

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

**SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA IN
RESPONSE TO THE APPLICATION FOR DISCLOSURE AND
DIRECTIONS ON PUBLIC HEARINGS**

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I. INTRODUCTION

1. This is not a public inquiry. By its Terms of Reference, this is an Internal Inquiry which is to be conducted in private. This was confirmed by the Commissioner in his Ruling on Terms of Reference and Procedure (the "Ruling").

Order in Council, P.C. 2006-1526

Ruling on Terms of Reference and Procedure, May 31, 2007

2. The relief the Applicants seek would effectively require the Internal Inquiry to be conducted in public. In so doing, the Applicants either misconceive the nature of the Internal Inquiry, treating it as though it were a public inquiry, or they seek to transform the Internal Inquiry into something it is not, a public inquiry. Either way, the Applicants run afoul of the Terms of Reference and the Commissioner's Ruling.

3. The Applicants attempt to get around the Commissioner's Ruling by arguing that circumstances have changed. However, they fail to demonstrate any legally relevant changes in circumstances meriting reconsideration of this Ruling. The changes in circumstances they allege do not alter the Terms of Reference which are the foundation for the Commissioner's powers and preclude the relief sought.

4. In any event, the relief sought is premature as the Commissioner has yet to define the remaining steps in the Internal Inquiry's process. The Applicants cannot obtain relief on the basis of a presumption that their concerns will not be addressed by the process. For these reasons, the Applicants must fail in their claim for relief.

II. TRUE NATURE OF THE RELIEF SOUGHT

5. The Applicants seek the disclosure of the names of witnesses who have been interviewed and all relevant documents, subject to claims for National Security Confidentiality. The Applicants also seek a list of documents, and a direction that witnesses with knowledge of the following issues be called to give their evidence in public:

- a. Embassy and consular conduct;
- b. Canadian government practice and policy on torture;
- c. Information sharing with foreign states; and
- d. Requests by Canadian officials to secure information from Messrs. Almalki, Elmaati and Nureddin while they were in detention.

Notice of Application, October 2, 2007, paras. 1-3

6. This relief, if granted, would render the Internal Inquiry procedurally indistinguishable from the Arar Inquiry. But this Inquiry is not the Arar Inquiry. The Internal Inquiry was specifically intended by its Terms of Reference to be a different process, crafted with due regard for Commissioner O'Connor's explicit recommendation against "a second stage" of the Arar Inquiry. As Commissioner O'Connor stated: "My experience in this Inquiry indicates that conducting a public inquiry in cases such as these can be a tortuous, time-consuming and expensive exercise."

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, p. 277.

III. ARGUMENT

A. The Commissioner's Ruling

7. The issues raised by the Applicants have already been ruled on by the Commissioner. The Commissioner has concluded that "there is no doubt that the Terms of Reference emphasize the internal or private nature of the Inquiry...." The Commissioner has confirmed "the presumptively private nature of the hearings" and ruled that "this Inquiry will be conducted in private, a term that [the Commissioner] interpret[s] to mean, in this context, in camera and ex parte." In short, this is not a public inquiry.

Ruling on Terms of Reference and Procedure, May 31, 2007, paras. 44 and 72

8. In seeking to transform the Internal Inquiry into a public inquiry, the Applicants effectively ask the Commissioner to reverse his Ruling. There is no legal basis for so doing. Indeed, the Applicants do not allege an error by the Commissioner in his Ruling. Instead, they argue that there has been a change in the public environment that compels a reconsideration of the Commissioner's Ruling.

9. The current public environment is an irrelevant consideration in determining what procedural elements flow from the Terms of Reference. The Commissioner cannot run this Inquiry by public opinion. The Commissioner must be guided by his Terms of Reference.

10. In any event, there is no evidentiary basis for concluding that there has been a change in the public environment. The Applicants have not adduced evidence to show what the public environment was at the time of the Commissioner's Ruling nor do they adduce evidence capable of showing a change in that environment. The selection of media reports cited by the Applicants establish nothing more than the opinions of particular editorialists.

B. The Terms of Reference

11. The Terms of Reference unambiguously establish that the Internal Inquiry shall be conducted in private except in exceptional circumstances. By virtue of paragraph (d) of the Terms of Reference, the Commissioner must take "all steps necessary to ensure that the Internal Inquiry is conducted in private." In exceptional circumstances, paragraph (e) provides that specific portions of the Inquiry may be conducted in public if the Commissioner is "satisfied that it is essential to ensure the effective conduct of the Inquiry." The Commissioner must always safeguard National Security Confidential information ("NSC").

Order in Council, P.C. 2006-1526, paras.(d), (e) and (k)

12. The standard set out in paragraph (e) of the Terms of Reference is not met here. The Applicants have failed to establish that it is essential to the effective conduct of the Internal Inquiry to hold public hearings to receive what would amount to nearly the entirety of the evidence and to require public disclosure of all documents, subject to NSC claims. This is not the process called for by the Terms of Reference which require the Commissioner to take "all steps necessary to ensure the Inquiry is conducted in private." The Applicants' claim for relief is also not limited to a specific portion of the Internal Inquiry but rather applies to the conduct of the Inquiry more broadly. It cannot be essential to the effective conduct of an internal inquiry for that inquiry to be transformed into a public inquiry.

Order in Council, P.C. 2006-1526, para. (d)

C. Guiding Principles: Workability and Practicality

13. In his Ruling, the Commissioner identified two principles that guide the conduct of the Internal Inquiry: workability and practicality.

14. The relief sought by the Applicants is neither workable nor practical. The Applicants fundamentally misapprehend the situation with respect to national security confidentiality. While it is evident that NSC material is present throughout the documents, no documents have been reviewed for NSC. Rather, all of the documents produced to the Commission have been produced in unredacted form. The Commissioner and his counsel see everything. The Internal Inquiry cannot disclose redacted documents or non NSC documents without engaging in a full NSC review. An NSC review cannot be conducted in a vacuum. To now conduct an NSC review of the tremendous number of documents produced to the Commission would be enormously time consuming. That is precisely what is to be avoided by holding an Internal Inquiry.

15. Efficiency and speed are important. The Terms of Reference respect Commissioner O'Connor's recommendation by aiming at the January 31, 2008, deadline. Considerable progress has been made by the Commission to date. The Commission has reviewed more than 35,000 documents and interviewed almost 40 witnesses under oath. It may be that rigor will challenge the Commissioner's deadline. Any other consideration that might threaten the Commissioner's deadline would betray the recommendation of Commissioner O'Connor that resulted in the establishment of this Internal Inquiry.

D. This Application is Premature

16. Even if there were merit to the Applicants' position, their Application is premature. The Commissioner has not established the next steps in the Internal Inquiry. Undoubtedly, the Commissioner will be guided by a concern to ensure effective participation and to ultimately inspire public confidence. There are many ways for these objectives to be achieved. It is simply premature to assume that the process will not satisfy these objectives. What is certain, however, is that these objectives must be satisfied within the framework established by the Terms of Reference. The Commissioner cannot transform the Internal Inquiry

into a public inquiry. He can only conduct specific parts in public and only if it is essential to ensure the effective conduct of the Internal Inquiry.

E. Motivation, Reputation and Remedy

17. The Applicants reveal the true motivation for the relief they seek when they argue that conducting the Internal Inquiry in private will not contribute to the right of the three men to an effective remedy. This Internal Inquiry is not aimed at providing a remedy to these three men. As stated in the Terms of Reference, the purpose of the Internal Inquiry is to inquire into the actions of Canadian officials. There are other processes by which the men may seek a remedy.

18. Similarly, the reputations of the three men are not in issue. They do not face a finding of misconduct. They have no case to meet. This is not an Inquiry into the actions of Messers. Almalki, El Maati and Nureddin. To repeat, it is an Internal Inquiry into the actions of Canadian officials and no one else.

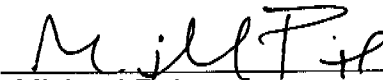
IV. CONCLUSION

19. Now is not the time to assess public confidence in the work of the Commissioner. That will have to await the Commissioner's report. Further, there is no basis for calling into question public confidence in the Internal Inquiry. This Inquiry cannot be measured against a public inquiry and assessed against a standard of transparency. That is not the correct standard. Instead, public confidence in an Internal Inquiry flows from the credibility of the Commissioner himself, which is beyond doubt, and a final report which includes not just findings but also an analysis of how those findings were reached and a description of the process relied on by the Commissioner.

20. For the foregoing reasons, the Attorney General of Canada respectfully requests that this Application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 25, 2007

A handwritten signature in dark ink, appearing to read "Michael Peirce", written over a horizontal line.

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