IN THE MATTER OF

INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU-EL MAATI AND MUAYEED NUREDDIN (THE "INQUIRY")

NOTICE OF APPLICATION

ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI and MUAYYED NUREDDIN ("the Applicants") and AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH BRANCH), INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP, CANADIAN ARAB FEDERATION, CANADIAN COUNCIL FOR AMERICAN ISLAMIC RELATIONS, CANADIAN MUSLIM CIVIL LIBERTIES ASSOCIATION and HUMAN RIGHTS WATCH ("the Intervenors") make a motion in writing pursuant to Rule 12(c) of the *General Rules of Practice and Procedure*.

PROPOSED METHOD OF HEARING:

The Applicants and the Intervenors named above ask that this application be heard in writing.

THE APPLICATION IS FOR:

1. A public hearing for the parties to make oral closing submissions on the following issues:
   (a) DFAIT, Embassy and consular conduct;
   (b) the Canadian government's practice and policy on torture;
   (c) information sharing with foreign regimes;
   (d) appropriate use of labels in national security investigations; and
   (e) the appropriate "standard of proof" to be applied by the Commissioner in making findings of deficient conduct.

2. Such further and other relief as counsel may request.

THE GROUNDS FOR THIS APPLICATION ARE:

1. The Applicants have a direct and substantial interest in the subject matter of the Inquiry.

2. The Inquiry was called pursuant to the recommendation of Commissioner O'Connor in the Report of the Events Relating to Maher Arar that the cases of the three applicants be reviewed "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".

3. The Applicants and intervenors have maintained the position throughout this Inquiry that openness is fundamental to the effective and fair conduct of the proceedings. In October 2007, the Applicants brought an Application seeking production of relevant documents and a direction that witnesses with relevant evidence be called to testify in public in relation to the following issues:
   (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 in detention;

4. The Commissioner declined to rule on the October 2007 application on the basis that it was unnecessary to do so. Nonetheless, in his reasons released November 6, 2007, the Commissioner made the following comments: "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 concerns."

5. While the Terms of Reference and Commissioner Iacobucci's May 31, 2007 and November 6, 2007 rulings envision that portions of the Inquiry could be conducted in public, to date there have been only two public hearings – one in respect of procedural matters and the other on standards of conduct. No witnesses have been called to give evidence publicly. No disclosure of documents, transcripts or witness statements has been made to the public or to the Applicants themselves.

6. In May 2008, pursuant to Commissioner Iacobucci's ruling of November 6, 2007, counsel for the Applicants and Intervenors were given access to a draft narrative containing a summary of evidence heard by the Commission over which there was no national security confidentiality ("NSC") claim. The information contained in the draft narrative reviewed by counsel will be contained in the public version of the Commissioner's report. The Applicants were not allowed to review the draft narrative and their counsel were prohibited from discussing the contents of the draft narrative with the Applicants. Similarly, counsel for the intervenors were not able to review or discuss the narrative fully with colleagues working with the intervening organizations. The Applicants applied twice to the Commissioner Iacobucci to reconsider the decision to preclude the Applicants from reviewing the draft narrative. Both applications were denied.

7. On June 20, 2008, all parties to the Inquiry filed final written submissions. On June 26, 2008, some parties filed written reply submissions. These final written submissions could not be shared with the Applicants and will not be posted on the Inquiry website until after the Commissioner's report is released.

8. When they received the Attorney General's closing submissions, counsel for the Applicants for the first time learned the position of the Attorney General on a wide range of issues, including, *inter alia*, whether the Applicants were tortured, the propriety of the investigation conducted in respect of the Applicants and the standard of "proof" to be applied before the Commissioner could make any findings of deficient conduct. Counsel

for the Applicants had only four business days to respond to the closing submissions of the Attorney General.

9. This Inquiry raises a number of issues of national and international importance. The Commissioner's findings will have far-reaching implications in respect of

(a) how Canadian officials share information with and receive information from foreign agencies;

(b) how Canadian consular, RCMP and CSIS officials function in countries with poor human rights records;

(c) how Canadian law enforcement agencies investigate and label individuals in national security matters;

(d) how Canadian officials assess the risk that Canadian citizens being detained abroad are being or have been tortured or mistreated; and

(e) how Canadian officials analyze and use information obtained in circumstances where there is a risk that it is the product of torture.

10. The proper resolution of these issues is of fundamental importance in a free and democratic society. Notwithstanding the preparation of written submissions, the Canadian public and the Applicants ought to have an opportunity to understand the issues and the scope of the debate on these issues prior to the Commissioner releasing his report. This opportunity is best provided by the convening of a public hearing for the parties to make closing submissions.

11. The open court principle is, as the Supreme Court noted in *Re Vancouver Sun*, [2004] 2 S.C.R. 332, a "hallmark of a democratic society and applies to all judicial proceedings." Similarly, in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, the Court held as follows:

> There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result

> of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.

12. The same considerations are relevant here. Commissioner Iacobucci recognized the importance of public dialogue in the context of a Commission of Inquiry when he wrote in his April 2, 2007 ruling that "transparency and openness 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."

13. The Arar Commission, in its submissions to the Federal Court for greater disclosure of facts over which the Government had overclaimed NSC, confirmed the vital importance of public scrutiny. In *Canada v. Arar Commission, [2007] F.C.J. No. 1081 at para. 95*, Justice Noel reiterated the Commission's position:

> 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."

These principles are as applicable to the public debate of vital questions of human rights and security as they are to maximum disclosure in the final public report.

14. The Inquiry will resolve a number of disputed issues as between the Applicants and Canadian government officials and set significant policy for all Canadian citizens. The importance of the issues at stake calls for some public process or dialogue.

15. In the ordinary course, the Applicants and intervenors would seek to make oral submissions on all issues relevant to the Commissioner's mandate. However, given Commissioner's ruling in relation to disclosing the content of the Draft Narrative and the lack of disclosure, the Applicants and intervenors recognize that such a request is neither

practical nor feasible. Counsel for Messrs. Almalki, Elmaati and Nureddin cannot effectively respond to allegations made about them without disclosure of the evidence called before the Inquiry. Further, any meaningful discussion of the allegations (to the extent they are known), the conduct of the investigation or the nature of the labels attached to Messrs. Almalki, Elmaati and Nureddin by Canadian officials would by necessity require reference to the information contained in the draft narrative which counsel undertook not to disclose to anyone. As a result, there are only a limited number of issues, as outlined above, that can be the subject of meaningful and detailed oral submissions.

16. Public closing submissions by counsel for the Applicants and intervenors on the limited issues outlined above will not result in the disclosure of information over which NSC has been claimed. Counsel for the Applicants and intervenors are only in possession of information over which there is no NSC claim. Counsel for the Attorney General is uniquely situated to protect information over which there is an NSC claim and can decide what information to disclose in oral submissions.

17. Oral submissions provide a unique opportunity for the Commissioner to engage in a dialogue with counsel on issues relevant to his mandate. It would afford an opportunity for the Commissioner, as necessary, to clarify, challenge and scrutinize the positions taken by the parties in the closing submissions, which could only assist the Commissioner in his deliberations and strengthen the final analysis of the issues.

18. Convening a public hearing for the purpose of receiving oral submissions from the parties on significant policy issues would further the goal of public understanding of the Inquiry process. It would inform the public, and the Applicants, of the scope of the issues at stake and would contribute to public confidence in the Commissioner's findings and conclusions.

19. Such further and other grounds as counsel may submit and this Inquiry accept.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Application:

1. Affidavit of Hadyat Nazami, July 11, 2008;
2. The within Notice; and
3. Such further and other evidence that counsel may submit.

Dated this 11th day of July 2008.

Jackman & Associates
Barristers & Solicitors
569 St. Clair Avenue West, Unit 3
Toronto, ON M6C 1A6

BARBARA JACKMAN
Tel: (416) 653-9964
Fax: (416) 653-1036

Solicitors for Ahmad Abou-Elmaati

Sutts, Strosberg LLP
Lawyers
#600-251 Goyeau Street
Windsor, ON N9A 6V4

JASMINKA KALAJDZIC
Tel: (519) 561-6231
Fax: (519) 561-6203

Solicitors for Abdullah Almalki

Di Luca Copeland Davies LLP
116 Simcoe Street
Toronto, ON M5H 4E2

BREESE DAVIES
Tel: (416) 868-1825
Fax: (416) 868-0269

Solicitors for Muayyed Nureddin

Amnesty International Canada
English-speaking branch)
312 Laurier Avenue East
Ottawa, ON K1N 1H9

ALEX NEVE
Secretary-General
Tel: (613) 744-7667, ext. 234
Fax: (613) 746-2411

International Civil Liberties
Monitoring Group
1 Nicholas Street, Suite 300
Ottawa, Ontario
K1N 7B7

WARREN ALMAND

Canadian Arab Federation

James Kafieh
Barrister, Solicitor & Mediator
136 Wilson St.
RR3 Almonte, ON K0A 1A0
Tel: (416) 529-6041
Fax: (416) 529-6042

Canadian Counsel for American
Islamic Relations and
Canadian Muslim Civil Liberties
Association

Human Rights Watch

Paliare Roland Rosenberg
Rothstein LLP
Barristers
250 University Avenue, Suite 501
Toronto, ON M5H 3E5

BRYDIE C.M. BETHELL

Tel: (416) 646-4302
Fax: (416) 646-4301

Solicitors for Human Rights Watch