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

OUTLINE OF SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA ON THE TERMS OF REFERENCE AND DRAFT RULES OF PROCEDURE AND PRACTICE

John H. Sims
Deputy Attorney General of Canada
Department of Justice
Litigation Branch
Bank of Canada Building
234 Wellington Street
10th Floor, East Tower, Room 1012
K1A 0H8

Per: Michael Peirce

Tel: (613) 948-9800
Fax: (613) 948-9802

Lead Counsel for the Attorney General of Canada

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INDEX

Introduction 3

Part One

General Observations 3

Part Two

Question 1 4

Question 2 6

Question 3 7

Question 4 8

Question 5 10

Part Three

Submissions on Rules of Procedure and Practice 12

INTRODUCTION

1. This outline of the submissions of the Attorney General of Canada is in response to the Supplementary Notice of Hearing dated March 27, 2007 requesting submissions on: (i) five questions arising from the Internal Inquiry's Terms of Reference[1]; and (ii) any aspect of the Internal Inquiry's Draft General Rules of Procedure and Practice (the "Rules").

2. This outline is divided into three parts. Part One offers general observations to guide the Commissioner in the course of his consideration of the Terms of Reference and the Rules. Part Two provides detailed answers to the questions raised in the Supplementary Notice. Part Three identifies a number of items for consideration prior to finalizing the Rules.

PART ONE - GENERAL OBSERVATIONS

3. The *Inquiries Act*[2] and the Terms of Reference provide the necessary framework to determine the proper process for the Internal Inquiry to follow. The Attorney General of Canada makes five general observations in this regard.

4. First, the calling of this Internal Inquiry represents the Government's commitment to the implementation of one of the recommendations arising from the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Inquiry"). Commissioner O'Connor recommended that the actions of Canadian officials in relation to Messrs. Almalki, Elmaati and Nureddin be reviewed through (i) a process other than a public inquiry; and (ii) a process which nevertheless remained independent, credible and inspired public confidence in its outcome.

5. Second, as the Terms of Reference unambiguously state, this is an Internal Inquiry. It is necessarily internal to government and shall be conducted in private subject to a limited and specific exception as set forth in paragraph (e). Nevertheless, as the

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[1] Order in Council P.C. 2006-1526
[2] *Inquiries Act*, R.S.C. 1985, c. I-11

Commissioner has confirmed, the Internal Inquiry shall be conducted independently, thoroughly and expeditiously so as to inspire public confidence in its outcome.

6. Third, this is an Internal Inquiry into the actions of Canadian officials and no one else. The Terms of Reference are specific and exhaustive in this respect. Accordingly, this is not an inquiry into the actions of Messrs. Almalki, Elmaati and Nureddin. The Terms of Reference do not provide a vehicle by which these individuals can properly seek to clear their names. To suggest otherwise is to suggest that this is equally an appropriate process by which to condemn these individuals. That is clearly not the case.

7. Fourth, this Internal Inquiry is an investigative and inquisitorial proceeding, not a judicial or adversarial one. There is no right or wrong answer and no individual's specific interests are to be served. Rather, this is ultimately a fact-finding exercise which will enable the Commissioner to answer the three specific questions set out in paragraph (a) of the Terms of Reference.

8. Fifth, the Terms of Reference establish a deadline of January 31, 2008, by which the Commissioner is required to report to the Governor in Council. As the Commissioner stated in his *Ruling on Participation and Funding*, time is of the essence. Accordingly, the Internal Inquiry must be focussed and surgical in its approach and must necessarily limit itself to the clear mandate entrusted to it in the Terms of Reference.

PART TWO – SUBMISSIONS ON THE QUESTIONS

Question One - What is the meaning of the phrase "any mistreatment" as it appears in paragraph (a)(iii) of the Terms of Reference?

9. The term "mistreatment" is not, and was not at the material time, a standard known to international law; nor is it a well-established standard in domestic jurisprudence, certainly not in a sense that would be relevant to its meaning here.

10. The term "mistreatment" takes its meaning from the manner in which it is used in paragraph (a)(iii) and from the Terms of Reference more broadly, as well as from the general context in which this Internal Inquiry has been called.

11. The specific language of paragraph (a)(iii) suggests a low threshold. There are no qualifiers used to describe either the kind of mistreatment or the extent of the mistreatment in issue. It does not refer to physical or psychological mistreatment. Similarly, it does not refer to serious or extreme mistreatment. Rather, it merely refers to "any mistreatment."

12. The phrase "any mistreatment" contemplates a threshold of treatment that is clearly less severe than either "torture" or "cruel, inhuman, or degrading treatment or punishment," as those terms are defined in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the case law which has since emerged.

13. That this is a low threshold is consistent with the role that the term "mistreatment" serves in paragraph (a)(iii). The reference to "any mistreatment" is not meant to impose a threshold preventing further inquiry under that paragraph, just as the term "detention" is not meant to limit in any significant way the inquiry under paragraph (a)(i).

14. Instead, the phrase "any mistreatment" is simply a reference that frames the subject matter of the inquiry under paragraph (a)(iii), an inquiry that considers whether any mistreatment of Messrs. Almalki, Elmaati or Nureddin resulted, directly or indirectly, from the actions of Canadian officials and, if so, whether those actions were deficient.

15. It is not contested that Messrs. Almalki, Elmaati and Nureddin were held in extremely difficult conditions in Syria and that Mr. Elmaati was further detained in Egypt.

16. It is acknowledged at this time and for the purposes of this Internal Inquiry that detention in those conditions constitutes mistreatment capable of engaging paragraph (a)(iii) of the Terms of Reference.

17. The question remains, however, whether any mistreatment resulted directly or indirectly from the actions of Canadian officials and, if so, whether those actions were deficient.

Question Two - 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, Messrs. Almalki, Elmaati and Nureddin were tortured in Syria and Egypt?

18. The Commissioner is not called upon to determine whether Messrs. Almalki, Elmaati and Nurreddin were subjected to torture. If the Governor in Council intended the Commissioner to make that determination, it would have unambiguously stated so. Instead, the Terms of Reference refer to "any mistreatment."

19. As discussed above, "mistreatment" contemplates a low threshold that is less severe than "torture." Once mistreatment is established, the Commissioner is mandated to determine whether the mistreatment resulted directly or indirectly from the actions of Canadian officials and whether those actions were deficient.

20. For the purposes of this Internal Inquiry, the Government acknowledges that the "mistreatment" threshold contemplated in paragraph (a)(iii) of the Terms of Reference is met. In order to fulfil his mandate, the Commissioner need not determine whether any other threshold, such as torture, has been met.

21. Finally, it is not evident that the issue of whether these individuals were tortured is capable of a definitive finding in the circumstances, certainly not absent the participation of Syria and Egypt in this Internal Inquiry. Therefore, to pursue this issue may jeopardize the ability of the Commissioner to report by January 31, 2008, despite the fact that the issue neither comes within the Terms of Reference nor furthers the ultimate determination the Commissioner is called upon to make.

Question Three - 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?

22. Paragraph (d) must be interpreted and applied in the context of the entirety of the Terms of Reference, the *Canada Evidence Act*[3] (CEA) and the *Government Security*

[3] R.S.C. 1985, c. C-5

Policy[4], which are specifically mentioned in the Terms of Reference.[5] Paragraph (d) requires that the Commissioner must conduct proceedings in the absence of the public and all persons who do not satisfy the two-pronged test of the *Policy* (i.e. persons with the appropriate level of security clearance who "need to know").

23. In addition, in order to determine who may properly attend the hearings conducted "in private", it is necessary to consider the meaning of that expression. The specific meaning of "in private" flows from the context in which it is used.[6] "In private" generally means "in camera" and may mean "*ex parte*". A hearing held "in camera" excludes members of the public, in the broadest possible sense, but may include parties to a proceeding; a proceeding *ex parte* excludes the other parties to the proceeding from appearing to make representations.[7]

24. The Commissioner shares with the Attorney General of Canada the responsibility to take all steps necessary to prevent the disclosure of sensitive or potentially injurious information,[8] as those expressions are defined by section 38 of the *CEA*. This shared responsibility imposes obligations. In the context of the Internal Inquiry, where National Security Confidentiality (NSC) is engaged, there is no room for error. Indeed, the cost of failure is high in matters of national security.[9] Accordingly, the expression "in private" must be interpreted to ensure the protection of NSC while permitting the thorough and expeditious conduct of the Internal Inquiry. In this context, "in private" must be interpreted to mean both in camera and *ex parte*.

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[4] http://www.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_12A/gsp-psg_e.asp. Appendix "B" to the *Policy* defines "need to know" as meaning "the need for someone to access and know information in order to perform his or her duties."

[5] At par. (l), (o), (p) and (q)

[6] The phrase "in private" appears in numerous federal Acts, including the *Canada Evidence Act,* the *Competition Act,* the *Access to Information Act,* the *Official Languages Act,* the *Privacy Act,* the *CSIS Act,* the *RCMP Act,* etc. It is used in those Acts to ensure the protection of confidential information in the course of an investigation or adjudication, as the case may be. The phrase has also been judicially considered in a number of different contexts. For example, see *Canada (Attorney General)* v. *Canada (Information Commissioner)* 2004 FC 431, par. 143 and ff

[7] *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, par. 25-26

[8] Terms of Reference, par. (d), (e), (h), (j), (k) to (q)

[9] *Secretary of State for the Home Department v. Rehman*, [2001] 2 W.L.R. 877 at p. 895, cited, with approval in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at par. 33; *Canada (A.G.) v. Ribic*, [2005] 1 F.C.R. 33, 2003 FCA 246, at par. par. 18-19 (F.C.A.; leave to appeal refused 22 Oct 03, SCC No. 29868)

25. Given that this is an Internal Inquiry into the actions of Canadian officials and no one else, and in light of the shared obligation of the Commissioner and the Attorney General to protect NSC, the requirement that the proceeding shall be in camera and *ex parte* necessarily excludes participants and intervenors other than the Attorney General of Canada and certain government officials. In addition, those attending the hearings will include witnesses, most probably the Canadian officials whose actions will be reviewed, and their counsel. It is therefore anticipated that, in appropriate circumstances, counsel for the Ottawa Police Services, the Ontario Provincial Police and other current or former Crown servants, may also be present at certain hearings conducted in private.

26. In summary, therefore, the requirement that the Commissioner must take all steps necessary to ensure that the Internal Inquiry is conducted in private means that hearings shall proceed in the absence of the public, participants and intervenors and their counsel. Apart from the Commissioner and members of his staff who hold a security clearance at an appropriate level, only counsel for the Attorney General of Canada, and subject to NSC, any other person including government officials permitted by the Commissioner, should be entitled to be present.

Question Four - 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?

27. Attendance by participants at in camera hearings is not appropriate for the reasons discussed above. However, appropriate participation will nevertheless be ensured through Inquiry Counsel.

28. Inquiry Counsel have been entrusted with the responsibility of representing the public interest and not any particular interest or point of view. Guided by this principle, Inquiry Counsel will review all of the government's documents, and decide which should be entered into evidence, whom to call as witnesses and in what order, what documents and issues to raise with those witnesses, what additional information should be sought and from whom, what issues require specific emphasis and which witnesses should be recalled. With unfettered access to all documents and witnesses, Inquiry Counsel will

carry out the fact finding-purpose central to this Internal Inquiry. They are quite clearly more than capable of fulfilling this important role.

29. In the context of the Internal Inquiry, therefore, appropriate participation may be ensured by providing participants with the opportunity to raise with Inquiry Counsel specific areas for questioning, in writing or otherwise, and documents to be put to witnesses in any hearing conducted in private upon being provided with the general subject matter of that hearing.

30. There is no adjudication of NSC issues contemplated by the Internal Inquiry's Terms of Reference or its Rules. In the Arar Inquiry, whose Terms of Reference contemplated an adjudication of NSC issues, an *amicus*, independent of the Government and with expertise in national security matters, was appointed to assist the Commissioner in ensuring that NSC claims were subjected to rigorous examination. There is no such role for an *amicus* in this Internal Inquiry.

31. Similarly, there is no need to appoint a special counsel to advance the interests of the three named individuals or some other particular interest in the private hearings. The Internal Inquiry is entirely distinguishable from the security certificate context that was before the Supreme Court of Canada in the *Charkaoui* case. As the Court observed, context is important.[10] There are no liberty interests at stake here and there is no particular interest or point of view being advanced, as it is only the actions of Canadian officials that may properly form the subject of this Internal Inquiry.

32. Past experience has shown that the provision of summaries of hearings held in private raise serious questions and can lead to unanticipated delays despite the reasonable and good faith efforts of all parties.

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[10] *Charkaoui v. Canada (Citizenship and Immigration)* 2007 SCC 9

Question Five - 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?

33. This is not a public inquiry. The Terms of Reference make it clear that this is an Internal Inquiry that is to be conducted in private. The conduct of this Internal Inquiry is not guided by the general principle of transparency or openness. As a result, this general principle cannot guide the determination of whether a specific portion of the Internal Inquiry must be conducted in public.

34. The standard for holding a specific portion of the Internal Inquiry in public is not mere possibility or desirability; rather, before doing so, the Commissioner must be satisfied that "it is essential" to ensure the effective conduct of the Internal Inquiry. In other words, the fact that a portion can be held in public is not a sufficient condition for doing so.

35. In determining whether it is essential to conduct a specific portion of the Internal Inquiry in public, the Commissioner must be satisfied that doing so will not engage the very difficulties sought to be avoided by the calling of an Internal Inquiry, including the risk of delaying its completion or otherwise introducing "a tortuous, time-consuming and expensive exercise."[11]

36. Turning to paragraph (e) itself, it is evident that the language "essential to ensure the effective conduct of the Inquiry" imposes a high standard that will not easily be met. Indeed, the term "essential" by itself speaks of true necessity rather than mere desirability.

37. In order for paragraph (e) to be engaged, the Commissioner must be satisfied that the effective conduct of the Internal Inquiry cannot be ensured without holding a specific portion in public. Further, holding a specific portion of the Internal Inquiry in public

[11] Arar Commission of Inquiry, page 277

cannot be essential unless there are no other means of addressing the concern giving rise to the prospect of holding that specific portion in public.

38. In addition, paragraph (e) speaks of the "conduct of the Inquiry" rather than some broader goal or interest. Accordingly, there must be a specific reason why the effective conduct of the Internal Inquiry cannot be ensured absent holding a specific portion in public.

39. Paragraph (e) also refers to holding a "specific portion" of the Internal Inquiry in public. It follows that, even if the Commissioner is satisfied that paragraph (e) is properly engaged, only a discrete and carefully-delimited portion of the Internal Inquiry may be conducted in public.

40. Examples of specific portions of the Inquiry that satisfy the foregoing propositions include: the holding of Hearings on Participation and Funding, which could not be held in private because at that stage there were no recognized participants; and the holding of Hearings on the Draft General Rules of Procedure and Practice, because the key concepts and the applicable rules necessary for the conduct of the Internal Inquiry have yet to be defined. Similarly, motions or portions of motions properly may be heard before the Commissioner in public.

41. Finally, given that the test is necessity rather than desirability, the Commissioner may only be satisfied that it is essential to conduct a specific portion of the Internal Inquiry in public if to do so will serve to protect the independence, fairness, thoroughness and expedition of the Internal Inquiry. In this regard, it is important to emphasize that the Commissioner must at all times be guided by fairness to those whose actions may be the subject of the Internal Inquiry.

PART THREE – SUBMISSIONS ON THE RULES OF PROCEDURE

42. In this Part, the Attorney General of Canada proposes a number of substantive amendments to the Rules for consideration by the Commissioner. These proposed

amendments aim to ensure sufficient clarity in the Rules governing specific situations, while permitting sufficient flexibility to permit the evolution of the Rules as the Internal Inquiry unfolds. In some instances, further clarification and even amendment of the Rules may be required at a later time.

Rule 7

43. Rule 7 incorporates the "deemed undertaking" rule found in the Ontario *Rules of Civil Procedure* and the common law. Rule 7 applies to many different types of information and documents, including information and documents that are unclassified, classified and subject to NSC. It is this latter category of information and documents that requires additional clarity. Although likely implicit in the current wording, it is suggested that more explicit wording be included to ensure the confidentiality of NSC information provided by the Internal Inquiry to participants and witnesses, reflecting the need for consultation with the Government when dealing with such information and acknowledging that individuals receiving NSC information must be permanently bound to secrecy pursuant to section 8 of the *Security of Information Act*.

44. In addition, it may be prudent in the circumstances for participants who receive information and documents during the course of the Internal Inquiry to execute an undertaking that they will use the information and documents solely for the purpose of the Inquiry. This suggestion met with great success in the Arar Inquiry.

45. The Attorney General recommends that Rule 7 be amended as follows:

> Participants and witnesses and their counsel are deemed to undertake that any information and documents that they receive in the course of the Inquiry, except information and documents that have been disclosed in a portion of the Inquiry that the Commissioner has determined should be conducted in public or in the Commissioner's separate public report, shall be treated as confidential and will be used solely for the purpose of the Inquiry. Participants and witnesses and their counsel shall execute an undertaking that any information and documents will be used solely for the purpose of the Inquiry. Participants and witnesses and their counsel who may receive NSC information must possess the necessary security clearance (if required) and be designated as a "person permanently bound to secrecy" pursuant to section 8 of the *Security of Information Act*.

Rule 11

46. Rule 11 incorporates the terms "in private" and "essential to ensure the effective conduct of the Inquiry", which are the subject matter of Questions 3, 4 and 5 above. The Attorney General makes no additional submissions in this regard. The Commissioner may, however, wish to consider the inclusion of either or both of these terms in the "Definitions" section of the Rules once he has made his determinations, or the inclusion of a direct reference to his Ruling on these items in the body of Rule 11. Either of these suggested changes would serve to ensure no misunderstanding by participants, intervenors or the general public as to the meaning of these terms.

47. The Attorney General also recommends that an explicit reference to interviews be added to Rule 11 to confirm that interviews will be conducted in private.

Rule 12(a)

48. Rule 12(a) stipulates that the Commissioner may make a determination that it is essential to ensure the effective conduct of the Inquiry that specific portions of the Inquiry be conducted in public "on his own motion". It is unclear whether any such motion will be made on notice to participants and, more importantly, whether participants will be provided with an opportunity to address the motion. This may be particularly important where the decision to conduct a portion of the Internal Inquiry in public might raise matters of NSC. Accordingly, the Attorney General recommends that Rule 12(a) be amended to read as follows:

> (a) on his own motion, <u>with notice to the participants who may make submissions including with respect to the protection of National Security Confidentiality</u>;

Rule 12(c)

49. Rule 12(c) stipulates that, "on application by a participant or other interested person," the Commissioner may make a determination that specific portions of the Inquiry be conducted in public. Since the term "participant" is defined in the

"Definitions" section, the Attorney General recommends that the reference to "other interested person" be removed. Rule 12(c) should be amended to read as follows:

(c) on application by a participant.

Rule 17

50. In light of recent Supreme Court of Canada decisions[12], the Attorney General recommends that an exception to Rule 17 be provided to recognize the nature of information that is subject to a claim of solicitor-client privilege. Information subject to a claim of solicitor-client privilege may be ordered disclosed only where absolutely necessary — a test just short of absolute prohibition. There should be no obligation imposed on participants to disclose to Inquiry Counsel information that is subject to a claim of solicitor-client privilege and any review of solicitor-client information by the Commissioner should be limited to situations of absolute necessity.

Rules 18, 19 and 20

51. The process by which Inquiry Counsel may interview any person who may have information or documents relevant to the Terms of Reference of the Internal Inquiry is set out in Rules 18 to 20. In the interest of greater clarity, the Attorney General submits that these Rules be amended to:

a. clarify whether the interviews will be taken under oath or affirmation, recorded, whether transcripts of the interviews will be prepared and to whom those transcripts will be made available;

b. require Inquiry Counsel to provide a listing of documents to which they intend to refer to during the interview (similar to Rule 28) at least five business days in advance[13] and allow counsel to provide additional documents to Inquiry Counsel which may be of assistance during the interview (similar to Rule 29); and,

[12] See for example, *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32

[13] If acceptable, similar advance notification should also be included in Rule 28

c. expressly permit counsel to ask questions during and/or prior to the end of the interview to clarify any information and documents provided.

Rules 21, 22 and 23

52. Rules 21 to 23 allow Inquiry Counsel to prepare proposed findings for the Commissioner's consideration "based on documents, interviews and the findings of other examinations", which the Commissioner may then, subject to section 13 of the *Inquiries Act*, adopt as his findings.

53. The Attorney General submits that amending Rule 21 to provide for disclosure beyond that contemplated by section 13 of the *Inquiries Act* will promote the efficiency of this Internal Inquiry. Section 13 requires notice solely for adverse findings. However, without notice as to the Commissioner's proposed findings respecting, *inter alia*, background facts, context and related events, it is difficult to ascertain the extent of evidence the Attorney General may need to call in response to a section 13 notice. The Attorney General may be compelled to present the entirety of a witness's evidence under oath and, further, to establish background facts, context and related events which the Commissioner may potentially already accept. This outcome risks unnecessary duplication in the taking of information and evidence.

54. To address this issue, the Attorney General recommends the addition of a rule setting out a process that would allow access to any potential findings, and the basis of those findings, in order that the Attorney General can determine what additional evidence and/or witnesses should be called during any subsequent hearings.

55. Further, as currently worded, the Commissioner can make adverse findings strictly on the basis of interviews "subject to section 13 of the *Inquiries Act*." The Attorney General submits that the procedural safeguards of section 13 should be specifically referred to in the Rules, thus confirming that no adverse finding will be made against a witness, strictly on the basis of their interview.

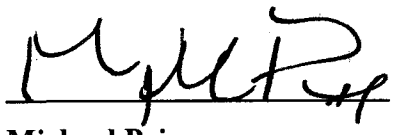
56. To address this issue, the Attorney General recommends the addition of a rule stating that: "Any adverse findings, including findings of misconduct, in a report by the Commissioner will be based on the record of the formal hearings".

General Comments

57. The Attorney General recommends, as a matter of consistency, that the reference to "mandate of the Inquiry" in Rules 13, 14, 15, 18 and 19 be amended to provide a direct reference to the "Terms of Reference", which is a defined term.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 11, 2007



Michael Peirce
Alain Prefontaine
Gregory Tzemenakis
Roger Flaim
Yannick Landry