

**University of Ottawa**  
**PROFESSIONAL DEVELOPMENT INSTITUTE**

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# PUBLIC INQUIRY

## BRIEFING NOTE



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Institut de développement professionnel  
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## ISSUE

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Whether a Commission of Inquiry under the *Inquiries Act* can be undertaken with respect to foreign interference given the sensitivity of the intelligence.

A public inquiry necessarily implies that information will be presented and debated openly. Some hold the view that such an inquiry would not lend itself to a matter such as foreign interference. The claim is that this would necessarily entail discussions involving sensitive information and therefore be impractical, if not impossible in a public setting. This note will explain why holding a Commission of Inquiry on foreign interference is viable.

## BACKGROUND

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More than a decade ago, three successive commissions of inquiry were held by the governments of the day.

On January 28, 2004, the Government of Canada, through Prime Minister Paul Martin, announced the creation of a *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*.

On May 1, 2006, Prime Minister Stephen Harper announced the creation of the *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182*.

In December 2006, the Canadian government directed the creation of the *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin*.

In all three inquiries, created under Part I of the *Inquiries Act*, a significant amount of sensitive information was at play.

Of note, despite having the authority to hold some portions in public, the last inquiry of December 2006 was conducted almost exclusively *in camera* and *ex parte*, unlike the two previous commissions.

In those two public inquiries, terms of reference delineated a clear and very practical process for dealing with sensitive information. This note will discuss this process.

### Commissions of Inquiries and Terms of Reference:

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Commissions of Inquiry are established by the Governor in Council (Cabinet) under Part I of the *Inquiries Act* to fully and impartially investigate issues of national importance.

Usually a distinguished individual, expert or judge, the Commissioner has the power to subpoena witnesses, take evidence under oath and request documents. A Commission of Inquiry's findings and recommendations are not binding. However, they may have a significant impact on public opinion and/or help shape public policy.

Each public inquiry begins with an Order in Council setting out the inquiry's terms of reference. They establish the inquiry's mandate, provide specific instructions outlining the questions that the inquiry should address, the types of information and feedback that the Government wants, and often a sense of when the inquiry should issue its report. These terms of reference are legally binding.

## Arar and Air India Commissions of Inquiry

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The terms of reference in both inquiries set out a procedure for dealing with information that was subject to national security confidentiality concerns. Primarily, the Commissioner was to take all steps necessary to prevent the disclosure of information during the inquiry that could, in his opinion, be injurious to international affairs, national defence or national security.

In doing so, discussions would regularly take place between the Commissioner and the Minister<sup>1</sup>, through their counsel and *amicus curiae*, on whether the disclosure of certain information (through a document or anticipated testimony of witnesses) would be injurious if released publicly. If the Commissioner disagreed with a determination of the Minister, he had to notify the Attorney General, in which case the notice would lead to a proceeding in the Federal Court under the *Canada Evidence Act* to resolve the matter. The same process would apply with respect to any reports ultimately prepared by the Commissioner.

## Proposed Process:

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First, nothing in the proposed terms of reference should not be construed as limiting the application of the *Canada Evidence Act* (CEA), specifically at its sections 38 and 38.01 to 38.15. Indeed, these provisions of the CEA apply to any proceeding before a court, person or body with jurisdiction to compel the production of information. The powers of the Commissioner under the *Inquiries Act* meet that definition and therefore the CEA applies to the inquiry. Consequently, the Commissioner will need to be a designated entity in the Schedule of the CEA in order to enable him/her to receive sensitive information<sup>2</sup> in the context of the inquiry.

Second, the Commissioner would be under the obligation to take all steps necessary to prevent the disclosure of information during the inquiry that could, in his/her opinion, be injurious to international affairs, national defence or national security.

Third, and although this is not part of the CEA provisions, an *amicus curiae* should be appointed to help the Commissioner in assessing and making arguments with respect to the injurious nature, or not, of some sensitive information if disclosed.

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<sup>1</sup> The Minister that is 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.

<sup>2</sup> While I am using the term sensitive information, section 38 of the CEA in fact refers to two notions: **potentially injurious information** which means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security; **sensitive information** which means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

## Principles:

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As stated above, in identifying in advance the information that the Commissioner intends to request (either through documents, reports or testimonies) in the context of the inquiry, the Minister will identify any portions that may contain sensitive information the disclosure of which would be injurious to international affairs, national defence or national security. This will require the support of the agencies, which will vary depending on the volume of such information at play.

If the Commissioner reaches the same opinion than that of the Minister, then this information may either form part of an agreed upon summary or may not be disclosed to the public at all. However, it must be noted that the Commissioner would nevertheless be entitled to consider the entirety of the summarized or non-disclosed information in the course of his/her decision-making process.

This will be an ongoing process throughout the inquiry. This process will also apply prior to the release of any report.

In order to support and help the above general principles, the following procedures<sup>3</sup> should be followed:

- i. on the request of the Attorney General of Canada (AG), the Commissioner shall receive or hear information<sup>4</sup> *in camera* and *ex parte* (in the absence of any party and their counsel) if, in the opinion of the Commissioner after having heard the submissions of the AG and of the *amicus curiae*, the disclosure of that information could be injurious to international relations, national defence or national security;
- ii. if the Commissioner is of the view that the information referred to in paragraph (i) should not be received or heard *in camera* and *ex parte*, he/she shall so notify the AG; this shall constitute notice under section 38.01 of the *Canada Evidence Act* (CEA);
- iii. in those circumstances, the applicable provisions of the CEA will be triggered; the matter will be presented and heard by a judge of the Federal Court;
- iv. further, the Commissioner may release either (1) a part or (2) a summary of the information received or heard *in camera*, if, in the opinion of the Commissioner, its disclosure would not be injurious to international relations, national defence or national security; this release of information will usually occur throughout the inquiry and does not constitute information from the report of the Commissioner;
- v. however, prior to any release of a part or a summary of the information received *in camera*, the Commissioner shall provide the AG with an opportunity to make submissions regarding any possible injury to international relations, national defence or national security that would take place with the release of the information; this opportunity should be within a reasonable delay in the circumstances but should be no less than 20 days;
- vi. if the Commissioner concludes that, contrary to the submissions of the AG referred to in paragraph (v), the release or disclosure of a part or a summary of information received *in camera* would not be injurious to international relations, national defence or national security, the Commissioner shall so notify the AG; this shall constitute notice under section 38.01 of the CEA;

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<sup>3</sup>These procedures stem from the ones created for the two public commissions of inquiry discussed in this document.

<sup>4</sup>This applies to documents, reports or anticipated testimonies.

- vii. in those circumstances, the applicable provisions of the CEA will be triggered; the matter will be presented and heard by a judge of the Federal Court;
- viii. also, the Commissioner shall, prior to submitting any reports (e.g., interim, final) to the Governor in Council that are intended for release to the public, provide the AG with an opportunity to make submissions regarding any possible injury to international relations, national defence or national security that would take place with the release of the reports; this opportunity should be within a reasonable delay in the circumstances but should be no less than 40 days;
- ix. if the Commissioner concludes that, contrary to the submissions of the AG referred to in paragraph (viii), disclosure of information contained in the reports intended for release to the public would not be injurious to international relations, national defence or national security, he/she shall so notify the AG, which notice shall constitute notice under section 38.01 of the CEA;
- x. here again, the applicable provisions of the CEA will be triggered; the matter will be presented and heard by a judge of the Federal Court;

# CONCLUSION

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The proposed principles and procedures discussed in this document have been successfully applied and used in the context of two commissions of inquiry more than a decade ago. Of note, these inquiries dealt with a very high volume of sensitive information. Although the amount of work imposed on the agencies was tremendous, in the end, both inquiries were viewed as successes. This is especially true with respect to the fact that injurious information was protected from public disclosure while the commissioners were permitted, at the same time, to perform their work.

In the context of an inquiry on foreign interference, many are of the view that a significant lesser amount of sensitive information would be at play. This simply adds to the strong argument that a Commission of Inquiry with respect to foreign interference, based on experiences of previous governments and on our proposed principles and procedures, is highly feasible.