Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki Ahmad Abou-Elmaati and Muayyed Nureddin

Enquête interne sur les actions des responsables canadiens relativement à Abdullah Almalki Ahmad Abou-Elmaati et Muayyed Nureddin

Hearing on Terms of Reference and Procedure

Audience sur le mandat et la procédure

Commissioner

L'Honorable juge / The Honourable Justice Frank Iacobucci

Commissaire

Held at:

Bytown Lounge
111 Sussex Drive
Ottawa, Ontario
Tuesday, April 17, 2007

Tenue à:

salon Bytown
111, promenade Sussex
Ottawa (Ontario)

le mardi 17 avril 2007

APPEARANCES / COMPARUTIONS

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Ottawa, Ontario

--- Upon commencing on Tuesday, April 17, 2007
at 9:30 a.m.

OPENING REMARKS BY COMMISSIONER IACOBUCCI

COMMISSIONER IACOBUCCI: Good morning.

I apologize for this delay. We will make it up, I think, because we are told that one participant, the Canadian Coalition for Democracies is not going to make oral submissions.

As you know, this hearing has been called to deal with questions arising from the Terms of Reference of the Inquiry, more specifically what is the meaning of the phrase "any mistreatment" that appears in paragraph (a)(iii) of the Terms of Reference.

Second, is it necessary in order for the Commissioner to determine the matters that paragraph (a) of the Terms of Reference mandate the Commissioner to determine -- a mandate for him to determine and for him to decide whether and the extent to which Mr. Almalki, Mr. Elmaati and Mr. Nureddin were tortured in Syria and Egypt.

Third, 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 hearings conducted in private.

Fourth, if the Commissioner decides that some participants are not entitled to attend hearings conducted in private what, if any, steps should he take to ensure that those participants can participate appropriately in the inquiry process.

Fifth, 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.

We also requested submissions concerning any aspects of the Inquiry's Draft General Rules, Procedure and Practice that may be of concern to participants.

All of this was put on our website, along with the Draft Rules, and so on.

We have received submissions. Thank

you all for making those submissions.

As you can see from the schedule, we have tried to assign time to each participant, if you will, to make your submissions. We have put a period of time at the end to allow those who hear things this morning to supplement their oral submissions made this morning. If they have heard things after they have spoken for example, then there would be time given for each of you to make any brief but what you think are appropriate comments.

If, in making your oral submissions in-chief, if I can call it that, you want to add also response points, please do so at your discretion. In fact, we would encourage that, if it fits your organization of your oral commentary.

So unless my counsel have anything to add or comment on...? No? Can we proceed?

Thank you.

Counsel for Mr. Almalki, please?

SUBMISSIONS BY MR. COPELAND

MR. COPELAND: Good morning, sir. My name is Paul Copeland. I am one of the counsel for Mr. Almalki. Jasminka Kalajdzic, who was here before you on the last occasion, is my co-counsel in the matter.

I think it probably appropriate first off to introduce you to the three men who are the people who have been granted standing in the inquiry. First, on your right is Mr. Almalki, next to him is Mr. Elmaati, and the third man is Mr. Nureddin.

Ms Jackman, who I think was before you on the last occasion, is counsel for both of the last two men, and Mr. Norris is also counsel for Mr. Nureddin and Mr. -- I'm sorry Hadayt, I lost your last name -- is also counsel.

What we propose to do this morning, sir, is I am going to do some introduction and general comments. We spent some time together over the last week or so trying to divide up the areas of approach. Ms Kalajdzic is going to do questions 1 and 2, Ms Jackman is going to do questions 3, 4 and 5. My comments are, I think, much more of an overview of the matter.

So if I might be permitted, I'm going to start right there.

I will be making reference to some of our submissions, some of the government's submissions. I also plan to make some reference to the Book of Documents that we sent up electronically. I gather

that did not make it onto the website. I had sent some inquiry about that on the weekend to the Inquiry and as of the time I left my office I had not received a response. That was yesterday afternoon.

The Supplementary Notice of hearing in regard to this matter talks at the outset about us being granted an opportunity to participate in inquiry concerning the procedures and methods to be followed in the conduct of the inquiry. You have now read out the specific questions that you were looking for.

It is my submission that we can't comment in a very meaningful way on the procedures and methods to be followed during this inquiry without knowing the scope of the inquiry.

The Terms of Reference are obviously very important in relation to this matter, and in particular the Terms of Reference -- these being printed in sufficiently small print that I need my glasses -- (a)(i):

> "whether the detention of (the three men) resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of

information with foreign countries and, if so, whether those actions were deficient in the circumstances,"

Part (iii) again focuses on:

"... in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances."

Those words "deficient in the circumstances" lead us to make the submission that we believe that the Inquiry must examine the complete investigation of our client, Mr. Almalki, Almonte, starting no later than 1998, and perhaps earlier because we don't really know when CSIS started their investigation.

This is reference to a paragraph 8 of our submissions where we say that everything is relevant in regard to the investigation, detention, interrogations, and interactions with Canadian and Syrian officials.

In our view, one of the overarching issues is the competence or lack of competence of the

work done by the government agencies, particularly CSIS and the RCMP, but also the work of those agencies with Foreign Affairs in working out liaison arrangements, particularly, in our client's case, with Syria.

I again point out the Terms of Reference very specifically say "particularly in relation to the sharing of information".

The Attorney General, in his submissions at paragraphs 26, 31 and 40 -- if you accept those submissions today may be the last day we get to make any submissions to this Inquiry.

Department of Justice drafted the Terms of Reference and they are now, in their submissions, in my view, seeking to very narrowly interpret those Terms of Reference.

The Terms of Reference, again in the very first paragraph, they talk about having a process that inspires public confidence in the outcome. I would submit to you that if you follow what the Attorney General's representatives say, you will not inspire public confidence.

I can tell you, sir, that we asked, through Mr. Strausberg's office, to have input into the Terms of Reference. Those requests were made to the

government Ministers, they were made to the Prime Minister, there was a very late response to that request and we never got an opportunity to make any submissions to the Terms of Reference. Mr. Strausberg had suggested that there was an appearance of a conflict of interest in the Justice lawyers drafting the Terms of Reference without input from the parties.

The Attorney General, in paragraph 6 of his submissions says:

> "The Terms of Reference do not provide a vehicle by which these individuals can properly seek to clear their names."

I would point out that was true as well in the Terms of Reference of the Arar Inquiry but, as I'm sure you know, that Inquiry resulted in the total clearing of Mr. Arar.

We are of the view that a complete investigation of Mr. Almalki over nine years may reveal that there was no basis for the investigation and a possible result may be that our client will be cleared of the terrible branding that has been done on him by Project A-OCANADA.

Paragraph 10 of our factum lays out

15 findings of the Arar Inquiry, and lays out with each of those important questions that need to be answered, or that this inquiry should seek to answer.

CSIS and its activities, in my view, were barely examined at the Arar Inquiry and I think it is very important that you examine what CSIS did, both in their investigation and particularly in regard to their sharing of information with other government agencies, foreign government agencies.

The chronology was filed by Amnesty International and which has been adopted by us in paragraph 9 at many places sets out in boldface questions that remain unanswered and, in our view, this Inquiry must seek to answer those questions.

Time obviously prevents me from reviewing the 15 items in paragraph 10 or the chronology, but I would urge you to look at both of those when making decisions in regard to the procedure to be followed.

In paragraph 11 of our factum we make reference to documents that we thought were relevant to the inquiry. The title of the document is set out in Schedule C to our factum, and that is at the very second last page of the material, the last page being

the cover sheet. It lists and number of things in there and I would like to -- if I'm not running out of time -- how am I doing?

I would like to point out some of the provisions of that.

I would like to reference for you that these documents, provision of these documents complies with paragraph 15 of the General Rules of Practice and Procedure and also complies with some of your comments in your decision on standing at page 4 of your April 2 decision.

I wanted to look a little bit at the items in the Book of Documents that we provided to you.

At Tab 2 there is a series of e-mail correspondence with the Ambassador of Egypt. I met him at a conference and ended up having communications with him trying to see whether Egypt would participate in the Inquiry.

I am not going to go through those at all.

But Tab 7 indicates some things that we want from Foreign Affairs and we are curious to know -- and I think the Inquiry should be curious to know -- whether or not Foreign Affairs sought to get

cooperation from the various governments, Egypt, the United States, Syria, and Malaysia in regard to this Inquiry.

At Tab 1 of the material is what I think is the least redacted version of the Appendix D to the Information to Obtain the Search Warrant which was executed in January of 2002. This is the one that the Ottawa Citizen has been fighting forever to get access to.

I can tell you that we want to see the document, in an unredacted form if possible. We want to have it made public if possible, with certain names redacted because there is a publication ban on some of those names.

At Tab 5 there is material in regard to the seizure of the luggage of my client's wife at Dorval Airport, a seizure that we regard as unlawful.

There is a bunch of correspondence there, which again I'm not going to go through, but one of the things I wanted to tell you is that there is a complaint filed with the Commissioner for Public Complaints against the RCMP, and that is on hold while we see whether or not the Inquiry is going to start looking at those issues.

I wanted to draw your attention in regard to item 5 --

COMMISSIONER IACOBUCCI: I am very grateful for you pointing out documents that you think are needed or questions that should be answered -- and I would say this to all concerned. That is something that I would like to know about as we go and get information that is coming in at a quick pace. How we do that and with what groups, and so on, or with what other parties, that is another question. So I am grateful for that.

But don't take my silence as saying that everything that you are asking that you want access to is something that I just agree with.

MR. COPELAND: No.

COMMISSIONER IACOBUCCI: But I am encouraging you.

I mean, the main point of my intervention is to say that information that you think we should be getting or questions that you think we should be asking, it is very important for us to know that.

MR. COPELAND: Thank you.

In regard to Tab 5, there are

some sub-tabs, and at Tab F under Tab 5 one of the things that I wanted to draw your attention to, Ron Atkey, who was the Amicus at the Arar Inquiry in dealing with issues of national security, as I understand it, sat in on everything in that and I have a reference to the oral submissions he made to that inquiry and I want to read those two paragraphs because they deal with the competence issue.

He said:

> "Should the RCMP be engaged in security intelligence activities at all or should they stick to law enforcement, which they do well, leaving security intelligence to CSIS? (As read)

Which was recommended by MacDonald in the '70s.

> "Did RCMP officers and/or members of Project A-OCANADA have adequate training, policy guidance and direction for security intelligence of the sort involved in Mr. Arar is a situation?" (As read)

I raise the same question in regard to Mr. Almalki.

I could say to you that in my view the RCMP competence is an issue in both this Inquiry and that the present time in the public domain with the resignation of Commissioner Zaccardelli and now the issues around the pension fund.

My submission is, the only way the competence issue is going to be determined is through this Inquiry. There is no other process. And it is an important part of your work, in my submission, to determine that because it reflects very much on what conclusions they made regarding my client.

As I'm sure you are aware, after nine years of investigation there have been no charges laid against my client. Although the word of Commissioner Zaccardelli, when he was still Commissioner, was that there was an ongoing investigation.

I got the same answer from Mr. Cabana, when I pointed out to him at the end of the few questions I was allowed to ask at the Arar Inquiry, that no warrant had been issued and his answer was "Not yet".

So my client is still under a very

great cloud, has been branded in a very -- very difficult fashion by CSIS.

The last item I wanted to refer you to is, I have filed with you -- just because it was easiest way to file the material, was some material -- I'm sorry, I'm in the wrong document.

--- Pause

MR. COPELAND: At Tab 8. That is a complaint that I have filed with Security Intelligence Review Committee about CSIS being involved or in paying no attention to the issue of torture.

I have probably run well over my time. All I want to say to you is that there is material in their relating to Ward Elcock's testimony at the Arar Inquiry, the testimony of a man named to P.G. at the Harkat bail hearing, the testimony of a man named J.P. at the Jaballah bail hearing, which in my submission are worth looking at in that my impression from the cross-examination of those men is that CSIS declined to ever form an opinion on whether or not the Syrian military intelligence engaged in torture in order that they could have liaison agreements with the Syrian government.

You will see at the end of J.P.'s

questioning that when asked whether or not -- if they concluded that Syria engaged in torture whether it would prevent them from having a liaison agreement -- and J.P. used to work on liaison agreements for CSIS -- that he said that was up to Foreign Affairs.

So that completes my submissions. I'm sorry if I have run a little bit over time.

COMMISSIONER IACOBUCCI: Thank you.

Ms Kalajdzic...?

SUBMISSIONS BY MS KALAJDZIC

MS KALAJDZIC: Thank you, sir, Jasminka Kalajdzic.

I will supplement the submissions of my colleague, Mr. Copeland.

He has addressed more generally the mandate of the Inquiry which of course bears on the procedures to implement. He has explored the central questions of why we are here and that is a question that I will come back to at the end of my submissions.

I will use my limited time to speak to four matters.

First, I will respond to the net effect of the approach taken by the Attorney General in his written submissions, which I will suggest promote

and unnecessarily narrow interpretation of your mandate and the terms and which, in effect, reduce the role of the Commissioner of a public inquiry to that of an investigator and an internal audit.

Second, I will address the meaning of mistreatment, which is of course question number one in the Supplementary Notice of Hearing.

Third, I will turn to the issue of when the need to establish that Messrs Nureddin, Elmaati and Almalki were tortured, question number two in the Notice of Hearing.

Fourth, and finally, I will make brief comments about the Draft Rules.

As Mr. Copeland alluded to, we have done our best as between counsel for the three men to coordinate our approach so my submissions, in particular on question numbers one and two, also represent the views of Mr. Nureddin and Mr. Elmaati.

So going first to our response to the government position.

Our views respectfully on what this Inquiry is about, how I should be conducted, who can and should participate could not be more diametrically opposed to those of the government. We advocate, in

essence, an open process with due regard to the principles of justice and fair process, one that is focused on unearthing the truth and, as a corollary, clearing the names of these three men who, as Mr. Copeland said, have never been charged with a crime and therefore will never have another opportunity to expose the truth.

We do not ignore the fact that the impetus for this Inquiry was a shocking claim of a pattern of torture of Canadian detainees and government complicity in that torture that arose from the Arar Commission report.

In contrast, as we see it, the government's position is that this Inquiry is a secret one, limited to answering three questions in as limited a fashion as possible. "Surgical" in fact is the adjective that they use.

You are not to determine if they were tortured in the government's position. This is not a vehicle by which the three men can clear their names, that only government participants can participate in the process, that public hearings should be held only when "essential", but at the same time, respectfully, the government's submission is that virtually none of

the business of this Inquiry meets that threshold.

Most remarkably, the government says, at paragraph 33 of their submission, that:

> "The conduce of this Inquiry is not guided by the general principle of transparency or openness".

That submission directly contradicts page 3 of your April 2nd ruling, where you wrote, Commissioner, that:

> "Transparency and openness generally are valued principles in the work of the Courts, Tribunals and Inquiries. Their advantages are obvious and of fundamental importance to ensure accountability of decision-makers and to inspire public confidence in the conclusions reached". (As read)

Paragraph 33 is not reasonable in light of the opening words of the Terms of Reference either. The government's vision for this inquiry, in my submission, is an impoverished one. Their vision of

this inquiry is that it is not about accountability, it is not about inspiring public confidence.

Their vision, which effectively ends Mr. Almalki's participation in this inquiry today, inspires no confidence on his part that this process a fact-finding will be thorough, fair and independent. If Mr. Almalki, Mr. Nureddin and Mr. Elmaati have no confidence in the process, in our submission neither can the Canadian public which does not have the same direct interest in it as do these three men.

The government's position on the secrecy of this inquiry ignores the spirit of Commissioner O'Connor's recommendation and, furthermore, violates your only ruling to date.

COMMISSIONER IACOBUCCI: Off microphone. I am having trouble understanding how my ruling says what you say it says, and also I'm having trouble understanding the genesis of this came from Justice O'Connor's report where he recommended a private -- a private, not a public hearing, not a public inquiry rather.

I'm just trying to square those two.

MS KALAJDZIC: I will do my best to respond to that, sir.

With respect to my summation that the government's -- when you take the tenor of the government's position ruling that it is not in keeping with the spirit of your April 2nd ruling, I say this --

COMMISSIONER IACOBUCCI: I'm not talking about the government's position, I'm talking about your position which you just raised, which was that my ruling supports --

MS KALAJDZIC: A transparent --

COMMISSIONER IACOBUCCI: -- an open process and Justice O'Connor's ruling also supports an open process.

That is not what he said in his report.

But go ahead, you elaborate.

MS KALAJDZIC: With respect, sir, you found that the three men have a substantial and direct interest in the matters at issue in this Inquiry and accorded them standing as participants.

Notwithstanding that finding, the government is advocating, in its recommendations, that the three men have no interest in this Inquiry because the hearing is not about them, it is only about the actions of Canadian officials somehow in a vacuum.

On the issue of the genesis of this inquiry from the recommendations of Commissioner O'Connor, many times in his Analysis and Recommendations Report -- and we quote, we reference his direct statements in those submissions, he talks about it behooving him as a Commissioner of Inquiry to make the process as public and transparent as possible. You are correct that he says in his recommendations with respect to the three men that something less than a full public inquiry would be in order but he says so in the particular circumstances before him, because he says that national security claims will arise repeatedly and you can't have a public inquiry each and every time allegations of misconduct arise.

He recommends in his Policy Review a procedure, an arm's-length body outside of -- or at arm's length from the RCMP that would deal with those issues in an effective matter.

That policy recommendation has not yet been implemented and, in the meantime, the government was faced with a choice of what to do.

They did not do what Justice O'Connor, Commissioner O'Connor recommended. One of his recommendations was to adopt the Rae Report.

What Mr. Rae did in that report -- and I looked at it on what should be done in Air India -- was not an inquiry pursuant to the Inquiries Act, but rather an Order in Council where the Commissioner -- if that is what you would call him or her -- does not have subpoena powers.

What in effect the Rae Report recommended, and which Commissioner O'Connor adopted by reference, was not what we have here today, and inquiry pursuant to the Inquiries Act.

So not withstanding recommendations of Commissioner O'Connor, the government didn't do what Commissioner O'Connor recommended, which was something less than a public inquiry. Which is what this is. This is pursuant to the Inquiries Act.

The government did not adopt the Rae recommendation, did not do, for instance, what Mr. Rae describes in his report as being done by Justice Archie Campbell in respect of the Bernardo investigation. He refers to that as a model.

I looked the other day at Mr. Justice Campbell's report --

COMMISSIONER IACOBUCCI: So have we.

MS KALAJDZIC: -- and it wasn't this,

it wasn't pursuant to the Inquiries Act.

COMMISSIONER IACOBUCCI: I guess the government chose to presumably -- first of all, we have to look at what the Terms of Reference sake as well as a Inquiries Act. The Terms of Reference have numerous references to private, internal, all those kinds of things, yet there is -- you are right, it is set up under the Inquiries Act and there is argument, which I want to hear from the Attorney General on, that has been made that that seems to be flying in the face of Part I and the language in the Inquiries Act. So we will get to that issue.

MS KALAJDZIC: My short response, sir -- and I will get to this towards the end of my submission --

COMMISSIONER IACOBUCCI: Yes...?

MS KALAJDZIC: is that the government can't have it both ways. They can't have their cake and eat it too. I will explain why I say that.

COMMISSIONER IACOBUCCI: All right. Go ahead.

MS KALAJDZIC: But, in addition, the position that we are advocating, there is no violation to the Terms of Reference themselves.

Ms Jackman will go through what we say "private" means for the purposes in this inquiry. So it is not as though we are ignoring the fact that that word appears, we just take a very different approach to what "private" means in the context in which we are faced.

Because this may help us when we get to Ms Jackman's submission. I read in your submissions, all of you for the three gentleman, that you all acknowledge national security concerns or claims or confidentiality.

So one of the questions I have is ex ante, going into this, when we are just getting this information, it would be, it seems to me, rather loose on my part to sort of say "Oh, yes, this is going to be public, when I don't know what the information will be, and to say, well, yes, in this ruling that I have to make I will put that in when we really are just beginning to get this information.

So it is very, very tricky, even if you are right on the submissions you are making that this can't be -- it has to be public, it has to be open, you all acknowledge that there is going to be part so we will have to be private.

I think my simple point is, as of today we can make a determination what will be public or will be private. We do know, we all agree, that if it raises national security confidentiality it won't be public. Right?

MS KALAJDZIC: That's right. That's as far as we would go as far as the private component of this Inquiry. That's all that needs to be done in private.

When I spoke a few minutes ago about why we submit that the position of the government in its submissions does violation to the spirit of your April 2nd ruling, I say this because they interpret "private" to mean not just that intervenors and the public are excluded, but also that non-government participants are excluded and they therefore give no effect whatsoever to your ruling that the three men are "participants in this Inquiry".

That position also contradicts Court pronouncements on duties of fairness owed to "participants' espoused in the Krever, Baker and Phillips cases, all of which are referenced in either our materials or Ms Jackman's.

The government's opposition to

holding any part of this inquiry begs the question: Why are we here? Why go through, frankly, the charade of having applications for standing and funding when there will be no other participation rights or attendances to fund?

If this Inquiry is supposed to be about unearthing the truth, then why advocate a process that restricts your ability to get all sides of the story and, in effect, get at the truth?

And why advocate a position, an interpretation of your mandate in a way that leaves you very little discretion in separating national security privileged evidence from evidence that is not privileged.

Respectfully, the government, as I said earlier, cannot have it both ways. On the one hand, it wants to be seen as addressing matters of grave public concern following the Arar Report, not the least of which was a finding that the Canadian government send questions to Syrian interrogators to be asked of Mr. Almalki, knowing the likelihood that he would be tortured in the process. It wants to be seen as addressing these matters in an inquiry under the Inquiries Act, in a process in which the men have

participant standing to give the Inquiry greater legitimacy.

On the other hand, the government wants, in effect, to have an internal departmental review where it controls the process from beginning to end and thus shields itself from public scrutiny.

The government's position, in our view, is not sustainable on the jurisprudence that we have cited in our three factums and as cited in the other submissions of some of the intervenors.

Their interpretation is not the only or the inevitable interpretation of the Terms of Reference.

With that, I will move on to question number one, the meaning of "mistreatment".

Our submissions on this question are at paragraphs 14 to 17 of our factum. We also adopt Mr. Nureddin's, Mr. Elmaati's, Amnesty International's, the BCCLA's and the Canadian Arab Federation position on the definition of this term.

When all of the submissions are synthesized, the position we take is that any mistreatment is, as the government says, a low threshold of conduct, but where we part ways is that we

do not accept that you are restricted to the low threshold.

So "mistreatment" would include conduct that falls short of torture or inhuman and degrading treatment, but certainly would include the form of mistreatment. It would include the absence of Consular access, refusal of a safe haven at an Embassy, denial of assistance to return to Canada, any actions that impeded or delayed the return of these men to Canada, arbitrary detention and conditions of detention, denial of due process and harm to reputation.

There I will pause to say that including media leaks as a subject of examination is necessary, because these media leaks, as Commissioner O'Connor found, occurred both during and after these men's detention and may have had, we suggest, an affect in terms of impeding their release. So that would constitute mistreatment as well.

I would also pause to note, in case there is any debate about this, that acts and omissions of Canadian officials needs to be examined even though the term in the reference refers only to "actions of Canadian officials".

The government concedes in its submissions that there was mistreatment for the purposes of this Inquiry.

It does not agree at this juncture that there was torture.

They suggest that as soon as you find that there was some mistreatment your fact-finding should end or should stop there. This, in our view, ignores the reality that torture took place, and by denying that these men were tortured the government compounds the harm that these three men have already suffered. Stephen Toope speaks to that in his report.

As a practical matter, you must look at all mistreatment to do proper fact-finding. You must identify the mistreatment in order to evaluate Canadian conduct in relation to it. Therefore, mistreatment includes all degrees of mistreatment from the common definition of "a wrong" to the definitions of violations of human rights and the international covenant on civil and political rights and other covenants to the highest level of mistreatment, that being torture.

Third, as a third matter, the question of torture, which is question number two in

your Hearing Notice, our position is outlined in the factum at paragraphs 18 to 23.

We suggested adopting Professor Toope's report as conclusive of the issue of whether these men were tortured by Syrians. Even if Professor Toope didn't explore the extent to which they were tortured that was within his mandate.

One of our caveats in our factum related to the government position on whether the men were tortured. It appears from their submissions that the Canadian government will not officially accept that these three men were tortured, in keeping with the position taken in Arar.

We adopt, therefore, the submissions of Amnesty, BCCLA and Canadian Air Federation on this point. You should appoint a fact finder to interview the men more fully that would build on the Toope report, fill in any gaps in factual detail of that report and thereafter report to you on these men's experience in a comprehensive manner.

We note that a fact finder has to be appointed in any event to report on Mr. Elmaati's experience in Egypt, because Professor Toope didn't deal with that at all in his report.

In terms of your mandate, in our submission it is critical to collect these facts.

Commissioner O'Connor said that information relating to Mr. Arar's treatment was essential background information and your analysis of the deficiency of Canadian officials conduct will have different implications and consequences depending on findings of torture.

For example, essentially we say context is crucial. If Canadians were to send questions to an English police authority who had detained a Canadian there, where there was no basis to believe the detainee had been mistreated and had been given Consular access, then the propriety of the conduct of those Canadian officials in that circumstance would be assessed differently than the conduct in the context of Mr. Almalki's detention.

Context is crucial in determining deficient conduct. You can only evaluate the sufficiency or propriety of conduct in the context of what happened to these three men. The standard by which conduct will be measured differs depending on this context.

Put briefly, these issues are

squarely within your mandate. Information-sharing with foreign governments, propriety of liaison agreements, provision of Consular services, all of these can only be assess properly if you have all of the information relevant to the mistreatment and torture of the three men.

I note that the submissions of the OPP seem to be in accordance with this.

Finally, the Draft Rules.

To a large extent we cannot make specific suggestions on wording of the Draft Rules until we know the approach you will take to the scope of your fact-finding mandate and the public/private debate. We made some comments in our factum and we adopt those of the intervenors, especially Mr. Allmand's submissions on behalf of the BCCLA and ICLMG.

We would like to reserve the right, if that is appropriate, to make specific suggestions on wording if applicable once we know the direction that you are going in, but I do make one additional submission on rules arising from the government's submission is laid out a paragraph 50 of their factum. That submission relates to Rule 17.

They have introduced the issue of

solicitor-client privilege. In our view, this inserts into an already complicated evidentiary issue this new potential source of over claiming. They want, or they seek to have Rule 17 amended to give them the right to keep secret, even from inquiry counsel, any information that they claim is subject to solicitor client privilege.

Moreover, they suggest that the Commissioner cannot even review the legitimacy of such a claim of privilege unless it is a situation of "of absolute necessity".

We note that this is far less than what we would get even in an ordinary civil action. I refer you to page 137, footnote 67 of the Arar Report where Commissioner O'Connor comments on the solicitor-client privilege issue. There Justice Department lawyer claims of solicitor-client privilege were made. Commissioner O'Connor said:

> "As a general rule an independent review body must have access to solicitor-client information in order to effectively carry out its mandate." (As read)

We urge you to adopt Commissioner O'Connor's position and reject the government recommendation on Rule 17.

In conclusion, I ask why we are here today. We submit that we are here today because of a previous finding that our government, its intelligence service made mistakes in the terrorism investigation and we are here because of the torture of at least four Canadians abroad. We are here because those mistakes were made and that torture likely occurred on the basis of secret evidence, secret deals, secret lists, secret information-sharing.

The government wants you to add another layer to this secretive process and we urge you not to do so.

Thank you very much.

COMMISSIONER IACOBUCCI: Thank you.

Ms Jackman...?

SUBMISSIONS BY MS JACKMAN

MS JACKMAN: My friend has covered some of the points that I would have covered and so I will try not to duplicate.

COMMISSIONER IACOBUCCI: I appreciate the coordinated effort you and your colleagues have

made.

MS JACKMAN: With respect to the third question that you have in the list of questions: What does it mean to take all steps necessary to ensure the Inquiry is conducted in private.

Countering that is the later question about: What is essential to the effective conduct of an inquiry such that I should be a public?

The questions don't fit together obviously. I mean, the principle of openness is -- the short answer to where is it essential, what is essential to have to the effective conduct of the inquiry is that all of the should be open, except for and NSC claims, national security claims or national defence or something like that, because what would the reason be?

Unless there is a valid claim to national security, in normal terms in a normal proceeding, it wouldn't be closed. So when my friend closed her submissions with saying it is adding another layer of secrecy, to us it doesn't make sense to say it has to be in private, implying -- if you take the government's position in their submissions, implying

that the whole hearing is in private, even when there is no justification for it, even when it is not a national security issue, it is just all in private and you might give us little titbits in public. That is the government's position.

When my friend says "What's the point?" Really, what is the point? What kind of a hearing is it going to be? All it is going to do is whitewash the government.

I'm not saying that you would whitewash in your answer, but in your Commission, I'm not trying to suggest that, but it is the process --

COMMISSIONER IACOBUCCI: I suggest you be careful. I would be very careful about --

MS JACKMAN: It is the process I'm concerned about, Justice.

COMMISSIONER IACOBUCCI: Well, I would be careful about saying things like that.

MS JACKMAN: You are right, I shouldn't have -- I shouldn't have put it that way.

But what it does is it just permits the government to continue what it has been doing all along without having to account for it.

You know, when we receive refugees in

Canada they come from countries that have those kind of procedures. It is a slippery slope if in a Commission of Inquiry you permit that to continue on matters as important as torture.

The statute indicates -- the Public Inquiries Act, notwithstanding the government's submissions, indicates that this Commission was struck under the public inquiries section. Now, the government make some esoteric argument that public inquiries is really private inquiries about matters of public business. It doesn't say that, it says "public inquiry" and it is about matters of public business.

The jurisprudence of the courts indicate -- and I quote from Phillips case:

> "The status and the high public respect for the Commissioner and the open and public nature of the hearing help restore public confidence, not only in the institution or situation investigated, but also in the process of the government as a whole. They are an excellent means..." (As read)

He is talking about Commissions:

> "... of informing and educating concerned members of the public." (As read)

That is the norm for a public inquiry, for a public inquiry, or a Commission struck under the Public Inquiries Act.

The second thing --

COMMISSIONER IACOBUCCI: The question I have for you and for counsel for the Attorney General, where is it that either authorizes this Inquiry to be conducted in private as a general matter with exceptional circumstances for public hearings and input, et cetera.

Is there anything in the Inquiries Act that (a) prohibits it or (b) authorizes it?

MS JACKMAN: I would say that --

COMMISSIONER IACOBUCCI: Or any cases that you have, because those cases that you cited in fact, with great respect, they don't issue -- they just talk about the utility of the public inquiries --

MS JACKMAN: The principles of it, of course.

COMMISSIONER IACOBUCCI: -- and I

don't disagree with those.

MS JACKMAN: Right.

I don't have -- I think we couldn't find cases that have addressed this particular issue and the reason for that is, when they have a Commission of Inquiry it is public, it is either a departmental investigation, in which case it is secret, most of the time, or it is a Public inquiry.

What the government has done in this case, in the context of these issues, torture, is to say "Oh, no, we don't really want it public. Now we are going to reverse the entire history of Commissions and make private and only -- presumptively private and only open where necessary, whereas if you look at this statute in terms of the purpose and the splitting between public inquiries and departmental investigations, the presumption is openness, not the reverse.

There is a question of whether it is even within the of purview of the Governor in Council to do what they have done, but I think what we want to do is try to cooperate and see if we can make the best of it given what you have been given in relation to the Terms of Reference.

But I think that if you look at the scheme, the breakdown between the two kinds of investigations, the presumption is openness. That is clear in the jurisprudence that they have always been open.

Second, it is a constitutional principle. I mean, that is the other thing. To reverse the presumption when the norm is for an open court principle and, as you know in the materials that we have all filed, it is your reasons Justice Iacobucci that we cited.

COMMISSIONER IACOBUCCI: I know. I know. I'm glad you cited them, they brought back happy moments for me.

With respect, Ms Jackman, I'm not sure in open court principle really applies to an inquisitorial investigative proceeding. I acknowledged that in the ruling on participation and standing. But I'm not quite sure that -- you know, and I might as well say this right now.

There is no trial here, there is no court preceding here, there is no one who has been charged, there are no case to meet kinds of principles that are operating.

I agree with your previous statement is there some way we can, looking at what the Terms of Reference are and looking at what happened to these individuals and so on, is there some way we can have a modus operandi of respecting the Terms of Reference and yet also reflecting the underlying, if you like, interests that ought to be properly recognize.

That is easy to say, but it is not easy to achieve. I understand all that.

But to reach for all of, if you like, the arsenal of the open court principle on all of its components to an investigative proceeding which is trying to find facts, albeit under a mandate, I think that is a different matter.

Isn't it?

MS JACKMAN: You know, I think if you look at the Krever Commission, you put that in the context of fairness, that is probably the closest case to dealing with some of the interests here.

What the court in the Krever Commission case has said, procedural fairness is essential for the findings of Commissioners because the finding of Commissions may damage the reputation of individuals.

The reality is -- and the government has made this submission and the Globe and Mail picked it up as a headline -- you are not determining the guilt or innocence of our three clients.

COMMISSIONER IACOBUCCI: No.

MS JACKMAN: You are not determining the guilt or innocence of Canadian officials who have acted, that's true, but it is out there in the open.

They have been branded, through the publicity around their cases and the fact that they were tortured, as terrorists. That is a terrible burden to bear. It means that you have to worry about getting on a plane, it means you can't cross the border. They are prisoners in Canada, some of them. Those are very, very profound effects.

To pretend that this Commission isn't going to affect those reputational interests, at least in a moral and a public sense, is to ignore the reality of it.

I say the same for Canadian officials. I mean, if in fact Canadian officials knowingly send information, knowing that it would cause a person to be tortured or to have torture continued our detention extended, that is an egregious, egregious

act on the part of Canadian officials.

That is an important interest. Both their interests and the interests of our clients require that this be a fair process. Fairness goes hand in hand with openness.

That is what the Supreme Court said.

COMMISSIONER IACOBUCCI: But fairness also, I think you properly said -- and it is worth repeating. I think fairness is for everyone who may be involved in this, whose conduct may be under review in this matter.

MS JACKMAN: Yes.

COMMISSIONER IACOBUCCI: I'm not trying to weigh the individual's reputation or treatment in any way as being less than those of Canadian officials. That's not what I'm trying to say by saying in particular that I am concerned. If there are national security concerns, then we have to be very careful about people who work in that area. Their lives could be at jeopardy. The techniques that would come out could be very damaging to future activities, and so on.

MS JACKMAN: Right.

COMMISSIONER IACOBUCCI: And fairness

would dictate that we take precautions, that this Commission of Inquiry take precautions to avoid those consequences.

MS JACKMAN: And we completely agree with you.

COMMISSIONER IACOBUCCI: Or to aggravate damage that may have already been done to individuals who were the subject matter of this inquiry due to their names.

So on all fronts there is this sensitivity for ensuring that if there is going to be a public, if you like, aspect to it, we have to be very careful.

MS JACKMAN: And I understand that. Certainly with the national security claims and those kinds of concerns, we accept that that is valid. Having argued against it for many years and lost every time, we are prepared to accept that it is a valid consideration.

The last thing I want to bring to your attention in terms of the considerations that you have to take into account is the Vancouver Sun case. Again that case was compelling the testimony of a witness, as I understood it, who was not facing charge,

was not facing any kind of reputational interest, and yet in that context -- and it is quasi criminal; I don't think you could call it completely criminal because it was just an investigation.

In that context you and Justice Arbour writing for the court recognized that feelings have to be presumptively open.

That was not judicial in the sense of the trial. It was an investigation in that context.

So I would ask that you look at the Vancouver Sun case closely because you set up important principles in that case.

COMMISSIONER IACOBUCCI: I take your point, but remember it was a judge who was being the agent of the state and compelling that testimony, not an inquirer --

MS JACKMAN: No. I recognize there are differences. All I'm saying is that --

COMMISSIONER IACOBUCCI: I get your point.

MS JACKMAN: -- it wasn't a criminal trial.

There are two ways of looking at it. The first position that we would take is that this

hearing in light of constitutional norms around openness, which do apply in commissions -- we take the position that it applies -- that there is really only a two-tiered way of doing it: have it all open in public and then closed just for national security claims.

That would be probably closer to Arar. That, in light of the principles, I think is the only way to do it.

The alternative is a three-tiered system.

If you don't accept the two-tiered one where it is presumptively open and only closed for national security, then we would urge on you the three-tiered model, which is that it is public, where that is essential to the conduct of the inquiry as you interpret it, because our understanding of essential to conduct is openness. But if you interpret it more narrowly, I will address that in a few minutes in terms of what part should be public.

There is part of it that is public; that there is part of it that is private; and that there is part of it that is secret.

I know the government collapses the secrecy with the privacy, but I would ask you to note

the model used by the Security Intelligence Review Committee.

When you go to a hearing at the Security Intelligence Review Committee, you are in a private hearing. The public isn't allowed to be in attendance at the hearings before the Security Intelligence Review Committee. But the persons concerned, the participants, are all at that private hearing.

Then when it closes for national security reasons, they are excluded. So there is a private part and there is a secret part.

There is precedent for having it both ways.

To the extent that you are able, this hearing should not be closed to the participants. Even if it is closed to the public, it should not be closed to the participants unless it is necessary.

The only justification in law for excluding participation of interested parties is national security claims or national defence, valid claims that support an ex parte proceeding. The government's position is that this whole thing should be ex parte basically. That isn't justifiable in law.

We would take the position that you are not setting a precedent no matter how you structure this, because every commission of inquiry has to be determined in terms of the interest and the issues before that commissioner.

We are not the Bernardo hearing. It is not Air India.

The government has used the Air India case as an example, and I will just deal with that now.

It is not the same. The families that wanted to participate in the secret part of the hearing for the Air India hearing had no reputational interest at stake, which is a recognized factor for commissions according to the Krever Commission judgment of the Supreme Court of Canada, and they could provide no assistance.

So you can't look at Justice Major's reasons in the context of Air India and apply them to this situation.

Our position is that you should permit participation for all participants at the private part of the hearing, even if it is not public, even if it is not being closed for national security grounds, and that you should clear counsel to

participate in the secret part of the hearing, at least for the three men if not for other organizations who have an interest.

COMMISSIONER IACOBUCCI: Do you mean on undertakings of confidentiality?

MS JACKMAN: On security clearances and undertakings of confidentiality. It has been done before.

COMMISSIONER IACOBUCCI: Yes, in the Code --

MS JACKMAN: In the Code situation, yes. And of course the Supreme Court of Canada left it as one of the options in the Charkaoui case that just came down recently.

COMMISSIONER IACOBUCCI: I'm just thinking out loud.

How does one get instructions from one's client if you are barred from giving him, in this case, information that you have received?

MS JACKMAN: You can't get instructions from the client with respect to that particular information. All that you can do is advance their interests in the secret part of the hearing because of what you know about the case.

But you are their counsel. The perspective that you bring to the secret part of the hearing in terms of examining witnesses is the perspective of the client, whether or not you can get specific instructions from them.

It certainly appeared to work in Air India. There have been instances I'm sure in other places where it has been used as well. In Canada we have more often used the special advocate model. That would be time consuming. I think that would add yet another layer.

It is preferable to have the actual counsel who are aware of the client's interests rather than having another instructing counsel involved.

The measures that we have suggested with respect to appropriate participation are:

First, that counsel should be participating.

Second, even if to the extent that there are parts of the Commission hearings where counsel is not present or participants are not present, there should be summaries or expurgated transcripts.

I know the government's position is that is time consuming. Essentially what the

government's argument is, because there is a January 2008 deadline, is that expediency trumps fairness.

COMMISSIONER IACOBUCCI: Maybe that is what they are saying. I don't know. We will ask them.

Where does expediency fit in your, if you like, taxonomy?

MS JACKMAN: I think it is how people cooperate through the course of the hearing.

For example, we are all aware there is a January 2008 deadline. But, for example, if you have counsel in the secret part of the hearing, as we have done today, we coordinate. There may be one lead counsel to ask questions. We can do it.

Or there may be areas that we all agree with Commission counsel that we won't cover; that we will leave to you to address.

It's not like we want to stall. We want the answers. Our clients want the answers. Certainly we can do things to streamline the proceeding, but it is through the conduct of the hearing, not through giving up the fairness at the outset on a presumption that because you let people participate therefore it is going to be a longer, more

extensive proceeding. It doesn't have to be that way.

I sat through much of the Arar Commission. Many of the questions Commission counsel covered and we didn't need to cover them. I don't see why that wouldn't happen here.

As well, there may be areas where we have already read some of it or we think that it is really not such a big issue for our clients and will just leave it to you. We don't even have to be there for that part.

That's what I mean by trying to address the problems. It should be done that way.

And I did want to touch upon the Charkaoui case.

I think what is important in Charkaoui is two things. I know Charkaoui is different, but what the court recognized in Charkaoui -- and this is the commonality in terms of that principle.

The court says:

> "Despite the judge's best efforts to question the government's witness and scrutinize documentary evidence,

> he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information." (As read)

I know you have Commission counsel but nobody, if they are secret hearings, nobody in that room will advance the interests of our clients. That is essential, I think, in terms of the answers that they need and in terms of their reputations that are on the line.

COMMISSIONER IACOBUCCI: Again, it just points to the difference between no judge under our system is an inquisitor. It is an adversarial proceeding. This is an inquisitor.

MS JACKMAN: True.

COMMISSIONER IACOBUCCI: We have far more -- I hope we have. We have been given undertakings by a government that we are going to be given information.

MS JACKMAN: True.

COMMISSIONER IACOBUCCI: We are

conducting the inquiry.

MS JACKMAN: I think the point in Charkaoui, though, was that even if it's a court, it's that you need a complete picture.

And unlike Air India, we can assist in that process.

COMMISSIONER IACOBUCCI: But Professor Toope made an important contribution.

MS JACKMAN: Yes, he did.

COMMISSIONER IACOBUCCI: He didn't have the benefit of foreign government involvement.

I'm not quarrelling with the report. Don't get me wrong. I'm just pointing out none of these things is perfect.

MS JACKMAN: No, it's not but that foreign government chose not to participate.

COMMISSIONER IACOBUCCI: Agreed. But we take his report. And it was certainly taken by Justice O'Connor as a very serious fact-finding, if you like, component.

MS JACKMAN: Yes.

COMMISSIONER IACOBUCCI: Yet there was no ability to get at all of the potential witnesses and all of the issues that could have arisen.

MS JACKMAN: But it may have been a better report if the other party had decided to participate. He could have judged credibility on both sides. He wasn't able to do that.

COMMISSIONER IACOBUCCI: All I'm simply saying, Ms Jackman, is that there are a lot of things that we have in an inquiry, if you like, practices that don't have the full, if you like, adversarial practices of examination and cross examination and full disclosure on a Stinchcombe basis, et cetera.

MS JACKMAN: Let me answer it this way, Justice Iacobucci. I have no doubt that this Commission -- and you have very effective counsel -- can do a good job, with our without our participation. It would be a better job if we participate.

But you have to put that in context, both in terms of the constitutional principles I was talking about, but also in terms of public confidence.

I have practised since the eighties in secret hearings. They are terrible things. You never know what is going on. They don't instill public confidence to the extent that there is a greater degree of participation, there is a greater degree of public

confidence.

That is why the Security Intelligence Review Committee, we like that process. We were permitted to participate, given the limitations. Even if it was in private hearings, we still participated.

The Federal Court process, the Supreme Court finally struck it down at the end of the day after so many years. And it's not the judge's fault. It had no confidence of anybody because of the nature of the statute that put that obligation the judges.

You have to recognize -- I think you really have to take seriously what is the degree of confidence in this process if you don't really grapple with how you make it public as much as you.

COMMISSIONER IACOBUCCI: That's right and that is a fair comment. The grappling that we are struggling for is just that. But we do have to start with the Terms of Reference.

MS JACKMAN: Yes, I agree.

COMMISSIONER IACOBUCCI: There is not a blank cheque to just fill in the procedure we think would be the most optimally desirable from a legitimacy standpoint, et cetera.

I think the government is saying -- maybe it sounds immodest of me to say this. I apologize for perceived immodesty if that is how you take it.

I think the government is saying we are going to ask a person who knows a little bit about independence and presumably has some sort of credentials to offer in that respect --

MS JACKMAN: I agree.

COMMISSIONER IACOBUCCI: And we are going to have a process of counsel that he has chosen, who you characterize as first class, and I do too, and a staff who are going to be dedicated to working as effectively as they can to get at the bottom of this as much as possible.

That isn't a complete answer, I agree, but I think it is part of the background of why the government chose this vehicle.

MS JACKMAN: That is the government's position and I would say -- I have to finish because I'm taking up too much time, but I just want to say two more things.

I would say, in answer to that, that they were dishonest to the public. In their notice

there was a big fanfare about this inquiry after the Arar Commission report came out. It was the same day I think they announced the inquiry.

They called it an internal inquiry; they didn't call it a secret inquiry. They didn't use the word "secret" in the Terms of Reference. They didn't use the word "ex parte" at all.

Now what they are saying to you is: Really, although we didn't tell the public that, that's what we want. That's not fair.

I think you have to look at the fact that they did not use ex parte and did not use secret and make the best of it.

On the last point, which is what should be open if you decide to keep parts of it private, it is in the written submissions. I won't go into detail.

Certainly the conduct of Canadian officials is essential to be public. Canada's practices and policy with respect to torture and information sharing by Canadian officials.

Those three areas, information sharing both ways.

I had put in the written submissions

about torture being secret, complicity and torture being secret. That is a very serious issue. You shouldn't permit it to go on and have further secrecy around what Canadian officials may have done or not done.

I guess because of my background as a refugee lawyer, I keep looking at what happens in Canada in light of what is going on in other countries and the refugees that we receive from other countries.

Impunity is a real problem in many countries that don't respect human rights. You don't want Canada going down that path. It is very, very important, because of that, that if you see something as serious as what appears to arise in these cases and it's not under as much public scrutiny as it can be under, then it just perpetuates the problem.

Thank you.

COMMISSIONER IACOBUCCI: Thank you very much.

--- Pause

COMMISSIONER IACOBUCCI: Go ahead.

SUBMISSIONS BY MR. PEIRCE

MR. PEIRCE: Good morning, Commissioner.

Michael Peirce for the Attorney General of Canada.

As you said during the Standing hearings, there is no policy component to this inquiry. Nevertheless, my friends have amply explored the policy behind calling commissions of inquiry.

In so doing, they depart from the Terms of Reference. They call into question the Terms of Reference. They suggest other processes. Nevertheless, this Commission must be guided by the Terms of Reference.

I do not intend to repeat my written submissions this morning. I will make some brief introductory comments and then I will address issues arising from other submissions, and specifically three issues in particular:

(1) what constitutes appropriate participation;

(2) the nature of the interests engaged in this inquiry; and

(3) the duty of procedural fairness, the extent to which those interests give rise to a duty of procedural fairness.

In many respects my submissions this

morning are straightforward as they are simply guided by the Terms of Reference. It has been suggested that the Attorney General of Canada has taken a narrow interpretation. Rather than a narrow interpretation, it is simply an interpretation that insists that the Terms of Reference not be dispensed with.

The Terms of Reference are the foundation of the internal inquiry and everything you do as Commissioner must find a home in the Terms of Reference.

As the Terms of Reference unambiguously state, this is an internal inquiry which is to be conducted in private except in limited and exceptional circumstances.

This has never been done before, certainly not in this way. To be clear, this is not the Arar Commission of Inquiry. The Arar Inquiry broke new ground. It was an important process, important at that time, but ultimately Commissioner O'Connor recommended that inquiries into issues of this nature be conducted differently.

To quote -- and I think it is a well-known quote now:

"My experience in this Inquiry

> indicates that conducting a public inquiry in cases such as these can be tortuous, time-consuming and an expensive exercise. I will simply say there are more appropriate ways than a full-scale public inquiry to investigate and report on cases where national security confidentiality must play a prominent role. It is not practical or realistic to respond by calling a public inquiry each time."
>
> (As read)

It is with that guidance that this inquiry, the internal inquiry, was called. This inquiry is different in important ways from the Arar Inquiry.

The Terms of Reference here are narrower and more specific. They focus on the conduct of Canadian officials and do not include an open-ended clause that appeared in the Arar Terms of Reference. Clause A(5), I believe it is.

The internal inquiry is to be conducted in private and only in public in exceptional circumstances where it is essential to ensure the effective conduct of the inquiry; whereas the O'Connor Inquiry, the Arar Commission Inquiry, was presumptively public.

Furthermore, in this inquiry you, Commissioner, will not be called upon to adjudicate national security confidentiality issues.

Finally, I would add that the draft rules which give life to the Terms of Reference in many respects here, are more straightforward and less formal, at least at the front end of the process.

We can learn as much from the Arar Commission about what not to do as we can about what ought to be done, and I think that is some of the guidance of Commissioner O'Connor in his recommendations.

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.

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.

My friends have suggested that this inquiry should be all open except where national security confidentiality is engaged. With respect, that is to recreate the Arar Commission of Inquiry. That is ultimately what transpired in the Arar Commission of Inquiry.

It was only where national security confidentiality was engaged that the hearings were in private. Everything else was conducted in public, in many instances recreated shorn of the national security confidentiality issues.

That is a tremendous and laborious process, tortuous, and we will be here for a long time if that is the process engaged. But it is not the process under the Terms of Reference.

The challenge of ensuring that this independent internal inquiry is conducted through a fair, thorough and expeditious manner in the time prescribed is an important challenge. It is a challenge that will determine whether in fact we can address these matters in a timely way in the future.

In my view, that challenge can only be met if the internal inquiry remains squarely focused on the Terms of Reference and the tasks set out in the Terms of Reference, and particularly the three questions there and the process that is defined by the Terms of Reference.

A number of submissions have raised the question of appropriate participation. I will go through and refer to the interests at stake and how those affect the need for a particular level of participation.

I do want to start by indicating that appropriate participation, which must be based on the nature and extent of the interests, appropriate participation here includes an opportunity to make submissions, the submissions today; submissions on the Terms of Reference as issues in relation to the Terms of Reference may arise from time to time; submissions on the rules; opening and closing submissions; submissions on motions.

Appropriate participation also includes the opportunity to submit any documents or other evidence and, perhaps most importantly, to work with inquiry counsel to ensure that questions are

asked, that lines of inquiry are followed.

In my submission, appropriate participation should not be more complicated than that.

COMMISSIONER IACOBUCCI: A part of that, though, especially the last point of your list, wouldn't it be more effective, just to take that word, if there were topics, for example -- and don't hold me to the detail of the example or the appropriateness of the example. I'm just thinking out loud.

Let's suppose we were concerned about consular services. Wouldn't it be, in your listing of appropriate participation, helpful to all concerned to allow counsel for the individuals to work with inquiry counsel to say: Look, you are in this topic; we would like you to follow these kinds of lines of inquiry, we would like you to really pursue this. Here is something you might wish to consider. You should be aware of this assessment, all of these kinds of issues.

Is that what you are talking about?

MR. PEIRCE: That is exactly what I'm talking about if I understand --

COMMISSIONER IACOBUCCI: Could there not be a series of those kinds of examples?

MR. PEIRCE: I anticipate there will

be.

COMMISSIONER IACOBUCCI: That's not just -- that doesn't spring from the Terms of Reference. It does spring, though, from a recognition that you are trying to search for something to allow a meaningful, if I can put it that way, role, albeit within the context of, as you call it, privacy or internal, ex parte, whatever.

Anyway, that is helpful.

MR. PEIRCE: As I said in my standing submissions, this is an internal inquiry into the actions of Canadian officials and no one else. It is the actions of Canadian officials that will be evaluated, determined to be sufficient or deficient.

This is certainly not an inquiry into Mr. Almalki, Mr. Elmaati and Mr. Nureddin. They are not on trial in any way. Their actions are not the subject of this inquiry.

They have a substantial and direct interest in the subject matter of this inquiry, as you have found. That is the nature of their interest. It is an interest in the subject matter of this inquiry.

They do not have a legal interest.

They undoubtedly have other interests

beyond the Terms of Reference here, including significant litigation claims that may be pursued. Internal inquiries should not become a proxy for those other interests.

They also have stated an interest in using this inquiry as a vehicle to clear their names. This is not that vehicle. It is not an inquiry into their actions. To make it an inquiry that would look to the prospect of clearing their names is equally to make it an inquiry that has the prospect of condemning these individuals. And that is not the case. That is not the task of this inquiry.

It certainly does not appear in the Terms of Reference.

To do so, in fact, would transform the internal inquiry into an inquiry into their actions when this is an inquiry into the actions of Canadian officials. It would subject the three individuals to potential findings of misconduct without their properly falling within the Terms of Reference.

It could potentially require findings akin to a finding of civil or criminal liability or a finding that there is no civil or criminal liability. But such findings are clearly outside of the Terms of

Reference and outside of inquiry.

It would require a review of the entirety of the investigative files, the bulk of which is not relevant to the Terms of Reference of this inquiry, the volume of which would potentially take this inquiry much, much longer than the period available.

So it would necessarily risk prolonging the inquiry. It could risk jeopardizing any ongoing investigations, which is specifically prohibited by paragraph (s) of the Terms of Reference.

If this inquiry were to go down this road and the Commissioner were unable to clear their names, for whatever reason, be it process, for whatever reason, it would by necessary implication cast a pall over their reputations, and that should not be done.

The mere suggestion that this inquiry might be a vehicle to clear their names is liable to put in issue their reputations. In my submission, it will be important to clarify at the outset of this inquiry that that is not the case.

The right to procedural fairness flows from the nature of the interest. The right to procedural fairness is engaged in an inquiry

specifically by the risk of an adverse finding is a finding of misconduct.

Section 13 of the Inquiries Act directs us on that point.

As this is not an inquiry into the actions of Mr. Almalki, Mr. Elmaati and Mr. Nureddin, they are not subject to findings to misconduct and nor, as I said, should the conduct of this inquiry reflect on their reputations.

No such interest is created sufficient to engage a duty of procedural fairness.

Even if a reputational interest were engaged, it would not engage a right to participate through any particular kind of procedure. My submission is that appropriate participation is the guidance within the Terms of Reference, and I have outlined what may constitute appropriate participation.

My friends have suggested in their submissions -- and I believe it is in the submissions of Mr. Almalki, but I stand to be corrected -- that a Section 7 Charter right is somehow engaged here.

Perhaps if that were the case, that would be the one thing that could push us beyond the Terms of Reference. However, it very clearly is not.

The framers of the Charter -- and I'm going to quote from the Blencoe case of the Supreme Court of Canada, which was a case involving the delay in an investigation into a human rights complaint.

The Supreme Court said:

> "The framers of the Charter chose to employ the words life, liberty and security of the person, thus limiting Section 7 rights to those three interests. While notions of dignity and reputation underlie many Charter rights, they are not stand-alone rights that trigger Section 7 in and of themselves." (As read)

To summarize, then, given the nature and extent of the interests of these individuals, it is the submission of the Attorney General of Canada that there is no duty of procedural fairness engaged here and that, in any event, any such duty would have to be interpreted within the Terms of Reference and the procedure set out there.

I would like to touch, if I could -- I'm mindful of the time. Am I all right on time?

COMMISSIONER IACOBUCCI: I don't know. I haven't been keeping track.

MR. PEIRCE: You will wave a hand?

MR. COPELAND: I think he is out of time, sir.

COMMISSIONER IACOBUCCI: The honourable member has suggested that you are out of time.

I would like to ask you a few questions.

MR. PEIRCE: And I'm certainly happy to entertain them at any point.

I can give you a quick road map of where I intend to go.

I was going to address the appointment of an amicus briefly, the Air India trial process very briefly.

I'm only at 20 minutes; thank you.

COMMISSIONER IACOBUCCI: I'm glad someone is paying attention.

MR. PEIRCE: And perhaps the Toope Report briefly and the Toope procedure.

COMMISSIONER IACOBUCCI: Sure.

MR. PEIRCE: A number of the

submissions have raised the prospect of appointing an amicus based on the recent Charkaoui decision of the Supreme Court of Canada. In my submission, that is neither necessary nor appropriate.

I have outlined in my submissions the interests of Mr. Almalki, Mr. Elmaati and Mr. Nureddin. These individuals are certainly not subject to detention or removal. Their interests in no way replicate the interests of those individuals who are subject to security certificate proceedings.

Relative to those individuals subject to security certificates, Mr. Almalki, Mr. Elmaati and Mr. Nureddin have a significantly attenuated interest relatively.

They also do not, unlike the security certificate matters, have a substantial evidentiary role here. The bulk of the evidence is under the control of the Attorney General of Canada and is being produced to your Commission counsel actively.

At the same time the process of course here is different from security certificate cases. There is -- and I think this is a key difference -- already another actor present in this process that is not process in the security certificate

cases, and that is inquiry counsel.

Inquiry counsel are charged with representing the public interest and will of course directly support you in eliciting the facts.

That points to the nature of your role. It is not an adjudicative role, as you have said. It is a fact-finding role. It is investigative, inquisitorial.

The differences then are stark on both ends of the spectrum, both in regard to the interests and in regard to the nature of the procedure. As a result, in my submission, the amicus model is unnecessary and not appropriate. Inquiry counsel will play the key role of ensuring fact-finding support to you. It will simply complicate the proceedings and complicate the role of Commission counsel.

We have made written submissions on the Air India trial process. I won't review those submissions.

I simply do want to point out that, in my view, the main thrust of the process that was used there was in fact the review of national security confidentiality and as what documents would be disclosed to satisfy the Stinchcombe burden.

That is not in issue here. Your Inquiry counsel already are receiving all of the documents, and you will see all of the documents.

There has been a brief reference to summaries. I will say, in summary fashion on that, that summaries have not proven helpful in the past; that as this is an internal inquiry which will almost exclusively be held in private under the Terms of Reference, the Commission will be called upon to summarize virtually the entire proceedings of the Commission if we went down that road.

It is certainly not reasonable and could only lead to unnecessarily delay.

I would also note that because the Attorney General is producing documents to you in unredacted form, with no removal of national security confidentiality, there is no baseline there. There is no reference point that would guide summaries, and it would take us a process to entirely review that to facilitate production of summaries.

COMMISSIONER IACOBUCCI: I do want to make just a slight comment here.

We are grateful for the cooperation we are getting in this flow of documents in unredacted

form, and we appreciate it.

Having said that, there are comments made in some of the submissions about over-claiming national security confidentiality that would come about in a report that would emanate from the Commission's work.

I just want to mention that I see no reason to be alarmed, but I do want to mention the importance at that end of the process, we certainly don't want to have unreasonably long discussions and more formal proceedings about what goes into a public report. That is where the issue, I think, of an over-broad claim of NSC would not be helpful in the expeditious sort of dispatch of our mandate.

I'm just using this as an occasion to reflect that concern that some of the participants have identified. So it is important.

The other thing that I would like to raise if this is an appropriate time -- if it's not, tell me -- is the solicitor-client point that was raised by participant counsel and your view on that because you called that in one of your suggestions for changing the rules.

Could you briefly comment on that?

MR. PEIRCE: Yes.

First on the national security confidentiality and the production of a public report, we are of course some way from that. Nevertheless, I am confident that with excellent cooperation with Inquiry counsel that we will effectively address those issues and avoid the concern of a time-consuming process.

On the solicitor-client issue, 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. Frankly, we do anticipate that any matters of solicitor-client will be addressed effectively before rising to the level of needing to adjudicate matters to be clear.

Nevertheless, as someone who has had in their time in government their legal advice put out for public review, it is a concern that we need to be able to maintain the confidence that comes with the solicitor-client guarantee and that that confidence ought not to be easily --

COMMISSIONER IACOBUCCI: But that isn't what I thought it was aimed at.

I thought it was aimed at my not

looking at that in some way. I know a breach is made when anybody sees it, no matter whether it's a judge or a commissioner. A breach is made. But with judges we say that is a justifiable breach.

Am I in the category of a justifiable breach to look at the legal advice?

MR. PEIRCE: I would say that is a difficult question.

COMMISSIONER IACOBUCCI: Could you think about it?

MR. PEIRCE: Yes, I could.

COMMISSIONER IACOBUCCI: It is very important.

MR. PEIRCE: I will suggest to you that the guidance I understand from the Supreme Court of Canada is that the test is absolute necessity. And if absolute necessity is reached, then absolutely you will review that information and that would be the process to be followed.

In other words, not that it is not possible but rather that you will not get there easily.

COMMISSIONER IACOBUCCI: Okay.

MR. PEIRCE: I will very briefly touch on mistreatment for the purpose of addressing

Toope and then I believe I will be in a position to end my submissions, subject to any questions you may have.

Mistreatment is not a known standard at international law, nor the domestic jurisprudence, and certainly was not at the time, the material time. Since it is not a known standard and wasn't at that material time, it should not be used as a standard by itself against which to measure whether the actions of Canadian officials were sufficient or deficient.

In my submission, the term is: Is there a threshold that frames the subject matter of the inquiry under Clause A(3) of the Terms of Reference?

So just as detention is a threshold in Clause A(1), if there is detention, you go on to look at the acts of Canadian officials and you go on to look at whether those acts were deficient. If there is mistreatment, you go on to look at the acts of Canadian officials and whether those acts were deficient.

At this time the Government of Canada acknowledges the mistreatment of Mr. Almalki, Mr. Elmaati and Mr. Nureddin.

In the submissions of the Attorney General of Canada, that takes you over that threshold and leads you to the inquiry into the actions of

Canadian officials.

The question was raised in the five questions in the Supplementary Notice of Hearing: Does that necessitate an inquiry into whether the three individuals were tortured?

It was suggested that the government has taken the position of denying torture. That is not the position that the government is taking. Rather, the government takes the position that torture is not referred to in the Terms of Reference; that that is not a standard to be applied here; that in fact it would be improper to impose or introduce a new standard outside of the Terms of Reference.

The Governor in Council could have used that term and did not.

The term is "mistreatment". Mistreatment is acknowledged.

That has implications for the Toope Report and the Toope process which has been raised. It has been suggested either that Toope be adopted or that a similar process be engaged.

In my submission, it is not necessary for the Commissioner to inquire into the issues raised in the Toope Report. The government has acknowledged

that the three individuals were mistreated within the meaning of paragraph A(3).

What is more, adopting Toope or engaging a similar process will not help to answer those questions and would be problematic in a number of respects.

Toope, I should say, has been taken to stand for more than it was designed to deliver. The Toope process was not intended to provide evidence on which findings of misconduct could be based. In fact, the Attorney General agreed to forgo cross-examination in the Toope process precisely because of the limited use that could be made of the report; that it would not be used as a basis for findings of misconduct; that it would not be used as a basis for finding deficiency in the actions of Canadian officials.

What was true then certainly remains true for the use of Toope in this inquiry. In other words, it cannot serve as a basis for assessing the sufficiency of the actions of Canadian officials.

Beyond relevance, I have to say that the Toope process is rife with frailties. There was no cross-examination. The Attorney General agreed to forgo cross-examination. The information was not

tested. There was no independent medical evidence. There was no additional evidence called, all of which limit the use that may be made of the Toope Report.

In my submission, then, it is neither necessary nor appropriate to rely on Toope or to recreate that process rife with the same frailties.

Subject to any questions you may have --

COMMISSIONER IACOBUCCI: I do have a number of questions.

I have a short question. I might as well get that one out of the way.

Submissions have been made about the interpretation of the Inquiries Act and how Part 1 deals with public inquiries and Part 2 deals with departmental inquiries. Your submissions acknowledge that because there were multi departments involved here, you couldn't use Part 2, amongst maybe other reasons. I don't know what the government had in mind.

But Part 1 is public inquiry. This doesn't seem to be the standard public inquiry that cases refer to and so on.

How do you justify the Terms of Reference and your interpretation of the Terms of

Reference, and how does that square with the provisions of the Part 1 of the Public Inquiries Act?

MR. PEIRCE: First, I should say that as I understand it, there is no challenge to the vires of the Terms of Reference. I believe Ms Jackman made that point.

So it is simply a question of the interpretation of the Terms of Reference, as I understand it.

Regardless, I think you have described the difference between the two effectively. Part 2, departmental investigations, this is an investigation into a single department.

Part 1, perhaps unfortunately entitled "Public Inquiries", and that is just a header. There is nothing in the terms below that, in the provisions of the Inquiries Act, that in any way limits it to public inquiries in the sense that has been described. Rather, it is inquiries into issues of the public business. And that is where the reference to public comes from.

It is not about how those inquiries are to be conducted. That remains within the discretion of the Governor in Council and, as a result,

the Terms of Reference fit consistent with the fact that this is an inquiry into a larger matter beyond a single department and in fact engages the whole of government, a number of departments and agencies and broader issues.

So that is the distinction. It fits well within the Terms of Reference and the Terms of Reference ought not to be affected by the language, Part 1 versus Part 2.

COMMISSIONER IACOBUCCI: You don't have any kind of authority to back you up on that.

MR. PEIRCE: The authority of Commissioner O'Connor, who addressed this issue.

COMMISSIONER IACOBUCCI: Yes. We'll take anything we can get.

MR. PEIRCE: And he reached the conclusion, I think it's in Appendix 1(b) of Volume 2 of the Factual Background -- it sits on my desk over there -- in which he specifically addressed that.

And now of course I'm left with the challenge of finding exactly where.

COMMISSIONER IACOBUCCI: We are going to have a pause and you can mention it later on. That's fine.

MR. PEIRCE: It is Appendix 1(b), in any event.

COMMISSIONER IACOBUCCI: The other question relates of course to the important issue of torture.

Just starting off very simply, the word is used "any" mistreatment in the Terms of Reference of the inquiry. I understand the practical difficulties of going ahead in this, but I don't understand that a necessary interpretation of the Terms of Reference is the same. Once you have any mistreatment, that's all you need for this inquiry.

I can understand why you would caution against going further, but that doesn't answer the question of whether the Terms of Reference prevent this inquiry from exploring the question of torture.

Mistreatment, as you concede, is wide in its ambit. So obviously torture is a form of mistreatment, obviously. All tortures are mistreatment but not all mistreatments are torture.

In reading the Terms of Reference, that you have been careful to remind us of, I don't see a sort of a break at the word "torture".

But then when I look at some of the

points that have been raised by counsel for the participants, they point out things like consular services, advice, and so on. I would have thought that the nature of the mistreatment is quite an important consideration for the level of consular, the appropriate consular service that was being rendered.

And it may be that that flows through on other points.

So, how are we, this Inquiry, I don't mean that -- I mean, how am I, as the Commission, going to deal with that if somebody said, no, I can't go down that path. I recognize there are obstacles in going down that path.

And then there is the whole question -- and this has nothing to do with Terms of Reference but it really, I have to say this because, you know, the Arar Inquiry went into this kind of area -- there is a certain relationship between the events relating to Mr. Arar and events relating to these individuals; somehow one Inquiry deals with torture, but this one would fall short of that.

I don't know. A reasonably informed Canadian seems to me might say, well, why would you not, you've got it in your Terms of Reference? One

Inquiry looked at this question in Arar and came to some findings, why wouldn't you do the same just as a matter of, you know, the public interest?

So, I guess I am having some trouble with confining it.

Then I have to ask you -- I think I would have to ask you at some point, well, what's the mistreatment that you are conceding? You have got to tell me what the mistreatment is. If you are conceding mistreatment, okay, the government, I don't know, it would certainly help the Commissioner to know what is it that is being conceded.

MR. PEIRCE: There are many points raised in that question and I will --

COMMISSIONER IACOBUCCI: No, no, no, I know, I know.

MR. PEIRCE: -- try to address them fulsomely, but the first is, you alluded to the difficulties in inquiring into the issue of torture.

Those difficulties range to the fact that these were events that took place, not at the hands of Canadian officials, and we do not have the participation of the foreign states where these actions took place.

COMMISSIONER IACOBUCCI: I just wanted to mention for the record -- Mr. Laskin, can you comment on what we did in that respect.

MR. LASKIN: Yes, we have written to Governments of Syria, Egypt and United States, not Malaysia which Mr. Copeland mentioned earlier, and we have provided those letters to DFAIT for transmission to the appropriate authorities in those governments requesting their cooperation, including provision of documents and access to individuals with knowledge for interviews and, if necessary, testimony and we have not received responses.

Those letters were written, oh, a good six weeks ago.

MR. PEIRCE: And I can indicate to the Commissioner that those have been transmitted overseas, that no response has been received and, as I understand it -- and I'll correct myself in follow up if I'm wrong -- but, as I understand, no response was received in the Arar Commission of Inquiry.

I mentioned the difficulties in investigating the issue of torture. In part because that undoubtedly guided the drafting of the Terms of Reference. I'm sure there were a number of factors,

but undoubtedly that guided the use of the phrase 'any mistreatment'.

You have asked what mistreatment has the government acknowledged? The government has acknowledged that detention in the circumstances that these three individuals were detained in constituted mistreatment.

You have also asked, well, is there anything that precludes an inquiry into torture beyond the difficulties of the challenge of that inquiry?

Torture does not, of course, appear in the Terms of Reference and, in my submission, ought not to be introduced as a new standard against which the actions of Canadian officials measured the standard as mistreatment as an access to the subject and then the standard is deficiency of their actions.

You will have evidence before you about the conduct of Canadian officials and it is the conduct of Canadian officials that is the subject of your inquiry.

So, whether in an objective defence outside of an assessment of the conduct of Canadian officials, which could only be based on what they knew or understood in the circumstances, independent of

that, whether there are actions rising to the level of torture will not help you answer the question of what did these Canadian officials do based on what they knew or understood and were those actions deficient?

So, an independent inquiry into the issue of torture will not, in the end, help you answer the questions that need to be answered here.

I fall back on the Terms of Reference and the fact that that standard was not used, was knowingly not used and ought not to be engaged.

It would, I will suggest, not aid the debate even further because once mistreatment is established, the Inquiry must go on and actions of Canadian officials investigated.

MR. LASKIN: If I could perhaps ask a question for assistance, Mr. Peirce.

Leaving aside the question of torture, per se, you've pointed out that the touchstone here should be the Terms of Reference, the Terms of Reference use the word deficiencies.

Is it possible that whether or not conduct was deficient depends on the nature of any mistreatment that occurred? There's conduct that might not have been deficient if the mistreatment were at the

lower end of the scale; might be deficient if the mistreatment were at the other end of a mistreatment continuum.

MR. PEIRCE: I think that you have to go back and look at it first from the perspective of what did Canadian officials know or understand as opposed to what is the independent reality that we may now know.

So, that's the first part of the answer is, it's based on what they knew or understood.

I would be loathe at this early juncture --

MR. LASKIN: Mm-hmm.

MR. PEIRCE: -- to offer a definition of deficiency and, in fact, I would suggest that if the Commissioner finds it necessary -- and you may well -- that that would be an issue on which further submission would be appropriate.

COMMISSIONER IACOBUCCI: I guess though the question, I mean -- and I'm not criticizing you for not answering the question because you haven't answered the question -- but I think the question raises the prospect that we should be not quick to cut back the reach of this Inquiry's work at this stage by

cutting out the word torture because there is a nexus between deficiency and torture and there may be a nexus between torture and other, if you like, state or official conduct that would have been in play, and even aside the question of what did the officials know at the time and all of those kinds of questions.

But that doesn't preclude, I don't think, getting into that as within the Terms of Reference even though there may be an explanation for what happened later on as to what happened, if you follow me.

MR. PEIRCE: And my answer wasn't meant to suggest that in no way is what Canadian officials knew of the extent of the mistreatment, that is not irrelevant, that wasn't my point.

My point was to say two things. First, the objective reality that we may now know is not the guide, the guide is what was known or understood; and, second, that torture is a very specific standard and ought not to be imported as the standard here but, rather, that mistreatment is the standard.

COMMISSIONER IACOBUCCI: Yes. No, no, I understand that, but torture also happens to

share another meaning; namely, it is a form of mistreatment. It is a form of it, it is not the definition of mistreatment, but it is a form of mistreatment.

MR. PEIRCE: And to look at that mistreatment, as it was known or understood, is certainly relevant and within the Terms of Reference.

COMMISSIONER IACOBUCCI: Okay. I got your point.

MR. PEIRCE: Those are my submissions, subject to further questions.

COMMISSIONER IACOBUCCI: John, did you have -- John Terry.

MR. TERRY: One question, and this takes us back to the issue of public and private hearings.

Two of the submissions, Mr. Almalki's submission, also Amnesty International's submission, state that at a minimum there should be submissions in public on issues of -- reading from Amnesty at paragraph 46:

> "(a) consular advice provisions in Amnesty conduct to Canadian policy and actions related to

torture"

And:

?(c) caveats testing and reliability of shared information."

And it seems that it will be likely as the Commissioner goes through his task that he will need to determine whether conduct was deficient to have some submissions on what the appropriate standards should be in trying to determine what is deficient and what's not deficient.

So, the question is: Is there room -- in the view of the Attorney General, is there room to have public submissions, for example, from the participants and interveners here on the standards that should be applied, for example, for consular advice and assistance or the standards that should be applied for information sharing? Is there room in the Terms of Reference to have public submissions on those points?

MR. PEIRCE: In my submission there is room for public hearings in regard to submissions on these kinds of deficiency, for example, as it arises in the Terms of Reference.

It is not, however, within the Terms

of Reference to say, this is an area that we think doesn't necessarily raise national security confidentiality, so we can hold that in public. The test isn't possibility, it is whether it is essential to the effective conduct of the Inquiry.

So, in regard to taking of evidence in these areas, for example, that would still be an in private hearing, according to the Terms of Reference.

COMMISSIONER IACOBUCCI: Thank you very much.

We are going to take a break, if that is all right with everyone. Ten minutes.

Thanks.

THE SECRETARY: Please stand. Veuillez vous lever.

--- Upon recessing at 11:35 a.m.

--- Upon resuming at 11:45 a.m.

COMMISSIONER IACOBUCCI: Submissions.

MS SMITH: Mr. Commissioner, it's Michelle Smith.

COMMISSIONER IACOBUCCI: Yes.

SUBMISSIONS BY MS SMITH

MS SMITH: You have joint submissions from me on behalf of both the Ottawa Police Service and

the Ontario Provincial Police, and you have those in writing.

Now, subsequent to the Ontario Provincial Police having made those submissions, we have had an opportunity to review the submissions of the Attorney General of Canada and, whereas initially we had indicated on behalf of the OPP that we took no position on the meaning of the phrase 'any mistreatment', we agree with the submissions of the Attorney General of Canada on this.

With respect to the second question, again, since we've had the opportunity to consider the position of the Attorney General and the agreement that mistreatment -- there was mistreatment in the detention and that mistreatment can include torture, the Ontario Provincial Police defers to the position of AG Canada on this point.

COMMISSIONER IACOBUCCI: Well, all right. I mean that is -- there is no crime in changing your mind, but you changed your mind on that point?

MS SMITH: Yes. Now, with respect to the third question, we submit that the counsel with security clearances for the police, Ottawa Police, Ontario Provincial Police should be permitted to attend

any hearing conducted in private, subject again to the need to know provision, and we note that paragraphs 25 and 26 of the Attorney General of Canada's submissions agree that the police counsel ought to be present, assuming they have security clearances in appropriate circumstances.

On item 4 we took no position and on reflection we would defer to the Attorney General Canada.

On item 5 we have the same position as the Attorney General of Canada, and that is that the Terms of
Reference here dictate that the Inquiry be in private except where the Commission determines it is necessary to have a public hearing, and that a broad definition of national security issues should be considered in determining whether or not it should be in public, with the presumption being that the hearing should be in private.

And we adopt the submissions of AG counsel on the provisions of the Public Inquiries Act and we refer you back to the Terms of Reference. It was meant to be an internal Inquiry in private.

With respect to the Draft General

Rules of Practice and Procedure, we have a couple of comments that are self-explanatory.

We would ask, as AG Canada did, that there be provision to hold back solicitor/client documents at least until a list of them could be prepared and an indication of on what basis any privilege would be claimed.

And then with respect to additional Draft Rules, because you are dealing with persons who may no longer be employed, and in large organizations we find that, certainly from past experience at inquiries, that it's helpful to have the rules that provide that Commission counsel would notify individuals that they're entitled to counsel and we've provided draft from the Krever report -- from the Krever Inquiry.

And those are my submissions, subject to any questions.

COMMISSIONER IACOBUCCI: Well, thank you very much, Ms Smith.

Good morning.

SUBMISSIONS BY MS ZOLKIEWSKA

MS ZOLKIEWSKA: Good morning, Commissioner.

My name is Anna Zolkiewska, I'm a student at law at Amnesty International and will be making Amnesty's submissions today.

COMMISSIONER IACOBUCCI: I understand that you might need a little extra time, so...

MS ZOLKIEWSKA: Yes, thank you.

COMMISSIONER IACOBUCCI: Okay.

MS ZOLKIEWSKA: Rather than taking you through our written submissions in detail, I would like to highlight some key points and respond to the submissions of other participants.

I will be focusing on the interpretation of specific terms as they appear in the Terms of Reference or the Draft Rules, as well as the need to make findings on allegations of torture and the need to maximize public participation to this process in order to restore public confidence and credibility in both the government's national security agencies and ensure public confidence as well as the independence and fairness of this process.

The terms deficient, deficiency, mistreatment and relevant in the Terms of Reference and Draft rules are not defined and could be open to a range of interpretations.

Amnesty respectfully submits that these terms be interpreted in a way that takes full account of Canada's international human rights obligations.

Specifically, the conduct of Canadian officials should be considered deficient if it in any way violates or undermines the responsibility of Canadian officials to respect and promote binding international human rights obligations. This will, of course, include both actions and omissions. Conduct may again, of course, be found to be deficient when measured against other standards as well.

Similarly, the term mistreatment should be considered to have taken place whenever it is determined that Messrs Almalki, Elmaati or Nureddin were treated in ways that violate their internationally protected human rights.

This will include, but is not limited to torture, ill treatment, arbitrary arrest and detention, inhuman prison conditions, lack of a fair trial and failure to grant consular access, but it will also include exposing them to the risk of all of these things.

Finally, we submit that Rule 13 must

be interpreted such that a test of reliability is added to that of relevance in ascertaining what evidence can be received by the Commissioner.

In particular, this has to be interpreted in conformity with Article XV of the UN Convention Against Torture which prohibits the use of evidence obtained under torture, except when determining the guilt or responsibility of a person who's accused of committing torture.

In this respect we hope that the Commissioner will keep in mind the comments that Justice Iacobucci made while examining the cases of these three men. In particular, on page 275 of his Fact Finding Report:

> "A practice by Canadian agencies seen in all the investigations...

referring to the three men:

> "...was that of accepting and relying upon information that might be the product of torture without conducting an adequate reliability assessment to determine whether or not torture

had been involved. Canadian officials appeared to be dismissive of allegations of torture or did not take them seriously."

The evidence presented in this Inquiry must respect this warning.

Furthermore, it is vital that the Commissioner reach a determination as to whether Messrs Almalki, Elmaati and Nureddin did experience torture in Syria and/or Egypt.

There is already a reliable determination made by Professor Toope, the fact finder in the Arar Inquiry, that their testimony as to being tortured in Syria is credible.

A similar process could be used to consider Mr. Elmaati's allegations of torture in Egypt which Amnesty International has heard in detail first hand and found to be wholly credible and believable.

A failure to reach a determination on this issue would leave this Inquiry incomplete. The cases of these three men have shocked and disturbed Canadians, in large part due to the allegations of severe torture. Canadians want, need and expect to see

those allegations examined through a fair and transparent process.

Ascertaining whether these men have been tortured will have important implications for the further analysis with respect to the full range of issues at stake in this Inquiry.

Torture gives rise to very particular and serious levels of obligation and responsibility within both national and international law.

By virtue of the UN Convention Against Torture, it carries a detailed set of binding obligations as to what is required of governments to prevent and avoid complicity in its commission.

It also includes a requirement, the Convention that is, includes a requirement to promptly and impartially investigate all acts of torture.

While it is true this Inquiry is not a fault-finding exercise, Amnesty respectfully submits that findings that will be adverse, critical or negative of departments or individuals will be necessary.

As Justice O'Connor himself said:

> "The Supreme Court has made it clear that a Public Inquiry

> Commissioner could make evaluative comments..."

This is from his interpretation of the Blood Inquiry case,

> "...even if critical of individuals, if they were necessary to fully report on the matters raised by the mandate, or if they were helpful in making recommendations."

Commissioner O'Connor used this, for example, to point out that some information provided to American agencies by the RCMP was inaccurate and unfair to Mr. Arar and that the RCMP did not follow its established information-sharing policies.

To quote, he says:

> "In order to properly report on these actions, I have set out how and why they took place and, importantly, why they were unacceptable, creating unfair risks for Mr. Arar. It is important, in my view, to report fully on these actions and the

problems that could arise if similar actions are taken in the future.

In several places in the report I comment on the actions of Canadian officials that created or increased a risk that Mr. Arar would be subjected to unacceptable treatment. While creating or increasing an unacceptable risk may sometimes fall short of establishing causation, creating an unacceptable risk is still something that should be avoided. In my view, reporting on the creation of unacceptable risk falls within the mandate set out in the Order-in-Council and is something that the Canadian public would expect me to do."

This Commission of Inquiry must answer one central question: What was the role of

Canadian officials in relation to the cases of Messrs Almalki, Elmaati and Nureddin? They've pressed for a public Inquiry for a number of reasons, among them, to clear their names, to know why this had happened and who was responsible, to hold those responsible to account, to be sure that this would not happen to anyone else in the future. Their reputations are at stake and it is naive to suggest that this Inquiry can somehow avoid affecting or bringing in the reputational interests.

This Commission must grapple with these important points. This Inquiry will review evidence presented in-camera, some of which will likely seek to explain or justify why these three men became part of a Canadian national security investigation.

To fulfil its mandate, the Commissioner must reach conclusions as to the nature and reliability of any such evidence.

If there is evidence against any of the men, they should have been treated in full accord with fundamental human rights and basic precepts of justice as well as Rule of Law. This would entail criminal charges and a fair trial, not arbitrary arrest, extraordinary rendition and torture.

Amnesty International further urges that the internal component of this Inquiry be limited to portions which need to be held in-camera due to constraints recognized under international standards governing fair trials and hearings.

Article XIV of the International Covenant on Civil and Political Rights recognizes that the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interests of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.

In the present circumstances, Amnesty International urges that the Iacobucci Inquiry's proceedings be open to the public, except in instances where valid and limited national security confidentiality considerations require otherwise.

Interpreting private to mean both in-camera and ex-parte proceedings would severely undermine the credibility and independence of this process, as well as have severe implications on fairness. Measures have to be taken to guard against

unfounded, excessive or over reaching national security claims being advanced by the government.

Experience at both the Arar Inquiry and the Air India Inquiry confirms this to be a very serious concern.

It may be advisable for the Commissioner to make use of amicus curiae with requisite expertise in national security matters to deal with these claims.

I'd just like to point out a passage that Commissioner O'Connor has in his report on the fact-finding part of the Arar Inquiry. He says:

> "The over claiming of national security occurred despite the Government's assurance at the outset of the Inquiry that its initial national security confidentiality claims would reflect its considered position and would be directed at maximizing public disclosure. The Government's initial NSC claims were not supposed to be an opening bargaining position.

I raise this issue..."

This is a direct quotation:

"...to highlight the fact that over claiming exacerbates the transparency and procedural fairness problems that inevitably accompany any proceedings that cannot be fully open because of national security claims. It also promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality. It is very important that at the outset of proceedings of this kind every possible effort be made to avoid over claiming."

Now, there are many examples of over claiming that in the end did reach public light. Three such examples are Monia Mazigh and Hadad were named Islamic extremists, that was something that was found to be inflammatory and unfounded in the words of Justice O'Connor.

The letter sent from the RCMP through the Canadian Ambassador to Syria, to Syrian military intelligence offering to share information about its investigation, including questions to be asked of Mr. Almalki.

And, finally, Amnesty International is deeply disturbed by revelations that a central piece of evidence in Mr. Elmaati's case, a map that was often described as hand-drawn and which served as the basis for accusations that it was a guide for a planned campaign of bombings in the Ottawa area was shown to have been an innocuous government issue map of an office complex in Ottawa, Tunney's Pasture, to be specific.

These types of things raise questions about the integrity of the investigations in all of these cases and cast considerable doubt as to the reliability of extensive amounts of evidence and examination -- and testimony, rather, that may be provided in-camera to you and not tested through cross-examination by lawyers for these men or the public assessment that comes through a public judicial process.

It is crucial that this Inquiry be as

widely accessible to the public to ensure that justice will in fact be served. It is also particularly crucial at a time when public confidence in Canada's approach to counter terrorism and particularly the specific actions and policies of law enforcement and security agencies has been shaken.

This Inquiry is being held in the wake of the report from the Arar Inquiry, as well as disagreements about national security confidentiality at the Air India Inquiry, both of which have troubled Canadians.

A public and transparent approach to this Inquiry will help restore the necessary trust and confidence in Canadian institutions.

The Commission should actively seek to operate in a manner consistent with internationally recognized fair trial standards, such as those found in Article XIV of the ICCPR.

While this is not a trial, the consequences are very similar for these three men. This is the only opportunity they have had to know the details of and respond to allegations against them. It is also the only opportunity they have had to seek an effective remedy for the severe human rights violations

they have experienced.

In these circumstances, and with the stakes so high, Amnesty International urges the Commissioner to be guided by these important international standards.

Justice O'Connor repeatedly highlighted in the Arar report the importance of disclosing publicly the pattern of investigative practices arising out of these three cases and, in particular, the systemic problems which should be addressed by relevant agencies through policies or guidelines.

The chronology submitted as an annex to our written submissions highlights a series of important questions to which the public will expect an answer. These are questions in relation to embassy and consular conduct, Canadian Government's practice and policy on torture, as well as information sharing with foreign regimes.

However, we do recognize that there will be some portions of this Inquiry which are held in-camera due to national security concerns. Amnesty International would urge that counsel for the three men be security cleared and allowed to participate fully in

the in-camera proceedings, and that intervening organizations be allowed to meet regularly with Commission counsel to review the progress of these proceedings, receive general briefings as to the nature of evidence being considered in-camera and invited to suggest lines of questioning.

Counsel for the Attorney General has suggested that excluding all participants and interveners other than the AG and certain government officials is necessary.

Amnesty International respectfully disagrees. Like the Arar Inquiry, this Inquiry presents an unusual challenge for Commission counsel in calling evidence. A good deal of the evidence, all from government witnesses, may be heard in-camera. The only parties other than the government which would be allowed to participate in the in-camera hearings, presumably, would be persons who had either received Section 13 notices and occasionally the OPP or the OPS.

This means that for the most part everyone appearing would have interests that were identical or similar to the government's.

The most important thing that helps Justice O'Connor deal with this issue, as he stated in

his report, and I quote:

> "Although the Public Inquiry is not, strictly speaking, an adversarial process, the Commission has the advantage of hearing evidence tested through cross-examination by those with competing points of view. However, when parties affected by the proceedings are not present to perform the cross-examination role, it is extremely helpful and even essential that there be an independent person able to do so."

In the case of the Arar Inquiry this was Commission counsel who got to incorporate witness examinations as well as cross-examine on the evidence that was presented.

Justice O'Connor also made use of an amicus curiae, specifically as an expert on national security matters to help him and guide him on the validity and substance of the national security claims

advanced by the government.

In his report he states:

> "I have described a number of steps taken in the Inquiry to address difficulties arising from a process in which some information could not be made public, the most important being the use of independent counsel during the in-camera hearings. However, I do not suggest that steps such as these are an adequate substitute for public hearings in which the public can scrutinize the evidence first hand and affected parties are able to participate. If it is possible to hold a public hearing, this should always be the first option. Openness and transparency are hallmarks of legal proceedings in our system of justice. Exposure to public scrutiny is unquestionably the

most effective tool in achieving accountability for those whose actions are being examined and in public confidence in the process and resulting decision."

This Inquiry is tasked with resolving a number of crucial factual questions as to what happened to Messrs Almalki, Elmaati and Nureddin as well as the complicity or possible participation of Canadian officials.

It is crucial, however, that the Inquiry not stop there. Amnesty International urges the Commissioner to draw appropriate conclusions from his findings of fact, outline recommendations as to how any of these deficiencies can be rectified and remedied and identify potential changes that may be necessary to Canadian law, policy or practice to avoid similar deficiencies in the future.

As the stories of these three men demonstrate, the cost of failure in matters of national security is indeed very high.

Subject to any questions, those are our submissions.

COMMISSIONER IACOBUCCI: Thank you

very much, Ms Zolkiewska.

SUBMISSIONS BY MR. ALLMAND

MR. ALLMAND: Commissioner, my name is Ward Allmand and I'm representing the International Civil Liberties Monitoring Group and the British Columbia Civil Liberties Association.

First of all, I want to apologize for the format of our outline which I prepared before I received clarification from the counsel for the Commission which suggested a mini factum or a concise factum and I had done my work prior to receiving that.

Since my time is limited, I'll not repeat all the points in our outline, but I will give priority to the issues raised in questions 3, 4 and 5 which is: What should be in private and what should be in public, and I'll try and resist the temptation to reply to all the submissions of the Attorney General which would take all my time, or maybe half the day.

In that respect I'd hope we'd have an opportunity to reply in writing within a few days to some of those arguments and we only received the Attorney General's response to some of our arguments late last night.

COMMISSIONER IACOBUCCI: I would like

to get on with giving a ruling as quickly as I can on this.

MR. ALLMAND: Okay. Well --

COMMISSIONER IACOBUCCI: It is going to be pretty challenging to do that. I am trying to get things out quickly, as you know. So, I think -- if I do it for you I want to do it for everybody.

MR. ALLMAND: Oh, well I was suggesting that.

COMMISSIONER IACOBUCCI: Yes. It is just that we are just going to keep going on.

MR. ALLMAND: Well, Commissioner, as I said, I'm going to give the priority to the issues in 3, 4 and 5, the questions, and that is: What should be in private and what should be in public?

And, yes, of course the Terms of Reference have to be fully respected, but we submit that all the provisions in the Terms of Reference have to be read together and they have to be read considering the spirit that they're under Part I of the Inquiries Act.

Now, while the preamble in paragraph 4, only in paragraph 4 refers to an internal Inquiry and paragraph (d) provides for private hearings, on the

other hand the preamble in paragraph 1 says that we have to have an independent and credible process and one that inspires public confidence in the outcome.

So, after considerable consideration of the Terms of Reference, Commissioner, we submit that the content for private hearings should be restricted to national security matters as set out in paragraph (k). In other words, the content of 'should be in private', should be (k); in other words, national security confidentiality and nothing else.

Now, we tried to imagine, Commissioner, what sort of matters could be dealt with in private that were not national security confidentiality and we couldn't come up with anything that could be included in an area that would be considered private, but not in-camera but not public. Our conclusion was that if it's national security confidentiality, yes, it should be held in private, but (k) gives you direction on how you should interpret (d).

Now, we know that some of our colleagues before you today have envisioned a third possibility, that is an area between national security confidentiality and public hearings but, as I said, we

tried to imagine what sort of matters would go in there and every time that we came up with something we felt that that should be in public.

Now, our position on this, we submit, is supported by the Terms of Reference, not only by the preamble which says that we should have an independent and credible process and one that inspires public confidence in the outcome, but I submit to you that in the past year or so the public's confidence in our security and intelligence processes and procedures has been severely shaken.

They've been shaken by the revelations of the Arar Commission Report, they've been shaken by the judgment of the Supreme Court in the Zarqawi case with respect to security certificates, they've been shaken by the testimony of Commissioner Zachardelli before the parliamentary committees in which he changed his testimony, although it's not in the same area of concern, but the allegations with respect to the Pension Fund have also shaken the public's confidence in the RCMP.

And on a broader basis, Commissioner -- although these things relate to the United States but the Canadians have been taken up in

them -- I would submit that the fact that the security and intelligence operations of the most powerful country in the world, their operations did not prevent 911; on the other hand, information was given to the American government which led to the invasion of Iraq which was found later to be totally false.

All of these things which are well known to Canadians have, I would say, seriously undermined the credibility of security and intelligence operations, not only in Canada but in the western world and, consequently, in what we do before this Commission credibility is at stake and it's set out in the first paragraph of your Terms of Reference.

I'd also say that the chronology that was tabled by Amnesty International and was supported by our organizations and several others contains many unanswered questions with respect to Messrs Almalki, Elmaati and Nureddin which require to be answered in public. If you look at that chronology, there are many important questions there that require answers in public.

Now, while I said that private -- the private hearings of this Commission should be conducted --should only relate to national security

confidentiality, in our outline I cautioned you to greet with suspicion every demand by the government for national security confidentiality because we found before the Arar Commission there were several cases where they claimed national security confidentiality and later changed their position and revealed information which was found to be something that should not have been claimed in the first place. So, there's a tendency to over react in claiming national security confidentiality.

Those are the main points that I want to make, but I'll very briefly -- because I don't have much time left -- with respect to any mistreatment, in our outline we've referred to several international instruments which Canada has either ratified and, therefore, they have obligations with respect to those instruments, and/or have supported, one of them being basic principles for the treatment of prisoners adopted by the UN General Assembly in 1990 and the use the word treatment, and I found as we were discussing mistreatment or treatment this morning, but we ask that you give a very broad interpretation to the word mistreatment and that for guidance you look at these international instruments which Canada has supported

and ratified and also to the jurisprudence with respect to certain articles under the Charter.

We would argue very strenuously that mistreatment, of course, includes torture. I followed your discussion this morning with the Attorney General's department.

My final remark, and I'm not -- as I say, I'm leaving out a lot that's in our outline, but I have serious concern, as I point out near the end of our outline, with respect to the interpretation of the word deficient in paragraphs (a)(i) and (a)(iii) of the Terms of Reference.

The usual meaning of deficient is to be lacking, inadequate, weak, maybe negligent, and a narrow interpretation would not include actions which were deliberate, intentional, excessive or planned and, of course, we argued before the Arar Commission that there was a pattern in the cases, not only of Mr. Arar, Almalki, Elmaati and Nureddin indicated, we believe, that at some level there was -- it was something, it wasn't just negligence or a question of a narrow interpretation of deficiency, but in fact something deliberate.

So, a narrow interpretation of that

word, Commissioner, would not include actions, as I say, that were deliberate and planned and there's a difference in the degree of culpability and we, therefore, recommend that this word deficient be given a broad interpretation to include all acts of commission and omission.

And I will conclude, once again, by saying I believe it's absolutely essential that the outcome of this Commission, as stated in the first paragraph of the Terms of Reference, the outcome inspires public confidence and, you know, I refer to your own words in your ruling which we fully concur with. I don't have it here, but you make some excellent statements with respect to -- I left it at my chair -- with respect to how the system or our system of justice requires openness and transparence and I smiled when I read that and I hope that you'll take that in consideration when you judge on our submissions today.

Thank you.

COMMISSIONER IACOBUCCI: Thank you, Mr. Allmand. Thank you very much.

Counsel for the Canadian Arab Federation.

SUBMISSIONS BY MR. KAFIEH

MR. KAFIEH: Thank you. It's okay.

My name is James Kafieh, I am the lawyer representing the Canadian Arab Federation, the Canadian Council on Arab/Islamic Relations and the Canadian Muslim Civil Liberties Association.

And between the Arab and Muslim communities, we're talking about a block of well over 1-million Canadians who are watching the Inquiry very closely. It's very critical to that premise of establishing a credible process that inspires public confidence that that kind of a constituency be taken into account. It's watching, and not just Arab Canadians and Muslim Canadians, all Canadians have taken a special interest in this Inquiry because it fundamentally addresses the question of how we deal with Canadians.

Now, in a sense to try to address the questions that came out of the O'Connor Commission, how do you do this in the future, it seems that the government has suggested a hybrid model and that we're creating new ground in a sense and there's this conflict between public and private or, as the Ministry of the Attorney General would put forward, secret

process, and this is what I would suggest they're arguing for.

We have responded to that with the suggestion of a three-tier process. One that would be essentially public like we are today; another one -- a second tier that would be private in that it would exclude the media, and but that people, you know, could participate fully in an in-camera session, and the final category where national security and confidentiality issues are seriously at stake or in play, that these matters could be held in private.

The Commission has been given a fixed deadline and so we understand that it needs to move expeditiously, but that there has to be a full process as well, that that's not something that's been exempted simply because the sessions aren't being held in public.

We've heard objections, for example, that redacted transcripts and summaries are an unnecessary, time consuming expense. I would suggest that while your time line is fixed, that your budget is not fixed and that there is an important need to make serious investments on occasion. We have to put the resources into this Commission that even though

portions -- everyone here agrees there are portions that will be dealt with in the context of the strictest of conditions that will preserve secrecy, we understand that, but part of the answer is an investment of resources to make sure that we can deal with the issues properly and it also means involvement.

So, for example, we have the Director of CSIS who has indicated that he is prepared to fully cooperate with this process. Well, with the hundreds of millions of dollars that are in CSIS' budget, they ought to be able to security clear perhaps 10 lawyers that would wish to participate in any aspect of this Inquiry. They should be able to do this very quickly, it's a matter of resources being put into it. But whether it's through undertakings or, alternately, through security clearances, that this is something that needs to be looked at in the context of a hybrid model which the government has drafted.

COMMISSIONER IACOBUCCI: What is the authority for me to bring that about?

MR. KAFIEH: To ask CSIS to --

COMMISSIONER IACOBUCCI: No, to bring it about, you said to have different people. How can I interfere with the decision of a government department

or agency officials to grant security clearance to anybody? Where is my authority to have that outcome achieved? That is the AG's position, if I understand it correctly.

MR. KAFIEH: CSIS is in the business of security clearing people to a large extent.

COMMISSIONER IACOBUCCI: I know that, but what -- I am just asking you, how do I get from my role the result you wish to achieve by getting people cleared?

MR. KAFIEH: It's difficult when we're travelling into new ground, as we say this is a hybrid model, I submit that I see it as a hybrid model, that I think that you have the ability to make the request. If CSIS doesn't respond, we have foreign governments, we've asked for their assistance. We've seen from the past at the O'Connor Commission that they probably will never respond, but now we're talking about our own government and he's pledged full cooperation. Let's take him for -- let's give him an opportunity to demonstrate, let the Director of CSIS demonstrate through his actions that he is very supportive, very cooperative.

We wouldn't be having much of the

discussion today if people were security cleared. That would save a lot of time. And if they were serious about doing it, if they wanted to go through the process, they could do it very quickly, whatever their decision, positive or negative in individual cases.

I want to be very brief because I think a lot of the ground has already been covered, but there's an area that I want to touch on in closing and that is that there is, indeed, as you observed, a nexus between deficiency and torture.

Actions don't take place in a vacuum. I'll give you an example and it's a hypothetical example, if we find out that government officials delayed the issuance of a passport to somebody, it's arguable that it's mistreatment, however, if they did it in the context to prevent a terrorist attack, Canadians might applaud it and say that there's no mistreatment, that it was necessary.

If, on the other hand, the passport was delayed that same one day so that an Arab Canadian or someone, a Canadian, could be delivered into the hands of a foreign government security service where their rights would be abused, that would have a different connotation entirely.

It makes all the difference in the world whether these gentlemen were tortured or the government officials involved had every reason to believe or ought to have known that they would be tortured if they had fallen into foreign government hands or specific foreign government hands, and so the full spectrum of the mistreatment is critical to putting this in context.

There is an issue of overly broad exclusions. The government has a record of doing this. This is not a theory, that they've declared things before that shouldn't be disclosed and then only after much time has passed, much time has been wasted that they would change their position.

So, it's critical that the Commission not take things on face value, it has to be very dedicated, the Commission has to be very dedicated in its efforts to get past these initial positions that the government is putting forward, and it comes to the term, for example, where we talk about actions, actions should include inactions.

Whether they knew things that they knew are important as things that they ought to have known. Both are relevant in this case.

And there's a concern that I have with regard to the term injurious as it relates to national security, national defence or internal relations or international relations, because it's arguable again with this concern, an over broad concern -- or an over broad position from the government that when they put forward something in this context that anything that embarrasses the Government of Canada or Canadian officials could have some damaging impact at some level on international relations or certainly in people's willingness to cooperate with the security agencies of the Government of Canada.

So, this should not be given a frivolous interpretation, and we're suggesting that the Tribunal take the approach that it has to be substantially injurious, not simply injurious on some theoretical level.

COMMISSIONER IACOBUCCI: I just can't resist, having spent almost a lifetime interpreting different things, sometimes the adverb gives you more trouble than not having the adverb.

MR. KAFIEH: Well, I respect that and I think that's why a former Supreme Court Justice is

heading the Commission, so your ground is cut out for you.

But we put these things forward from the perspective that it's critical that these considerations be taken into account if we are going to have public confidence in the process.

COMMISSIONER IACOBUCCI: I appreciate that.

MR. KAFIEH: Subject to any questions, that concludes the submission.

COMMISSIONER IACOBUCCI: Thank you very much.

MR. KAFIEH: Thank you.

COMMISSIONER IACOBUCCI: Maybe there are a few questions we could ask, John Laskin.

MR. LASKIN: Reflecting on, we had provided in the time table for an opportunity for counsel to reply on additional issues that arose during the submissions this morning, so I don't know if counsel wish to --

COMMISSIONER IACOBUCCI: Yes.

MR. LASKIN: -- ask you for an opportunity, Mr. Commissioner, to do that.

But one question arose for us as

Inquiry counsel out of the submissions we heard from counsel for the individuals concerning -- in support of a fact-finder process and the concerns raised by counsel for the Attorney General concerning that process, including a concern that it would not allow for the testing of evidence.

So, that leads to a couple of questions that we would put in the hope that the answer may be of assistance to the Commissioner on this.

In recommending the fact-finder -- a fact-finder process, either one involves accepting Professor Toope's conclusions, or one that involves a new fact-finder being appointed, you are in effect recommending a different fact-finder than the Commissioner to deal with this one issue that you say should be addressed as emerging from the Terms of Reference.

So, the question is perhaps, to start, why a separate process, why not have the determination of the extent of mistreatment, if the Commissioner decides that that's appropriate, made on the basis of evidence or information provided to the Commissioner himself, why distance it from the Commissioner?

And perhaps as a corollary, how do you respond to the concerns about the testing of the evidence in a fact-finder process?

And perhaps third, how do the submissions about the use of fact-finder fit into your overall submissions about what portions of this process should be held in public as opposed to in private?

MS JACKMAN: (off mike)

MR. LASKIN: That was the easy one.

MS JACKMAN: With respect to that question, I would note that we would need to talk it through with our client. Certainly it's the option of meeting with Commission counsel to conduct sort of a fact-finding process would be -- sounds fine but, like I said, we haven't really thought it through fully, so subject to that qualification.

With respect to your question, Mr. Laskin, about the concerns raised by the Attorney General about not being able to test the evidence, we live with that every day through these kinds of secret proceedings, we are not allowed to test the evidence that the government puts forward. I am frankly appalled that the government would raise that concern when it's not a concern for them in respect of

substantive matters that these security certificate proceedings that arise in those kinds of proceedings all the time.

MR. LASKIN: Well, that's not quite -- that is not quite the concern as I understood it.

The fact-finder process, as I understand it in any event in the Arar Commission, did not involve the participation of Commission counsel, it involved a direct --

MS JACKMAN: Fact-finder, who investigated and asked the questions.

MR. LASKIN: No. Excuse me.

But the only participation in the eliciting of information from the individuals was by the fact-finder without the involvement of Commission counsel.

So the testing that would come from the role of Inquiry counsel wasn't present in that fact-finder process and would not, as I understand the submissions you have made to the Commissioner today, be present under a fact-finder model that you are putting forward in this inquiry.

MS JACKMAN: I understand what you

are saying and I don't think there is difficulty with a fact-finder investigating and testing the evidence, given the nature of the evidence.

It may be that if there is a limited function that there could be other counsel testing it beyond the fact-finder.

My only point was that is what happens with respect to government evidence all the time. The fact-finder, the Federal Court, judge or the Commissioner or someone, does the testing of the evidence in the absence of cross-examination by the concerned parties.

He can't just sort of say it's unfair if the men are talking about torture to not have an independent counsel testing the evidence, but it is fair for the government to do it otherwise whenever they want to.

That was my only point.

With respect to -- can I sort of cover a couple of points that came up in relation to submissions that were made?

MR. LASKIN: I'm not sure you have responded to the third aspect of my question, which relates to --

MS JACKMAN: Oh, whether it is private or public.

MR. LASKIN: Yes.

MS JACKMAN: Well, we would say of course that it has to be private given the nature of the subject matter. I think I dealt with that in the written submissions.

MR. LASKIN: All right.

MS JACKMAN: We are talking about torture. I don't think Mr. Elmaati, in the many years that I have known him now, has ever told me completely the details of the torture. It is shameful, it is demeaning of his dignity, and it should not be subject to public cross-examination in any open hearing.

If you are going to judge the credibility or anyone is going to judge the credibility of what he had -- what happened to him, he should be accorded the dignity of being able to discuss those matters in private.

As I said before, I think the first time I was here, he has had seven operations because of it. That was terrible torture. And to talk about that in the public setting is unnecessary, in my submission.

There were a number of points that I

just wanted to briefly cover with respect to the submissions of the government. A lot of them I don't need to cover.

The government's position was you are guided by the Terms of Reference and I would say, yes, you are guided by the Terms of Reference but it is trite to say that you are also guided by the Charter, human rights norms, and the statute in terms of how you interpret those Terms of Reference.

I mean, the government is rather simplistic in terms of saying: This is how we see the Terms of Reference, therefore that is what you do. I mean, you have to put it in the context of the values we hold in Canada towards fairness and transparency.

As I take the government's position to you essentially, it is that we will not participate, that the extent of the participation will really be to make submissions on issues or make opening and closing statements. That is not participation. I don't think there is any case in Canada which has recognized that as meaningful participation.

With respect to that kind of participation I think you have to keep in mind -- and I think underlying our concerns about this process -- and

I should say in reply, vires is not off the table until we see how -- I explained to you, we want to cooperate, we want to make this process work. It is a very serious concern for our clients. But if it is such a secret hearing that it cannot be called a hearing in which our clients are permitted to participate, then we have to consider our options.

The bottom line is, they want to assist you, Mr. Commissioner, in reaching a fair and just conclusion to this Commission, but they want to be able to do it. They don't want to sit back and have you at the end of the day come up with a decision.

I think what you have to understand here is that if they are apprehensive over the next eight or nine months while you are doing a secret investigation, that is not confidence inspiring. Even if at the end of the day you come out with a full and fair report which they are satisfied with, the process is as important as the outcome.

COMMISSIONER IACOBUCCI: But the process is going to have to be dictated, as we are struggling with this --

MS JACKMAN: Yes.

COMMISSIONER IACOBUCCI: -- by what

has been given to me. I didn't sort of --

MS JACKMAN: No, I realize that.

COMMISSIONER IACOBUCCI: -- make this up on my own.

MS JACKMAN: So if that is the case -- you know, the whole Terms of Reference are problematic. if that is the case, the three tier system is the fairest, that you separate out national security from private. You are still acting in --

COMMISSIONER IACOBUCCI: Isn't that what we are suggesting by some of these comments that have been made by my counsel and myself and others in their briefs?

MS JACKMAN: Well, I don't think that Mr. Terry's question to the government is a good -- Would you consider participation? Meaning that we get to make submissions on what are consular standards. That's not participation. That is just making submissions on issues. I mean, if you want factums, tell us.

But if that is the extent of the participation, that is not meaningful participation.

COMMISSIONER IACOBUCCI: You are

defining that. You tell me what meaningful participation means by your definition of meaningful participation, Ms Jackman.

I'm having some trouble squaring that with what I have.

MS JACKMAN: Right.

My concern is, in principle, in terms of the constitution around openness and the rest of that, it's two-tiered. National security is closed, the rest is open. You can't do that the way the Terms of Reference are written.

So the saw off is: You have to have private hearings, but nothing in the terms of reference says those private hearings be without participation. The only justification for no participation or limited participation through security cleared counsel would be the national security claims.

But to read "private" in the Terms of Reference as national security claims, plus anything else the government wants, in my submission is too narrow of an interpretation.

COMMISSIONER IACOBUCCI: All right, we have the point. We have that point.

MS JACKMAN: All right.

The government commented that there was no legal interest at stake. I would note the International Covenant on Civil and Political Rights characterizes reputation as a human right. There are legal interests at stake here.

COMMISSIONER IACOBUCCI: But if we are going down that path of reputation, if we are going down that path, what about the comment made by the Attorney General, then we are transforming this from conduct of officials to the conduct of the three individuals.

MS JACKMAN: Well, you know, reputation, like I said, is at issue anyways because of what has gone on in the past already, but let me put it this way: The submissions to you on the torture issue, that in order to understand the consequences of Canadian action or inaction, you need to know what it was they were dealing with.

It is the same with these men. You need to know what kind of men they were dealing with in terms of what steps they took. That was what motivated Justice O'Connor. It wasn't warranted what was done at all in respect of Mr. Arar. The conduct of Canadian officials was inappropriate because the character of

Mr. Arar.

That is relevant. I don't see how you can avoid any of it. You are not making section 13 findings, but it has to underpin how you look at the case.

Mr. Peirce made the submission that you have to look at it within the context of what Canadian officials knew or understood. That is wrong. It is what Canadian officials knew or understood or ought to have known, whether there was wilful blindness or negligent disregard for what was happening, whether they were obligated. So I think it is a much broader thing than he had said.

I am going to skip over all of my reply except the ones where I have little stars.

The vires issue I had indicated is -- you know, it really depends on what happens here.

--- Pause

MS JACKMAN: The amicus. The submissions that have been made to you on the amicus.

Certainly an amicus would be helpful but, frankly, I don't understand if you have the jurisdiction to appoint an amicus, and certainly

Justice O'Connor interpreted his terms of reference providing that. Didn't speak to it. Neither do yours. But it is helpful, it makes it a more fair process.

Then why not the counsel for the persons -- why not counsel for the participants, for the three men? Like what's the difference? Why can't we be there? We have security experience in working in this field. If we are security cleared to participate, why can't we be the amicus? We have the interests of our clients at stake. I don't understand the point.

COMMISSIONER IACOBUCCI: What about yours truly? What am I supposed to be doing here?

MS JACKMAN: Well, you are the decision-maker at the end of the day, conducting an investigation and reaching decisions. We have our client's interests to protect.

COMMISSIONER IACOBUCCI: But what am I guided by? Aren't I guided by the public interest in ensuring that these claims, these three-part Terms of Reference are absolutely explored thoroughly, comprehensively, fairly and expeditiously?

MS JACKMAN: Certainly. Certainly you have that role, and so does your Commission counsel --

COMMISSIONER IACOBUCCI: I can apply --

MS JACKMAN: -- but you don't represent the interests of our clients.

COMMISSIONER IACOBUCCI: I can certainly retain experts to help me in terms of understanding.

MS JACKMAN: But I think you have to look at it in terms of what could be brought to --

COMMISSIONER IACOBUCCI: You see, an amicus comes from a point of view that is not normally represented by the parties, and it comes from the court proceeding.

MS JACKMAN: Right.

COMMISSIONER IACOBUCCI: That's where it comes from.

MS JACKMAN: My answer to you is --

COMMISSIONER IACOBUCCI: And it really, really, just to follow through, it comes from where you think there is not a representation of interest or a point of view that is in fact reflected by those who are before the panel or the judges.

MS JACKMAN: Well, I am not advocating for an amicus, I am advocating that we be

present in the private and the parts of the hearing that are national security where national security is claimed, because our clients do have an interest.

COMMISSIONER IACOBUCCI: So you are abandoning the amicus?

MS JACKMAN: No, I was just saying why an amicus. I wasn't promoting it. I was just saying, if you were going to appoint one, why an amicus and not the person concerned's counsel because that is the point.

--- Pause

MS JACKMAN: There are likely many other points, but I will leave them to my friends, to my colleagues.

COMMISSIONER IACOBUCCI: Well, if they don't pick them up you make sure you get up and --

MS JACKMAN: All right.

MR. COPELAND: Might I inquire firstly, Mr. Commissioner, Ms Kalajdzic and I haven't had an opportunity of discussing it. She apparently has five points to discuss, I have perhaps two points to discuss, plus I would like to answer Mr. Laskin's three questions.

So if that is permissible I will go ahead.

COMMISSIONER IACOBUCCI: Sure.

SUBMISSIONS BY MR. COPELAND

MR. COPELAND: If I could deal firstly with the issue of solicitor-client privilege.

After listening to Mr. Peirce I'm still not sure what the issue is.

What he talked about, as I understood him saying, is he was concerned about the legal opinions that he gave becoming public.

That's not the privilege. The privilege is the client's privilege. If the lawyer is embarrassed because the client decides to waive the privilege, that is the lawyer's problem and that is the risk you take when you write legal opinions.

In regard to the issue of torture -- and I will deal with Mr. Laskin's questions in a minute -- let me say that we could resolve this issue entirely if the government acknowledged that the men were tortured. I don't understand why in April of 2007 the Government of Canada is saying: We will admit there was mistreatment, but we are not prepared to

acknowledge that these men were tortured.

Why did they pay $10.5 million to Maher Arar if they are not acknowledging that he was tortured in Syria?

If they were to say: Yes, we acknowledge they are tortured, you could then send a notice to the Syrian government, to the Egyptian government saying we are prepared -- It has been conceded by the Government of Canada for the purposes of this hearing that these men were tortured, do you want to bring any evidence to show that that is not correct?

But instead we get this partway position where they say: We agree to mistreatment, but we are not acknowledging that the men were tortured.

If I could deal with Mr. Laskin's three questions, Mr. Laskin says: Why have a separate process? Why not have the Commissioner decide?

Subject to having some discussions with Mr. Laskin and Mr. Terry, that doesn't sound like a bad idea. I need to obviously talk to Mr. Almalki about that.

The second question he asked was:

How do you respond to the testing of the evidence?

I had a very brief conversation with mr. Almalki and he says generally speaking he has no objection to the testing of evidence, but he is concerned about the depth of testing. I can tell you that he is still seeing a psychiatrist for post traumatic stress disorder and he is not interested in getting every little nitty detail of the torture that he endured subject to cross-examination.

The last question on whether it should be public or private, I agree with Ms Jackman: It should be private.

Those are my submissions.

Thank you.

COMMISSIONER IACOBUCCI: Thank you.

SUBMISSIONS BY MS KALAJDZIC

MS KALAJDZIC: Very briefly I hope, Commissioner,

First, with respect to a question that you posed to my friend: Where is the authority for his interpretation of the Inquiries Act, the Part I, Part II debate, the only authority that he referred you to is Justice O'Connor's ruling, which is found at page 586 and following of Volume 2.

I think it is important to understand the context in which that ruling was made. I'm not going to go over it, it is there for you to read, but it was a ruling on a jurisdictional issue that was raised by a person who had been given section 13 notice. That person disputed the jurisdiction of the Inquiry to look into the actions of Canadian officials in relation to Mr. Arar at all.

It was parsing the wording of Part II which talked about investigation and saying since those words aren't in Part I you can't investigate actions.

So it was within that context that the Commissioner made his ruling and said, you know, Part I doesn't speak that all of it has to be in public and Part II doesn't say that all of it has to be in private. So that context I think is important.

Second, on this struggle that we all seem to be having about national security and how so much of it needs to be in private, in particular because of these Terms of Reference, I think it is worth noting -- and Mr. Allmand referred to 9/11 for example that our friends south of the border had an exhaustive inquiry into the circumstances leading up to 9/11.

Commissioner O'Connor refers to that report at page 776 of the same volume and comments how open a proceeding it was, that it fostered public confidence, that the credibility of that inquiry south of the border was something to be commended.

So I think that is a reference that bears some reference.

Third, I heard -- and I hope I was wrong in what I heard -- Mr. Peirce say that this proceeding, this process, this hearing, is not a proxy for civil litigation interests. If I'm wrong in paraphrasing him I apologize.

I take umbrage at the suggestion that that is what we are doing here. The government asked us to put our civil litigation on hold pending this inquiry. We agreed to do so because we believed in the good faith that the government was taking in establishing this inquiry.

This is not a proxy for civil litigation interests. In fact, we could pursue those interests much better it seems in that process than what the government is proposing we are going to get here.

Next, the statement was also

made that "the bulk of this investigation is irrelevant to the inquiry". Excuse me, "the bulk of the investigation of Mr. Almalki is irrelevant to the inquiry."

Again, I don't understand that. I don't know how you can take a snapshot of what happened, for example in May of 2002, and not look at what the investigation was before that date. I don't know how you can assess deficiency of conduct without looking at what led to the point of detention.

I also note that the Terms of Reference in Arar, like the Terms of Reference here, don't specify a timeframe for the investigation, what is relevant to the mandate of this inquiry.

In Arar Justice O'Connor went back to September 11th because that was when he thought the investigation of Arar began, but noted that government should produce documents predating September 11 if they exist.

So going back where we started this morning with Mr. Copeland's submissions, the investigation began long before September 11th and I submit all of that is relevant to the work you have before you.

Next to last point, the question of mistreatment.

Government's position is that mistreatment is not a recognized term in law and that somehow it should only serve as a threshold for your jurisdiction, in effect, that unless there is mistreatment you cannot assess actions in relation to it. So it almost serves like a gate-keeping function.

Again, we respectfully and strongly disagree with that notion.

We also refer you to the Arar Report where there is a chapter entitled "Mistreatment of Mr. Arar in Syria". And there it is not just about some threshold question but obviously incorporates a very lengthy discussion of the torture and the extent of the mistreatment.

I don't think that is a reasonable interpretation of the Terms of Reference, particularly (i), (ii) and (iii), to say that somehow all that mistreatment does is get you in the door of looking at the actions of Canadian officials. I don't think that is a reasonable interpretation and I don't think it is in compliance with the spirit of this inquiry and why we are here; that it comes in the wake of much more

serious allegations of mistreatment.

Finally -- and this is in response to a submission by the Ottawa Police and OPP. I believe she said that you should take a broad definition of national security confidentiality. I would respectfully submit that that is not the case and that the Terms of Reference don't say that at all.

I make this point in the closing paragraphs of our factum.

The test in Paragraph K of the Terms of Reference are that the evidence or information would be injurious to national security; not could be injurious, which is the test in the Canada Evidence Act.

I submit that we have a much stricter standard and not a broad interpretation. Anything that could possibly be related to national security must be privileged and remain so.

Subject to your questions, those are my reply submissions.

COMMISSIONER IACOBUCCI: Thank you.

Anyone else? Any of the other participants who wish to say something?

SUBMISSIONS BY MS ZOLKIEWSKA

MS ZOLKIEWSKA: Anna Zolkiewska for Amnesty again.

I just want to make two brief points.

The fact-finder process in the Arar Inquiry, the use of Professor Toope, was found to be necessary particularly because Maher Arar was unable to see evidence that was used against him. As a result, this was a compromise.

The reason the government did not test Arar is exactly for this reason. It wouldn't have been fair to Arar, as Justice O'Connor deemed, to subject him to a process where he would be put in a situation of being cross-examined by the government on evidence he nor his counsel had seen.

This specifically points to the problem in having this kind of divide.

There is a real need to have the counsel security cleared here in order to protect their interests. And whatever they may decide in how they want to deal with fact-finding on the issue of torture, this is something we have to keep in mind.

The other thing that I wanted to bring up is just the issue of amicus curiae.

The idea in the Arar Inquiry, which

Justice O'Connor specifically pointed to, was "to appoint a person independent of the government with extensive expertise in national security matters to assist me in ensuring that the government's claim were subject to rigorous examination".

That is on top of the fact that he also did have Commission counsel who were there to cross-examine evidence as it pertained.

Again, we would like to submit that this process could be useful but it is certainly not the only one that is open to you, and we would hope that it is not the only one you adopt.

Thank you.

COMMISSIONER IACOBUCCI: Thank you.

Any other questions?

Seeing no other volunteers to make comments or observations, I guess this brings our proceeding to a close.

Obviously we will be toiling to get our ruling out as soon as possible. We will be giving the usual notices of where we are going and the pathway ahead once that gets in.

I have taken the observation that the commentary on the rules -- the rules themselves, as you

have noted, are not written in stone because we have said there is a need to move ahead but yet at the same time take a pause and reflect and ask ourselves whether adjustments have to be made.

You can understand that. I hope you understand that, because this is an unfolding story.

So thank you very much for your submissions and your presence here today. It has been very helpful. We will be in contact in due course.

Thank you very much.

--- Whereupon the hearing adjourned
at 1:08 p.m.