

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

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

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1. To assist the Commissioner, the Attorney General of Canada provides the following reply submissions.

### **I. The Focus of the Internal Inquiry**

2. Given the position expressed by other participants, it bears repeating the only focus of the Internal Inquiry is the actions of Canadian officials, as they relate to the three topics identified in paragraph (a) of the Terms of Reference. Messrs. Almalki, Elmaati and Nureddin are not on trial; their reputation is not in issue; they therefore do not have a case to meet.

3. Our main submissions already address the differences distinguishing your Terms of Reference from those of Commissioner O'Connor. These differences confirm why there is no need to adopt, for the Internal Inquiry, the solutions devised by Commissioner O'Connor for his public inquiry.

### **II. Use of Toohe Report or a Similar Fact-Finder**

4. A number of participants invite the Commissioner to inquire into whether Messrs. Almalki, Elmaati and Nureddin were tortured by agents of foreign states. However, in this Internal Inquiry, there seems to be a consensus among the participants: everyone agrees Messrs. Almalki, Elmaati and Nureddin were mistreated. It can therefore be assumed, for the purposes of this Internal Inquiry, that Messrs. Almalki, Elmaati and Nureddin were mistreated.

5. Accordingly, there is no need for either a fact finder or for reliance on the Toohe Report. There is only a need to resolve the remaining question in respect of mistreatment: what actions of Canadian officials, if any, contributed directly or indirectly to the mistreatment suffered by Messrs. Almalki, Elmaati and Nureddin?

6. The investigation proposed by those other participants has important practical consequences. Should the Commissioner decide to inquire

into whether there was mistreatment or torture, these underlying facts will become facts in issue. Because those facts will be in issue, the Internal Inquiry will face the concomitant obligation to provide to persons, such as Canadian officials, or organizations potentially facing an adverse finding the chance to (i) know the case they have to meet; (ii) challenge the evidence put forward; and (iii) put forward their own evidence.

7. Procedural fairness prevents the use of the conclusions of the Toope report as the foundation for an adverse finding against Canadian officials: it is not part of the record and was not tested by cross-examination, even before Commissioner O'Connor. To use the Toope report in this Internal Inquiry therefore opens the door to the difficult issue of whether Messrs. Almalki, Elmaati and Nureddin must testify before the Commissioner and face the cross-examination of other participants. Yet, those persons are not on trial and their actions are not the focus of this Internal Inquiry.

8. The Terms of Reference do not require the Commissioner to investigate this issue to fulfill his mandate, given that the Commissioner can assume for the purposes of this Internal Inquiry that Messrs. Almalki, Elmaati and Nureddin were mistreated. There is, therefore, no need for either a fact finder or for reliance on the Toope Report.

### **III. An Internal Inquiry is Conducted in Private**

9. The Terms of Reference must guide the Commissioner. In the framework paragraph (d) establishes, the Commissioner must take all steps necessary to conduct the Inquiry in private. The open court principle must operate within the safeguards created by the Terms of Reference to protect National Security Confidentiality.<sup>1</sup> It cannot find the same application in the present Internal Inquiry as it does in judicial proceedings.

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<sup>1</sup> The preamble to the Terms of Reference acknowledge Commissioner O'Connor's recommendation that the Governor-in-Council creates an internal inquiry: "Whereas that report

10. The Internal Inquiry can achieve public confidence through the work done by Inquiry Counsel, a full and thorough investigation, a public report and by conducting the Inquiry expeditiously. To hold otherwise would deprive paragraph (d) of any purpose.

11. Some submissions misconstrue the effect of the creation of this Internal Inquiry pursuant to Part I of the *Inquiries Act*. Parts I and II mainly differ as to the scope of the inquiries they create. Part II permits inquiries only into the affairs of a single department.<sup>2</sup> Hence, those inquiries are "departmental". By contrast, Part I allows inquiries into "*any matter connected with the good government of Canada or the conduct of any part of the public business thereof.*"<sup>3</sup> They deal with the public business of the good government of Canada. The titles of each part consequently do not convey the meaning these submissions attribute to them.

12. Indeed, the argument about the public access derived from these titles is misguided. There is nothing in the *Inquiries Act* which makes inquiries under Part II more or less public than inquiries under Part I or Part IV. It is not so much the Part pursuant to which a commission of inquiry is created which informs the degree of public access to its investigation, as the subject matter it will inquire into.

13. In this case, because the affairs of more than a single department of government form the subject of the inquiry, the Internal Inquiry could not properly be created pursuant to section 6 of the *Inquiries Act*. Nothing turns on the fact that this Internal Inquiry was created pursuant to Part I.<sup>4</sup>

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states that there are more appropriate ways than a full-scale public inquiry to investigate and report on cases where national security confidentiality must play a prominent role"

<sup>2</sup> *Inquiries Act*, R.S.C. 1985, c. I-11, s. 6

<sup>3</sup> *Inquiries Act*, R.S.C. 1985, c. I-11, s. 2

<sup>4</sup> In this respect, see the *Ruling on a Jurisdictional Issue* made by Commissioner O'Connor: *Factual Background*, vol. II, appendix 1(B), p. 587-592

14. The submissions of other participants also suggest the adoption of a process devised during the Air India criminal prosecutions. It is noteworthy that Commissioner Major recent ruled that he could not use this approach to conduct the Air India Inquiry.<sup>5</sup>

15. The Commissioner has no jurisdiction to grant to Messrs. Almalki, Elmaati and Nureddin, or to their counsel, access to the hearings conducted in private nor to unredacted versions of documents. Unlike a court of inherent jurisdiction, a commission of Inquiry only has the powers granted to it by statute or by its Terms of Reference. The Commissioner's powers and duties respecting the matter raised by the participants are found in paragraph (d), (k), (l), (p) and (q).

16. The net effect of these provisions is to ensure that all possible safeguards are put in place to protect information subject to National Security Confidentiality. Because of these safeguards, counsel for the Government has entered into a Document Protocol with Inquiry Counsel. This Document Protocol provides the Internal Inquiry with unfettered access to unredacted documents. It also defers the considerations of any claims of NSC to a later point in time.


17. The use of summaries of evidence is similarly unhelpful to the Internal Inquiry. Commissioner O'Connor attempted to use them only once. This Internal Inquiry must report before January 31, 2008. By necessary implication, the Terms of Reference contemplate that the report of the Commissioner will summarize all of the information the Commissioner will consider relevant and informative. There is, therefore, no need to engage in the time-consuming process of preparing summaries.

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<sup>5</sup> *Reasons For Decision With Respect To the Aivfa's Request for Directions Regarding Access to Unredacted Documents and In Camera and Ex Parte Hearings*, January 3, 2007, par. 24 ([http://www.majorcomm.ca/en/reasonsfordecision\\_aivfa\\_request/index.asp](http://www.majorcomm.ca/en/reasonsfordecision_aivfa_request/index.asp))

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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FOR   
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