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

FACTUM OF ABDULLAH ALMALKI
(April 17, 2007 Hearing re: Rules of Procedure)

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TABLE OF CONTENTS

PART I—OVERVIEW

1. By Supplementary Notice of Hearing dated March 27, 2007, the Commissioner has requested submissions concerning the procedures and methods to be followed in the conduct of the Inquiry. Submissions have been specifically requested concerning five questions arising from the Inquiry's Terms of Reference.

2. By virtue of the Commissioner's ruling dated April 2, 2007, Abdullah Almalki has been granted standing as a participant in the Inquiry, given that he has a "substantial and direct interest" in the matters before it. In his ruling, the Commissioner confirmed his commitment to ensuring that the Inquiry is "independent, fair, thorough, and expeditious."

> Ruling on Participation and Funding, April 2, 2007, pages 3-5;
> Terms of Reference, Preamble.

3. Mr. Almalki submits that the Terms of Reference must be interpreted in a manner consistent with the four principles enunciated by the Commissioner in his ruling. These principles were first expressed by Commissioner O'Connor, when he recommended in his *Report of the Events Relating to Maher Arar* that the cases of Messrs. Almalki, El Maati and Nureddin be reviewed "through an independent and

credible process" that investigates the matters "fully" and, in the end, "inspire[s] public confidence in the outcome."

> Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar, Analysis and Recommendations* (Ottawa: Public Works and Government Services, 2006) at 278 ("Arar Report").

4. Mr. Almalki further submits that the Terms of Reference must be interpreted in a manner consistent with the *Inquiries Act*, principles of fundamental justice and the *Charter*. To the extent that the Commissioner is urged to accept an interpretation of any Term that is inconsistent with these statutes and principles, he should reject it.

PART II—THE FACTS

5. As of 2006, when former RCMP Commissioner Zaccardelli stated before the Standing Committee on Public Safety and National Security that the investigation of Mr. Almalki continued, Mr. Almalki had been under investigation by Canadian intelligence and police authorities for approximately nine years. Despite the time and resources devoted to his investigation, no charges have been laid. He has not been questioned by the RCMP, OPP or any other Canadian enforcement agency. When CSIS asked to interview him in the late 1990's, he cooperated.

6. Mr. Almalki and his family continue to be harmed by this perpetual investigation. Mr. Almalki has lived for years under a cloud of suspicion. As the

Commissioner noted in his Ruling on Standing, Mr. Almalki is participating in this Inquiry "to clear his name".

> Ruling, page 5.

7. In addition, of course, Mr. Almalki was also harmed by his detention and torture in Syria. He spent one year, ten months, and seven days in Syrian prisons. He was tortured. He "suffered severe physical and psychological trauma." He was "especially badly treated, and for an extended period of time."

> Toope Report, Appendix 7, Arar Report, Factual Background, Vol. II, page 805.

8. Virtually all of the particulars of Mr. Almalki's investigation, detention, interrogations, interactions with Canadian and Syrian officials, and abuse are relevant facts for the purposes of this hearing. They define the "mistreatment" that is to be investigated. They bear on whether the Commissioner determines the extent of Mr. Almalki's torture. They also inform the debate as to how much of the Inquiry should be held in private.

9. For the purposes of this hearing, Mr. Almalki adopts the recitation of facts set out in the Chronology prepared by Kerry Pither on behalf of several intervenor organizations with standing at this Inquiry. The Chronology will be filed by the relevant intervenors in advance of the hearing, and is incorporated by reference to this factum.

10. In addition to the comprehensive Chronology, the following findings of fact contained in the Arar Report are relevant to the scope of the factual inquiry before this Commission:

(a) The RCMP provided American authorities with the entire database from its terrorism investigation in ways that did not comply with RCMP policies requiring screening for relevance, reliability and personal information. (Arar Report, Analysis, p. 13.) This suggests that unreliable information about Mr. Almalki was shared with other governments and raises the question as to whether the database contained investigation materials dating back to 1998 or beyond.

(b) The RCMP failed to properly oversee Project A-O's investigation and information sharing practices (pp. 13-14). This conclusion necessitates a comprehensive exploration of the extent of improper investigation and information sharing in Mr. Almalki's case with all foreign authorities, including the extent of such investigation and information sharing by CSIS.

(c) The Department of Foreign Affairs and International Trade (DFAIT) received a summary of a statement by Mr. Arar and shared it with CSIS and the RCMP without informing them that the statement was likely a product of torture (p. 15). Were statements obtained from Mr. Almalki under torture and given to Canadian authorities, and if so, to whom, when and how were they shared?

(d) In January 2003, the RCMP, via Ambassador Pillarella, sent Syrian Military Intelligence questions from Mr. Almalki, signaling that they approved of his imprisonment and interrogation (p. 15). The full extent of indifference to or complicity in the torture of Mr. Almalki must be fully explored, acknowledged and condemned.

(e) Project A-O Canada was directed to carry out an investigation into the activities of Mr. Almalki (p. 16). If Mr. Almalki was the main target of an investigation already determined to have been carried out negligently, contrary to internal RCMP policies, and in breach of Canadians' human rights, then a full investigation into what happened to Mr. Almalki is all the more pressing.

(f) Mr. Arar had nine consular visits over the course of one year, leading Commissioner O'Connor to conclude that DFAIT had done everything it could to obtain access to him (p. 43). In contrast, Mr. Almalki received

no consular visits. Why did Mr. Almalki not receive any consular visits? Could more have been done?

(g) Leo Martel wrote an inaccurate, incorrect memo in which he denied Mr. Arar had told him that he had been beaten (p. 46). This finding raises a strong suspicion that inaccuracies and mistakes were made by Mr. Martel and others in their reporting about Mr. Almalki. Any such inaccuracies and mistakes must be explored.

(h) Commissioner O'Connor stated that the surveillance of the Mango Café meeting between Mr. Arar and Mr. Almalki was reasonable and proper given Project A-O Canada's investigation of Mr. Almalki. Commissioner O'Connor also stated that he had heard evidence about certain aspects of the RCMP's investigation of Mr. Almalki as it related to Mr. Arar, but not all of the evidence (pp. 68, 78). As Commission O'Connor did not hear all the evidence, this Inquiry must conduct a thorough review of the reasonableness of the RCMP's and CSIS' investigation of Mr. Almalki from the outset.

(i) Commissioner O'Connor stated that, while there is a great need to share information with other agencies, there must be caution in relation to the content of information and the use to which it may be put by the recipient (pp. 103-104). This Inquiry should determine what was the RCMP or CSIS practice with respect to information sharing with Syria.

(j) With few exceptions, members of Project A-O Canada had never been involved in a national security investigation (p. 129). In light of this lack of experience, Mr. Almalki's description as a suspected terrorist is highly questionable and requires thorough investigation.

(k) Mr. Arar was put on an American terrorist watch list because of information and inquiries received from Canada (pp. 161-162). Was Mr. Almalki put on a Syrian terrorist watch list as a result of Canadian information and inquiries, and did this cause his detention?

(l) Minister Graham was not informed of what should have been viewed as critically important information, the likelihood of Mr. Arar's torture (p. 192). Was the Minister informed of the mere certainty that Mr. Almalki was being tortured? If not, why not?

(m) CSIS did not do an adequate reliability assessment of Mr. Arar's confession given the likelihood that it had been obtained by torture (p. 198). What reliability assessments were done regarding Mr. Almalki's confessions?

(n) The RCMP sent questions to Syrian military intelligence knowing that there was a "credible risk of torture" if the questions were send. DFAIT was party to the discussions which took place regarding send questions to be posed to Mr. Almalki (pp. 208-209). Cross-examinations of government witnesses on the extent of their knowledge regarding questions sent to Mr. Almalki was not permitted in the course of the Arar Inquiry. Indeed, some of the information relevant to this issue was improperly the subject of the government's NSC claims until after the public hearings had concluded. Consequently, the decision to send questions and the participants to this event must be fully explored in this inquiry.

(o) One of the media leaks contained references to Mr. Almalki as the main target of Project A-O Canada (p. 259). What other leaks took place regarding Mr. Almalki and who is responsible?

11. These facts as recounted in the Arar Report, and the questions they raise, are all facts on which Mr. Almalki relies in this hearing. Documents in the possession of Mr. Almalki's counsel that are relevant to these facts are listed in Schedule C to this factum.

PART III—ISSUES AND ARGUMENT

12. The issues raised in the Supplementary Notice of Hearing are as follows:

(1) What is the meaning of the phrase 'any mistreatment' as it appears in paragraph (a)(iii) of the Terms of Reference?

(2) Is it necessary, in order for the Commissioner to determine the matters that paragraph (a) of the Terms of Reference mandate him to determine, for him to decide whether, and the extent to which, Mr. Almalki, Mr. El Maati and Mr. Nureddin were tortured in Syria and Egypt?

(3) What does paragraph (d) of the Terms of Reference mean in requiring the Commissioner, subject to paragraph (e), to take all steps necessary to ensure that the Inquiry is conducted in private? In particular, who should be entitled to attend any hearing conducted in private?

(4) If the Commissioner decides that some participants are not entitled to attend a hearing conducted in private, what if any steps should he take to ensure that those participants can participate appropriately in the Inquiry's process?

(5) What considerations should the Commissioner take into account in determining, in accordance with paragraph (e) of the Terms of Reference, whether he is satisfied that it is essential to ensure the effective conduct of the Inquiry that specific portions of the Inquiry be conducted in public?

(6) What other aspects of the Inquiry's Draft General Rules of Procedure and Practice may be of concern?

13. In this factum, Mr. Almalki will focus his submissions on issues (2) and (3). He agrees with the submissions of Mr. El Maati and Mr. Nureddin in respect of issues (1), (4) and (5), with additional submissions below.

(1) WHAT IS THE MEANING OF THE PHRASE 'ANY MISTREATMENT' AS IT APPEARS IN PARAGRAPH (A)(III) OF THE TERMS OF REFERENCE?

14. Mistreatment is commonly defined as "ill treatment", "misuse" and "wrong". Clearly, and at a minimum, mistreatment encompasses torture, inhuman and degrading treatment and punishment, as those terms are defined and understood in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT"). Such treatment would include the psychological and physical

torture endured by Mr. Almalki, his abysmal living conditions in Syria, and the circumstances surrounding his detention.

15. It is submitted that mistreatment also should include the lack of diplomatic assistance Mr. Almalki experienced in Syria. While "deficiencies" in the actions of Canadian officials in providing consular services are specifically within the mandate of the Commission by virtue of paragraph (a)(ii), mistreatment in paragraph (a)(iii) should also include the harm suffered by Mr. Almalki as a result of the absence of consular access, the refusal of a safe haven at the Embassy, and the denial of assistance in reuniting with his family and returning to Canada, which would include the acts and omissions of the Canadian Embassy in Malaysia.

16. The terms of reference for the Arar Commission were arguably more specific insofar as the areas investigated and reported on. Paragraph (a) of those terms of reference required the Commissioner to investigate and report on the actions of Canadian officials in relation to Maher Arar, including with regard to his detention, deportation, imprisonment, treatment and return to Canada. Paragraph a(iii) of this Inquiry's Terms of Reference refers to "any mistreatment". The term, therefore, at the very least should include investigation of facts related to Mr. Almalki's detention, imprisonment, treatment and return to Canada.

Order-in-Council, P.C. 2004-48.

17. Commissioner O'Connor also investigated facts related to the serious leaks to the media which compounded Mr. Arar's suffering and unfairly damaged his reputation in Canada. While investigation of the media leaks was not explicitly listed in the terms of reference for that Commission, it was still accepted as a matter relevant to its mandate. Mr. Almalki urges the Commissioner to take a similar approach to his mandate. Mistreatment should be defined to include media leaks which occurred both while Mr. Almalki was in Syria, and since his return to Canada, and which have caused him considerable personal harm and reputational damage.

(2) IS IT NECESSARY, IN ORDER FOR THE COMMISSIONER TO DETERMINE THE MATTERS THAT PARAGRAPH (A) OF THE TERMS OF REFERENCE MANDATE HIM TO DETERMINE, FOR HIM TO DECIDE WHETHER, AND THE EXTENT TO WHICH, MR. ALMALKI, MR. ELMAATI AND MR. NUREDDIN WERE TORTURED IN SYRIA AND EGYPT?

18. At the Arar Commission, Professor Stephen Toope was appointed a fact-finder to "investigate and report to the Commission on Mr. Arar's treatment during his detention in Jordan and Syria and its effects upon him and his family." The appointment of Professor Toope resulted from the decision that Mr. Arar should not be compelled to testify at the Inquiry given that he would not have access to all of the information and evidence in the government's possession. Commissioner O'Connor, however, determined that it would still be helpful to know about Mr. Arar's treatment as this was "important, even essential, background information."

Ruling, Factual Background, vol. II, pp. 764-765
Toope Report, Appendix 7, Factual Background, vol. II, p. 790.

19. Professor Toope interviewed Mr. Almalki in the context of this mandate, in order to better assess the credibility of Mr. Arar's story. He found Mr. Almalki's recounting of the details of his torture and imprisonment in Syria to be credible. Professor Toope's report was accepted by the Commission. Specifically, Commissioner O'Connor noted that "Professor Toope concluded that all three men had been interrogated and tortured while in Syria and that the interrogations had been based on information that had originated in Canada."

Ruling on Process and Procedural Issues, Appendix 6(I), Factual Background, vol. II, p. 765.
Analysis, pp. 269, 297.

20. Professor Toope did not interview Mr. Almalki with the mandate to determine if Mr. Almalki had been tortured. The interview, done on a rather rush basis, was conducted in order to better assess the credibility of Mr. Arar's story. Nevertheless, he found Mr. Almalki's account of what happened in Syria to be credible. He believed that Mr. Almalki had suffered severe physical and psychological trauma and that Mr. Almalki "was especially badly treated." So far as Professor Toope's conclusion goes, it should be accepted.

Toope Report, Appendix 7, Factual Background, vol. II, p. 805.

21. Professor Toope's report is also of limited utility in that he did not detail the physical, psychological, emotional and economic effects of the torture on Mr. Almalki. Details of those effects on Mr. Arar were reported, and were useful to Commissioner O'Connor.

22. This Inquiry would be leaving out "important, even essential, background information" (to use the words of Commissioner O'Connor) if it did not investigate and make findings related to the torture of Mr. Almalki. As Commissioner O'Connor noted,

> The reason this Inquiry was called was because of Mr. Arar's allegations of mistreatment. People are shocked and want to know if Canadian officials were in any way involved in what happened. Because Mr. Arar's allegations of mistreatment triggered this Inquiry, [...]it is important that I receive information about Mr. Arar's treatment in Jordan and Syria.

So, too, should this Inquiry receive information about Mr. Almalki's treatment.

> Arar Report, Factual Background, vol. II, p. 764.

23. So, while this Inquiry should receive and accept Professor Toope's report as conclusive that Mr. Almalki was tortured in Syria, Mr. Almalki submits two caveats:

(a) If Government officials at this Inquiry continue to doubt that Mr. Almalki was tortured, as was the case throughout the Arar Commission, then Mr. Almalki seeks the appointment of the same or another fact-finder with the same mandate conferred on Professor Toope vis-à-vis Mr. Arar. In this way, a more comprehensive interview can take place and a specific finding as to the occurrence and nature of the torture can be made.

(b) If the Commissioner adopts a broad definition of mistreatment in paragraph a(iii) of the Terms of Reference, one which includes the effects of mistreatment as well as its causes, then the fact-finder should be appointed to report on the physical, psychological, family and economic effects of torture on Mr. Almalki.

> Toope Report, Appendix 7, Factual Background, vol. II, 812-818.

(3) WHAT DOES PARAGRAPH (D) OF THE TERMS OF REFERENCE MEAN IN REQUIRING THE COMMISSIONER, SUBJECT TO PARAGRAPH (E), TO TAKE ALL STEPS NECESSARY TO ENSURE THAT THE INQUIRY IS CONDUCTED IN PRIVATE? IN PARTICULAR, WHO SHOULD BE ENTITLED TO ATTEND ANY HEARING CONDUCTED IN PRIVATE?

24. This Inquiry was called pursuant to Part I of the *Inquiries Act*. It is not a "departmental investigation", which is defined under Part II of that Act.

> *Inquiries Act*, R.S., c. I-11.
> Order in Council, P.C. 2006-1526.

25. It is now broadly accepted that two main purposes of public inquiries are: to hear the evidence relating to the events in public so that the public can be informed directly about those events, and to provide those who are affected by the events an opportunity to participate in the inquiry process.

> Ruling on RCMP Testimony, Appendix 6(j), p. 773.
> *Phillips* v. *Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paras. 60-63.

26. Like Commissioner Iacobucci, Commissioner O'Connor was faced with the vexing problem of national security confidentiality (NSC), and the reality that evidence marked by NSC claims could not be heard in public. Importantly, Commissioner O'Connor noted in his order rejecting the RCMP's motion for a blanket ruling that RCMP witnesses be examined *in camera*, that this reality does not mean we should abandon the concept of public hearings for all or even part of the evidence that is not subject to NSC claims. He stated: "I think it behooves me as Commissioner in a

public inquiry to take reasonable steps to attempt to maximize, during the hearing stage of the Inquiry, the disclosure of information to the public."

Ibid. pp. 773-774.

27. While Commissioner O'Connor noted several times in his report the difficulties of holding a public inquiry where evidence subject to NSC claims is prevalent, he reiterated at least as many times the fundamental importance of conducting hearings in public. Put simply, "the government chose to call a public inquiry, not a private investigation."

Ibid.

28. Evidence subject to privilege is not a new phenomenon. What made the issue of privilege so problematic in the Arar example is that the government overclaimed it. Commissioner O'Connor is unambiguous in his report on the problem overclaiming caused in his Inquiry. For example, he stated that the

> public hearing part of the Inquiry could have been more comprehensive than it turned out to be, if the Government had not, for over a year, asserted NSC claims over a good deal of information that eventually was made public, either as a result of the Government's decision to re-redact certain documents beginning in June 2005, or through this report. ... This 'overclaiming' occurred despite the Government's assurance at the outset of the Inquiry that its initial NSC claims would reflect its 'considered' position and would be directed at maximizing public disclosure. The Government's initial NSC claims were not supposed to be an opening bargaining position.
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> Arar Report, Analysis, p. 302.

29. Mr. Almalki accepts that there will necessarily be private hearings where NSC claims are made – and vetted – and where NSC evidence is called and tested. He submits the following procedure for such claims and evidence:

(a) Government counsel should heed the words of Commissioner O'Connor when he stated that in "legal and administrative proceedings where the Government makes NSC claims over some information, the single most important factor in trying to ensure public accountability and fairness is for the Government to limit, from the outset, the breadth of those claims to what is truly necessary."

Arar Report, Analysis, p. 304.

(b) NSC claims will be argued *in camera*. Government counsel will have to satisfy the Commissioner that release of the information or evidence "would" be injurious to international relations, national defence, national security or the conduct of any investigation or proceeding, in accordance with para. (k) of the Terms of Reference. Mr. Almalki submits that a strict standard of proof ought to be adopted, in accordance with the English Court of Queen's Bench decision in *Wagstaff* v. *Secretary of State for Health*, [2001] 1 W.L.R. 292 (Q.B.) at para. 99.

(c) Counsel for the parties with standing will be security cleared and permitted to attend the *in camera* hearings. They will do so on the undertaking not to disclose any of the NSC information or evidence, even to their own clients. Their clients will consent to this procedure. Such a model has been used successfully in other complex cases, including most notably the Air India criminal trial, more fully described below.

(d) Commission counsel and counsel for parties with standing will cross-examine on the evidence over which the government has claimed NSC. Where the Commissioner disagrees with government counsel that an NSC claim is properly made, the evidence remains privileged.

(e) Once all *in camera* hearings are complete, any outstanding NSC claims with which the Commissioner does not agree will be assessed by the Federal Court, in accordance with the s. 38 *Canada Evidence Act* procedure.

(f) Any testimony or other evidence that is not subject to an NSC claim will be tendered in public hearings.

30. The Air India model is fully described by Professor Code in his article, "Problems of Process in Litigating Privilege Under the Flexible Wigmore Model." In the Air India prosecution, the Crown possessed the fruits of a seventeen-year long RCMP investigation and CSIS intelligence gathering. Massive amounts of evidence were subject to claims of privilege, including NSC privilege. At the suggestion of Crown counsel, the following procedure was adopted by the Court and counsel:

(a) Defence counsel would obtain consents from their clients permitting counsel to conduct a preliminary review of the withheld material, without further disclosure of the material to anyone, including the client.

(b) Defence counsel then provided a written undertaking to the Crown, in much the same way written undertakings were provided by counsel in the Arar Commission.

(c) After defence counsel's initial review, the materials that were clearly irrelevant or of such marginal utility that they could not overcome a competing interest in NSC, would be returned to the Crown.

(d) Those materials that defence counsel believed should be disclosed would be submitted for reconsideration by the Crown of its initial decision not to disclose.

(e) Any materials that remained in dispute would be submitted to the court in the traditional manner.

Code, Michael, "Problems of Process in Litigating Privilege Under the Flexible Wigmore Model", *LSUC Special Lectures 2003: The Law of Evidence*, Irwin Law 2004, at 272.

31. Professor Code notes in his article that this procedure worked very well, and that counsel were able to resolve the disclosure/privilege dispute in all instances. With good faith among counsel, including government counsel's commitment not to

overclaim, the modified Air India model could be equally successful and efficient in this Inquiry.

32. The Commission's approach to the question of "privacy" in paragraph (e) of the Terms of Reference must also be informed by the Supreme Court of Canada's decision in *Charkaoui*. Importantly, this decision was released after the Order in Council was issued. The Governor General in Council, therefore, did not have the benefit of the Court's important reasoning at the time the Terms were drafted.

> *Charkaoui* v. *Canada (Citizenship and Immigration)*, [2007] S.C.C. 9 (February 23, 2007).

33. In striking down the secret evidence provision in the *Immigration and Refugee Protection Act* ("IRPA"), a unanimous court made important statements on the use of secret evidence and the content of section 7 of the *Charter*:

> 61 In the context of national security, non-disclosure, which may be extensive, coupled with the grave intrusions on liberty imposed on a detainee, makes it difficult, if not impossible, to find substitute procedures that will satisfy s. 7. Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case. Yet the imperative of the protection of society may preclude this. Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world. If s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here.
>
> 62 The only protection the *IRPA* accords the named person is a review by a designated judge to determine whether the certificate is reasonable. The ministers argue that this is adequate in that it maintains a "delicate balance" between the right to a fair hearing and the need to protect confidential security intelligence information. The appellants, on the other hand, argue that the judge's efforts, however conscientious, cannot provide an effective substitute for informed participation.

> 63 I agree with the appellants. ... The fairness of the *IRPA* procedure rests entirely on the shoulders of the designated judge. Those shoulders cannot by themselves bear the heavy burden of assuring, in fact and appearance, that the decision on the reasonableness of the certificate is impartial, is based on a full view of the facts and law, and reflects the named person's knowledge of the case to meet. **The judge, working under the constraints imposed by the *IRPA*, simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing. The judge sees only what the ministers put before him or her. The judge, knowing nothing else about the case, is not in a position to identify errors, find omissions or assess the credibility and truthfulness of the information in the way the named person would be.** Although the judge may ask questions of the named person when the hearing is reopened, the judge is prevented from asking questions that might disclose the protected information. **Likewise, since the named person does not know what has been put against him or her, he or she does not know what the designated judge needs to hear. If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is sufficient or reliable.** Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information.
>
> 64 ...The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?
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> *Charkaoui, ibid* at paras. 62-62 (emphasis added).

34. Although Mr. Almalki's liberty interest is not at stake in this Inquiry, there is no question that principles of fundamental justice and procedural fairness govern the conduct of these proceedings. His reputational interest in the outcome of this Inquiry requires that the Commissioner reach his conclusions through "an open and fair

procedure ... with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker".

> *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 22.

35. Similarly, Commissioner O'Connor found that "[p]arties who have an interest in the outcome of legal proceedings generally are entitled to a broad range of discovery or disclosure about the matters in issue. Procedural fairness, in general terms at least, requires that parties (those who will be affected by the outcome) have access to information that may affect their interests so that they can adequately respond if necessary."

> Ruling on Process and Procedural Issues, Appendix 6(I), Factual Background, Vol. II, page 763.

36. The Supreme Court of Canada's views on the issue of procedural fairness in an Inquiry such are unequivocal. Commissioner O'Connor referred to this statement by Le Dain J. in concluding that the Commission owed Mr. Arar a duty of procedural fairness: "[A]s a general common law principle, a duty of procedural fairness [lies] in every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."

> *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at para. 14.
> Ruling on Process and Procedural Issues, *ibid.*

37. Moreover, it is submitted that this Inquiry, although an administrative proceeding, must not derogate from the core principle that a person is entitled to "the

right to meet the case". Professor Code refers to this term as one used in civil, criminal and administrative law, and which requires that a person hear the evidence put against him and be afforded the opportunity to challenge that evidence by way of cross-examination and/or rebutting evidence. In the post-*Charter* era, the Court has held that the "right to call and challenge evidence" and "the right to cross-examine" are section 7 principles of fundamental justice.

> Code, Michael and Roach, Kent, "The Role of the Independent Lawyer and Security Certificates" (2006) 52 Crim.L.Q. 85.
> *R. v. Lyttle,* [2004] 1 S.C.R. 193.

38. The Court in *Charkaoui* concluded that the secret hearing provision in IRPA contravened section 7 and did not meet the minimal impairment test under section 1 because the Federal Court judge was not an adequate substitute for the traditional adversarial model. Mr. Almalki submits that without his counsels' participation in the in camera hearings, the requirement of procedural fairness and fundamental justice will not be met. Without his counsels' vetting of the evidence tendered by the Government, the fairness of the Inquiry rests entirely on the shoulders of the Commissioner and his counsel. To paraphrase the Court in *Charkaoui*, those shoulders cannot by themselves bear the heavy burden of assuring, in fact and appearance, that the search for the truth at the core of the Inquiry's mandate will be based on a full view of the facts and law, and reflects Mr. Almalki's knowledge of the case to meet.

39. To be sure, in many cases it will only be Mr. Almalki, or his well-informed counsel, who has the necessary information to challenge the confidential

information and place it in context. Only in this way can the Commissioner arrive at the truth, and only in this way can Mr. Almalki be assured of a credible opportunity to clear his name.

(4) IF THE COMMISSIONER DECIDES THAT SOME PARTICIPANTS ARE NOT ENTITLED TO ATTEND A HEARING CONDUCTED IN PRIVATE, WHAT IF ANY STEPS SHOULD HE TAKE TO ENSURE THAT THOSE PARTICIPANTS CAN PARTICIPATE APPROPRIATELY IN THE INQUIRY'S PROCESS

40. Based on the model described under issue (3), above, it is submitted that only hearings where evidence subject to NSC claims will be conducted in private. In those private hearings, counsel for parties with standing will be present and have rights of cross-examination. In all other instances, the hearings will be public.

41. Depending on the extent of the evidence called in private hearings, the Commissioner may consider preparing summaries of the evidence, much like was done in the latter days of the Security and Intelligence Review Committee process.

42. It is hoped, however, that with the overarching commitment not to overclaim NSC reflected in the preamble to the Terms of Reference, and mandated by Commissioner O'Connor and the Court in *Charkaoui*, very little evidence will be called in private.

(5) WHAT CONSIDERATIONS SHOULD THE COMMISSIONER TAKE INTO ACCOUNT IN DETERMINING, IN ACCORDANCE WITH PARAGRAPH (E) OF THE TERMS OF REFERENCE, WHETHER HE IS SATISFIED THAT IT IS ESSENTIAL TO ENSURE THE EFFECTIVE CONDUCT OF THE INQUIRY THAT SPECIFIC PORTIONS OF THE INQUIRY BE CONDUCTED IN PUBLIC?

43. Mr. Almalki adopts the submissions of Mr. Nureddin on the importance of holding as much of the Inquiry as possible, in light of the compelling line of authorities dealing with the "open court" principle.

44. Mr. Almalki submits that, at a minimum, all evidence relevant to the following issues must be called in public hearings, as these issues are of general but important public interest, and indeed, may affect a great number of Canadian citizens, particularly those who travel abroad:

(a) *Embassy and consular conduct*: the Canadian public has an interest in being fully aware of the type of consular services available and the nature of the work done for Canadians abroad by DFAIT and Consular Services Sections of Canadian Embassies;

(b) *The Canadian government's practice and policy on torture*: The legal prohibition against torture is absolute and knows of no exceptions. Canada is a signatory to international treaties confirming this normative principle, including the CAT. The Canadian public has an interest in knowing whether its government is or has been indifferent to the possibility a Canadian detainee may be tortured, or has relied on evidence obtained under torture;

(c) *Information sharing with foreign regimes*: the competence of CSIS and the RCMP, particularly as it relates to information sharing and requests to detain Canadians traveling abroad, are matters of critical public importance, particularly now when confidence in these agencies is notoriously low.

45. In all of these areas, the Inquiry can only inspire public confidence if there is transparency and openness. It is submitted that the Commissioner exercise his power under paragraph (e) of the Terms of Reference to hold public hearings wherever matters related to these spheres are at issue.

(6) WHAT OTHER ASPECTS OF THE INQUIRY'S DRAFT GENERAL RULES OF PROCEDURE AND PRACTICE MAY BE OF CONCERN?

46. Given the limited time and resources Mr. Almalki had leading up to the filing of his factum, his counsel was unable to consider fully all of the implications of the Draft Rules. While counsel may have comments about other provisions in reply submissions or at the hearing, the following comments are provided with respect to paragraphs 2, 11, 13, 17 and 21.

47. *Paragraph 2:* Mr. Almalki agrees with this Rule but submits that the goal of an "expedited" hearing should be accorded the least weight. This Inquiry's first and foremost responsibility is to search for the truth – a fact-finding inquiry can do no less. As Commissioner Iacobucci himself has stated in respect of commissions of inquiry, "the basic focus must be the search for truth and not the defeat or subjection of opposed interests." It would be inconsistent with the first paragraph of the preamble to the Terms of Reference, and with principles of fundamental justice discussed above, for

the Inquiry to sacrifice thoroughness and fairness in order to meet an arbitrary deadline of January 31, 2008.

> Iacobucci, Frank, "Commissions of Inquiry and Public Policy in Canada" in Pross, A., Christie, I. and Yogis, J., eds., *Commissions of Inquiry* (Toronto: Carswell, 1990) 21 at 26.

48. *Paragraph 11:* Mr. Almalki's submissions under issue (3) above, are relevant to this paragraph and will not be repeated here. It should be emphasized, however, that by setting private hearings as the norm, with public hearings being the exception, the Inquiry rewards the government for overclaiming NSC, behaviour that both the Supreme Court of Canada and Commissioner O'Connor have criticized. It is also inconsistent with inquiries called under the *Inquiries Act* to relegate the majority of the Commission's work to private hearings; had the Governor General in Council intended for a purely private investigative mechanism, she would have adopted the approach recommended by Commissioner O'Connor at page 278 of his Report (*Analysis*). There, he suggested the type of process recommended by Bob Rae for reviewing the investigations in the Air India case, which involved an inquiry pursuant to a Cabinet Order in Council, not the *Act*, where the commissioner would not have subpoena powers, and where a wide latitude for determining what would be public/private would be given. It is untenable for the government to call a public inquiry under the *Act* and then expect it to be done in private.

49. *Paragraph 13:* It is submitted that such evidence or information cannot include that obtained under torture. To do otherwise would be to violate CAT, among other laws. Furthermore, counsel for the parties with standing must be given the opportunity to test the evidence and make submissions to the Commissioner as to what weight ought to be given to such evidence.

50. *Paragraph 17:* It should be borne in mind that the standard for claiming NSC is higher in the Terms of Reference than in the *Canada Evidence Act* (CEA). In paragraph (k), the Commissioner is directed to prevent the disclosure of information that "would be injurious" to international relations, national defence, etc. The test in section 38 of the CEA is that disclosure "could" be injurious. The "would be injurious" standard is more stringent.

51. *Paragraph 21:* It is unclear where in the process the proposed findings would be offered. Will they be prepared before witnesses are examined? Counsel for the parties with standing should be given an opportunity to review the proposed findings in draft, and offer comments thereon. Moreover, in light of their proposed rights of cross-examination, it should be open to these parties to reverse those findings.

PART IV—THE NATURE OF RULING REQUESTED

52. Mr. Almalki requests that the Commissioner adopt the recommendations set out in this factum, and as may be supplemented at the hearing on April 17, 2007.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 11, 2007

JASMINKA KALAJDZIC
Solicitor for Abdullah Almalki

Paul Copeland per JK

PAUL COPELAND
Solicitor for Abdullah Almalki

#480996

SCHEDULE "A"—LIST OF CASES

1. Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar, Analysis and Recommendations, Factual Background, vol I and II,* (Ottawa: Public Works and Government Services, 2006) at 278 ("Arar Report")

2. *Phillips* v. *Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97

3. *Wagstaff* v. *Secretary of State for Health*, [2001] 1 W.L.R. 292 (Q.B.)

4. Code, Michael, "Problems of Process in Litigating Privilege Under the Flexible Wigmore Model", *LSUC Special Lectures 2003: The Law of Evidence*, Irwin Law 2004

5. *Charkaoui* v. *Canada (Citizenship and Immigration)*, [2007] S.C.C. 9 (February 23, 2007)

6. *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

7. *Cardinal* v. *Director of Kent Institution*, [1985] 2 S.C.R. 643

8. Code, Michael and Roach, Kent, "The Role of the Independent Lawyer and Security Certificates" (2006) 52 Crim.L.Q. 85

9. *R.* v. *Lyttle,* [2004] 1 S.C.R. 193

10. Iacobucci, Frank, "Commissions of Inquiry and Public Policy in Canada" in Pross, A., Christie, I. and Yogis, J., eds., *Commissions of Inquiry* (Toronto: Carswell, 1990) 21

SCHEDULE "B"

1. ***Inquiries Act*, R.S., c.I-11; Charter of Rights and Freedoms**

PART I
PUBLIC INQUIRIES

Inquiry

2. The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

R.S., c. I-13, s. 2.

Appointment of commissioners

3. Where an inquiry as described in section 2 is not regulated by any special law, the Governor in Council may, by a commission, appoint persons as commissioners by whom the inquiry shall be conducted.

R.S., c. I-13, s. 3.

Powers of commissioners concerning evidence

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to

(*a*) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and

(*b*) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

R.S., c. I-13, s. 4.

Idem, enforcement

5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

R.S., c. I-13, s. 5.

PART II
DEPARTMENTAL INVESTIGATIONS

Appointment of commissioners

6. The minister presiding over any department in the federal public administration may appoint, under the authority of the Governor in Council, a commissioner or commissioners to investigate and report on the state and management of the business, or any part of the business, of the department, either in the inside or outside service thereof, and the conduct of any person in that service, so far as the same relates to the official duties of the person.

R.S., 1985, c. I-11, s. 6; 2003, c. 22, s. 174.

Powers of commissioners

7. For the purposes of an investigation under section 6, the commissioners

(*a*) may enter into and remain within any public office or institution, and shall have access to every part thereof;

(*b*) may examine all papers, documents, vouchers, records and books of every kind belonging to the public office or institution;

(*c*) may summon before them any person and require the person to give evidence, orally or in writing, and on oath or, if the person is entitled to affirm in civil matters on solemn affirmation; and

(*d*) may administer the oath or affirmation under paragraph (*c*).

R.S., c. I-13, s. 7.

Subpoena or summons

8. (1) The commissioners may, under their hands, issue a subpoena or other request or summons, requiring and commanding any person therein named

(*a*) to appear at the time and place mentioned therein;

(*b*) to testify to all matters within his knowledge relative to the subject-matter of an investigation; and

(*c*) to bring and produce any document, book or paper that the person has in his possession or under his control relative to the subject-matter of the investigation.

Idem

(2) A person may be summoned from any part of Canada by virtue of a subpoena, request or summons issued under subsection (1).

Expenses
(3) Reasonable travel expenses shall be paid at the time of service of a subpoena, request or summons to any person summoned under subsection (1).
R.S., c. I-13, s. 8.
Evidence taken by commission
9. (1) In lieu of requiring the attendance of a person whose evidence is desired, the commissioners may, if they deem it advisable, issue a commission or other authority to any officer or person named therein, authorizing the officer or person to take the evidence and report it to the commissioners.
Powers for that purpose
(2) An officer or person authorized under subsection (1) shall, before entering on any investigation, be sworn before a justice of the peace faithfully to execute the duty entrusted to the officer or person by the commission, and, with regard to the taking of evidence, has the powers set out in subsection 8(1) and such other powers as a commissioner would have had if the evidence had been taken before a commissioner.
R.S., c. I-13, s. 9.
Witnesses failing to attend, etc.
10. (1) Every person who
(*a*) being required to attend in the manner provided in this Part, fails, without valid excuse, to attend accordingly,
(*b*) being commanded to produce any document, book or paper, in his possession or under his control, fails to produce the same,
(*c*) refuses to be sworn or to affirm, or
(*d*) refuses to answer any proper question put to him by a commissioner, or other officer or person referred to in section 9,
is liable, on summary conviction before any provincial court judge, or judge of a superior or county court, having jurisdiction in the county or district in which that person resides, or in which the place is situated at which the person was required to attend, to a fine not exceeding four hundred dollars.
Justice of the peace
(2) For the purposes of this Part, a judge of a superior or county court referred to in subsection (1) shall be a justice of the peace.
R.S., 1985, c. I-11, s. 10; R.S., 1985, c. 27 (1st Supp.), s. 203.

PART III
GENERAL

Employment of counsel, experts and assistants
11. (1) The commissioners, whether appointed under Part I or under Part II, may, if authorized by the commission issued in the case, engage the services of
(*a*) such accountants, engineers, technical advisers or other experts, clerks, reporters and assistants as they deem necessary or advisable; and
(*b*) counsel to aid and assist the commissioners in an inquiry.
Experts may take evidence and report
(2) The commissioners may authorize and depute any accountants, engineers, technical advisers or other experts, the services of whom are engaged under subsection (1), or any other qualified persons, to inquire into any matter within the scope of the commission as may be directed by the commissioners.
Powers
(3) The persons deputed under subsection (2), when authorized by order in council, have the same powers as the commissioners have to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence, and otherwise conduct the inquiry.
Report
(4) The persons deputed under subsection (2) shall report the evidence and their findings, if any, thereon to the commissioners.
R.S., c. I-13, s. 11.
Parties may employ counsel
12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of an investigation, to be represented by counsel.
R.S., c. I-13, s. 12.
Notice to persons charged

13. No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.
R.S., c. I-13, s. 13.

PART IV
INTERNATIONAL COMMISSIONS AND TRIBUNALS

Authority to confer powers on

14. (1) The Governor in Council may, whenever the Governor in Council deems it expedient, confer on an international commission or tribunal all or any of the powers conferred on commissioners under Part I.

Exercise of powers in Canada

(2) The powers conferred on an international commission or tribunal pursuant to subsection (1) may be exercised by the commission or tribunal in Canada, subject to such limitations and restrictions as the Governor in Council may impose, in respect of all matters that are within the jurisdiction of the commission or tribunal.
R.S., c. I-13, s. 14.

2. ***Canada Evidence Act*, s. 38**

International Relations and National Defence and National Security

Definitions	**38.** The following definitions apply in this section and in sections 38.01 to 38.15.
"judge" « *juge* »	"judge" means the Chief Justice of the Federal Court or a judge of the Federal Court--Trial Division designated by the Chief Justice to conduct hearings under section 38.04.
"participant" « *participant* »	"participant" means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information.
"potentially injurious information" « *renseignements potentiellement préjudiciables* »	"potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.
"proceeding" « *instance* »	"proceeding" means a proceeding before a court, person or body with jurisdiction to compel the production of information.
"prosecutor" « *poursuivant* »	"prosecutor" means an agent of the Attorney General of Canada or of the Attorney General of a province, the Director of Military Prosecutions under the *National Defence Act* or an individual who acts as a prosecutor in a proceeding.
"sensitive information" « *renseignements sensibles* »	"sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard. R.S., 1985, c. C-5, s. 38; 2001, c. 41, s. 43.
Notice to Attorney General of Canada	**38.01** (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.
During a proceeding	(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the

person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Notice of disclosure from official

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Military proceedings

(5) In the case of a proceeding under Part III of the *National Defence Act*, notice under any of subsections (1) to (4) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Exception

(6) This section does not apply when
(*a*) the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding;
(*b*) the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under section 38, this section and sections 38.02 to 38.13, 38.15 and 38.16;
(*c*) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or
(*d*) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

Exception

(7) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (6)(*c*) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter with the person presiding under subsection (2).

Schedule

(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.
2001, c. 41, s. 43.

Disclosure prohibited

38.02 (1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding
(*a*) information about which notice is given under any of subsections 38.01(1) to (4);
(*b*) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);
(*c*) the fact that an application is made to the Federal Court--Trial Division under section 38.04 or that an appeal or review of an order made under any of subsections 38.06(1) to (3) in connection with the application is instituted; or
(*d*) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).

Entities

(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.

Exceptions

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

(*a*) the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or

(*b*) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

2001, c. 41, s. 43.

Authorization by Attorney General of Canada

38.03 (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, the Attorney General of Canada may authorize disclosure only with the agreement of the Minister of National Defence.

Notice

(3) The Attorney General of Canada shall, within 10 days after the day on which he or she first receives a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under section 38.01 about that information of his or her decision with respect to disclosure of the information.

2001, c. 41, s. 43.

Disclosure agreement

38.031 (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(*b*) to (*d*) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court--Trial Division under paragraph 38.04(2)(*c*), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

No application to Federal Court

(2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court--Trial Division under paragraph 38.04(2)(*c*) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).

2001, c. 41, s. 43.

Application to Federal Court -- Attorney General of Canada

38.04 (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court--Trial Division for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).

Application to Federal Court -- general

(2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section 38.031, authorizes the disclosure of only part of the information or disclosure subject to any conditions,

(*a*) the Attorney General of Canada shall apply to the Federal Court--Trial Division for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;

(*b*) a person, other than a witness, who is required to disclose information in

connection with a proceeding shall apply to the Federal Court--Trial Division for an order with respect to disclosure of the information; and
(*c*) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court--Trial Division for an order with respect to disclosure of the information.

Notice to Attorney General of Canada

(3) A person who applies to the Federal Court--Trial Division under paragraph (2)(*b*) or (*c*) shall provide notice of the application to the Attorney General of Canada.

Court records

(4) An application under this section is confidential. Subject to section 38.12, the Administrator of the Federal Court may take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

Procedure

(5) As soon as the Federal Court--Trial Division is seized of an application under this section, the judge
(*a*) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;
(*b*) shall decide whether it is necessary to hold any hearing of the matter;
(*c*) if he or she decides that a hearing should be held, shall
(i) determine who should be given notice of the hearing,
(ii) order the Attorney General of Canada to notify those persons, and
(iii) determine the content and form of the notice; and
(*d*) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

Disclosure agreement

(6) After the Federal Court--Trial Division is seized of an application made under paragraph (2)(*c*) or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,
(*a*) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(*b*) to (*d*) or part of the information, or disclosure of the facts or information subject to conditions; and
(*b*) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.

Termination of Court consideration, hearing, review or appeal

(7) Subject to subsection (6), after the Federal Court--Trial Division is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.
2001, c. 41, s. 43.

Report relating to proceedings

38.05 If he or she receives notice of a hearing under paragraph 38.04(5)(*c*), a person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside may, within 10 days after the day on which he or she receives the notice, provide the judge with a report concerning any matter relating to the proceeding that the person considers may be of assistance to the judge.

2001, c. 41, s. 43.

Disclosure order

38.06 (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.

Disclosure order

(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

Order confirming prohibition

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.

Evidence

(3.1) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.

Introduction into evidence

(4) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (2) but who may not be able to do so in a proceeding by reason of the rules of admissibility that apply in the proceeding may request from a judge an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection (2).

Relevant factors

(5) For the purpose of subsection (4), the judge shall consider all the factors that would be relevant for a determination of admissibility in the proceeding.
2001, c. 41, s. 43.

Notice of order

38.07 The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.
2001, c. 41, s. 43.

Automatic review

38.08 If the judge determines that a party to the proceeding whose interests are adversely affected by an order made under any of subsections 38.06(1) to (3) was not given the opportunity to make representations under paragraph 38.04(5)(*d*), the judge shall refer the order to the Federal Court of Appeal for review.
2001, c. 41, s. 43.

Appeal to Federal Court of Appeal

38.09 (1) An order made under any of subsections 38.06(1) to (3) may be appealed to the Federal Court of Appeal.

Limitation period for appeal

(2) An appeal shall be brought within 10 days after the day on which the order is made or within any further time that the Court considers appropriate in the circumstances.
2001, c. 41, s. 43.

Limitation periods for appeals to Supreme Court of Canada

38.1 Notwithstanding any other Act of Parliament,
(*a*) an application for leave to appeal to the Supreme Court of Canada from a judgment made on appeal shall be made within 10 days after the day on which the judgment appealed from is made or within any further time that the Supreme Court of Canada considers appropriate in the circumstances; and
(*b*) if leave to appeal is granted, the appeal shall be brought in the manner set out in subsection 60(1) of the *Supreme Court Act* but within the time specified by the Supreme Court of Canada.

2001, c. 41, s. 43.

Special rules

38.11 (1) A hearing under subsection 38.04(5) or an appeal or review of an order made under any of subsections 38.06(1) to (3) shall be heard in private and, at the request of either the Attorney General of Canada or, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, shall be heard in the National Capital Region, as described in the schedule to the *National Capital Act*.

Ex parte representations

(2) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may give any person who makes representations under paragraph 38.04(5)(*d*), and shall give the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, the opportunity to make representations *ex parte*.

2001, c. 41, s. 43.

Protective order

38.12 (1) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may make any order that the judge or the court considers appropriate in the circumstances to protect the confidentiality of the information to which the hearing, appeal or review relates.

Court records

(2) The court records relating to the hearing, appeal or review are confidential. The judge or the court may order that the records be sealed and kept in a location to which the public has no access.

2001, c. 41, s. 43.

Certificate of Attorney General of Canada

38.13 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, the Attorney General of Canada may issue the certificate only with the agreement, given personally, of the Minister of National Defence.

Service of certificate

(3) The Attorney General of Canada shall cause a copy of the certificate to be served on

(*a*) the person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside;

(*b*) every party to the proceeding;

(*c*) every person who gives notice under section 38.01 in connection with the proceeding;

(*d*) every person who, in connection with the proceeding, may disclose, is required to disclose or may cause the disclosure of the information about which the Attorney General of Canada has received notice under section 38.01;

(*e*) every party to a hearing under subsection 38.04(5) or to an appeal of an order made under any of subsections 38.06(1) to (3) in relation to the information;

(*f*) the judge who conducts a hearing under subsection 38.04(5) and any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3) in relation to the information; and

(*g*) any other person who, in the opinion of the Attorney General of Canada,

should be served.

Filing of certificate

(4) The Attorney General of Canada shall cause a copy of the certificate to be filed
(*a*) with the person responsible for the records of the proceeding to which the information relates; and
(*b*) in the Registry of the Federal Court and the registry of any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3).

Effect of certificate

(5) If the Attorney General of Canada issues a certificate, then, notwithstanding any other provision of this Act, disclosure of the information shall be prohibited in accordance with the terms of the certificate.

Statutory Instruments Act does not apply

(6) The *Statutory Instruments Act* does not apply to a certificate issued under subsection (1).

Publication

(7) The Attorney General of Canada shall, without delay after a certificate is issued, cause the certificate to be published in the *Canada Gazette*.

Restriction

(8) The certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with section 38.131.

Expiration

(9) The certificate expires 15 years after the day on which it is issued and may be reissued.
2001, c. 41, s. 43.

Application for review of certificate

38.131 (1) A party to the proceeding referred to in section 38.13 may apply to the Federal Court of Appeal for an order varying or cancelling a certificate issued under that section on the grounds referred to in subsection (8) or (9), as the case may be.

Notice to Attorney General of Canada

(2) The applicant shall give notice of the application to the Attorney General of Canada.

Military proceedings

(3) In the case of proceedings under Part III of the *National Defence Act*, notice under subsection (2) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Single judge

(4) Notwithstanding section 16 of the *Federal Court Act*, for the purposes of the application, the Federal Court of Appeal consists of a single judge of that Court.

Admissible information

(5) In considering the application, the judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base a determination made under any of subsections (8) to (10) on that evidence.

Special rules and protective order

(6) Sections 38.11 and 38.12 apply, with any necessary modifications, to an application made under subsection (1).

Expedited consideration

(7) The judge shall consider the application as soon as reasonably possible, but not later than 10 days after the application is made under subsection (1).

Varying the certificate

(8) If the judge determines that some of the information subject to the certificate does not relate either to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to national defence or security, the judge shall make an order varying the certificate accordingly.

Cancelling the certificate

(9) If the judge determines that none of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to national defence or security, the judge shall make an order cancelling the certificate.

Confirming the certificate

(10) If the judge determines that all of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to national defence or security, the judge shall make an order confirming the certificate.

Determination is final

(11) Notwithstanding any other Act of Parliament, a determination of a judge under any of subsections (8) to (10) is final and is not subject to review or appeal by any court.

Publication

(12) If a certificate is varied or cancelled under this section, the Attorney General of Canada shall, as soon as possible after the decision of the judge and in a manner that mentions the original publication of the certificate, cause to be published in the *Canada Gazette*
(*a*) the certificate as varied under subsection (8); or
(*b*) a notice of the cancellation of the certificate under subsection (9).
2001, c. 41, s. 43.

Protection of right to a fair trial

38.14 (1) The person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of subsections 38.06(1) to (3) in relation to that proceeding, any judgment made on appeal from, or review of, the order, or any certificate issued under section 38.13.

Potential orders

(2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:
(*a*) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;
(*b*) an order effecting a stay of the proceedings; and
(*c*) an order finding against any party on any issue relating to information the disclosure of which is prohibited.
2001, c. 41, s. 43.

Fiat

38.15 (1) If sensitive information or potentially injurious information may be disclosed in connection with a prosecution that is not instituted by the Attorney General of Canada or on his or her behalf, the Attorney General of Canada may issue a fiat and serve the fiat on the prosecutor.

Effect of fiat

(2) When a fiat is served on a prosecutor, the fiat establishes the exclusive authority of the Attorney General of Canada with respect to the conduct of the prosecution described in the fiat or any related process.

Fiat filed in court

(3) If a prosecution described in the fiat or any related process is conducted by or on behalf of the Attorney General of Canada, the fiat or a copy of the fiat shall be filed with the court in which the prosecution or process is conducted.

Fiat constitutes conclusive proof

(4) The fiat or a copy of the fiat
(*a*) is conclusive proof that the prosecution described in the fiat or any related process may be conducted by or on behalf of the Attorney General of Canada; and
(*b*) is admissible in evidence without proof of the signature or official character of the Attorney General of Canada.

Military proceedings

(5) This section does not apply to a proceeding under Part III of the *National Defence Act*.
2001, c. 41, s. 43.

Regulations

38.16 The Governor in Council may make any regulations that the Governor in Council considers necessary to carry into effect the purposes and provisions of sections 38 to 38.15, including regulations respecting the notices, certificates and the fiat.

2001, c. 41, s. 43.

Confidences of the Queen's Privy Council for Canada

Objection relating to a confidence of the Queen's Privy Council

39. (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction

3. ***Charter of Rights and Freedoms,* s. 1, 7**

GUARANTEE OF RIGHTS AND FREEDOMS

RIGHTS AND FREEDOMS IN CANADA.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

LEGAL RIGHTS

LIFE, LIBERTY AND SECURITY OF PERSON.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Schedule "C"

INDEX

1. Less redacted extract from the Information to Obtain the 7 Search Warrants executed on January 22nd, 2002.

2. E-mail exchanges with the Ambassador from Egypt regarding possible Egyptian participation in the Inquiry.

3. Notification dated October 10, 2006 regarding covert entry General Warrant dated October 16, 2001 and related correspondence.

4. Notification dated September 6, 2006 re: interception of private communications Authorization, dated October 16th, 2001 for Abdullah Almalki and Kalifah Khuzaimah and related correspondence.

5. Notice dated December 2, 2003 regarding General Warrant to examine luggage issued on November 30th, 2001 and related correspondence as follows:

    a. Letter dated August 19, 2005 to Shirley Heafey, Commission for the Public Complaints Against the RCMP.

    b. Letter to Justice Dorval dated September 27, 2005.

    c. Letter to Justice Dorval dated October 19, 2005.

    d. Letter from Justice Dorval dated November 1, 2005.

    e. Letter from RCMP dated April 27, 2006.

    f. Letter to RCMP dated May 4, 2006.

6. List of items we want to obtain from CSIS

7. List of items we want to obtain from Foreign Affairs

8. Material concerning complaint to SIRC re: CSIS and evidence obtained by torture.

9. Report of Professor Stephen J. Toope, Fact Finder. October 14, 2005. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar.

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