May 31, 2007

RULING ON TERMS OF REFERENCE AND PROCEDURE

I. INTRODUCTION

[1] By Supplementary Notice of Hearing dated March 27, 2007, I directed a public hearing that was held on April 17, 2007 to receive submissions from those granted an opportunity to participate in the Inquiry concerning the procedures and methods to be followed in the conduct of the Inquiry.

[2] More specifically, submissions were requested concerning the following questions arising from the Inquiry's Terms of Reference:

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. Elmaati 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?

[3] A sixth question was also asked inviting submissions relating to any aspects of the Inquiry's Draft General Rules of Procedure and Practice that might be of concern to the participants. The Draft General Rules are posted on the Inquiry's website, www.iacobucciinquiry.ca, but for convenience are attached to this ruling as Appendix A.

[4] In dealing with the above questions, certain background considerations must be borne in mind. At the outset, the Inquiry is subject to the provisions of the *Inquiries Act* and must observe the dictates of the Act as interpreted by the courts relating to the conduct of this Inquiry. In addition, the Inquiry is subject to its Terms of Reference, which are contained in P.C. 2006-1526 of December 11, 2006. The Terms of Reference are attached to this ruling as Appendix B.

[5] Also of application is the jurisprudence surrounding the conduct of inquiries in general and rulings of commissions of inquiry that provide guidance in answering the above questions. In this respect, I have benefited greatly from views expressed and opinions rendered in the Arar Inquiry, the Air India Inquiry, and the Walkerton Inquiry, as well as others.

[6] In this ruling, I will first set out a summary of the views submitted by participants and intervenors on the above questions. I will then discuss some informing principles and factors that are important to consider in formulating my ruling on these questions. Next I will discuss the disposition of the questions and end with some concluding observations.

II. SUBMISSIONS OF PARTICIPANTS AND INTERVENORS ON QUESTIONS ASKED

1. The meaning of "mistreatment" (Question One)

[7] Paragraph (a)(iii) of the Terms of Reference directs the Commissioner to determine "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…and, if so, whether those actions were deficient in the circumstances…".

[8] Participants and intervenors were asked to make submissions on the meaning of "any mistreatment" in this context. Specifically, they were asked:

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

[9] The Attorney General of Canada submits that "any mistreatment" is a low threshold, one that refers to treatment that is clearly less severe than either "torture" or "cruel, inhuman or degrading treatment or punishment". The Attorney General acknowledges, for the purposes of this Inquiry, that the conditions under which Messrs. Almalki, Elmaati and Nureddin were detained meet this threshold.

[10] In their written submissions, the Ottawa Police Service ("OPS") and Ontario Provincial Police ("OPP") declined to take a position on the meaning of "mistreatment". However, in oral submissions before me the OPS and OPP agreed with the Attorney General's submissions on the meaning of "mistreatment".

[11] Messrs. Almalki, Elmaati and Nureddin submit that "mistreatment" should be interpreted broadly to include arbitrary, discriminatory and indefinite detention; physical and psychological torture; denial of diplomatic assistance and consular access; extended separation from family;

harm to reputation; intrusions on privacy; the refusal of a safe haven at the Canadian Embassy; and media leaks.

[12] The definitions of "mistreatment" advanced by the intervenors Amnesty International, International Civil Liberties Monitoring Group ("ICLMG"), the B.C. Civil Liberties Association ("BCCLA"), Canadian Arab Federation ("CAF") and the Canadian Coalition for Democracies ("CCD") are generally in accord with that advanced by Messrs. Almalki, Elmaati and Nureddin. The organizations support a broad interpretation of mistreatment.

2. Investigation of Torture (Question Two)

[13] Participants and intervenors were also asked:

> 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?

[14] In the Arar Inquiry, Justice O'Connor appointed Professor Stephen Toope as a fact-finder to "investigate and report to the Commission on Mr. Maher Arar's treatment during his detention in Jordan and Syria and its effects upon him and his family".[1] In the course of his fact-finding and to better assess the credibility of Mr. Arar's story, Professor Toope interviewed Messrs. Almalki, Elmaati and Nureddin. Professor Toope found the three men's accounts of what happened to them in Syria to be credible.[2] He found that they "suffered severe physical and psychological trauma while in detention in Syria".[3]

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1 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Factual Background, Volume II* (2006) at 790

2 *Ibid.* at 805

3 *Ibid.*

[15] Messrs. Almalki, Elmaati and Nureddin submit that this Inquiry should adopt Professor Toope's report as conclusive evidence of their torture in Syria, subject to three caveats. First, they submit that, if Government officials dispute their torture claims, this Inquiry should appoint Professor Toope or another fact-finder with the same mandate as that conferred on Professor Toope with respect to Mr. Arar. Second, Mr. Elmaati seeks the appointment of a fact-finder to examine his claims of torture in Egypt, a subject that was not examined by Professor Toope for the Arar Commission. Third, Mr. Almalki submits that, if the Commissioner adopts a broad definition of "mistreatment", a fact-finder should be appointed to report on the physical, psychological, family and economic effects of torture.

[16] Counsel for Messrs. Almalki, Elmaati and Nureddin also submit that any fact-finding investigation into the men's allegations of torture be conducted in private owing to the sensitive nature of the subject matter. They do not, however, object to this fact-finding, to the extent that it is required, being conducted by the Commissioner and Inquiry counsel, rather than by an external fact-finder.

[17] The Attorney General submits that, since the Terms of Reference refer to "any mistreatment" and not to "torture", there is no need to determine whether Messrs. Almalki, Elmaati and Nureddin were subjected to torture. The Attorney General acknowledges that the men suffered "mistreatment" in Syria and Egypt and therefore submits that additional fact-finding, whether by the Commissioner or a separate fact-finder, is unnecessary. As for the Toope report, the Attorney General describes it as "rife with frailties" and submits that it should not be used as a basis for this Inquiry's findings. The OPP and the OPS agree with the position taken by the Attorney General.

[18] The organizations with intervenor status submit that examining the nature and extent of the torture suffered by Messrs. Almalki, Elmaati and Nureddin is essential, and a number of them propose that a fact-finder be appointed to this end.

3. Public vs. Private (Questions Three, Four and Five)

[19] Paragraph (d) of the Terms of Reference directs the Commissioner to "take all steps necessary to ensure that the Inquiry is conducted in private". Paragraph (d) is subject to paragraph (e), which authorizes 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".

[20] Participants and intervenors were asked to provide submissions on how these paragraphs should be interpreted. Specifically, they were asked:

> 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?
> 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?
> 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?

[21] The Attorney General submits that, for reasons of national security confidentiality and expedition, "private" must be interpreted to mean *in camera* and *ex parte*. Under this interpretation, the Inquiry's hearings would be open to counsel for the Attorney General and witnesses permitted by the Commissioner, and closed to the public, participants and intervenors and their counsel.

[22] While the Attorney General proposes that participants not be permitted to attend the Inquiry's hearings, he submits that the role of Inquiry counsel will ensure that these participants can participate appropriately in the Inquiry's process. He suggests that participants could be given the opportunity to raise with Inquiry counsel specific areas for questioning and documents to be put to witnesses.

[23] The Attorney General submits that the threshold for holding hearings in public, pursuant to paragraph (e) of the Terms of Reference, is a high one that will not be easily met. In the Attorney General's view, the standard imposed by paragraph (e) is not mere possibility or desirability; the Commissioner must be satisfied that holding a hearing in public is essential and necessary. He suggests that to introduce a lower standard risks delaying the completion of the Inquiry or introducing a "tortuous, time-consuming and expensive exercise", the very problems that calling an internal inquiry was intended to avoid.

[24] The OPP and OPS submissions on the interpretation of paragraphs (d) and (e) of the Terms of Reference are generally in accord with the Attorney General's submissions. They agree that these paragraphs mandate the Commissioner to conduct a presumptively private inquiry. The OPP and OPS add, however, that security cleared counsel for the OPP and OPS should be permitted to attend any hearing conducted in private.

[25] Mr. Almalki, Mr. Elmaati, Mr. Nureddin and the majority of the intervenors, on the other hand, envision a much more public process, one that entails a much more robust role for the participants, the intervenors and their counsel. They argue that the Commission must conduct as much of its business as possible in public. In support of this argument, they invoke the constitutional principle of openness, the decision of the Supreme Court of Canada in

Charkaoui,[4] the language of the *Inquiries Act* (which provides, they say, that all inquiries are public unless they are departmental ones set up under section 6 of the *Inquiries Act)* and the need to inspire public confidence in the outcome of the Inquiry referred to in the Terms of Reference.

[26] Messrs. Almalki, Elmaati and Nureddin submit that the Inquiry's hearings should only be conducted in private where national security confidentiality claims are made, and then only after and to the extent that evidence that might engage national security confidentiality is tested and it is determined that the evidence does indeed engage national security confidentiality. They also ask that their counsel be security-cleared and, upon giving an undertaking not to disclose information that engages national security confidentiality to their clients, permitted to attend and cross-examine at any private hearings. Depending on the extent of the evidence called in private hearings, the three individuals propose that the Commissioner consider making available to the public one or more of summaries of the evidence, expurgated transcripts and redacted documents.

[27] Messrs. Almalki, Elmaati and Nureddin submit that, at minimum, all evidence relevant to the following issues must be called in public hearings: (a) embassy and consular conduct; (b) the Canadian government's practice and policy on torture; (c) information sharing with foreign regimes; and (d) requests by Canadian officials to secure information from the three men while they were in detention.

[28] The submissions of the organizations with intervenor status, with the exception of the CCD, generally accord with those of Messrs. Almalki, Elmaati and Nureddin. Amnesty

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

International, the ICLMG, the BCCLA and the CAF argue in favour of a presumptively public process, with private hearings held only where legitimate national security confidentiality matters arise. Amnesty International and the CAF endorse the proposal by the three individuals that their counsel be security-cleared and able to fully participate in all private sessions of the inquiry. The ICLMG and BCCLA also propose a number of steps that the Commission could take to ensure that participants not entitled to attend private hearings can participate appropriately. These include providing participants with the names of witnesses, copies of documents, descriptions of documents subject to national security confidentiality, periodic updates on the status of the Inquiry and the right to recommend questions for examination and cross-examination.

[29] The CCD submits that paragraphs (d) and (e) of the Terms of Reference establish a presumptively private process. The CCD argues that, since the proceedings of the Inquiry are not in the nature of criminal or civil law matters, they do not attract the same obligation of openness. The CCD proposes that the Inquiry make redacted transcripts available to those who are not permitted to attend private hearings.

4. Draft General Rules of Procedure and Practice

[30] Finally, participants were invited to make submissions relating to any aspects of the Inquiry's Draft General Rules of Procedure and Practice that might be of concern to them.

[31] A number of submissions are related to the participants' arguments regarding the public or private nature of the Inquiry. In this respect, Messrs. Almalki, Elmaati and Nureddin , ICMLG and BCCLA argue that Rule 11 of the Draft Rules, which specifies that the Inquiry shall be conducted in private, must be interpreted in a manner that is consistent with their

perspective on the need for public hearings. Conversely, the Attorney General of Canada submits that the same Rule must be amended so as to make clear that every aspect of the Inquiry, including the interviews, shall be conducted in private. Furthermore, the Attorney General of Canada requests an amendment that would ensure that all interested participants be notified and be given an opportunity to make representations on NSC claims, before I make a determination under Rule 12(a) that a portion of the Inquiry be conducted in public.

[32] Other submissions relate to opportunities for participants to contribute to or call into question the evidence that will be received and the findings that will be made in the course of the Inquiry. Messrs. Almalki, Elmaati and Nureddin, and Amnesty International, propose amendments to Rule 13 and Rule 21, so as to provide participants with opportunities to test the evidence that will be received and to review and challenge the proposed findings of the Inquiry. ICMLG and BCCLA propose further amendments to Rules 20, 28 and 33 which would enable a broader range of participants to receive copies of the statement of the evidence to be given by a person who is to be called as a witness, as well as transcripts, redacted where appropriate, of any portion of the Inquiry conducted in private. For his part, the Attorney General of Canada proposes amendments to Rule 18 that would give his counsel advance notice of the documents to be discussed during an interview, as well as an opportunity to put questions to a person interviewed by Inquiry counsel. The Attorney General of Canada also requests a number of amendments to Rules 21, 22 and 23, so as to be provided with notice of proposed findings for which notice may not be required under section 13 of the *Inquiries Act*. In addition, the Attorney General of Canada seeks a clarification of the same rules to ensure that adverse findings against a witness will be based on the record of a formal hearing, and will

not be made strictly on the basis of an interview. OPP and OPS seek opportunities to test and challenge the findings that might be made on the basis of interviews.

[33] A few additional submissions raise more specific concerns with the Draft Rules. The Attorney General of Canada proposes a few amendments of this nature: an amendment to Rule 7 to clarify the scope of the duty of confidentiality to which participants, witnesses and their counsel are subject; an amendment to Rule 17, limiting the circumstances in which documents over which a claim of solicitor-client privilege is asserted can be disclosed and reviewed; and an amendment to Rule 18, specifying the degree of formality of interviews. OPP and OPS propose an additional rule giving notice to a participant that one of its current or former employees is to be interviewed, so as to provide an opportunity for this person to be represented by the participant's counsel. ICMLG and BCCLA point out what they see as a contradiction between Rules 31 and 32 (c), and seek a clarification of the role of counsel for a witness. Messrs. Almalki, Elmaati and Nureddin and Amnesty International propose an amendment to Rule 13 so as to clarify that the Inquiry may not accept evidence obtained under torture.

[34] Finally, many participants propose amendments to the Rules that are essentially stylistic and do not change the substantive import of the Rules, but might be considered to provide greater clarity or certainty.

III. INFORMING PRINCIPLES AND CONTEXTUAL FACTORS

[35] Before providing my ruling on the specific questions asked of the participants and intervenors, I think it is helpful to reflect on the informing principles and contextual factors that should be kept in mind in answering the specific questions. In discussing these principles and

factors, I am obviously mindful of the provisions of the *Inquiries Act* and of the Terms of Reference as well as the jurisprudence and practices of commissions that have been held in our country over recent years. At the same time, I must keep in mind the context of this Inquiry and the specific mandate given as well as the deadline for submission of its reports.

[36] At the outset, it is important to note, as I mentioned in my Ruling on Participation and Funding (a copy of which is attached hereto as Appendix C), that this Inquiry is inquisitorial, investigative or fact-finding in nature and not an adversarial proceeding. There is no one charged, no one is on trial, and no one has a case to meet. What is at issue is the conduct of Canadian officials regarding three individuals, and I am directed to ensure that the serious concerns that are raised by the Terms of Reference are dealt with effectively, comprehensively and independently. Consequently, many of the attributes of protection and process that criminal or other adversarial proceedings engage do not apply in the context of this Inquiry. In this respect, I find it very helpful to cite Chief Justice McLachlin in the *Charkaoui* decision:

> There are two types of judicial systems, and they ensure that the full case is placed before the judge in two different ways. In inquisitorial systems, as in Continental Europe, the judge takes charge of the gathering of evidence in an independent and impartial way. By contrast, an adversarial system, which is the norm in Canada, relies on the parties – who are entitled to disclosure of the case to meet, and to full participation in open proceedings – to produce the relevant evidence….
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> The judge [under the *IRPA*] is not afforded the power to independently investigate all relevant facts that true inquisitorial judges enjoy. At the same time, since the named person is not given a full picture of the case to meet, the judge cannot rely on the parties to present missing evidence. The result is that, at the end of the day, one cannot be sure that the judge has been exposed to the whole factual picture.[5]

[5] *Ibid.* at paras. 50-51

[37] In this Inquiry, as in the inquisitorial proceedings to which the Chief Justice refers, I am mandated to "[take] charge of the gathering of evidence in an independent and impartial way." Consequently, the ordinary features of an adversarial proceeding are not in play.

[38] It might be helpful to elaborate in this respect on my role as Commissioner and the role of Inquiry counsel. Firstly, the Commissioner is appointed as an independent investigator who is obliged to pursue the terms of his mandate to the best of his ability and to ensure that the process is fair, effective and expeditious. And most importantly, the Commissioner, through his or her role as an independent investigator, represents the public interest.

[39] Also playing a key role in this respect is Inquiry counsel. On this topic, several commissioners and commentators have made guiding comments about the role of commission counsel in the public inquiry context. Recent comments made by the Honourable John Major in an Air India Inquiry ruling are particularly apposite.

[40] In that Inquiry, the Air India Victims Families Association (AIVFA) brought a "Request for Directions" asking that their security-cleared counsel be admitted to in camera hearings and be granted access to unredacted documents. AIVFA argued that this access would ensure that AIVFA would be engaged as a full contributor to the Commission's work while increasing the confidence and trust of family members in the Inquiry itself.

[41] Commissioner Major dismissed AIVFA's motion for directions and provided several reasons why it was appropriate to exclude AIVFA's counsel from in camera hearings and deny them access to unredacted documents. Among these reasons was the role of commission counsel in protecting the public interest. Commissioner Major wrote:

> 21. It is important the public interest (which includes the interest of the families) with respect to a full exploration of all the facts is not left unguarded. At the restricted *in camera* hearing and/or the redaction of document [*sic*] it is the responsibility of the Commission and the role of Commission counsel to protect that public interest. As noted by Mr. Justice Dennis O'Connor, Commissioner at the Arar Inquiry, in his non-judicial article, "The Role of Commission Counsel in a Public Inquiry":
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> > "…commission counsel's role is not to advance any particular point of view, but rather to investigate and lead evidence in a thorough, but completely impartial and balanced manner. In this way, the commissioner will have the benefit of hearing all the relevant evidence unvarnished by the prospective of someone with an interest in a particular outcome." (2003), 22 Advocates Soc. J. No. 1, at para. 12.
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> 22. As also noted by Justice O'Connor, where a public inquiry does hear evidence *in camera*, the role of Commission counsel in representing the public interest allows Commission counsel to depart somewhat from his or her normal role and to engage in pointed cross-examination where necessary, so as to ensure that evidence heard *in camera* is thoroughly tested – a procedure intended to be followed by this Commission.[6]

[42] Justice O'Connor also made some helpful comments about the role of commission counsel in the Report of the Walkerton Inquiry:

> Commission counsel play a special role in a public inquiry. Their primary responsibility is to represent the public interest at the inquiry. They have the duty to ensure that all issues bearing on the public interest are brought to the Commissioner's attention. Commission counsel do not represent any particular interest or point of view, and their role is neither adversarial nor partisan.[7]

[43] Finally, Edward Greenspan, Q.C., in his article "The Royal Commission: History, Powers and Functions, and the Role of Counsel" wrote:

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[6] Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *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), http://www.majorcomm.ca/en/reasonsfordecision_aivfa_request/index.asp

[7] The Honourable Dennis R. O'Connor, *Part One, Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues* (2002) at 479

> If the inquiry is investigatory, commission counsel serves as an independent legal adviser to the commission and is subject to the direction of the commissioner. He assists the commission in the adoption of procedures, examines and cross-examines witnesses called by the inquiry, and assists in the preparation of its report. He is, as indicated by his title, the commissioner's counsel and his conduct, therefore, must always be governed with this in mind. He must guard against becoming the advocate exclusively for one point, but rather must strive to ensure that all of the evidence necessary for a proper investigation is presented to the commission.[8]

[44] As I stated in the Ruling on Participation and Funding, as a general matter, it is preferable that both adversarial and inquisitorial proceedings be open and public. I do not resile from that comment but I do note that it reflected a general preference that was subject to the specific terms of reference of the inquiry in question and the context that surrounds the inquiry. Here there is no doubt the Terms of Reference emphasize the internal or private nature of the Inquiry and that national security confidentiality is a very important consideration. Paragraph (k) of the Terms of Reference expressly directs me, 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 defense, national security, or the conduct of any investigation or proceeding

if the information, in my opinion or the opinion of the Minister responsible, falls into that category.

[45] Even apart from the requirements of the Terms of Reference, one must be extremely cautious when delving into questions that involve considerations of national security confidentiality. The security of the country depends on the efforts of our various agencies to protect the Canadian public in a world that is increasingly tense and concerned about terrorism

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[8] Edward L. Greenspan, Q.C., "The Royal Commission: History, Powers and Functions, and the Role of Counsel" in *Administrative Tribunals* (F. Moskoff Q.C. ed. 1989) 327 at 345

and threats to national security. Human lives are often at risk when individuals serve our country's security and intelligence efforts, and a breach of confidentiality could have serious repercussions for those individuals that all of us would wish to avoid. At the same time, the Inquiry will be sensitive to the potential for overbroad assertions of national security confidentiality and not let that become a shield to prevent the Inquiry from doing the necessary work to fulfill its mandate.

[46] It is also significant to note that the agencies whose conduct is implicated by the Terms of Reference, CSIS, the RCMP and DFAIT, have pledged to co-operate fully with the Inquiry, and that the Attorney General has agreed with the Commission to full production of documents without any redactions at this stage for national security confidentiality. As a final resort the Inquiry has the power to subpoena witnesses and documents to obtain relevant information. Moreover, the requirement in the Terms of Reference for a report on the completion of the work of the Inquiry operates to ensure that the Commissioner is accountable to review all the relevant evidence and to arrive at conclusions that are based on that evidence in order to successfully complete the role that has been assigned to the Inquiry.

[47] There is another principle that I believe is important to note in interpreting and applying the Terms of Reference of this Inquiry. I would like to call this the "principle of workability".

[48] This concept appears to me to capture what Justice O'Connor had in mind in the Arar Commission report, where he stated: "[C]onducting a public inquiry in cases such as these can be a tortuous, time-consuming and expensive exercise…. [t]here are more appropriate ways than a full-scale public inquiry to investigate and report on cases where national security

confidentiality must play such a prominent role."[9] It also seems to me to be what counsel for the Attorney General was referring to when he submitted:

> This should not become an exercise in redaction, redaction for national security confidentiality and other privileges. This should not become a process in which hearings are held in private and then recreated in public.
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> This should not be a process – and I think this is perhaps the most important point – that takes two and a half years to complete. That is in no one's interest, certainly not at this stage.[10]

[49] Even where the "open court" principle is applicable, "workability" has been cited as a factor that may militate against public access. For example, in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, Justice La Forest stated:

> [T]his Court has noted on previous occasions that public access to certain judicial processes would render the administration of justice unworkable…. The importance of ensuring that the administration of justice is not rendered unworkable provides a palpable reason for prohibiting public access…. Indeed, as we have seen in the case, the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable.[11]

[50] The concept has also figured in decisions about access to proceedings more like this one – proceedings of boards of inquiry appointed under the *National Defence Act*.

[51] In *Travers v. Canada (Chief of Defence Staff)*,[12] representatives of the media brought an application challenging on *Charter* grounds a decision by the Chief of Defence Staff that the proceedings of a board of inquiry on the subject of the Canadian Airborne Regiment Battle Group not be open to the public. The board had been established to investigate the

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9 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations* (2006) at 277-278

10 *Transcript of Proceedings on April 17, 2007* at 66-67

11 [1996] 3 S.C.R. 480 at para. 29

12 [1993] 3 F.C. 528 (T.D.)

leadership, discipline, operations, actions and procedures of the Canadian Airborne Regiment Battle Group during its deployment in Somalia. The regulations under the Act provided that a board of inquiry should meet in private unless the convening authority otherwise directs.

[52] Justice Joyal determined that the board of inquiry was conducting an internal inquiry, rather than a judicial or quasi-judicial proceeding of the kind that engaged the "open court" principle. In the course of his discussion of the nature of the board's proceedings, he also commented on certain practical consequences of opening up its proceedings. Though he did not use the term "workability", he was certainly cognizant of the potential impact on the board's work of allowing public access. He observed:

> It is clear on the evidence before me that the mandate given to the Board must be exercised within a very short time. When first established on April 28, 1993, it was given a 90-day life span. Yet it was bestowed with a wide generic field of enquiry, which would necessarily involve in its proceedings the kind of communication which might be classified or might be prejudicial to any one or more of the named accused, or which might otherwise be contrary to public interest to disclose or which would constrain the proper exercise of Canada's international peacekeeping role. No serious observer would conclude that these are not at least plausible grounds for a discreet approach. As elaborated by the respondent, Major-General deFaye, in the course of his cross-examination by the applicants, an open policy would have required a series of *voir dire* on what evidence was to be adduced, on what was classified or not, on what was directly or by implication prejudicial to individuals. These *voir dire* would of course have had to be conducted behind closed doors, otherwise the whole purpose of the enquiry within the enquiry would have been aborted.[13]

He also noted that the report of the board of inquiry would be made public, subject to certain constraints in the board's terms of reference and imposed by law.

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[13] *Ibid*. at 534-535

[53] The Federal Court of Appeal expressed its general agreement with his reasons in dismissing an appeal from his decision.[14]

[54] In *Gordon v. Canada (Minister of National Defence)*,[15] Justice Harrington of the Federal Court dismissed an application for judicial review of a decision of another board of inquiry to deny access to its proceedings to the media. The board of inquiry had been struck under the *National Defence Act* to investigate and report on fires that occurred in the HMCS Chicoutimi, resulting in the death of a crew member and injury to others. The terms of reference of the board of inquiry provided that the president of the board was to

> ensure that the proceedings and activities of the BOI are conducted in such a manner as to strike the appropriate balance between the interest of the public in being informed of the BOI's progress, and the public's interest in ensuring that security, privacy, operational and international relations requirements, is achieved. This direction is to ensure that as much information as is appropriate and reasonable is publicly available and disclosed.

[55] In denying a request by the media for access to the hearings of the board, the president observed among other things that

- the board had been convened as an internal administrative investigation, and was not a judicial or quasi-judicial proceeding or a public inquiry under the *Inquiries Act*;
- the board's mandate must be exercised within a very short time, and public access would cause delays, because he had to be mindful of the release of information that could compromise security, operational and international relations, and public access "would require [him] to take additional steps to ascertain when witnesses and information could be heard in the presence of the public"; and
- under the terms of reference he was directed to ensure that information be publicly available and disclosed, which he had done by posting information on a

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14 (1994), 171 N.R. 158

15 2005 F.C. 335

> national defence website, granting interviews with the media and distributing printed material.

[56] Justice Harrington agreed that the proceedings were not judicial or quasi-judicial in nature, and that the "open court" principle did not apply. He also agreed that the decision to exclude the press was reasonable. While he recognized that the president could have decided to give the press access subject to exclusion depending on the topic being discussed, he accepted that there was force in the president's comment that "public access would cause delays as it would require me to take additional steps to ascertain when witnesses and information could be heard in the presence of the public."[16] The decision thus represents another invocation of the concept of "workability".

[57] Closely related to "workability" is practicality. By that I mean that, in carrying out my work, I must consider the most practical means to accomplish the Inquiry's objectives. For example, as I noted above, counsel for Messrs. Almalki, Elmaati and Nureddin have suggested that a counsel representing their interests be security-cleared and, upon giving an undertaking not to disclose information that engages national security confidentiality to their clients, permitted to attend and cross-examine at these private hearings. Even if the necessary security clearance could be obtained within the time frame of the Inquiry's work, I am not convinced as a practical matter that this arrangement would assist Messrs. Almalki, Elmaati and Nureddin or the Inquiry in carrying out its work.

[58] Counsel for Messrs. Almalki, Elmaati and Nureddin acknowledge that the security-cleared counsel would not be able to disclose national security information to his or her non-security-cleared colleagues or to their clients. Indeed, given the extraordinary sensitivity of

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[16] *Ibid*. at para. 45

the matters pertaining to national security confidentiality under discussion, the security-cleared counsel would as a practical matter be unable to communicate *at all* with his or her colleagues and clients about the matters at issue in this Inquiry. Even something as innocuous as a request for a document or for clarification of a fact could trigger questions from colleagues and clients that might result in disclosure of information subject to national security confidentiality. In these circumstances, given the mandate of Inquiry counsel to vigorously test the evidence of all the witnesses that will be interviewed or examined in private, I do not see how the presence of a security-cleared counsel for Messrs. Almalki, Elmaati and Nureddin will as a practical matter assist the Inquiry or these individuals. As Commission Major noted in denying a similar request from the families of the Air India victims, "it is impossible to see how access to *in camera* hearings or unredacted documents would add to the families' 'opportunity to explore the cause' or allow them 'to be satisfied that they know what happened.' Counsel themselves might believe that they had more information about what happened, but they could not communicate that information to their clients."[17]

[59] In my view, a far more practical and effective way for counsel for Messrs. Almalki, Elmaati and Nureddin to have genuine input into this Inquiry is for them to consult with Inquiry counsel, as was done in the Arar Inquiry, prior to the interviews and examinations of witnesses by Inquiry counsel. Through this process, Inquiry counsel can obtain input from the entire counsel group with respect to witnesses to be examined, lines of questioning to be pursued, and documents and other facts to be put to witnesses. The Arar Inquiry process has

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[17] Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *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), http://www.majorcomm.ca/en/reasonsfordecision_aivfa_request/index.asp

demonstrated that this consultation can be done in a manner that allows for effective input into the Inquiry process while protecting nationality security confidentiality.

[60] Thus I conclude that the appropriate process for this Inquiry is one that should not only reflect its inquisitorial nature and the sensitive context in which the questions that I must determine arise, but also respect the workability and practicality principles that have been endorsed judicially and sensibly so in my view. It would serve no one's interest if the process of the Inquiry impeded it from an expeditious determination of the questions that I have been mandated to pursue.

[61] Having said that, I also believe that, as the Inquiry is beginning its review of evidence, one should be mindful of the importance of being flexible. Once a fuller understanding of that evidence has been obtained it may be necessary to modify the approach of the Commission in doing its work. Principles are important to provide a forest before the work of tree analysis is done, but the Commission should be prepared to adapt appropriately to the circumstances as they become more fully understood.

[62] In a similar way, one should not be rigid in one's approach to the mandate of the Inquiry and if there are ways to balance interests in a more transparent way every effort should be made to do so without violating the Terms of Reference or the interests that must be properly acknowledged.

IV. DISPOSITION ON THE QUESTIONS ASKED

1. The Meaning of Mistreatment

[63] I agree with the views expressed that the words "any mistreatment" are to be interpreted broadly and to include any treatment that is arbitrary or discriminatory or resulted in physical or

psychological harm, as well as denial of properly entitled assistance and other forms of treatment that would normally be included in the meaning of mistreatment.

[64] Although the Attorney General of Canada acknowledged that any mistreatment is a low threshold, his counsel went on to assert that a detention would be included in the meaning of the phrase. However, since detention is expressly referred to in paragraph (a)(i) it would presumably not be included as a separate heading under mistreatment. By like reasoning, the denial of consular access would not be dealt with under the heading of mistreatment since it is also dealt with separately in paragraph (a)(ii) of the Terms of Reference.

[65] Having said all that, it is also my view that the Terms of Reference are not aimed at trivial matters so that mistreatment should be regarded as something more than trivial; but to repeat, mistreatment is very broad in its meaning.

2. Torture

[66] I am of the view that it is proper and appropriate for the Inquiry to ascertain whether the three individuals were tortured as a specific aspect of their alleged mistreatment. I say this because whether there were deficiencies in the provision of consular services, or indeed other possible deficiencies referred to in the Terms of Reference, may well be related to the nature of the treatment or mistreatment that the individuals received. Put another way, the services provided by Canadian diplomatic officials and the conduct of other Canadian officials should have some relationship to the treatment or lack of treatment accorded to Canadian citizens abroad. On a common sense reading of the Terms of Reference, the nature and extent of any mistreatment, and whether that mistreatment amounted to torture, may at a minimum be relevant to whether there were deficiencies in the actions of government officials, or whether

their actions were “deficient in the circumstances”. This is especially so when Canada is privy to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and there are other international instruments and standards of conduct that refer to or may turn on the existence of torture.

[67] I also believe that, from another standpoint, namely, that of the public interest, it is important to ascertain whether these individuals suffered torture. As already mentioned, Canada is a party to the UN Convention Against Torture and the Canadian public no doubt has an interest not just in knowing whether a mistreatment has occurred but also whether that mistreatment amounted to torture. If the conduct of Canadian officials was deficient in this connection, they would wish to be apprised of what actually occurred.

[68] This means, depending how events unfold, that it will likely be necessary to do follow-up work on and further investigation of some of the matters addressed in the fact-finding report of Professor Toope. For the purposes of this Inquiry it will be important both not to ignore what Professor Toope concluded and the reliance that Justice O’Connor placed on his conclusions, and to consider what further investigation may be required and how best to carry it out. The Inquiry will also have to examine the allegations of mistreatment of Mr. Elmaati not just in Syria, but also in Egypt. I have instructed Inquiry counsel to consult with counsel for participants concerning the most appropriate means of inquiring into the allegations of torture.

3. Public vs. Private

[69] As noted, there were many submissions made on the approach to the private vs. public nature of the Inquiry. At the outset, an argument was raised that the *Inquiries Act* prevents the holding of a private inquiry unless it is pursuant to a departmental investigation under section 6

of the *Inquiries Act*. In dealing with this argument, I am guided by the ruling that Mr. Justice O'Connor made in the Arar Inquiry.

[70] Commissioner O'Connor had before him a motion by a recipient of a notice under section 13 of the *Inquiries Act* alleging that the Commission lacked jurisdiction to inquire into the actions of Canadian officials. It was argued that the manner in which the Commission was established , the fact that evidence was received in camera and by a fact finder corresponded more closely to a Part II Investigation than to a public Inquiry. Commissioner O'Connor rejected the motion on January 3, 2006 for the following reasons:

> Section 2 of the Act provides that a Part I inquiry may be established "whenever the Governor in Council deems it expedient (to) 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." This may be contrasted with the power to establish departmental investigations under s. 6, which empowers the minister presiding over any federal government department to appoint a commissioner to investigate and report on the state and management of the business of the department, either in the inside or outside service thereof, and the conduct of any person in that service. While made by the minister pursuant to s. 6, such appointments are under the authority of the Governor in Council.
>
> Although it is accompanied by a heading that refers to public inquiries, Part I does not require that an inquiry be conducted exclusively in public, nor does it purport to abrogate confidentiality or privilege. In fact, it makes no mention of the inquiry being held in public at all. This is consistent with the flexibility that public inquiries must possess in order to be fair and efficient. Correspondingly, Part II contains no requirement that departmental investigations be conducted in private.
>
> Moreover, giving the Act the fair, large and liberal construction that s. 12 of the *Interpretation Act* requires, I conclude that the circumstances in which a Part I inquiry or a Part II investigation may

> be created are not mutually exclusive. Had Parliament intended otherwise, it would have said so in clear and unambiguous terms.[18]

[71] Although Justice O'Connor was dealing with section 13 of the *Inquiries Act*, I agree with his views on the public-private nature of inquiries set up under the Act. The difference between Part I and II seems to be the subject matter of the Inquiry. While Part I refers to "good government and public business" Part II refers to "state and management of the business of the department". In my view, there is nothing in the Act to prevent a public inquiry being held in part or all in private.

[72] In looking at the Terms of Reference and the principles and factors that I outlined in the previous section relating to the nature of the hearing being inquisitorial and not adversarial, the sensitivity to national security confidentiality, the importance of an independent, fair and thorough hearing, and the workability and practicality considerations, I conclude as follows on the submissions made by the participants on the questions relating to public vs. private hearings.

1. Although the Terms of Reference admit of a public hearing they emphasize the presumptively private nature of the hearings, among other things to respect national security confidentiality.

2. Unless I specifically direct otherwise, the formal hearings conducted as part of this Inquiry will be conducted in private, a term that I interpret to mean, in this context, *in camera* and *ex parte*. Further details concerning the manner in which

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[18] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Factual Background, Volume II* (2006) at 587

the hearings will proceed are set out in the Inquiry's Rules of Procedure and Practice.

3. Because there is a great importance attached to public hearings, Inquiry counsel and I will be continually sensitive to having public hearings when they can be held with the proper respect for the Terms of Reference and the underlying national security confidentiality concerns. I intend to interpret the words, "essential to the effective conduct of the Inquiry", as not being totally restrictive, since they reflect an intention that holding some aspects of this Inquiry can contribute to the effective conduct of the Inquiry. In other words, it is my opinion that "to ensure the effective conduct of the Inquiry" means holding portions of the Inquiry in public to ensure that goal as circumstances may warrant. This will be ultimately a discretionary decision, to be made on a case-by-case basis, influenced by the need for a blending of efficiency and transparency dictated by the circumstances and the context.

4. As I stated above, I wish to ensure that the Inquiry benefits from the perspective and information that the participants can provide. I have instructed Inquiry counsel to maintain regular contact with counsel for the participants, and especially counsel for the three individuals, so that Inquiry counsel are apprised of information that is relevant and helpful from the participants' perspective. I also encourage the counsel for the individuals, in particular, to suggest questions and lines of inquiry to pursue in interviews and hearings that are held in private.

5. I do not believe that this mode of proceeding will relegate counsel for the individuals to a passive or ineffective role. On the contrary, I would invite them to co-operate as fully as they can with Inquiry counsel to ensure that we are not leaving any stone unturned as we pursue our mandate.

6. I do not find it workable or in many ways practical for the counsel for the individuals or the individuals themselves to receive security clearance or to be present at all of the inquiries that my counsel or I will be making. This would unnecessarily prolong the Inquiry and make it unworkable. In saying this I am not elevating the workability principle to a unjustifiable degree, but simply recognizing that, for example, to encourage arguments over material that would be presented and whether it would be cleared for release or for redaction purposes and the like would, as experience in the Arar Inquiry demonstrated, cause significant delay and complexity.

7. Nor do I see the need for an *amicus* to be appointed. The role of the *amicus* in the Arar Inquiry was to assist the Commissioner in making determinations of national security confidentiality. The Terms of Reference of this Inquiry, unlike those of the Arar Inquiry, do not give me a decision-making role on these matters, but leave them to determination in accordance with the *Canada Evidence* Act. As I have outlined above my role and that of my counsel are to represent the public interest and I would hope that our vigilance and commitment to conducting the Inquiry to reflect an objective and independent view would permit our handling the matters with the proper sensitivity and objectivity that are required.

4. Draft Rules of Procedure and Practice

[73] In light of my ruling on the extent to which the Inquiry will be conducted in public and in private, I find it unnecessary to modify the Rules so as to specifically extend opportunities for participants to be apprised of the content of portions of the Inquiry that will be conducted in private, as well as to expand the role of participants in relation to interviews of individuals and examination of witnesses. This said, I accept the submission of the Attorney General of Canada that interested participants should be notified before I make a determination under Rule 12(a) that a portion of the Inquiry must be conducted in public, and this rule will be modified accordingly.

[74] I have reviewed the submissions that focus on the clarity and wording of the Rules and find, with two exceptions, that amendments are not necessary in this respect. I accept, first, the suggestion of the Attorney General of Canada that Rule 7 be clarified so as to indicate that where participants and witnesses and their counsel have received information and documents that have not been disclosed in the public report or in a public portion of the Inquiry, this information and those documents shall be kept confidential. Rule 7 is amended accordingly.

[75] The second clarification which is necessary in my view relates to the discrepancy between Rule 31 and Rule 32(c), which was identified by ICLMG and BCCLA. I agree that there is an ambiguity in the Draft Rules, and have introduced an amendment to Rule 31 (now Rule 32) to clarify the scope of the role of counsel for a witness during an examination.

[76] In every other respect, in my view, the Rules have been drafted with sufficient precision and flexibility to enable me to conduct the Inquiry in accordance with the applicable law and the Terms of Reference. In particular, I find it unnecessary to stipulate that the Inquiry will not

accept evidence obtained under torture, and equally unnecessary to specify that adverse findings against a witness cannot be made strictly on the basis of an interview. As to the first point, assuming (without of course deciding at this stage) that one or more of the three individuals suffered torture, what was said or not said under torture, and what use was made of this information, might well be relevant to the determinations that I must make. My receiving this kind of evidence for the purposes of the Inquiry does not in my view engage the concerns underlying the submissions that I received on this issue. As to the second point, in my view the provisions of the Rules and the *Inquiries Act* provide appropriate and adequate safeguards. Similarly, the desire of the Attorney General of Canada to obtain broader disclosure regarding non-adverse findings made on the basis of an interview, to prepare more adequately for responding to any notices under section 13 of the *Inquiries Act*, can be accommodated as issues arise, without any need to amend the Rules.

[77] As described above, the Attorney General submits that Rule 17 should be amended to prohibit Inquiry counsel from reviewing documents over which solicitor-client privilege is asserted and to allow the Commissioner to review such documents only where absolutely necessary. The Attorney General's submission is contrary to the established case law on this issue, which has confirmed the right of Commission counsel as agents of the Commissioner to review documents over which solicitor-client privilege is asserted. In *Lyons v. Toronto Computer Leasing Inquiry*,[19] the Divisional Court upheld Commissioner Bellamy's ruling that Commission counsel be entitled to screen documents over which privilege had been asserted to determine whether they were privileged. Madam Justice Swinton, writing for the Court, emphasized the unique role of Commission counsel, who have an obligation of impartiality and

[19] (2004), 70 O.R. (3d) 39

do not have an adversarial relationship to the other participants in an inquiry.[20] Commissioner O'Connor adopted a similar approach in the Walkerton Inquiry. The parties agreed that Commission counsel would inspect documents before any assertion of privilege, with a procedure for resolving issues of privilege before any document was put into evidence.[21].

[78] The Attorney General's submission is based on the Supreme Court of Canada's decision in *Goodis v. Ontario (Ministry of Correctional Services)*,[22] denying a request by counsel for one party to view the solicitor-client privileged documents of another party. As the Divisional Court in *Lyons* had earlier recognized, that circumstance is very different from the review of documents by Commission counsel. I see nothing in the Supreme Court's decision in *Goodis* that would cause me to depart from well-established practice of previous Commissions of Inquiry.

[79] In any event, as was conceded orally by counsel for the Attorney General of Canada, "it may be in some respects a tempest in a teapot because it is not anticipated that this is going to be a matter of conflict or dispute".[23]

[80] Finally, I accept the suggestion of OPP and OPS that a rule be added to create an opportunity, where appropriate, for participants to offer the services of their counsel to an employee or former employee who is to be interviewed. I have inserted a new Rule to address this issue, which is now Rule 19. Subsequent Rules have been renumbered accordingly. As

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20 *Ibid.* at paras. 38-39

21 The Honourable Dennis R. O'Connor, *Part One, Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues* (2002) at 486-487

22 [2006] 2 S.C.R. 32

23 *Transcript of Proceedings on April 17, 2007* at 78

indicated earlier, a revised version of the Rules is attached to this Ruling as Appendix D, and will also be made available on the website of the Inquiry, www.iacobucciinquiry.ca.

[81] As for the other suggestions to add or replace words, most of them put forward out of stylistic concerns or abundance of caution, I have considered them but do not regard them as either desirable or necessary.

V. CONCLUSION

[82] By way of concluding remarks, I wish to reiterate the points made earlier that the Commission is still in the process of receiving and digesting a great deal of information so that the dispositions made in this ruling should not be cast in stone. If a fuller understanding of the facts and background information calls for modification of a part or parts of this ruling, this will be done and, if appropriate, upon proper notice to the participants and intervenors with an opportunity for their input.

[83] Finally, I wish to thank counsel for the participants and intervenors for their cooperation in providing me with their submissions which I found to be very helpful.