International Civil Liberties Monitoring Group
(ICLMG)

and

B.C. Civil Liberties Association
(BCCLA)

Outline of Joint Submission
Concerning Procedures and Methods to be Followed in the Conduct of the Inquiry

to the

Commission of Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almaki, Ahmad Abou-Elmaati and Muayyed Nureddin

April 11, 2007

(the ICLMG the BCCLA have been granted "Intervenor Status" by the Commission)

Outline of Joint Submission by ICLMG and BCCLA to the Inquiry, concerning the procedures and methods to be followed in the conduct of the Inquiry to be considered at a hearing to take place on Tuesday April 17th, 2007 at the Bytown Lounge, 111 Sussex Drive, Ottawa, Ontario.

A. In response to the five questions submitted by the Commission

1. The meaning of "any mistreatment" as it appears in par. (a)(iii) of the Terms of Reference

These words should be given a broad interpretation and without restriction should include – arrest, imprisonment, abusive interrogation, torture, threats, conditions of incarceration, deprivation of essential needs, inaccessibility to legal counsel, consular services and to family, and similar acts of commission and omission.

The meaning of these words should also be interpreted in accordance with the jurisprudence interpreting articles 7 to 14 of the Canadian Charter of Rights and Freedoms and in accordance with the following international instruments to which Canada is a states-party :

The International Covenant on Civil and Political Rights (art. 7, 9, 10 and 14)

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 1, 3 and 11)

and also in accordance with the:

Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (adopted by the U.N.G.A. on Dec. 9, 1988)

Basic Principles for the Treatment of Prisoners (adopted by the U.N.G.A. on Dec. 14, 1990)

Standard Minimum Rules for the Treatment of Prisoners (adopted by the U.N. Congress on Crime and Offenders, Aug. 30, 1956)

2. "Whether and to what extent Almaki et al were tortured in Syria and Egypt?"

While par. B of the Terms of Reference gives the Commissioner the right to accept the findings of other examinations, such as those carried out by the Arar Commission and in particular the Report by Stephen Toope, we believe it is imperative that the Commissioner continues to examine the nature and extent of torture suffered by these men in order to fill in any gaps that might exist in the Toope and other reports, and to better understand the magnitude of these offences in their stark realities.

3. (A) "Requirement to ensure that the Inquiry is conducted in private". – (Terms of Reference par. D)

All provisions in the Terms of Reference should be read together. While preambular par. 4 of the Terms of Reference directs the Commissioner to conduct an "internal inquiry" and par. D to take all

steps necessary to ensure that the Inquiry is conducted in private, there are other provisions which favour sessions in public.

Preambular par. 1 provides the "review should be done through an independent and credible process …. that inspires public confidence in the outcome" and par. E authorizes the Commissioner to conduct specific portions …. in public if he is satisfied that it is essential to ensure the effective conduct of the Inquiry.

Finally par. K directs the Commissioner to take all steps necessary to prevent the disclosure of "national security confidentiality" (NSC).

Consequently we submit that the provisions in par. D to ensure that the Inquiry is conducted in private are made specific in par. K. Therefore private sessions should be limited to the matters of national security confidentiality as set out in par. K. (subject to our later arguments on the "conduct of any investigation or proceeding" as found in Rule 1(F). In other words we submit that sessions in private should be restricted to issues of national security confidentiality. We cannot visualize any issues that aren't NSC that should be considered in "private" and not in "public". This interpretation should be formulated as a Rule following Rule 11 and 12.

If a wider interpretation is given to "private" sessions, we don't see how the process can be considered "credible" and one that will inspire "public confidence" as set out in the preamble. We would argue that recent events have shaken public confidence in police and security operations – i.e.: the Arar Commission Report; the Supreme Court ruling in Charkaoui et al; commissioner Zaccardelli's testimony before parliamentary committees; and the recent allegations regarding the RCMP Pension Fund. Consequently, if the process is to be credible and inspire public confidence, then the Commissioner should use par. E to the greatest extent possible.

While we have argued that "private" sessions should be limited to NSC, we would recommend that the Commissioner greet with suspicion claims for NSC requested by the government. At the Arar Inquiry the government made initial claims for NSC on some matters and later dropped these claims, demonstrating a tendency to over-react in making such claims.

Finally we refer to your Ruling of April 2nd 2007 where on page 3 you stated that "transparency and openness … were valued principles in the work of the courts, tribunals, and inquiries …. and their advantages were … of fundamental importance to ensure accountability …. and to inspire public confidence". We concur.

3. (B) Who should be entitled to attend any hearing conducted in private?

On page 3 of your ruling on April 2nd 2007 you stated that you were committed to "ensuring that the Inquiry is independent, fair, thorough, and expeditious". To be "fair" and "thorough" the following practice should apply. If certain testimony or other evidence affects a matter or person which requires a response, comment, or cross-examination then the relevant participant should be present to respond, comment, or cross-examine. This can be implemented by following the recommendation for a new process as set out by the Supreme Court in the Charkaoui judgement. Rule 27 should be amended accordingly.

4. Participants not entitled to attend private hearings.

The following steps should be taken to ensure that participants not entitled to attend private hearings can participate appropriately:

a) Such participants should be provided in advance with the names of persons to be examined and/or interviewed, with their background information, and the subject area of the examination.
b) Similarly they should be provided with a description of the documents to be tabled or to be considered for examination – as well as all documents not subject to NSC.
c) Where documents and transcripts are only partly subject to NSC, these documents and transcripts should be provided in redacted form to all participants.
d) Such participants should have the right to recommend to commission counsel questions for examination and cross-examination.
e) Such participants should have the right to recommend additional witnesses and documents for examination by the Commission, setting out the relevance to the Inquiry of such witnesses and documents.
f) Such participants should be given periodic updates on the status of the Inquiry by the Commissioner and/or commission counsel.
g) All participants should be consulted on any changes to the general Rules and with respect to any issue relating to the interpretation or application of the General Rules and/or Terms of Reference.

5. That specific portions of the Inquiry be conducted in public. – (Terms of Reference par. E)

Our answer to this question is contained in our response to question no. 3.

B. Comments respecting the Draft General Rules of Procedure.

Rule 1 (f) – It is not usual to include "the conduct of any investigation or proceeding" under NSC. This provision is too broad and general and would cover many matters that are not essentially NSC. It is recommended that these words which also appear in Terms of Reference par. K be interpreted restrictively only as they relate to international relations, national defence and national security.

Rule 1 (g) – Participants and Intervenors should be defined separately more or less as you have done on page 3 of your Ruling on April 2nd 2007, and in consideration of our comments in answer to question 3 (A) above.

Rule 3 – The word "undertake" in this draft rule has a special significance for lawyers which is not appropriate or necessary in the context of this inquiry. We suggest that the word "undertake" be replaced by the word "agree".

Rule 7 – As with Rule 3, replace the word "undertake" with the word "agree".

Rule 11 and 12 – Should be followed by a new Rule setting out that NSC should be the criteria for conducting the Inquiry as suggested in our answer to question 3 (A).

Rule 17 (e) – The word "may" in this rule is too imprecise. It should be changed to read "If the person does not accept the view of Inquiry Counsel, the person in question should have the right to apply to the Commissioner for a ruling .

Rule 17 (f) - Should be reworded to read "The Commissioner will inspect the document and rule on the claim, or refer…". Once again the word "may" leaves the disagreement inconclusive and undetermined.

Rule 20 – Should be amended so that the statement of anticipated evidence is provided to any participant whose rights would be affected by the evidence.

Rule 21 – If the "proposed findings" are the result of a closed process then they should be provided to any participant whose rights would be affected by these findings.

Rule 27 – This rule should be amended to correspond with the answer we gave to question 3 B; i.e. any participant should be entitled to be present if his right would be affected by the testimony and there would be a need to respond, comment or cross-examine.

Rule 28 – This rule should be amended to provide that such statements of anticipated evidence be available to all participants in accordance with our answers to questions 4(a) (b) and (c); i.e. the entire statement when it is not subject to NSC and redacted statements when they are partially subject to NSC.

Furthermore there appears to be a conflict between this Rule and Rule 20 which should be clarified.

Rules 31 and 32 – There appears to be a contradiction between Rule 31 and Rule 32(c). Rule 31 says that counsel for a witness will be limited to making appropriate objections while Rule 32(c) says that counsel for a witness may ask both leading and non-leading questions. This should be clarified.

Rule 33 – This rule should be amended to set out criteria for the Commissioner in deciding accessibility to transcripts which criteria should be in accordance with the answers we gave to questions 3 B and 4; i.e. transcripts in redacted form should be available to all participants.

C. Interpretation of the Terms of Reference.

We have concerns with respect to the interpretation of the word "deficient" in paragraphs A(1) and (3) of the Terms of Reference. The usual meaning of "deficient" is to be "lacking", "inadequate", or "weak". A narrow interpretation would not include actions which were deliberate, intentional, excessive, or planned. There is a difference in the degree of culpability. We recommend that the word "deficient" be given a broad interpretation to include all acts of commission or omission.

Respectfully submitted,

Warren Allmand
Counsel for ICLMG on behalf of ICLMG and BCCLA
Montreal, April 11, 2007