

## **CLOSING SUBMISSIONS BY THE CHURCHILL SOCIETY FOR THE ADVANCEMENT OF PARLIAMENTARY DEMOCRACY**

1. At the conclusion of the first week of hearing of the *Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions*, the Society makes three submissions for consideration by the Commission:
  - a. That an *amicus curiae* be appointed to assist the Commissioner;
  - b. that a dispute resolution officer be appointed to resolve conflicts, in a summary manner, with respect to disputes over confidentiality involving section 38 of *the Canada Evidence Act*; and
  - c. that the open court principle (substantively and in spirit) be the governing principle to be applied by this Commission to resolve any questions or disputes relating to the disclosure of information. This would include information obtained through witnesses, documents or otherwise.
  
2. The Society submits that transparency of its process and decision making is of consequence in this hearing given the nature of the allegations and the involvement of diaspora communities. It is important for trust to be maintained in Canadian institutions and therefore we urge the Commission to ensure transparency.

### Appointment of *Amicus Curiae*

3. The Arar Commission, with respect to the conduct of its hearings faced challenges which could inform this Commission. (Commissioner Dennis O'Connor, *Commission of Inquiry into the Actions of Canadian Officials in Relation into Maher Arar* September 18, 2006 at p. 292) (Arar Commission). The Commissioner in that Commission discussed the importance of testing the evidence through cross examination while acknowledging that a Commission of Inquiry is not strictly speaking an adversarial process. In that Commission the Commissioner made the further point that when parties affected by the proceedings are not present to perform the cross examination it was essential that there be an independent person available to do so. Having Commission counsel take on this role of vigorous testing of the evidence by cross examination was deemed vital in that Commission. (ibid, page 292-293).
  
4. However, The Arar Commission made a nuanced distinction between the role of Commission counsel and that of *amicus curiae*. The Commissioner discussed the role of Commission Counsel and stated that the Commission Counsel's role in a public inquiry is to lead the evidence in an independent and fair manner, and that a Commission Counsel should neither advocate a particular position nor "set out to prove a case. The Commissioner added that this does not mean that the Commission Counsel cannot engage in cross examination, even challenging ones (ibid 292-3).

5. Given the specialized nature of the legal expertise that was required and looking for an approach that would test the government's assertions of confidentiality, the Commission appointed *amici curiae* to carry out the specific role of testing the government's NSC claims. We submit that given the similarities in the legal nature of the confidentiality claims likely to be made, this Commissioner should consider this or similar approach in accordance with the Commissioner's powers and discretion. This would also avoid the challenge of Commission counsel getting drawn into innumerable procedural issues.

Appointment of a dispute resolution officer to resolve conflicts with respect to disputes over confidentiality, in a summary manner

6. Another significant challenge faced by the Arar Commission was delay as a result of disputes over disclosure pursuant to section 38 of the *Canada Evidence Act*. The parties had to repeatedly resort to the Federal court to resolve these disputes over disclosure resulting in undue delay in completing the inquiry.
7. The Arar Commission compromised and proceeded with another approach. The Commissioner stated his disappointment with the process he had finally adopted. (ibid page 296).

I also indicated that I would no longer be seeking to publish the summary of in camera evidence from CSIS that I considered could be disclosed publicly,

even though I continued to believe its disclosure was appropriate. (ibid page 296).

8. The Society submits that in the interests of transparency and fairness, an independent third party be appointed with all the necessary powers required to resolve in a summary and expeditious manner all disclosure disputes. For example, one option could be the appointment of a federal court judge to carry out this function. This would have the additional benefit of preventing the Commission from getting bogged down in procedural matters and allow the Commission to maintain its appearance of impartiality and independence.

#### The Open Court Principle

9. The Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25, para 30 (Sherman) held that:

Openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy .... Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view... the test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise.

10. As the Commissioner has noted in the Bob Mackin decision, “there is a strong presumption in favour of open courts. The purposes of the open court principle include fostering a fair and accountable justice system” (Commissioner Marie-Josée Hogue, Decision on Leave to Bring Application for Disclosure of the Applications for standing, February 8, 2024, para 9) (*Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions*). As the Commissioner noted this principle is applicable to the working of this Commission.

11. It is submitted that the open court principle should be applied as the governing principle to any requests to withhold information by various security agencies/government entities. This would be in accordance with the Commissioner’s statements and the public interest. It would also help the Commission in achieving its transparency and fairness purposes. The open court principle should be used in relation to reducing the number of *in camera* hearings as well as in keeping with the presumption that justice should proceed in public view.

12. In *Sherman*, the Supreme Court of Canada, after setting out the three-part test stated:

Only where all three of these prerequisites have been met can a discretionary limit on openness - for example, a sealing order, a publication ban, an order excluding

the public from a hearing, or a redaction order - properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments. (para38)

## **CONCLUSION**

13.The Society submits that the application of these principles will assist the Commission in meeting its mandate.

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