for the purpose of determining appropriate disclosure. In the event that such discussions are unsuccessful, the Commissioner shall:

a) Express his opinion as to whether the document contains information which, if disclosed to the public, would be injurious to national defence, international relations or national security, or the conduct of any investigation or proceeding;

b) Give at least ten days' notice to the Attorney General of such intention to disclose;

c) Give to the appropriate Minister an appropriate opportunity to allow that Minister to express his opinion; and,

d) If the Commissioner disagrees with the opinion of the Minister, the Commissioner shall notify the Attorney General as provided in paragraphs (l) and (o) respectively of the Terms of Reference.

[*] The reference to paragraph 10(f) should be read as a reference to paragraph 11.

14. Any amendments or changes to this protocol must be made by mutual consent of the parties to this protocol and must be in writing. This protocol does not abridge and is no way intended to abridge any of the prerogatives, privileges and/or immunities of the Crown at large.

Dated at Ottawa, Ontario this 6 th day of March , 2007

Counsel for the Attorney General of Canada
John Sims, Q.C.
Deputy Attorney General of Canada
Per Michael Peirce

Witness

Counsel for the Internal Inquiry into the Actions of Canadian Officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin
Per: John Laskin

Witness

# APPENDIX G

## CERTIFICATE OF THE ATTORNEY GENERAL OF CANADA, DATED OCTOBER 7, 2008

**INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND MUAYYED NUREDDIN**

**CERTIFICATE OF PRODUCTION OF DOCUMENTS**

I, DANIEL THERRIEN, of the Province of Quebec, Assistant Deputy Attorney General, Citizenship and Immigration Portfolio, Department of Justice, representative of the Attorney General of Canada, have made the necessary enquiries of others to inform myself in order to make this Certification and, to the full extent of my knowledge, information and belief, based on those enquiries, do CERTIFY THAT:

1. The Attorney General of Canada received document requests from the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (the "Internal Inquiry").

2. In accordance with the document request and correspondence from the Internal Inquiry dated March 6, 2007 and the Protocol for the Protection of Privileged and Immune Information as between the Government of Canada and the Internal Inquiry, the search for documents was restricted to documents created in the period from January 1, 2000 to December 11, 2006, and as set out in correspondence to the Internal Inquiry dated February 7th and March 20th, 2007, unless the Government of Canada had knowledge of relevant documents specific to Messrs. Almalki, ElMaati and Nureddin which were created prior to January 1, 2000 and unless otherwise specifically directed by the Internal Inquiry. Throughout the hearings of the Internal Inquiry further informal document requests were made.

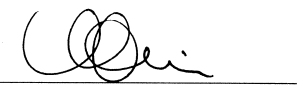
3. The Attorney General of Canada directed the government and its agents, servants, contractors, agencies and departments to conduct a diligent search of the paper-based and electronically-maintained documents in the possession, custody or

control of the Government of Canada in response to the Internal Inquiry's document requests and any subsequent communication with the Internal Inquiry which requested all documents related to Messrs. Almalki, Elmaati and Nureddin in relation to paragraph (a) of the Internal Inquiry's Terms of Reference. The vast majority of these documents originated with the Royal Canadian Mounted Police, the Department of Foreign Affairs and International Trade and the Canadian Security Intelligence Service.

4. The Attorney General of Canada established a system to ensure that the document requests were acted upon appropriately and I am fully satisfied that all the documents requested by the Internal Inquiry, as referenced in paragraph 2 above, have been produced to the Internal Inquiry.

5. If the Attorney General of Canada or counsel for the Government learn, before the public release of the Commissioner's Report, that this Certification was based on incorrect information, the Internal Inquiry shall be contacted forthwith with the correct information.

Date: 7 Oct. 08



Signature

# APPENDIX H

## LIST OF THE INTERVIEWS CONDUCTED BY INQUIRY COUNSEL

**Canadian Security Intelligence Services**

| | |
|---|---|
| Jack Hooper | Nine other officials* |

**Royal Canadian Mounted Police (including secondments)**

| | |
|---|---|
| Michel Cabana | Patrick Callaghan |
| Garry Clement | Stephen Covey |
| Dennis Fiorido | Richard Flewelling |
| Kier MacQuarrie | Patrick McDonell |
| Scott Mills | Timothy O'Neil |
| Wayne Pilgrim | Richard Proulx |
| Richard Reynolds | Giuliano Zaccardelli |

**Department of Foreign Affairs and International Trade**

| | |
|---|---|
| Stuart Bale | Roger Chen |
| Brian Davis | Michel de Salaberry |
| Robert Fry | Hon. William Graham |
| Scott Heatherington | Daniel Livermore |
| Léo Martel | Garfield Pardy |
| Myra Pastyr-Lupul | Franco Pillarella |
| Donald Saunders | Konrad Sigurdson |
| Jonathan Solomon | James Wright |

**Other**

| | |
|---|---|
| Senator Pierre De Bané | Daniel McTeague |
| Senator Terry Stratton | Ahmad Abou-Elmaati's aunt |

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* Legislation prohibits the disclosure of information concerning the identity of any person who is or was an employee of the Service engaged in covert operational activities.

# APPENDIX I

## AMENDED NOTICE OF HEARING ON STANDARDS OF CONDUCT, DATED NOVEMBER 26, 2007

Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

Enquête interne sur les actions des responsables canadiens relativement à Abdullah Almalki, Ahmad Abou-Elmaati et Muayyed Nureddin

**Amended Notice of Hearing on Standards of Conduct**

A hearing will take place on Tuesday and Wednesday, January 8 and 9, 2008 at the Bytown Lounge, 111 Sussex Drive, Ottawa, Ontario, to receive submissions from participants in the Inquiry concerning the standards that the Commissioner should apply in determining the matters set out in paragraph a of the Inquiry's Terms of Reference.

The hearing will begin at 9:00 a.m. EST on Tuesday, January 8, 2008.

Submissions are requested concerning the questions set out below. Inviting submissions on these questions should not be taken as confirmation of any fact or circumstance to which the questions refer. The Inquiry's investigation into the relevant facts is ongoing.

**1. Sharing information with foreign authorities**

(a) During the period 2001 to 2004, in what circumstances, if any, would it have been appropriate for

(i) Canadian officials responsible for investigating activities that may on reasonable grounds be suspected of constituting threats to the security of Canada, or

(ii) Canadian officials responsible for conducting criminal investigations into the possible commission of terrorism offences

to

(iii) share information concerning Canadian citizens with the authorities of a foreign state, or

(iv) in particular, provide the authorities of a foreign state with information concerning the travel plans of Canadian citizens?

(b) If there were circumstances during the period 2001 to 2004 in which it might have been appropriate for the Canadian officials referred to in question 1(a) to share information concerning Canadian citizens with the authorities of a foreign state or, in particular, provide the authorities of a foreign state with information concerning the travel plans of Canadian citizens, what considerations should the Canadian officials have taken into account before doing so?

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**2. Questioning Canadian citizens detained in foreign states**

(a) During the period 2001 to 2004, in what circumstances, if any, would it have been appropriate for the Canadian officials referred to in question 1(a) to

(i) send questions to the authorities of a foreign state to be used by the foreign authorities to question,

(ii) attend in a foreign state to participate in the questioning by the foreign authorities of, or

(iii) attend in a foreign state to question directly,

a Canadian citizen detained in the foreign state?

(b) If there were circumstances during the period 2001 to 2004 in which it might have been appropriate for the Canadian officials referred to in question 1(a) to engage in some or all of the activities referred to in question 2(a), what considerations should the Canadian officials have taken into account before doing so?

**3. Provision of consular services to Canadian citizens detained in foreign states**

(a) During the period 2001 to 2004, what standard of consular services, including but not limited to

(i) the nature and frequency of consular visits,

(ii) the nature and frequency of efforts to ascertain the location of the detainee and how the detainee was being treated while in detention,

(iii) the nature and frequency of efforts to gain access to the detainee,

(iv) the nature and frequency of efforts to secure the detainee's release,

(v) the nature and frequency of contact with the detainee's family, and

(vi) the nature of efforts to assist the detainee upon release to return to Canada,

would it have been reasonable for Canada to provide to a Canadian citizen detained in Syria or Egypt?

(b) During the period 2001 to 2004, what considerations should Department of Foreign Affairs and International Trade (DFAIT) officials have taken into account in determining the nature and frequency of the consular services, including but not limited to the services referred to in question 3(a)(i) to (vi), to be provided to a Canadian citizen detained in Syria or Egypt?

(c) During the period 2001 to 2004, what practices should DFAIT officials have followed when meeting a Canadian citizen who was detained or who had been detained in Syria or Egypt to assess whether the Canadian citizen was being or had been mistreated?

**4. Disclosure of information obtained by consular officials**

(a) During the period 2001 to 2004, in what circumstances, if any, would it have been appropriate for the Canadian officials referred to in question 1(a) to seek from DFAIT officials disclosure of information that DFAIT officials had obtained from a Canadian citizen to whom they were providing or had provided consular services?

(b) If there were circumstances during the period 2001 to 2004 in which it might have been appropriate for the Canadian officials referred to in question 1(a) to seek from DFAIT officials disclosure of information that the consular officials had obtained from a Canadian citizen to whom they were providing or had provided consular services, what considerations should the Canadian officials have taken into account before doing so?

(c) During the period 2001 to 2004, in what circumstances, if any, would it have been appropriate for DFAIT officials to disclose to the Canadian officials referred to in question 1(a) information obtained from a Canadian citizen to whom they were providing or had provided consular services?

(d) If there were circumstances during the period 2001 to 2004 in which it might have been appropriate for DFAIT officials to disclose to the Canadian officials referred to in question 1(a) information obtained from a Canadian citizen to whom they were providing or had provided consular services, what considerations should DFAIT officials have taken into account before doing so?

**5. Role of consular officials in national security or law enforcement matters**

(a) During the period 2001 to 2004, in what circumstances, if any, would it have been appropriate for DFAIT officials to assist the Canadian officials referred to in question 1(a) to engage in some or all of the activities referred to in question 2(a)(i) or (iii)?

(b) If there were circumstances during the period 2001 to 2004 in which it might have been appropriate for DFAIT officials to assist the Canadian officials referred to in question 1(a) to engage in some or all of the activities referred to in question 2(a)(i) or (iii), what considerations should DFAIT officials have taken into account before doing so?

Participants who wish to make oral submissions at the hearing must,n o later than 5:00 p.m. EST on Friday, December 14, 2007, submit by e-mail to the Inquiry, at inquiry.admin@bellnet.ca, and serve on other participants a written outline of their submissions. Participants that wish to respond in writing to other participants' outlines

may do so, by e-mail to the Inquiry and to other participants, no later than 12:00 noon EST on Friday, December 21, 2007. Outlines will be posted on the Inquiry's website, www.iacobucciinquiry.ca.

The Commissioner requests that, to the maximum extent possible, participants collaborate with other participants and make their written and oral submissions jointly, so as to facilitate the efficient conduct of the hearing. Following receipt of the written submissions, the Commissioner will issue a directive allocating time for oral submissions to each participant that has made written submissions. The Commissioner recognizes that because the hearing will be held in public, it will not be possible for him to receive submissions at the hearing that refer to information protected by national security confidentiality.

November 26, 2007

# APPENDIX J

## RULING ON APPLICATION MADE BY NOTICE OF APPLICATION (DATED OCTOBER 2, 2007), DATED NOVEMBER 6, 2007

Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

Enquête interne sur les actions des responsables canadiens relativement à Abdullah Almalki, Ahmad Abou-Elmaati et Muayyed Nureddin

November 6, 2007

**RULING ON APPLICATION MADE BY NOTICE OF APPLICATION**

**DATED OCTOBER 2, 2007**

On October 2, 2007 Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (the "Individuals") and Amnesty International, British Columbia Civil Liberties Association, International Civil Liberties Monitoring Group, Canadian Arab Federation, Canadian Counsel for American Islamic Relations, Canadian Muslim Civil Liberties Association and Human Rights Watch (the "Applicants") made an application to the Inquiry, which they asked be heard orally, for an order seeking:

(1) disclosure of the names of all Canadian officials interviewed by Inquiry Counsel, except those currently employed by CSIS in covert operations;

(2) production of all documents disclosed to Inquiry Counsel by all of the participants in the Inquiry without redaction, except where there are valid national security confidentiality claims requiring redaction;

(3) a Direction that all interviewees with knowledge of the following issues be called as witnesses to give evidence publicly:

PO Box / CP 1208, Station B / Succursale B
Ottawa Ontario Canada K1P 5R3
613-947-7606 Fax / télécopieur 613-992-2366
www.iacobucciinquiry.ca / www.enqueteiacobucci.ca

(a) embassy and consular conduct;

(b) the Canadian government's practice and policy on torture;

(c) information sharing with foreign regimes; and

(d) requests by Canadian officials to secure information from Messrs. Almalki, Elmaati and Nureddin while they were in detention; and

(4) such other relief as counsel may request.

The application was supported by an affidavit of Hadayt Nazami, one of the counsel representing Mr. Ahmad Abou-Elmaati. Upon reviewing the application and the affidavit in support, I directed that the application be determined on the basis of written submissions, and invited written submissions from the Individuals and the Applicants and others who were granted Participant or Intervenor status in the Inquiry. Submissions were received from the Individuals and the Applicants as well as from the Attorney General of Canada, whose submissions the Ontario Provincial Police adopted.

The submissions from the Individuals and the Applicants set forth lucidly the reasons why they are seeking the relief sought and made supporting arguments on the need for public hearings and for information to be given to the Individuals and the Applicants so that they can in their view have more meaningful participation in the Inquiry. Reference was made to both Canadian law and international human rights law to support their submissions and the relief sought.

On the other hand, the Attorney General of Canada made submissions to the effect that the application should be dismissed because the Individuals and Applicants were misreading the

Inquiry's Terms of Reference and the Ruling made by me on May 31, 2007 regarding the interpretation of the Terms of Reference, and because the application was premature.

**Ruling**

Having considered the application and supporting material along with the submissions of the Individuals and Applicants and the Attorney General of Canada, I am of the view that it is unnecessary either to grant or to deny the application at this time. I arrive at this conclusion because I have ruled on the Terms of Reference and their interpretation, and the Inquiry is proceeding with a view to fulfilling the mandate given to it along the lines described in the Ruling of May 31, 2007. That Ruling contemplates public hearings and disclosure of information under appropriate circumstances. The application was made, understandably as I will explain further below, without a full appreciation of the steps that the Inquiry will follow and the further opportunities that these steps will give the Individuals and Applicants for meaningful participation. Accordingly, I do not find it necessary at this juncture to rule specifically on the request for information and participation in the manner set forth in the application.

In discussing more fully my reasons for this conclusion, I will provide an update on the work of the Inquiry to date and what lies ahead. The update and future steps are important to the present ruling because they provide context for the ruling as well as providing the Individuals, the Applicants and the Attorney General, and of course, the public, with information as to how the Inquiry intends to proceed.

**Reasons**

It is important to recall that this Inquiry has its origins in the recommendation of Justice O'Connor in the Arar Commission report that the cases of the Individuals should be reviewed through an independent and credible process that can address the nature of the underlying allegations and inspire public confidence in the results of the investigation. Justice O'Connor went on to say that there are more appropriate ways than a full scale public inquiry to investigate and report on cases where national security confidentiality must play a prominent role.[1] These sentiments are reflected in the recitals to the Terms of Reference of the Inquiry. More specifically, paragraph (d) of the Terms of Reference authorizes 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. However paragraph (e) goes on to provide that despite paragraph (d), the Commissioner is authorized 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.

Although I do not wish to reiterate all of the points that I made in the Terms of Reference Ruling of May 31, 2007, some points are worth repeating. First, this Inquiry is inquisitorial, investigative and fact-finding in nature and not an adversarial proceeding. I went on to say there is no one charged, no one is on trial and no one has a case to meet.[2] What is at issue is the conduct of Canadian officials regarding three individuals, and I am directed to ensure that the serious concerns raised by the Terms of Reference are dealt with effectively, comprehensively and independently. As Chief Justice McLachlin stated in *Charkaoui v. Canada (Citizenship and Immigration)*, a person conducting an inquisitorial proceeding, as opposed to an adversarial one, is mandated "to take charge of

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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* (2006) at 277-278

2 *Ruling on Terms of Reference and Procedure* (May 31, 2007) at para. 36

the gathering of evidence in an independent and impartial way".[3] Consequently, the ordinary features of an adversarial proceeding are not in play.

However, I agree, as I stated in my Ruling on Participation and Funding and repeated in the Ruling on the Terms of Reference, that it is preferable that both adversarial and inquisitorial proceedings be open to the public. That is a general preference that I still hold but it is subject to the Terms of Reference of this Inquiry and its surrounding context, all of which I discussed in the Terms of Reference Ruling. In that respect, I went on to state that apart from the requirements of the Terms of Reference, one must be extremely cautious when examining questions of national security confidentiality. The security of the country depends very much on the agencies whose role it is to protect the Canadian public against threats to national security.[4] Human life is often at risk when individuals serve our country's security and intelligence efforts and any breach of confidentiality could have serious consequences which must be avoided.

As the Individuals and Applicants rightly point out, I did go on to say that the Inquiry will be sensitive to the potential for overbroad assertions of national security confidentiality and not let that become a shield to prevent the Inquiry from doing the necessary work to fulfil its mandate. In this connection, I am also guided by the recent decision of Mr. Justice Noel in *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*,[5] which is instructive on ensuring that claims of national security are given effect only within proper bounds. In concluding that the appropriate process for the Inquiry is one that should not only reflect its inquisitorial nature and the sensitive context in which the required questions must be examined, I also discussed the important but not overriding factors of workability and practicality as the Commission does its work.

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3 [2007] 1 S.C.R. 350 at para. 50

4 *Ruling on Terms of Reference and Procedure* (May 31, 2007) at para. 45

5 2007 FC 766

As the Individuals and Applicants have pointed out, I also emphasized the importance of being flexible as we proceed in our examination of the facts. I pointed out that as we do our work it may be necessary to modify our approach and that the Inquiry should be prepared to adapt appropriately to the circumstances as they become more fully understood. Furthermore I emphasized that in pursuing the mandate of the Inquiry, Inquiry Counsel and I will be on the lookout to balance the interests in a more transparent way without violating the Terms of Reference or the interests that must be appropriately recognized.

In that respect, I also stated that because of the great importance attached to public hearings, Inquiry Counsel and I will be continually sensitive to having public hearings when they can be held with the proper respect for the Terms of Reference and the underlying national security confidentiality concerns. I expressed the view that the words "essential to the effective conduct of the Inquiry" in paragraph (e) of the Terms of Reference are not totally restrictive as was argued by the Attorney General of Canada, since they reflect an intention that holding some aspects of this Inquiry in public can contribute to its effective conduct. I then went on to say that rulings on holding portions of the Inquiry in public would be made as circumstances warrant and on an individual case by case basis.[6]

As I have mentioned above, the Inquiry's Terms of Reference authorize me "to adopt any procedures and methods that [I consider] expedient for the proper conduct of the Inquiry, while taking all steps necessary to ensure that the Inquiry is conducted in private". When the Inquiry began I determined that it would be undesirable to fix in advance, when we had only a limited sense of the context and the facts that our investigation would disclose, all of the elements of the procedures that the Inquiry would ultimately follow. I wanted to ensure that I retained the flexibility, as a more complete picture emerged, to proceed in the manner that would enable the Inquiry to conduct a thorough and

[6] *Ruling on Terms of Reference and Procedure* (May 31, 2007) at para. 72

expeditious examination of the relevant facts, so as to be in a position to answer the questions that I am mandated to answer within the framework set by the Terms of Reference and with appropriate participation by Participants and Intervenors. At this stage of the Inquiry it is appropriate both to review what has been accomplished to date and to describe some of the further steps in the process that the Inquiry will be following.

The Inquiry has now reviewed more than 35,000 documents produced by the Government of Canada and interviewed 39 witnesses under oath. These documents comprise both the initial production made in response to a request for production of relevant documents that I directed to the Attorney General of Canada, and additional documents provided in response to further requests arising from our document review and interviews. The Attorney General will be certifying, before the Inquiry is complete, that all relevant documents have been provided to the Inquiry. We have so far secured co-operation from counsel for the Attorney General with respect to all of our requests for information. As contemplated by the Terms of Reference, the documents produced to the Inquiry have been provided in unredacted form. This has helped us to proceed expeditiously without time-consuming review for national security confidentiality. Other Participants and Intervenors have also provided the Inquiry with documents relevant to the issues that the Inquiry is mandated to determine.

The 39 interviews conducted by Inquiry Counsel to date have included individuals associated with the Canadian Security Intelligence Service, the Royal Canadian Mounted Police and the Department of Foreign Affairs and International Trade. Inquiry Counsel have taken into account the suggestions made by the Participants and Intervenors in determining whom to interview. Several further interviews have been scheduled. After reviewing all the transcripts of the interviews, I will shortly be conducting further interviews of some of the witnesses previously interviewed by Inquiry Counsel. In that connection, the Inquiry has retained former Ambassador Paul Heinbecker to provide it with advice

on consular services and intelligence matters as they relate to the activities of DFAIT. These interviews will add further focus and information on the issues bearing on the Inquiry's mandate.

With respect to the very important issue whether the Individuals were subjected to torture, the determination of which I have ruled is part of the Inquiry's mandate, I expect to preside over interviews of the three Individuals as part of the Inquiry's investigation into the Individuals' allegations. To assist with these interviews, and after consultation with Participants and Intervenors, the Inquiry has retained Professor Peter Burns of the University of British Columbia Faculty of Law, a well-known expert in the field who has among other things served as Chairman of the UN Organization Committee Against Torture. Interview procedures are being discussed between counsel for the Individuals and counsel for the Attorney General of Canada. These interviews will be conducted in a way that is sensitive to the interests of the Individuals and, as they have requested, will be conducted in private. It is expected that these interviews will be held in the near future.

The Inquiry's Rules provide that to facilitate the expeditious conduct of the Inquiry, Inquiry Counsel may prepare proposed findings for the Commissioner's consideration based on documents, interviews and the findings of other examinations that may have been conducted into the actions of Canadian officials in relation to the Individuals. Once the interviews have been completed, Inquiry Counsel will be preparing a draft of proposed factual findings, accompanied by a supporting factual narrative, that would be provided to me for my consideration. I have directed Inquiry Counsel to review this draft with counsel for Inquiry Participants and Intervenors on a confidential basis, subject to appropriate measures to protect national security confidentiality, before it is finalized, and to take into account their comments and suggestions, including suggestions for further investigation. This will in my view provide Participants and Intervenors with another important opportunity for an effective

contribution to the Inquiry's process. In addition, they will ultimately have an opportunity to make final submissions on the matters that I must determine.

In the meantime, the Inquiry will be inviting submissions from Participants and Intervenors concerning the standards by which to assess the conduct of Canadian officials during the relevant period, 2001 to 2004, in determining whether that conduct was deficient, as I am mandated to do. The Inquiry is issuing today a notice of hearing requesting submissions on standards relating to, among other things, sharing information with foreign authorities, questioning Canadian citizens detained in foreign states, provision of consular services to Canadian citizens detained in foreign states, and the role of consular and other DFAIT officials in national security and law enforcement matters. A public hearing will be held on these matters in Ottawa on December 19 and 20, 2007.

Apart from the steps to which I have referred, I will be considering what further steps should be followed in completing the Inquiry's mandate, and advising Participants, Intervenors and the public as appropriate.

While the Inquiry has proceeded as expeditiously as possible, and I intend that it will continue to do so, the further work that needs to be done and the necessity for consultations with Participants lead me to the view that the reporting deadline of January 31, 2008 set out in the Terms of Reference is not practical. Accordingly, I will be seeking an extension of the date for submitting my report, including the report suitable for disclosure to the public, to a date that is both realistic and achievable, assuming that the reviews for national security confidentiality that must be conducted proceed in a timely manner.

In conclusion, in light of the status of the Inquiry's work and the further tasks underway and to be carried out, I do not consider it necessary or desirable to make any specific ruling on the

application at this time, either by ordering the relief sought or rejecting it as being inappropriate. A number of the matters raised in the application are contemplated by the May 31, 2007 Ruling and will be under continuous consideration by Inquiry Counsel and me as we go forward. The application was brought at a time when the Individuals and Applicants could not have had a complete understanding of the further steps that the Inquiry would follow and the further opportunities for information and participation that that these procedures will provide. I am satisfied that this disposition of the application is appropriate in the circumstances and will best contribute to the effective and expeditious conduct of the Inquiry, recognizing the interests of all concerned.

Frank Iacobucci

# APPENDIX K

## RULING ON APPLICATION MADE BY NOTICE OF APPLICATION (DATED SEPTEMBER 26, 2008), DATED OCTOBER 8, 2008

Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

Enquête interne sur les actions des responsables canadiens relativement à Abdullah Almalki, Ahmad Abou-Elmaati et Muayyed Nureddin

October 8, 2008

**RULING ON APPLICATION MADE BY NOTICE OF APPLICATION DATED SEPTEMBER 26, 2008**

On September 26, 2008, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (the "Applicants") made an application to the Inquiry for an order:

(1) releasing their counsel from the undertaking of confidentiality signed in May 2008 so that their counsel may discuss with the Applicants the draft factual narratives, final submissions and reply submissions of all participants in the Inquiry;

(2) granting the Applicants and their counsel immediate access to the amended draft narratives with leave to file additional comments; and

(3) providing for an oral hearing to hear submissions on the interpretation of subparagraph (a)(ii) of the Terms of Reference.

Upon reviewing the application, I invited written submissions on the issues raised in the application from the Applicants and others who were granted Participant or Intervenor status in the Inquiry. I also invited counsel to make written submissions respecting the interpretation of subparagraph (a)(ii) of the Terms of Reference, in the event that I decided not to provide for an oral hearing on that issue. Submissions were received from the Applicants, Amnesty International and the Attorney General of Canada. The Applicants also requested that, in view of the impending date for the delivery of my report, I expedite my ruling. In order to meet those timing constraints, I have kept my reasons brief in the rulings set out below.

1. Request for Release from Undertaking of Confidentiality

The Applicants request that I release their counsel from the undertaking of confidentiality signed in May 2008 so that their counsel may discuss with the Applicants the draft narratives, final submissions and reply submissions of all participants in the Inquiry. The Applicants have already requested twice before that I reconsider my decision to limit disclosure of the draft narratives to counsel only. In my ruling dated May 23, 2008, denying the second request for reconsideration, I noted that counsel are in a position to give professional undertakings as lawyers that ensure the maintenance of confidentiality and that having access to the factual narratives could affect or be seen to affect the Applicants' evidence if they were called as witnesses. This time, the Applicants submit that they need to be able to read the draft narratives and submissions so that: (1) they have time to absorb the information before the report is released and they are asked to comment on it; and (2) they have an opportunity, alone or with

professional assistance, to process any emotional reaction they might have to the allegations made in the government submissions.

While I understand the concerns of the Applicants, those concerns must be balanced against the need to protect the confidentiality of my report until its public release, and the possibility that the Applicants might, even at this late stage, be called as witnesses (for example, in the event that my counsel receive a response from Syria to their recent communications with that government indicating that Syria is willing to cooperate with the Inquiry). Considering all of the foregoing, I have asked my counsel to discuss with counsel for the Individuals and for the Attorney General a process to accommodate, to the extent possible, the Applicants' request to review the draft narratives and submissions for the limited purposes described above. The kind of arrangement I have in mind is one that might allow the Applicants to review these materials, with the assistance of their counsel, a day or so in advance of the public release, with appropriate safeguards to protect the confidentiality of these materials.

2. Request for Access to Revised Draft Narratives with Leave to File Additional Comments

The Applicants further request that they and their counsel be permitted to review and file comments on the latest versions of the draft narratives. Counsel for the Applicants have already had an opportunity to review and comment on the draft narratives. All of the comments they provided were carefully considered and revisions were made to the draft narratives as a result. As the Applicants acknowledge, granting their request would require a further extension of the deadline for submitting my report to the government. Given these circumstances, I do not consider it necessary or advisable to delay the submission of my report in order to receive further comments at this time on the draft narratives.

3. Interpretation of Subparagraph (a)(ii) of the Terms of Reference

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.