IN THE MATTER OF
INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU EL MAATI AND MUAYYED NUREDDIN (THE 'INQUIRY')

SUBMISSIONS OF THE APPLICANTS, AHMAD EL MAATI, MUAYYED NUREDDIN, ABDULLAH ALMALKI, CANADIAN COUNCIL FOR AMERICAN ISLAMIC RELATIONS, CANADIAN MUSLIM CIVIL LIBERTIES ASSOCIATION and CANADIAN ARAB FEDERATION

I. OVERVIEW

1. The Applicants are cognizant of the overlap between the issues raised by this application and their initial submissions as to the conduct of the Inquiry. The legal principles advanced by the Applicants in their respective submissions before the Commission on April 17, 2007, including those relating to interpretation of the governing statute, the *Inquiries Act*, the Terms of Reference of this Commission, and common law and constitutional norms of openness, should continue to govern the Commissioner's interpretation of his mandate; those principles will not be repeated again in these submissions.

2. While the principles initially argued in April are equally applicable to the within application, it does not follow that the application is duplicative of the April hearing. The Commissioner's May 31, 2007 ruling specifically contemplated the possibility of revisiting his ruling when he wrote, at paragraphs 61 and 62:

> [61] Having said that, I also believe that, as the Inquiry is beginning its review of the 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. ...[T]he 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**. [emphasis added]

3. Moreover, the Commissioner also held, at page 27 of his May 31 ruling, that there is "great importance attached to public hearings" and that he would be "**continually sensitive to having public hearings** when they can be held with proper respect for the Terms of Reference and the underlying national security confidentiality concerns" (emphasis added).

4. The Applicants, therefore, bring this application, one that is specifically contemplated by both the May 31 ruling and the Rules of the Inquiry itself, because the participants and the Commission have reached a critical juncture: the fact-finding work of the Commission appears to be nearing its conclusion and the Applicants have yet to meaningfully participate in or contribute to the work of this Commission.

5. Two other developments necessitate this application. First, public concern about the conduct of Canadian security investigations has heightened since the release of the May 31 ruling. Second, the release of Justice Noel's decision in *Canada v. Arar Commission* reinforces the Applicants' view that the government's claims of national security confidentiality (NSC) must be viewed skeptically, and cannot automatically justify the conduct of the Inquiry *in camera* in the name of efficiency.

6. The time for 'balancing interests in a more transparent way', to use the words of the Commissioner, has come.

II. ARGUMENT

(a) May 31 Ruling, Terms of Reference and Rules of Inquiry

7. 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."

8. These Terms of Reference are echoed in Rule 11 of the General Rules of Procedure and Rules (the "Rules"), which empower the Commissioner to hold specific portions of Inquiry proceedings in public. Rule 12 provides that the Commissioner may make a determination to hold specific portions of the Inquiry in public "where it is essential to ensure the effective conduct of the Inquiry", on his own motion, or on application by a participant.[1]

9. In determining how the Inquiry would be conducted in light of the Terms of Reference, the Commissioner in his May 31, 2007 ruling recognized that it could become necessary to modify the approach taken and noted that every effort should be made throughout the conduct of the Inquiry to balance interests as transparently as possible.[2]

10. With respect to the term "essential to the effective conduct of the Inquiry" contained in the Terms of Reference and Rules, the Commissioner rejected the extremely restrictive interpretation advanced by counsel for the Attorney-General and wrote:

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[1] General Rules of Procedure and Practice, Appendix D to May 31, 2007 Ruling

[2] May 31 Ruling, paras. 61 and 62

> 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.[3]

11. In the May 31, 2007 ruling the Commissioner indicated that a practical way of proceeding would be to permit the three men to meet with Commission counsel, as was done in the Arar Commission. The Commissioner noted that "[t]hrough 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."[4]

12. This approach, however, has proven to be of limited value for the Applicants, and likely for Commission counsel as well. As Mr. Copeland noted in his letter of June 14, 2007 to the Commissioner, with virtually no information being provided about the CSIS interviewees, he was unable to make meaningful suggestions as to lines of questioning for those unnamed officials.[5]

13. Moreover, the public hearings which the Applicants reasonably expected to take place since May 31 have not transpired. To date, the Inquiry has been held entirely in secret. The three men, their counsel, the intervenors, and the public have been provided with virtually no information about the progress of the Inquiry's work. The Applicants acknowledge that there have been meetings between counsel for the Applicants, Commission counsel and on occasion with

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[3] May 31, 2007 Ruling, para.72 (#3)

[4] *Ibid*, para. 59

[5] Application Record, Nazami Affidavit, para. 14 and Exh. B Copeland Letter, June 14, 2007

the Commissioner. These have been conducted in secret. There has been no disclosure to date of documents, interview transcripts, summaries of interviews, or summaries of the nature of the evidence received. There has been no disclosure of even witness lists or documents received. With the exception of the within application record (in redacted form), nothing has been posted on the Inquiry's web site since the Commissioner's ruling on the conduct of the proceeding and the rules on May 31, 2007.

14. It was the Applicants' hope and expectation following the May 31 Ruling that public hearings would have been held by now. In the May 31 Ruling, the Commissioner stated that "because there is great importance attached to public hearings, Inquiry counsel and I will continually be 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."[6] Repeated requests, in writing and in person, have been made of Inquiry Counsel and the Commissioner to hold such hearings, to no avail.

15. The Applicants have consistently raised genuine concerns about the secret nature of the inquiry process, through correspondence with the Commission and in the meetings that have taken place between counsel for the Applicants, Commission counsel and the Commissioner. While requests have been made for disclosure and for clarification as to how the Inquiry will proceed once interviews have been completed, there has been no answer to these requests. [7]

16. The Applicants are of the view, as we come closer to the end of this Inquiry, that public confidence in, indeed the effectiveness of, this Inquiry calls for a more transparent process. No matter the results of the important work of this Inquiry,

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[6] May 31 Ruling at paragraph 72.3

[7] Sampling of letters to Commissioner and Inquiry Counsel attached at tabs B and C of Nazami Affidavit

its effectiveness as an authoritative investigation into the conduct of Canadian officials in relation to Messrs. Almalki, El Maati and Nureddin will be compromised if there is a lack of public confidence in the manner by which the Commissioner reached his conclusions. The Applicants are deeply concerned about the lack of transparency, the limited participation of the three men and the intervenors, and the lack of public knowledge as to how the Inquiry is being conducted.

17. The growing frustration of the individual Applicants over the last months as the Inquiry has proceeded without their effective participation should not be discounted. Messrs. Almalki, El Maati and Nureddin are the three who experienced torture. As they indicated in their opening submissions both on standing and on the conduct of the Inquiry, they have a need to know what happened - how and why they came to be detained in foreign jails and tortured. At the end of the process, if they have been excluded from any meaningful participation, their need for closure will not be answered.

18. The intervenors represent significant elements of civil society. Their experience in human rights work both in relation to Canada and elsewhere has given them an understanding of the importance of transparency in investigations of human rights abuses. Transparency is the first principle in such investigations if a society is to come to terms with the wrongs done in the past or the absolving of individuals from findings of wrongdoing.

19. Investigations are an important forum for determining responsibility or understanding why institutionally or individually there is no fault. Secrecy fosters a belief that there is a cover up. Even if the results of an investigation do assign individual or institutional responsibility, there will be lingering questions of how thorough the investigation has been. It is very unfortunate, that the government's

overly broad assertions of national security confidentiality, as evidenced for example in the later disclosures of the Arar Commission, foster such suspicions.[8]

20. Although the Commissioner has expressed an awareness of the concern regarding overclaiming NSC and has indicated he will guard against it,[9] it is ultimately the public who must be satisfied that the Inquiry has fully and thoroughly done the work that it has been mandated to do. A sampling of the media reports and editorials following the release of the decision in *Canada v. Arar Commission* confirms that some Canadians are concerned about the use of NSC claims to shield government action from public scrutiny.[10]

21. In light of the entirely secretive nature of the Inquiry to date, the goal of transparency should be given emphasis now. In the April 2, 2007 Ruling the Commissioner noted that "transparency and openness generally are valued principles in the work of 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". [11]

22. Given that the Terms of Reference, the Rules and Commissioner Iacobucci's previous rulings all envision the conduct of the Inquiry in public where necessary to ensure its effectiveness, and in light of the complete exclusion of the Applicants and the public from the Inquiry to date, it is submitted that the

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[8] *Canada v. Arar Commission,* [2007] F.C.J. No. 1081

[9] May 31, 2007 Ruling, para. 45

[10] Press Clippings, Exh. A to Nazami Affidavit

[11] April 2, 2007 Ruling on Participation and Funding at page 3. The importance of public confidence was also noted by Justice O'Connor in the Arar Commission Report, when he wrote that "whatever process is adopted, it should be one that is able to investigate matters fully and, in the end, inspire public confidence in the outcome." 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 278.

participation of the Applicants in the Inquiry process must now be given primacy.[12]

(b) Public Concern about National Security Investigative Agencies and Overclaiming NSC

23. This Inquiry is taking place in the broader context of public questioning in Canada about the work of agencies like the RCMP and CSIS in protecting Canada, Canadians, and those within Canada's jurisdiction, not just in respect of national security, but as well in respect of Canada's commitment to human rights protection. The Commissioner and the Inquiry's counsel are acting on behalf of Canadians on an issue that is of crucial importance. Public confidence in the government has been shaken in recent years following the findings of the Arar Commission Report, the Supreme Court of Canada's ruling in *Charkaoui*,[13] Commissioner Zacardelli's testimony before parliamentary committees, and recent allegations over the RCMP pension fund. The Arar Commission and now the Air India Inquiry before Commissioner Major have raised or are raising troubling concerns about Canada's security agencies. The subject matter of this Inquiry raises similar and equally troubling questions, but unlike the other two commissions, these questions are not being explored in any public way in the current Inquiry.

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[12] Prime Minister Harper recently relied on the Commissioner's power to hold public hearings when he rejected the call by Messrs. Almalki, El Maati and Nureddin to broaden the Commisison's mandate to convert it to an explicitly public inquiry. The Prime Minister stated: "Justice Iacobucci has all the power necessary to decide whether something should be held in private or whether it can be held in public", leaving the impression in the minds of the public that the Terms of Reference are not to be restrictively interpreted. See "PM won't force disclosure rules on inquiry; Judge has authority to decide what's secret: Harper", The *Ottawa Citizen*, October 13, 2007, Page: A5 Byline: Andrew Duffy

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

24. The news articles and commentary contained in the application record speak to a public concern.[14] From outright assertions that the secrecy of this Inquiry is a continuation of the government's efforts to keep hidden incompetent and disgraceful behaviour of Canadian officials, to expressions of the need to restore Canadians' faith in the probity of their government and national police force, the articles are reflective of the broad public concern about the issues being canvassed by this Inquiry. Public confidence must be in the process, not just the result. It is axiomatic to say that justice must not only be done, but it must be seen to be done. Our courts have affirmed this fundamental principle countless times, in a variety of contexts. Importantly, the obligation to ensure that justice be done and be seen to be done rests more heavily on the shoulders of those who discharge public duties.[15] The Commissioner's mandate in this Inquiry is manifestly a discharge of a public duty.

25. Transparency has as its goal not only the symbolic value of public scrutiny, but also the practical value that public participation can add to the fact-finding exercise. The Applicants have made specific requests. They seek the names of all Canadian officials interviewed by the Commission, except for those currently employed by CSIS in covert operations and in respect of these latter officials they seek particulars of the roles they played in the investigations of Messrs. Almalki, El Maati, and Nureddin. They seek a list of all the documents received by the Inquiry, including those for which an NSC claim has been made, and production of all documents, other than those already disclosed at the Arar Commission,

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[14] Application Record, Nazami Affidavit, para. 14, and Exh. A, news articles and opinions

[15] *Named Person v. Vancouver Sun*, [2007] S.C.J. No. 43 at para. 84. See also *Boucher v. The Queen*, [1955] S.C.R. 16 where this principle is enunciated in the criminal context. The concept has been recognized as one that guides the conduct of public officials in a broader sphere of activities; see for example *Popowich v. Saskatchewan*, [1995] S.J. No. 187 (QB) [conflict of interest case] and *Dovale v. Metropolitan Toronto Housing Authority*, [2000] O.J. No. 4581 (SCJ) [tenant eviction case].

that have been disclosed to Inquiry counsel by the government, without redaction, except where there are NSC requiring redaction.[16]

26. The above requests are rooted in the concern for the need for transparency to ensure public confidence in the process. They are also rooted in a concern for effective participation, which is impossible in a factual vacuum. A redacted summary of information is insufficient to enable the participants to meaningfully participate. For example, not knowing who and how many officials have been interviewed leaves the Applicants and the public unable to determine how thorough the investigation has been. The Applicants cannot make submissions about the adequacy of the investigation - significant from the perspective of the three men, the intervenors and the public - nor can they suggest further areas of evidence which ought to be explored which Commission counsel may have missed.

27. The same concerns arise with respect to the documents. It is essential that all non-NSC documents be disclosed. The publicity in recent times with the security certificate detainees and the later disclosure ordered by the Federal Court in respect of the Arar Commission[17] point to a real concern with using evidence that may have been obtained by torture and with misstating actual conversations or events. The three individual Applicants are the ones most likely to know if their own statements or actions have been distorted or not fully reported.

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[16] The witness list requested in this case is already in existence. The documents requested, but for the anticipated few that would have to be redacted, ought not take an undue amount of time to locate and disclose as they have been examined already by Inquiry counsel.

[17] One example is the case of Mr. Harkat where statements relied upon by the Service from Abu Zubaida were later impugned as having been obtained through torture. The later disclosure from the Arar Commission brought to light the use of Mr. El Maati's statements obtained under torture to obtain a search warrant without alerting the judge who granted the warrant that this was a concern.

28. Further, public confidence in the process requires that the public be satisfied as to the scope and thoroughness of the investigation and in particular that there has been a full vetting of the evidence by those affected.[18] It is of crucial importance that this Inquiry take all necessary steps to refute the concerns raised in the public about government efforts to use the Inquiry to 'cover up' the deficiencies of its own officials.

29. As the Applicants emphasized in their earlier submissions to the Commissioner, there are several areas where the Applicants' participation and public awareness are essential. This includes the examining of witnesses and making full submissions in respect of embassy and consular conduct, Canadian government practice and policy on torture, information sharing with foreign states, and requests by Canadian officials to secure information from Messrs. Almalki, El Maati and Nureddin while they were in detention. The evidence related to these four areas are of the highest relevance to the Canadian public (including the Applicants); in some circumstances, the higher the relevance, the greater the public interest in its disclosure.[19] The Applicants believe that the 'effective conduct of the inquiry' can only be achieved through a public examination of the officials involved both because to be "effective", the Inquiry must inspire public confidence, and because of the practical value the Applicants can add to the fact-finding exercise.

30. The expectation of protection of Canadians by their government if they face difficulties while abroad is core to the understanding of the right of citizenship. Canadians need to know that our government does not condone torture, that it

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[18] It is difficult to reconcile the concern about the reputations of the Canadian officials involved, who presumably will have a right to participate if s. 13 notices are given, with what is a seeming dismissal on the part of the government with the reputations of Messrs. Almalki, El Maati and Nureddin, whose reputations have already been compromised by the same officials and who have already suffered severely from physical torture and arbitrary detention as a result.

[19] *Canada v. Arar Commission, supra* note 8 at paras. 93 and 94

will make efforts to protect them from such treatment not just at the hands of its own officials, but of officials in other state jurisdictions through the efforts of Canadian officials abroad. If this has not happened, Canadian must know this and must be assured that deficiencies in the conduct of their officials will be corrected. This cannot be done in secret.

31. The Arar Commission, in its submissions to the Federal Court, confirmed the vital importance of public scrutiny. That Commission submitted that

> Public Inquiries play an important role in democracy by ensuring that Government officials are accountable. A commission's ability to reveal the truth to the public about a particular controversy may allow the public to regain its confidence in governing institutions. ...[M]aximum disclosure will the Government be exposed to public scrutiny [sic], which is, according to the Commission "unquestionably the most effective tool in achieving accountability for those whose action [sic] are being examined."[20]

32. The views of the Arar Commission are apposite to the Inquiry called on the heels of *Arar*. The Inquiry is at a critical stage in its process. With the examinations completed or nearly completed, it may be the last opportunity for the Commissioner to open up the process in a manner that does justice to the Participants, the public interest, and the pressing need to hold public officials accountable by exposing them to public scrutiny. It is at this point that transparency becomes critical to the effective conduct of the Inquiry in order to inspire public confidence in the process and ensure a thorough, just result.

III. RELIEF SOUGHT

33. The Applicants respectfully request:

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[20] *Canada v. Arar Commission, supra* note 8 at para. 95

a. Disclosure of the names of all Canadian officials interviewed by the Commission, except for those currently employed by CSIS in covert operations and in respect of these latter officials particulars of the roles they played in the investigations of Messrs. Almalki, El Maati, and Nureddin should be provided;

b. A list of all documents received by the Inquiry, including those for which an NSC claim has been made;

c. Production of all documents, other than those filed as public exhibits in the Arar Commission, that have been disclosed to Inquiry counsel by all participants, without redaction, except where there are valid NSC claims requiring redaction;

d. A direction that all interviewees with knowledge of the following issues be called as witnesses to give evidence in public;
   i. Embassy and consular conduct;
   ii. Canadian government practice and policy on torture;
   iii. Information sharing with foreign states; and
   iv. Requests by Canadian officials to secure information from Messrs. Almalki, El Maati and Nureddin while they were in detention.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 16, 2007

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