

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

**MOTION FOR STANDING BY THE
ATTORNEY GENERAL OF CANADA**

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The Attorney General of Canada hereby moves to participate fully in the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (the “Internal Inquiry”). The grounds for the motion are as follows:

Overview

1. The full participation of the Attorney General of Canada is essential to the conduct of this Internal Inquiry. The Attorney General will represent the Government of Canada and its several departments and agencies as well as individuals whose actions may be the subject of investigation or who may have relevant evidence.

Grounds for Granting Appropriate Participation

2. Pursuant to paragraph (f) of the Order in Council P.C. 2006-1526, (the “Order in Council”), the Commissioner is authorized “to grant any person who satisfies him that they have a substantial and direct interest in the subject-matter of the Inquiry an opportunity for appropriate participation in it.”

3. Further, the Internal Inquiry's *Rules for Procedure and Practice Respecting Participation and Funding* provide that "a person may be granted an opportunity to participate as an intervenor in the Inquiry if the Commissioner is satisfied that the person has a genuine concern about the subject matter of the inquiry and has a particular perspective or expertise that may assist the Commissioner."
4. The Attorney General has a substantial and direct interest in the subject-matter of the Internal Inquiry and seeks full participation.

Mandate of the Internal Inquiry

5. The Internal Inquiry was established by Order in Council dated December 12, 2006, with a mandate to conduct an internal inquiry to determine the following:
 - (i) whether the detention of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nurreddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances,
 - (ii) whether there were deficiencies in the actions taken by Canadian officials to provide consular services to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin while they were detained in Syria or Egypt, and
 - (iii) whether any mistreatment of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances.
6. By virtue of the Terms of Reference, this is an internal inquiry into the actions of Canadian officials and no one else.

Powers, Duties and Functions of the Attorney General

7. The *Department of Justice Act*, R.S. 1985, c. J-2, establishes the office of the Attorney General and provides that the Minister of Justice is *ex officio* the Attorney General of Canada. The office of the Attorney General is one with constitutional dimensions recognized in the *Constitution Act, 1867*.¹

8. The powers, duties and functions of the Attorney General are set out in section 5 of the *Department of Justice Act*. In addition to the historic powers and duties of the Attorney General referred to in paragraph 5(a) of the *Department of Justice Act*, the Attorney General is responsible for, *inter alia*:
 - (i) the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada; and

 - (ii) advising the heads of the several departments of the Government on all matters of law connected with such departments.

9. The Attorney General must be guided by the public interest and must represent and serve the interests of the Government as a whole and, in so doing, may serve the specific interests of individual departments and agencies.

Representation of the Government of Canada, Affected Departments and Agencies and Crown Servants

10. The Government of Canada and several federal departments and agencies, in particular, have a substantial and direct interest in the subject of this Inquiry. The views of the Government and its officials will not only assist the Commissioner, they will be essential to the conduct of the Internal Inquiry.

¹ Kreiger v. The Law Society of Alberta, [2002] 3 S.C.R. 372 at para. 26.

11. The Attorney General will represent the interests of the Government as a whole in this Inquiry as well as the specific interests of affected departments and agencies, including those referred to in the declarations of the Order in Council, the Royal Canadian Mounted Police, the Canadian Security and Intelligence Service and the Department of Foreign Affairs and International Trade.
12. In addition, and in accordance with Treasury Board's *Policy on the Indemnification of and Legal Assistance for Crown Servants*, the Attorney General may also represent former and current Canadian Officials whose actions are the subject of this Internal Inquiry and other Crown Servants who have knowledge of facts, events, policies and procedures that may be relevant to the mandate of the Internal Inquiry.

Advice to the Government and affected Departments and Agencies

13. The Attorney General will advise the Government and the heads of affected departments and agencies throughout the Internal Inquiry. The Attorney General will also advise the Government and affected departments and agencies on the legal aspects of the response to the findings and recommendations of the Internal Inquiry.

Conduct of the Internal Inquiry

14. The Terms of Reference of the Internal Inquiry provide that it shall be conducted in private with the exception that the Commissioner is authorized by paragraph (d) to conduct specific portions of the Inquiry in public if he is satisfied that it is essential to ensure the effective conduct of the Inquiry.
15. The Attorney General must be able to participate fully in the Internal Inquiry to ensure the effective and efficient conduct of the Internal Inquiry in private. The Attorney General must be in a position to present relevant information and to protect the confidentiality of evidence and testimony received in private, if necessary.

Possession, Custody and Control of Relevant Documents

16. The majority of the documents relevant to the Internal Inquiry's mandate are within the exclusive possession, custody or control of the Government of Canada.
17. The Attorney General is responsible for representing the Government in matters related to the production of documents to the Internal Inquiry.
18. On March 6, 2007, the Commissioner issued Document Request No. 1 to the Attorney General requiring the Government of Canada to produce all documents relevant to the Terms of Reference.
19. Also on March 6, 2007, the Government of Canada and the Inquiry executed a *Protocol for the Protection of Privileged and Immune Information* with the objective of ensuring the timely production of documents in the possession of the Government.

Protection of National Security Confidentiality and Any Ongoing Investigations or Proceedings

20. The Commissioner is directed by the Order in Council to protect information that, if it were disclosed, would be injurious to international relations, national defence, national security, or the conduct of any investigation or proceeding (collectively referred to as "National Security Confidential information ").
21. The Commissioner is specifically required by paragraph (k) of the Terms of Reference "to take all steps necessary to prevent the disclosure of information to persons or bodies other than the Government of Canada that, if it were disclosed to those persons or bodies, would be injurious to international relations, national defence, national security, or the conduct of any investigation or proceeding if the information, in the opinion of the Commissioner or the responsible Minister, falls into that category."

22. Pursuant to paragraph (n) of the Terms of Reference, there is a similar obligation on the Commissioner to protect National Security Confidentiality in the preparation of a separate report that is suitable for disclosure to the public.
23. Paragraph (s) of the Terms of Reference directs the Commissioner “to perform his duties in such a way as to ensure that the conduct of the Inquiry does not jeopardize any ongoing investigation or criminal proceeding, and to consult with the Government institution responsible for any ongoing investigation or proceedings about any jeopardy that could result from the conduct of the Inquiry.”
24. Throughout the Internal Inquiry, the Attorney General will identify sensitive information that must be protected by the Commissioner and will alert the Commissioner to any outstanding investigations or proceedings. As such, the Attorney General is a necessary participant to the Internal Inquiry in order to ensure that the Commissioner can carry out his mandate in regard to the protection of National Security Confidential information and the integrity of any ongoing investigations or proceedings.

Counsel for the Attorney General of Canada

25. Lead counsel for the Attorney General of Canada will be Michael Peirce. Mr.

Peirce may be reached at:

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Oral Submissions

26. The Attorney General wishes to make brief oral submissions.

Conclusion

29. For the foregoing reasons, it is submitted that the Attorney General of Canada has a substantial and direct interest in all aspects of the Internal Inquiry and should be granted the right to participate fully, through counsel, to give evidence, examine or cross-examine witnesses and make submissions.

Dated at Ottawa this 14th day of March 2007.



Counsel for the Attorney General of Canada

Counsel for the Attorney General of Canada

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AFFIDAVIT OF ROGER FLAIM IN SUPPORT OF THE
MOTION FOR STANDING BY THE
ATTORNEY GENERAL OF CANADA

I, **ROGER FLAIM**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SWEAR AS FOLLOWS:**

1. I am counsel in the Ontario Regional Office (Toronto) of the Department of Justice Canada. I am one of the counsel representing the Government of Canada in the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati And Muayyed Nureddin (the "Internal Inquiry").
2. The Internal Inquiry was established by Order in Council number P.C. 2006-1526, dated December 12, 2006, (the "Order in Council") which established the Commissioner's Terms of Reference. A copy of the Order in Council is attached hereto as exhibit "A".
3. Pursuant to the Terms of Reference, the Commissioner shall determine:
 - i. whether the detention of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nurreddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances;
 - ii. whether there were deficiencies in the actions taken by Canadian officials to provide consular services to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin while they were detained in Syria or Egypt, and

- iii. whether any mistreatment of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances
4. Pursuant to his powers, duties and functions as set out in section 5 of the *Department of Justice Act*, R.S. 1985, c. J-2 (a copy of which is attached hereto as exhibit "B"), the Attorney General will represent the interests of the government as a whole before the Internal Inquiry as well as the specific interests of affected departments and agencies, including those referred to in the Terms of Reference: the Royal Canadian Mounted Police, the Canadian Security and Intelligence Service and the Department of Foreign Affairs and International Trade.
5. The majority of the documents and information that is relevant to the mandate of the Internal Inquiry is in the control of the Government of Canada. The Attorney General has, since shortly following the calling of the Internal Inquiry overseen an extensive document collection effort which has generated documents relevant to the fulfillment of the Terms of Reference.
6. Further, a number of current and former Crown Servants may have knowledge of the facts, events, policies and procedures that may be relevant to the mandate of the Internal Inquiry. Current and former Crown Servants may be represented before the Internal Inquiry by the Attorney General in accordance with Treasury Board's *Policy on the Indemnification of and Legal Assistance for Crown Servants*.
7. In addition, as stated in the preamble of the Order in Council, full cooperation has been pledged by the Government of Canada, the Commissioner of the Royal Canadian Mounted Police, the Director of the Canadian Security Intelligence Service and the Deputy Minister of Foreign Affairs.
8. Based on the foregoing, the Government of Canada has a substantial and direct interest in the subject of this internal inquiry.

SWORN BEFORE ME at
the City Of Ottawa, in the
Province of Ontario, this
14th day of March, 2007

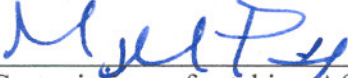


A Commissioner for taking Affidavits



Roger Flaim

This is exhibit "A" to the Affidavit of
Roger Flaim sworn March 14, 2007


A Commissioner for taking Affidavits

Whereas the *Report of the Events Relating to Maher Arar* of September 18, 2006 recommends that the cases of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin should be reviewed and that the review should be done through an independent and credible process that is able to address the integrated nature of the underlying investigations and inspires public confidence in the outcome;

Whereas that report 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;

And whereas the Government of Canada, the Commissioner of the Royal Canadian Mounted Police, the Director of the Canadian Security Intelligence Service and the Deputy Minister of Foreign Affairs have committed to full cooperation with the review process;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Public Safety and Emergency Preparedness, hereby directs that a Commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Frank Iacobucci as Commissioner to conduct an internal inquiry into the actions of Canadian officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (the "Inquiry"), which Commission shall

- (a) direct the Commissioner to conduct the Inquiry in order to determine the following:
 - (i) whether the detention of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances,

- (ii) whether there were deficiencies in the actions taken by Canadian officials to provide consular services to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin while they were detained in Syria or Egypt, and
 - (iii) whether any mistreatment of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances;
- (b) direct the Commissioner to conduct the Inquiry as he considers appropriate with respect to accepting as conclusive, or giving weight to, the findings of other examinations that may have been conducted into the actions of Canadian officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin;
- (c) direct the Commissioner to conduct the Inquiry under the name of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin;
- (d) authorize the Commissioner to adopt any procedures and methods that he considers expedient for the proper conduct of the Inquiry, while taking all steps necessary to ensure that the Inquiry is conducted in private;
- (e) despite paragraph (d), authorize the Commissioner to conduct specific portions of the Inquiry in public if he is satisfied that it is essential to ensure the effective conduct of the Inquiry;
- (f) authorize the Commissioner to grant to any person who satisfies him that they have a substantial and direct interest in the subject-matter of the Inquiry an opportunity for appropriate participation in it;

(g) authorize the Commissioner to recommend to the Clerk of the Privy Council that funding be provided, in accordance with approved guidelines respecting rates of remuneration and reimbursement and the assessment of accounts, to ensure the appropriate participation of any party granted standing under paragraph (f), to the extent of the party's interest, where in the Commissioner's view the party would not otherwise be able to participate in the Inquiry;

(h) authorize the Commissioner to rent any space and facilities that may be required for the purposes of the Inquiry, in accordance with Treasury Board policies;

(i) authorize the Commissioner to engage the services of any experts and other persons referred to in section 11 of the *Inquiries Act*, at rates of remuneration and reimbursement approved by the Treasury Board;

(j) direct the Commissioner to use the automated document management program specified by the Attorney General of Canada and to consult with records management officials within the Privy Council Office on the use of standards and systems that are specifically designed for the purpose of managing records;

(k) direct the Commissioner, in conducting the Inquiry, to take all steps necessary to prevent the disclosure of information to persons or bodies other than the Government of Canada that, if it were disclosed to those persons or bodies, would be injurious to international relations, national defence, national security, or the conduct of any investigation or proceeding, if the information, in the opinion of any of the following persons, falls into that category:

(i) the Commissioner, or

(ii) the Minister responsible for the department or government institution in which the information was produced or, if not produced by the government, in which it was first received;

(l) direct the Commissioner that, if he disagrees with the opinion of the Minister referred to in subparagraph (k)(ii) that the disclosure of the information would be injurious to international relations, national defence or national security, he shall, without adjudicating the matter, so notify the Attorney General of Canada, which notice shall constitute notice under section 38.01 of the *Canada Evidence Act*;

(m) direct the Commissioner to submit, on or before January 31, 2008, both a confidential report and a separate report that is suitable for disclosure to the public simultaneously in both official languages to the Governor in Council;

(n) direct the Commissioner, in preparing the separate report, to take all steps necessary to prevent the disclosure of information that, if it were disclosed to the public, would be injurious to international relations, national defence, national security or the conduct of any investigation or proceeding, if the information, in the opinion of any of the following persons, falls into that category:

(i) the Commissioner, or


(ii) the Minister responsible for the department or government institution in which the information was produced or, if not produced by the government, in which it was first received;

(o) direct the Commissioner that, if he disagrees with the opinion of the Minister referred to in subparagraph (n)(ii) that the disclosure of the information would be injurious to international relations, national defence or national security, he shall, without adjudicating the matter, so notify the Attorney General of Canada, which notice shall constitute notice under section 38.01 of the *Canada Evidence Act*;

(p) direct that nothing in the Commission shall be construed as limiting the application of the provisions of the *Canada Evidence Act*;

- (q) direct the Commissioner to follow established security procedures, including the requirements of the Government Security Policy, with respect to persons engaged under section 11 of the *Inquiries Act* and the handling of information at all stages of the Inquiry;
- (r) direct the Commissioner to perform his duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization;
- (s) direct the Commissioner to perform his duties in such a way as to ensure that the conduct of the Inquiry does not jeopardize any ongoing investigation or criminal proceeding, and to consult with the government institution responsible for any ongoing investigation or proceedings about any jeopardy that could result from the conduct of the Inquiry;
- (t) direct the Commissioner to file the papers and records of the Inquiry with the Clerk of the Privy Council as soon as reasonably possible after the conclusion of the Inquiry; and
- (u) direct the Commissioner, in respect of any portion of the Inquiry conducted in public under paragraph (e), to ensure that members of the public can, simultaneously in both official languages, communicate with the Commission of Inquiry, and obtain from it services including any transcripts of proceedings that have been made available to the public.

This is exhibit "B" to the Affidavit of
Roger Flaim sworn March 14, 2007


A Commissioner for taking Affidavits

Department of Justice Act

J-2

An Act respecting the Department of Justice

SHORT TITLE

Short title

1. This Act may be cited as the *Department of Justice Act*.

R.S., c. J-2, s. 1.

POWERS, DUTIES AND FUNCTIONS OF THE ATTORNEY GENERAL

Powers, duties and functions of Attorney General

5. The Attorney General of Canada

(a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the *Constitution Act, 1867*, came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada;

(b) shall advise the heads of the several departments of the Government on all matters of law connected with such departments;

(c) is charged with the settlement and approval of all instruments issued under the Great Seal;

(d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada; and

(e) shall carry out such other duties as are assigned by the Governor in Council to the Attorney General of Canada.

R.S., c. J-2, s. 5.

Loi sur le ministère de la Justice

J-2

Loi concernant le ministère de la Justice

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur le ministère de la Justice.*

S.R., ch. J-2, art. 1.

POUVOIRS ET FONCTIONS DU PROCUREUR GÉNÉRAL

Attributions

5. Les attributions du procureur général du Canada sont les suivantes :

a) il est investi des pouvoirs et fonctions afférents de par la loi ou l'usage à la charge de procureur général d'Angleterre, en tant que ces pouvoirs et ces fonctions s'appliquent au Canada, ainsi que de ceux qui, en vertu des lois des diverses provinces, ressortissaient à la charge de procureur général de chaque province jusqu'à l'entrée en vigueur de la *Loi constitutionnelle de 1867*, dans la mesure où celle-ci prévoit que l'application et la mise en oeuvre de ces lois provinciales relèvent du gouvernement fédéral;

b) il conseille les chefs des divers ministères sur toutes les questions de droit qui concernent ceux-ci;

c) il est chargé d'établir et d'autoriser toutes les pièces émises sous le grand sceau;

d) il est chargé des intérêts de la Couronne et des ministères dans tout litige où ils sont parties et portant sur des matières de compétence fédérale;

e) il remplit les autres fonctions que le gouverneur en conseil peut lui assigner.

S.R., ch. J-2, art. 5.