SUTTS, STROSBERG LLP
LAWYERS

JASMINKA KALAJDZIC
phone 519.561.6231
fax 866.316.5308 toll free
fax 519.561.6203
email jk@strosbergco.com

May 20, 2008

Our file: 11-153-001

BY EMAIL AND FAX

Commissioner Frank Iacobucci
Iacobucci Inquiry
c/o Torys LLP
79 Wellington Street West
Toronto ON

Dear Commissioner Iacobucci:

Internal Inquiry into the Actions of Canadian Officials
In Relation to Abdullah Almalki, Ahmed El Maati and
Muayyed Nureddin

As Commission Counsel may have already informed you, Messrs. Almalki, El Maati and Nureddin, as well as the counsel group, are very troubled by your decision to exclude our clients from the draft narrative review process. In our view, this decision is impractical, unfair, and made without proper consultation. On behalf of the three men and their counsel, I write to request a reconsideration of your decision.

Procedural Unfairness

Before setting out the grounds on which access to the draft should be granted, it is important to understand the process that led us to this point. The release of the draft narrative was discussed and referred to in various conversations and written correspondence with Commission Counsel over the past six months. The process of reading the draft and providing meaningful comments and proposed revisions was understood to be the first and only opportunity to see some of the facts that have been presented to you by Government witnesses. In lieu of getting disclosure of non-NSC documents and redacted transcripts or summaries of transcripts, the non-government Participants were to get a chance to review the draft narrative prepared by members of your counsel team and apprise them of gaps in the evidence, contradictions, etc.

The first we learned of the possibility that our clients would be excluded from this process was in mid-March, in a conversation I had with John Terry. At that time, it was my understanding that the concern was that our clients might be seen as tailoring their evidence if they chose to give further evidence after seeing the draft. I immediately expressed my concern about delaying disclosure of the draft to my client for this reason, and set out counsels' collective views in a March 2008 letter. I do not believe we received a substantive response to that letter.

On May 2, 2008, John Terry and I spoke about the status of the draft narrative and the timing for its review by both counsel and the clients. I was advised that the men could read the draft but it was suggested that they read it after they gave any further evidence.

The following week, Mr. Terry indicated that it was not yet confirmed when our clients would be able to view the document. My understanding again was not that our clients would never be able to see the document, but rather, that it would be preferable if they did not see it until their lawyers have done so, and after any further evidence is given. In addition to the 'tailoring of evidence' concern, I also learned that government lawyers raised the issue of their clients' reputational interests. I asked that the rationale for delaying or denying access to our clients be put in writing on at least two occasions, but did not receive anything.

On May 14, 2008, in a meeting with Messrs. Laskin and Terry, I was read the substance of an email from Michael Pearce in which the latter set out arguments as to why the three men should not see the document. For the first time, reference was made to your November 6, 2007 ruling as the basis for denying disclosure. I asked for a copy of the email but have not received it.

On May 15, in response to my repeated requests for a formal position in writing as to why our clients could not review the draft, I was directed to the November ruling.

As a matter of fair process, we have a number of concerns. First, why is Mr. Pearce permitted to advocate the government's position without our even knowing about it, let alone being given the chance to respond? Second, the November ruling responded to our application for disclosure of non-NSC documents and public proceedings; the issue was not the process for review of a draft narrative, and we certainly never turned our minds to who would have access, and when. The reference to sharing the draft "with counsel for the Participants" was not a decision (ruling) *per se*, and no reasons for limiting disclosure were given. Third, when we expressed our concerns about the possibility of excluding our clients in my March letter, we should have been advised then that a "decision" to exclude had already been made, and the reasons for such a decision.

I understand that this Inquiry is an unusual one, and how it is conducted continues to be something of an 'organic' process. It is unfair, however, for counsel for the three men not to be given notice of such fundamental decisions as the denial of access to a non-NSC document.

<u>Substantive Arguments</u>

Quite apart from the unfairness of the process, the decision to deny access is itself unfair, and impractical. Our reasons follow:

1. The draft narrative is not protected by any privilege or NSC. As Participants, the three men are entitled to see it and up until very recently we all understood that they would be able to participate in this one and only 'evidentiary' juncture in the Inquiry.

2. If the objective of sharing the draft is to get meaningful feedback, the three men are better situated to provide that feedback than any of the Intervenors or counsel, especially in relation to the parts of the narrative that describe their interactions with others. It is *necessary*, therefore, that they review it.

3. The severe time constraints we are now under mean that the more knowledgeable eyes there are critically reviewing the draft, the better.

4. More than any other individuals named in the draft, our clients' reputational interests are at stake. As a matter of fairness, they are entitled to see the draft summary of evidence.

5. There should be no concern about the three men leaking the document. Government officials, on the other hand, leaked documents having a national security dimension both before and during the Arar Inquiry. In any event, because of the Commission's physical control of the document, there is no chance any of the three men could leak the document.

6. The suggestion that our clients might tailor their evidence is unwarranted and unfair. Their chronologies were made public years ago and their evidence has been consistent throughout. The Arar Report confirmed facts that our clients made public long before facts were disclosed in that Inquiry.

7. Counsel met with the three men two days ago and we found it extremely difficult (at some points impossible) to get information and feedback because of the undertaking we were made to sign last week. For us to get clarification or information from our clients without disclosing what we have read is unduly cumbersome and time-consuming. It is also unnecessary given the absence of an NSC claim or privilege.

8. The November 6 ruling does not refer to any undertaking. As a matter of interpretation, therefore, the reference to "sharing the draft narrative with counsel for the Participants" does not require strict confidentiality or preclude counsel from seeking input and instructions from our clients.

9. Finally, the lack of transparency, unwarranted secrecy, and unfounded speculation about tailoring evidence or breaching undertakings all lead to the inescapable impression that our clients are seen to be untrustworthy and inferior. What has already been a very distressing process has become untenable. Respectfully, you cannot underestimate the human toll these past several months have taken on our clients.

Please let us know if you wish to discuss our views further.

Yours truly,

Jasminka Kalajdzic per: MU

Jasminka Kalajdzic
JK/
#593864v2

cc: J. Laskin & J. Terry