

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

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**SUBMISSIONS OF THE ATTORNEY  
GENERAL OF CANADA IN RESPONSE  
TO THE NOTICE OF APPLICATION  
DATED SEPTEMBER 26, 2008**

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DATED: OCTOBER 03, 2008

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Canada

1. The Attorney General of Canada responds to the Notice of Application dated September 26, 2008. This Application and the relief sought are simply untenable at this late date in the Internal Inquiry process.
2. The Applicants have no right of access to revised narratives, no right to relief from the confidentiality undertakings that were required as a condition of having access to the original narratives and no right to an oral hearing to contest the Commissioner's interpretation of his Terms of Reference.

### **Access to Revised Narratives**

3. The Commissioner is authorized by his Terms of Reference "to adopt any procedures 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" (para. d).
4. As the Commissioner has observed, this is an inquisitorial proceeding, as opposed to an adversarial one. As Chief Justice McLachin stated in *Charkaoui v. Canada (Citizenship and Immigration)*, a person conducting an inquisitorial proceeding is mandated "to take charge of the gathering of evidence in an independent and impartial way."<sup>1</sup>
5. On this basis, the Commissioner adopted an extraordinary process in which he directed Inquiry Counsel to prepare draft factual narratives to be reviewed with counsel for Inquiry Participants and Intervenors on a confidential basis prior to its release to take into account their comments and suggestions, including suggestions for further investigation.

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<sup>1</sup> [2007] 1 S.C.R. 350 at para. 50.

6. In seeking access to revised narratives, the Applicants seek to take an extraordinary opportunity provided in the discretion of the Commissioner and claim it as a right one which they claim bestows other rights. No such rights exist.
7. Indeed, the Applicants' claim for a right of access to revised draft narratives is nothing less than a claim for a right of access to the draft portions of the Commissioner's report in advance of his providing it to the Governor in Council to whom he must report. Framed in this way, it is evident that no such right can possibly exist.
8. Not only is there no right to extend the extraordinary process adopted by the Commissioner, it would be entirely impractical in the circumstances.
9. The Commissioner cannot disclose the revised draft narrative at this time. The Commissioner is obliged by paragraphs (k) and (n) of his Terms of Reference to take all steps necessary to prevent the disclosure of National Security Confidentiality (NSC) information.
10. The revised draft narratives have not been reviewed for NSC and approved for disclosure to counsel for the Participants and Intervenors.
11. While the Commissioner's draft Report is presently being reviewed for NSC as part of the process for finalizing the Report, to engage in an interim NSC process for the purpose of providing access to counsel for the individuals at this stage would only serve to disrupt the process for the completion of the Inquiry, which is imminent.

## **Access by the Individuals to Previous Versions of the Draft Narratives**

12. The argument of the Applicants in seeking access to the draft narratives for the three individuals amounts to no more than an attempt to have the Commissioner reconsider a matter on which he has ruled repeatedly and on which he has previously denied a request for reconsideration. Accordingly, this aspect of the Application is improper and should be dismissed without further consideration.
  
13. This issue has been thoroughly canvassed and the non-exhaustive list of reasons given by the Commissioner for limiting access to the narratives to counsel remains sound including the fact that only "counsel are in a position to give professional undertakings" (Letter from the Commissioner to Counsel for Participants and Intervenors, May 23, 3008.)
  
14. The Applicants' claim that "the draft narrative has already been shared with two government witnesses" (para. 12, Notice of Application) is unsupported except for an undocumented vague reference in the Notice of Application to a statement by Commission Counsel to the effect that a copy of the draft Narrative "may have been shared with two government witnesses" (para. 6, underlining added).
  
15. Inadvertent access by two witnesses does not establish a basis for providing access to the individuals and is not even a material consideration. Even if it was a material consideration, it does not amount to a basis for providing access to the three individuals. The individuals and government officials are not similarly situated in this Internal Inquiry; it is only the actions of the latter that are in issue before the Inquiry.

16. Further, no inquisitorial purpose can be served by giving the three individuals direct access to narratives that are no longer current or accurate.

17. The Applicants' demand for access to the draft narratives for the individuals should be dismissed accordingly.

### **Oral Hearing on the Terms of Reference**

18. The Applicants' request for an oral hearing on the meaning of paragraph (a)(ii) of the Terms of Reference ignores the fact that oral hearings have already been held on meaning of the Terms of Reference.

19. Paragraph (a)(ii) of the Terms of Reference is unambiguous. It expressly provides that the Commissioner is to determine "whether there were deficiencies in the actions taken by Canadian officials to provide consular services to Abdullah Almalki, Ahmad Abou-Elmaait and Muayyed Nureddin while they were detained in Syria or Egypt". No further submissions on the unambiguous language of the Terms of Reference are required.

20. The Applicants' statement that correspondence dated September 23, 2008, "was the first indication that the Commissioner did not intend to make findings with respect to issues that arose after the Applicants were released from detention but before their return to Canada" is irrelevant. Becoming aware of the Commissioner's views does not entitle the Applicants to contest those views before the Commissioner.

21. Except where the Commissioner may make a finding of misconduct against a person, which entitles that person to notice pursuant to section

13 of the *Inquiries Act*, no one has a right to be informed of the views that the Commissioner intends to express in his final Report.

22. Since there is no right to be informed of the conclusions of the Commissioner, no one can have a right to a public hearing before the Commissioner to contest his conclusions. Agreeing or disagreeing with the Commissioner is the prerogative of all who will read his Report but it does not entitle anyone to an oral hearing before him.

**Conclusion**

23. For the foregoing reasons, the Notice of Application should be dismissed in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: October 03, 2008

A handwritten signature in black ink, appearing to read 'M. Peirce', written over a horizontal line.

Michael Peirce  
Alain Préfontaine  
Roger Flaim  
Gregory Tzemenakis  
Yannick Landry