

Ruling: Rules of Procedure and Practice

I have received submissions from the parties and intervenors with respect to the Draft Rules of Procedure and Practice. Copies of those submissions are available in the Commission's office. I have incorporated many of the suggested changes in the revised Rules which will be posted on the Commission's website shortly. I would like to thank the parties and intervenors for the time and effort they have put into their submissions. I think that the Rules have been improved as a result of this process.

In this Ruling I want to comment on some of the more important aspects of the Rules.

First the Rules must reflect the Terms of Reference. The effect of some submissions would be to alter or expand my mandate. That, of course, is not something that comes within my authority.

In formulating the Rules I have been guided to the extent possible by four principles: thoroughness, expedition, openness to the public, and fairness. I discussed the importance of each of those principles in the Report of the Walkerton Inquiry, Part One – Chapter 14.

The Terms of Reference for this Inquiry present challenges with respect to the principles of openness and fairness. Paragraph k of those Terms directs that I take steps to prevent public disclosure of information that would be injurious to international relations, national defence or national security (national security confidentiality). As a result, it is inevitable that some of the evidence will have to be heard *in camera* and in the absence of parties and their counsel. Unfortunately, there is nothing that I can do to avoid having some *in camera* hearings.

The Terms of Reference provide for a two-stage process for determining which documents and evidence need to be heard *in camera*. At the first stage, an *in camera* hearing will take place at which the government will bear the onus of establishing that disclosure would be injurious to national security confidentiality. If I agree with the government's submissions, I will hear the evidence *in camera*. The second stage of the process will involve a determination of whether the release of a part or summary of the information received *in camera* would provide insufficient disclosure to the public. I will elaborate on this stage of the process in my Ruling on the principles that apply to the *in camera* hearings.

In designing the Rules I have attempted to minimize, to the extent possible, the impact of the *in camera* hearings on the principles of openness and fairness. For example, I provided the parties and intervenors with an opportunity to make submissions on the principles that will guide my decisions on what evidence needs to be heard *in camera*. In addition, I have appointed Mr. Ronald Atkey, who has expertise in national security matters, as *amicus curiae* to test the government's submissions about the need for *in camera* hearings. Mr. Atkey's participation is intended to help ensure that the government's submissions are subject to rigorous scrutiny. In my Rulings with respect to the *in camera* hearings, I will make clear the principles that I have adopted in reaching

my decisions and, to the extent possible, I will describe the types of evidence that will be heard *in camera*.

The Rules also provide that before evidence is heard *in camera* Commission Counsel will, to the extent possible, advise the parties and intervenors of the nature of the anticipated evidence. The parties and intervenors will be able to advise Commission Counsel of areas of evidence that they wish to be covered and after the hearings will be informed if those areas were in fact addressed. In addition, after the hearing of evidence *in camera*, I will prepare and publish a summary of the evidence heard, to the extent that I am able to do so, without breaching national security confidentiality.

Insofar as fairness is concerned, when writing my Report, I will bear in mind that I should not make findings adverse to the interest of any person on the basis of evidence that that person has not had an opportunity to hear and challenge.

No doubt the conduct of this Inquiry presents special challenges. However, despite the constraints that are placed on the Inquiry process by virtue of concerns about national security confidentiality, I remain confident that I can fully address the issues raised by the mandate and that I will be able to report publicly and in sufficient detail for those involved and for the public to understand the role that Canadian officials played in the events relating to Mr. Arar.

A number of intervenors have raised a concern that the Policy Review is to be run concurrently, not consecutively, with the Factual Inquiry. Some take the view that the Policy Review should be conducted only after I have released my Report setting out my findings in the Factual Inquiry. Others say that the Policy Review should be carried out concurrently so that the evidence of the Factual Inquiry, not necessarily my findings of fact, is available to inform consideration of the issues in the Policy Review.

I agree with the second position. Let me expand upon the procedure that I have adopted for the Policy Review. With the assistance of the Advisory Panel, the Commission is preparing and will be publishing a consultation paper designed to provide a factual background for the Policy Review and to help focus the public consultation process that will take place next fall. A draft outline for the consultation paper including a draft list of issues has been published on our website for public comment.

The Commission intends to publish the consultation paper by late summer. At that time, the parties and the public will be asked to comment on the paper and the Commission will be calling for public submissions on the recommendations to be made in the Policy Review part of the mandate. Currently, it is planned that public meetings will be held in the months of October and November, 2004 to discuss those submissions.

In my view, it would not be in the public interest to have the Policy Review process await the publication of my findings from the Factual Inquiry. Although the findings of the Factual Inquiry may inform the Policy Review, the considerations which will be assessed in the Policy Review will go far beyond the scope of the Factual Inquiry. Indeed, I

assume that many submissions to the Policy Review will be made without reference to the Factual Inquiry. Moreover, the submissions from the Policy Review will not be due until after most, if not all, of the public hearings in the Factual Inquiry are completed so that those submissions may be informed by the evidence from the public hearings. If any matter arises from the summaries I publish for the *in camera* hearings on which someone wishes to comment, there will be an opportunity to supplement the submissions to the Policy Review with those additional comments. I am satisfied that informed and useful submissions can be made to the Policy Review before my factual findings in the Factual Inquiry are published. It is in the public interest to report to the government in a timely manner and I am hopeful that the procedure I have adopted will ensure that this is done. If, however, having heard the evidence in the Factual Inquiry and the submissions from the Policy Review I consider that there is benefit to delaying the completion of the Policy Review until after the publication of my Report from the Factual Inquiry, I will do so.

A number of intervenors made submissions requesting very detailed Rules to address what they see as a possibility of unfairness arising from circumstances that may or may not occur. For the most part I have not revised the Rules to reflect these types of concerns. Instead I have made it clear in Rule 5 that I retain an overriding discretion to conduct the Inquiry so as to ensure that it is thorough, fair and timely. Applications in writing can be made to me, as deemed necessary, to achieve these objectives.

June 15, 2004