

**Commission d'enquête  
sur les actions des  
responsables canadiens  
relativement à Maher Arar**



**Commission of Inquiry into  
the Actions of Canadian  
Officials in Relation to  
Maher Arar**

**Audience publique**

**Public Hearing**

**Commissaire**

L'Honorable juge /  
The Honourable Justice  
Dennis R. O'Connor

**Commissioner**

**Tenue à:**

Salon Algonquin  
Ancien hôtel de ville  
111, Promenade Sussex  
Ottawa (Ontario)

le jeudi 30 juin 2005

**Held at:**

Algonquin Room  
Old City Hall  
111 Sussex Drive  
Ottawa, Ontario

Thursday, June 30, 2005

## APPEARANCES / COMPARUTIONS

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Mr. Ronald G. Atkey	<i>Amicus Curiae</i>
Mr. Lorne Waldman Ms Marlys Edwardh Ms Breese Davies Ms Brena Parnes	Counsel for Maher Arar
Ms Barbara A. McIsaac, Q.C. Mr. Colin Baxter Mr. Simon Fothergill Mr. Gregory S. Tzemenakis Ms Helen J. Gray	Attorney General of Canada
Ms Lori Sterling Mr. Darrell Kloeze Ms Leslie McIntosh	Ministry of the Attorney General/ Ontario Provincial Police
Mr. Faisal Joseph	Canadian Islamic Congress
Ms Marie Henein Mr. Hussein Amery	National Council on Canada-Arab Relations
Mr. Steven Shrybman	Canadian Labour Congress/Council of Canadians and the Polaris Institute
Mr. Emelio Binavince	Minority Advocacy and Rights Council
Mr. Joe Arvay	The British Columbia Civil Liberties Association

## APPEARANCES / COMPARUTIONS

Mr. Kevin Woodall	The International Commission for Jurists, The Redress Trust, The Association for the Prevention of Torture, World Organization Against Torture
Colonel M <sup>e</sup> Michel W. Drapeau	The Muslim Community Council of Ottawa-Gatineau
Mr. David Matas	International Campaign Against Torture
Ms Barbara Olshansky	Centre for Constitutional Rights
Mr. Riad Saloojee Mr. Khalid Baksh	Canadian Council on American-Islamic Relations
Mr. Mel Green	Canadian Arab Federation
Ms Amina Sherazee	Muslim Canadian Congress
Ms Sylvie Roussel	Counsel for Maureen Girvan
Ms Catherine Beagan Flood	Counsel for the Parliamentary Clerk
Mr. Norman Boxall	Counsel for Inspector Michael Cabana
Mr. Richard Bell	
Mr. Vince Westwick	Counsel for Ottawa Police Service
Mr. Paul Copeland	Counsel for Abdullah Almalki
Ms Barbara Jackman	Counsel for Ahmed El Maati
Mr. Don Bayne	Counsel for Michel Cabana

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1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Thursday, June 30, 2005

3 at 9:06 a.m. / L'audience débute le jeudi

4 30 juin 2005 à 09 h 06

5 THE REGISTRAR: Please be seated.

6 Veuillez vous asseoir.

7 THE COMMISSIONER: Good morning,

8 Ms Edwardh.

9 MS EDWARDH: Good morning,

10 Mr. Commissioner.

11 Before we commence our  
12 cross-examination, I wonder if I could raise one  
13 brief matter.

14 You may recall first I think when  
15 Mr. Pardy testified, but certainly when Minister  
16 Graham testified, there was an indication that a  
17 review of sorts had been undertaken by the  
18 department with respect to consular services.

19 I have made a number of requests  
20 to my colleagues over the days and weeks that we  
21 have sat, asking what the status of that review is  
22 and whether it will be made available. On the  
23 cusp of our adjournment, and looking perhaps down  
24 the way, it is certainly my submission that  
25 counsel for Mr. Arar would like to have an

1 opportunity to look at it. It may be very  
2 important to Mr. Martel or perhaps even others,  
3 and I just want to raise that with you to invite  
4 some resolution of that issue.

5 THE COMMISSIONER: Mr. Cavalluzzo?

6 MR. CAVALLUZZO: That was in the  
7 evidence of Mr. Graham, Mr. Commissioner, not  
8 Mr. Pardy. Mr. Graham did testify that as a  
9 result of what happened in respect of Mr. Arar, he  
10 commanded and directed that a study be done in  
11 order to have his officials in the department  
12 better prepared to deal with situations of  
13 Canadians detained and tortured.

14 I have asked Government counsel  
15 for that study. I have still not got a response  
16 from Government counsel. So I am expecting from  
17 Government counsel either the study or an  
18 undertaking to advise us that no study was in fact  
19 done.

20 THE COMMISSIONER: Mr. Fothergill?

21 MR. FOTHERGILL: I have no  
22 information that I can offer you at this time, but  
23 obviously we will speak with Mr. Cavalluzzo, and  
24 if there is information we can provide, we will.

25 THE COMMISSIONER: And then

1 through Mr. Cavalluzzo we could let Ms Edwardh  
2 know.

3 Mr. Fothergill, if we could do  
4 that sooner rather than later, it would seem to be  
5 a fairly straightforward request. Thank you.

6 PREVIOUSLY SWORN: MICHEL CABANA  
7 EXAMINATION

8 MS EDWARDH: Superintendent  
9 Cabana, my name is Marlys Edwardh and I represent  
10 Maher Arar.

11 I want to just establish one of  
12 the basic parameters of your evidence, sir, and  
13 I'm going to ask this question. Please don't  
14 answer it until my friends have had an opportunity  
15 to respond.

16 Is it your position here today,  
17 sir, that Mr. Arar is presently the subject of a  
18 national security investigation?

19 THE COMMISSIONER: Ms Edwardh said  
20 don't answer it.

21 Mr. Fothergill?

22 MR. FOTHERGILL: I wonder if I  
23 might just have a moment with my client behind me?

24 THE COMMISSIONER: Sure.

25 --- Pause



1 MR. FOTHERGILL: My instructions  
2 are that as a matter of policy the RCMP does not  
3 confirm or deny that a particular individual is  
4 the subject of an ongoing investigation.

5 MS EDWARDH: Thank you.

6 I take it that that is an NSC  
7 claim.

8 THE COMMISSIONER: That will be an  
9 NSC claim.

10 MS EDWARDH: Thank you,  
11 Mr. Commissioner.

12 THE COMMISSIONER: I think it is.

13 MR. FOTHERGILL: Yes, it is, sir.

14 MS EDWARDH: Superintendent  
15 Cabana, I heard you respond to a series of  
16 questions posed by Mr. Cavalluzzo yesterday that  
17 you did not feel you had or bore any  
18 responsibility for the U.S. treatment of Mr. Arar  
19 in rendering him to Syria. I don't intend to  
20 pursue that, but I would like to pursue another  
21 area of responsibility.

22 You will agree with me, sir, that  
23 you are a peace officer?

24 MR. CABANA: Yes, ma'am, I am.

25 MS EDWARDH: That you have a

1 mandate and duty to investigate crime?

2 MR. CABANA: Yes, that's correct.

3 MS EDWARDH: You have a duty to  
4 detect crime, to prevent crime and to prosecute  
5 those who commit crime?

6 MR. CABANA: Yes, ma'am.

7 MS EDWARDH: The RCMP, more  
8 perhaps than any other police force, is a police  
9 force that is involved in the investigation of  
10 transnational and international crime?

11 MR. CABANA: That's correct.

12 MS EDWARDH: And therefore, if one  
13 were to look at large money laundering  
14 enterprises, large drug conspiracies, and even  
15 organized crime, one would find that the RCMP is  
16 often involved in the investigation and  
17 prosecution of such crimes on a transnational and  
18 international basis. Correct?

19 MR. CABANA: Yes, we are.

20 MS EDWARDH: And as part of your  
21 approach to the world of criminal law enforcement,  
22 you have no hesitation to investigate government  
23 officials if there is a reasonable basis to  
24 believe they are involved in crime?

25 MR. CABANA: Yes, ma'am.

1 MS EDWARDH: And that would mean  
2 also that you would have no hesitate to  
3 investigate police officers if you believe that  
4 they are involved in crime?

5 MR. CABANA: That's correct.

6 MS EDWARDH: And under this broad  
7 set of duties we have described, ultimately the  
8 goal of any peace officer is to prevent crime?

9 MR. CABANA: Yes.

10 MS EDWARDH: If a crime has a real  
11 and substantial connection to Canadian soil,  
12 whether or not the participants of that crime are  
13 abroad does not in any way affect your decision to  
14 investigate, prosecute and move for extradition.

15 Is that correct?

16 MR. CABANA: That's correct.

17 MS EDWARDH: And I take it the  
18 fundamental principle of professional policing is  
19 no one above the law, and the law is to be  
20 enforced without fear or favour?

21 MR. CABANA: I would say that  
22 would be a fair statement, yes.

23 MS EDWARDH: Sir, I'm going to  
24 suggest to you that one of the more serious crimes  
25 provided for in the Criminal Code of Canada is the

1 crime of torture?

2 MR. CABANA: Yes, ma'am.

3 MS EDWARDH: And it is punishable  
4 by a term of imprisonment of up to 14 years?

5 MR. CABANA: Yes.

6 MS EDWARDH: And I would like, if  
7 I could, sir, to review with you the elements of  
8 the offence of torture.

9 I have provided to the Registrar  
10 and for everyone, just for handy reference, since  
11 I don't believe we all brought our Criminal Codes  
12 with us, section 269.1 of the Criminal Code.

13 I take it, sir, you would have  
14 some general familiarity with this offence?

15 MR. CABANA: Very general, yes.

16 MS EDWARDH: Right. You are  
17 responsible as a peace officer for having, as best  
18 you can, a working knowledge of all crimes in the  
19 Criminal Code that you may come across. Correct?

20 MR. CABANA: Yes, ma'am.

21 MS EDWARDH: And that would  
22 include this provision?

23 MR. CABANA: Yes.

24 MS EDWARDH: And the offence of  
25 torture is directed at officials. Is that

1 correct?

2 MR. CABANA: Yes.

3 MS EDWARDH: The definition of  
4 "official" under our Criminal Code is quite broad.  
5 It includes peace officers, public officers,  
6 members of the Canadian Armed Forces?

7 MR. CABANA: Yes.

8 MS EDWARDH: And interestingly  
9 enough, it has another provision under (d):

10 "Any person who may exercise  
11 powers pursuant to a law in  
12 force in a foreign state that  
13 would in Canada be exercised  
14 by a person referred to in  
15 paragraphs (a), (b) or (c)."

16 Do you see that?

17 MR. CABANA: Yes.

18 MS EDWARDH: So in theory that  
19 would cover -- and you will agree with me I'm  
20 sure -- persons employed by Syrian Military  
21 Intelligence?

22 MR. CABANA: Yes, I guess it  
23 would.

24 MS EDWARDH: Persons employed by  
25 the Federal Bureau of Investigation?

1 MR. CABANA: Yes.

2 MS EDWARDH: And persons employed  
3 by the CIA?

4 MR. CABANA: Yes.

5 MS EDWARDH: Now, we go on and we  
6 define torture further on in the section, and it  
7 means:

8 "by any act or omission --"  
9 That is language you are very  
10 familiar with?

11 MR. CABANA: Mm-hmm.

12 MS EDWARDH: You can commit a  
13 crime by failing to do something you have a duty  
14 to do?

15 MR. CABANA: Yes.

16 MS EDWARDH:

17 "... whereby severe pain or  
18 suffering, physical or  
19 mental, is intentionally  
20 inflicted on a person for the  
21 purpose of obtaining a  
22 statement."

23 That is really what I'm interested  
24 in. Do you see that?

25 MR. CABANA: Yes, I do.

1 MS EDWARDH: All right. And  
2 another interesting aspect of the Criminal Code is  
3 there no defence of superior orders.

4 Do you see that under sub 3?

5 MR. CABANA: Yes.

6 MS EDWARDH: That would mean, of  
7 course, a person is responsible for their own  
8 conduct, would it not?

9 MR. CABANA: Yes, ma'am.

10 MS EDWARDH: Regardless of what  
11 anyone directed them to do, whether there was a  
12 superior officer directing them, an individual  
13 personal decision must be made by the officer in  
14 question -- or the public officer. Correct?

15 MR. CABANA: Yes, ma'am.

16 MS EDWARDH: And there is another  
17 provision, just for our interest, which relates to  
18 statements or information obtained through the  
19 commission of this offence and it is simply  
20 inadmissible. Fair enough.

21 I want to deal with one aspect of  
22 the offence of torture in particular because it is  
23 quite unusual. You may be aware of it.

24 Canada's Criminal Code has also  
25 been amended to provide for jurisdiction over the

1 offence of torture when, in fact, it does not  
2 occur in Canada.

3 Do you know that?

4 MR. CABANA: No, ma'am, I don't.

5 MS EDWARDH: You have before you  
6 another section of the Criminal Code, section 3.7.

7 Do you see that?

8 THE COMMISSIONER: We didn't get  
9 it yet.

10 MR. CABANA: No.

11 MS EDWARDH: Oh, you don't have it  
12 yet? I apologize.

13 THE COMMISSIONER: Thank you.

14 MR. CABANA: Thank you.

15 MS EDWARDH: Take a moment because  
16 there is always some struggle in reading this kind  
17 of language.

18 But it establishes for the  
19 principles of the application of the Canadian  
20 Criminal Code a different set of considerations as  
21 are usually exercised in respect of the  
22 jurisdiction of our courts.

23 If I can just briefly put it to  
24 you that the effect of this section, particularly  
25 if you look at sub (d), is that torture anywhere



1 in the world inflicted upon a Canadian citizen is  
2 a cognizable crime in Canada.

3 Do you agree?

4 MR. CABANA: Yes, ma'am.

5 MS EDWARDH: In August of 2002,  
6 you, sir, as a peace officer, learned that a claim  
7 had been made by Mr. El Maati in Egypt that he, a  
8 Canadian citizen, had been tortured by Syrian  
9 Military Intelligence.

10 Do you agree?

11 MR. CABANA: I was made aware of  
12 that, yes. Exactly when in August, I don't know.

13 MS EDWARDH: We understand it  
14 would be around mid-August, but the date is of no  
15 consequence for this discussion.

16 MR. CABANA: Okay.

17 MS EDWARDH: And that claim, I  
18 take it you were aware, came through to the  
19 Government of Canada through consular contacts  
20 with Mr. El Maati?

21 MR. CABANA: That's correct.

22 MS EDWARDH: In other words,  
23 government officials had had an opportunity to see  
24 him and discuss the issue of his torture. That is  
25 what you understood?

1 MR. CABANA: I understood that the  
2 information came to us through DFAIT. Exactly the  
3 context under which the information was obtained,  
4 I'm not aware.

5 MS EDWARDH: Did you request  
6 access to the details of Mr. El Maati's  
7 description of what happened to him, sir?

8 MR. CABANA: With respect to ...

9 MS EDWARDH: His torture.

10 MR. CABANA: No, ma'am.

11 MS EDWARDH: His claim of torture.

12 MR. CABANA: No, ma'am.

13 MS EDWARDH: He is a Canadian  
14 citizen?

15 MR. CABANA: Yes, he is.

16 MS EDWARDH: Torture is a serious  
17 crime?

18 MR. CABANA: Yes, ma'am, it is.

19 MS EDWARDH: Under your watch,  
20 sir, under your investigation, someone you are  
21 investigating makes a claim of torture and you  
22 don't feel any need to conduct an investigation?

23 MR. CABANA: I would submit to  
24 you, ma'am, that Mr. El Maati has never made any  
25 official complaint of torture. And if he would

1           have made an official complaint of torture, I  
2           would also submit that I would not, or my team  
3           would not, have been responsible to investigate  
4           that claim.

5                           MS EDWARDH: Let me just establish  
6           some parameters. Even though the man is in an  
7           Egyptian prison at this time --

8                           MR. CABANA: Yes, ma'am.

9                           MS EDWARDH: -- and can't really  
10          phone up the local detachment. Right?

11                          MR. CABANA: Right.

12                          MS EDWARDH: I take it until he  
13          manages maybe -- maybe -- to get back to Canada,  
14          you wash your hands of this claim unless he can  
15          put a credible complaint before you, or some other  
16          police officer?

17                          MR. CABANA: I don't think I said  
18          I was washing my hands of this. I think what I  
19          said is I was not aware, I was never made aware  
20          that there was any form of official complaint,  
21          whether through DFAIT or upon Mr. El Maati's  
22          return, of a complaint of torture.

23                          MS EDWARDH: Well, I have a lot of  
24          trouble with that, Superintendent Cabana.

25                          MR. CABANA: I understand you do.

1 MS EDWARDH: Because if a man is  
2 in prison and finally, after many months of  
3 isolation, has an opportunity to meet with  
4 representatives of the Government of Canada and  
5 offer his complaint of treatment at the hands of  
6 the Syrian Military Intelligence, what more  
7 credible complaint could he make for help, help  
8 from our national police force?

9 MR. CABANA: What is your  
10 question, ma'am?

11 MS EDWARDH: Isn't that a  
12 complaint?

13 MR. CABANA: No, not in my  
14 perspective, no. DFAIT did not come to us to say  
15 could you please investigate this. Nobody came to  
16 us and asked for an investigation.

17 MS EDWARDH: Now, sir, this causes  
18 me -- sometimes you wait for a complaint to come.  
19 But if you are doing a drug investigation and one  
20 of the targets ends up being murdered one morning,  
21 you don't wait for a member of the family to phone  
22 you and make a complaint to begin a homicide  
23 investigation.

24 MR. CABANA: No, ma'am, but I  
25 would submit to you that the team that is

1           investigating the drug offence is not the one that  
2           is going to be investigating the murder offence.  
3           The nature of the investigation doesn't change.

4                       MS EDWARDH: Of course you are not  
5           going to be the same team. But you wouldn't  
6           hesitate to pick up the phone and say, "Gentlemen,  
7           I think we need the homicide squad here."  
8           Correct?

9                       MR. CABANA: I would suggest if  
10          there is a murder, there is a complaint that is  
11          made somewhere, and there is no call that is made  
12          that says, "We need the homicide squad."

13                      MS EDWARDH: Well, if you walk  
14          into a scene as a drug officer and one of the  
15          targets of the investigation is dead, it is the  
16          officer at the scene who will call in colleagues  
17          to investigate the homicide. Correct?

18                      MR. CABANA: Correct. And the  
19          officer at the scene, I would submit, would not be  
20          a member of the investigative team that is looking  
21          after the drug investigation. It would likely be  
22          a uniform officer that was called to the scene  
23          following whatever event occurred.

24                      MS EDWARDH: Well, let's try  
25          another one.

1 MR. CABANA: Certainly.

2 MS EDWARDH: I'm going to get you  
3 to be -- the drug squad is going in, executing a  
4 search warrant they have obtained in order to  
5 conduct a drug investigation.

6 MR. CABANA: Yes.

7 MS EDWARDH: They run across a  
8 dead body.

9 MR. CABANA: Yes.

10 MS EDWARDH: What do they do?

11 MR. CABANA: Well, they would  
12 advise their supervisors that there is a body that  
13 has been found and there would be an investigation  
14 that would be launched.

15 MS EDWARDH: Fair enough. Because  
16 you don't need a complaint in some cases.

17 MR. CABANA: I agree with you on  
18 that point.

19 MS EDWARDH: So even if DFAIT sat  
20 and didn't ask you to investigate, surely you  
21 appreciated that there was a Canadian citizen who  
22 could well use some of the services of the RCMP to  
23 conduct a criminal investigation that you had the  
24 authority to conduct in Canada?

25 MR. FOTHERGILL: Commissioner,

1 before the witness continues, I wish to raise an  
2 objection to this line of questioning based on  
3 your mandate.

4 This is a commission of inquiry  
5 established to investigate the be actions of  
6 Canadian officials in relation to Mr. Arar. This  
7 would appear to be a line of inquiry that is  
8 directed solely towards the actions or omissions  
9 of Canadian officials in relation to Mr. El Maati,  
10 and I don't think that is properly within the  
11 scope of your mandate.

12 THE COMMISSIONER: Would I take  
13 your objection would not apply if the questions  
14 related to Mr. Arar?

15 MR. FOTHERGILL: That would be  
16 correct, yes.

17 THE COMMISSIONER: I just wonder  
18 if the line of questioning -- well, let me hear  
19 from you.

20 MS EDWARDH: I am just at the  
21 warm-up stage, Mr. Commissioner.

22 --- Laughter / Rires

23 THE COMMISSIONER: What I would  
24 think, Mr. Fothergill, and respond to it, is that  
25 the line of questioning I assumed was headed

1           towards Mr. Arar, which would be relevant.

2                       I wonder, as background or  
3           context, if the same type of situation -- I'm not  
4           saying it is -- but there might be an argument it  
5           existed a month before, if that wouldn't be  
6           something that --

7                       MR. FOTHERGILL: Well returning  
8           again to your terms of reference, you can  
9           certainly inquire into matters directly related to  
10          Mr. Arar. This would seem to be an inquiry into  
11          matters indirectly related to Mr. Arar, and I  
12          don't know why Ms Edwardh can't simply ask her  
13          questions in the context of Mr. Arar, why this  
14          needs to be approached indirectly.

15                      THE COMMISSIONER: Well, there is  
16          some force to that. I'm not going to preclude you  
17          from cross-examining with respect to others, but  
18          the point is well taken. This is Mr. Arar, and  
19          ultimately that is all I will deal with in my  
20          report.

21                      MS EDWARDH: This may be,  
22          Mr. Commissioner, essential background to  
23          understanding the rest of the conduct of the  
24          Canadian officials with respect to Mr. Arar.

25                      I'm really finished in the area.



1 THE COMMISSIONER: Okay.

2 MS EDWARDH: I think the officer  
3 has answered the questions, if they are going to  
4 be of any assistance to you at all.

5 Anyway, Superintendent Cabana, in  
6 addition to this receipt of information in August  
7 of 2002 about Mr. El Maati's claim that he was, as  
8 a Canadian citizen, tortured by Syrian Military  
9 Intelligence, you were, I take it, given your  
10 general knowledge as you have developed it,  
11 familiar with the well-documented human rights  
12 record of the Syrian Military Intelligence --  
13 generally familiar?

14 MR. CABANA: Generally familiar.

15 MS EDWARDH: Right. And as a  
16 person heading up an investigation, considering  
17 cooperation and embracing the Syrian Military  
18 Intelligence as a partner in investigations, I  
19 take it that --

20 MR. CABANA: I am sorry, ma'am, I  
21 am not sure where you are getting this. The team  
22 never embraced Syrian Military as a partner.  
23 There was discussions with Canadian partners over  
24 the prospect of sharing with Syrians. That is as  
25 far as it went.

1 MS EDWARDH: Well, let me put it  
2 this way. You discussed, you met, you considered  
3 whether or not you would share -- intelligence and  
4 information with Syrian Military Intelligence.  
5 Correct?

6 MR. CABANA: Certainly, ma'am, and  
7 I would submit that under the circumstances, if we  
8 didn't look at every option that was available to  
9 us, we stood to be highly criticized at the end of  
10 the day.

11 MS EDWARDH: Thank you. And as a  
12 result of your consideration, you decided to go  
13 ahead and share?

14 MR. CABANA: It was a joint  
15 decision, yes.

16 MS EDWARDH: Joint with whom?

17 MR. CABANA: Joint with the  
18 stakeholders that were at the table throughout a  
19 lengthy consultation process that involved DFAIT,  
20 CSIS, Justice and other agencies.

21 MS EDWARDH: And ultimately, sir,  
22 though, as the repository of the information, it,  
23 the decision, rests on your lap, institutionally,  
24 the RCMP.

25 They make this decision. They

1 make the rules upon which they share.

2 MR. CABANA: I would submit, if  
3 you look at our policy, the decision to share with  
4 foreign jurisdictions actually rests with DFAIT,  
5 because the sharing would occur through DFAIT.

6 MS EDWARDH: I appreciate the  
7 sharing occurs through DFAIT.

8 MR. CABANA: So if DFAIT refuses  
9 to share for whatever reason, conflict with their  
10 mandate, then I would submit that the RCMP would  
11 be hard-pressed to share.

12 MS EDWARDH: Right. But if DFAIT  
13 says "gentlemen, we will do what you wish us to  
14 do because we go over to Damascus, and we wear  
15 many hats" -- we have learned -- "and one of them  
16 is to represent your interests, sir, because that  
17 is what the ambassador does".

18 MR. CABANA: Yes.

19 MS EDWARDH: So, unless the  
20 ambassador says to the RCMP "I'm not going to have  
21 anything to do with this", it is your decision, it  
22 isn't anybody else's, if DFAIT lets you write your  
23 ticket. Correct?

24 MR. CABANA: It is an  
25 institutional decision, yes.

1 MS EDWARDH: And it was made in  
2 this case, sir, that the institution, the Royal  
3 Canadian Mounted Police, was prepared to share  
4 with Syrian Military Intelligence.

5 Is that right?

6 MR. CABANA: Yes, ma'am.

7 MS EDWARDH: And that decision, I  
8 take it, was made with you and some of your  
9 colleagues at the table? You have described that.

10 MR. CABANA: Yes.

11 MS EDWARDH: And I want to know,  
12 sir, first of all -- could I have the officer be  
13 given Exhibit 27, please?

14 Sir, this is a U.S. government  
15 publication. It can be found on a Website readily  
16 available to the world if someone wants to inquire  
17 about another country.

18 Are you familiar with it?

19 MR. CABANA: With this?

20 MS EDWARDH: Yes.

21 MR. CABANA: No, I'm not.

22 MS EDWARDH: Well, can you tell me  
23 what inquiries you, as a police officer -- forget  
24 DFAIT for a moment -- made about the entity or  
25 organization you were prepared to share with?

1 MR. CABANA: The inquiries I  
2 conducted, ma'am, were with the stakeholder  
3 agencies and the experts in this field.

4 MS EDWARDH: And who was the  
5 expert you consulted? Let's start with them.

6 MR. CABANA: I would start with  
7 Justice Department.

8 MS EDWARDH: Okay -- I'm sorry.

9 MR. CABANA: And CSIS and DFAIT,  
10 including Mr. Pillarella.

11 MS EDWARDH: And who in Justice  
12 gave you advice about the propriety of having a  
13 relationship with Syrian Military Intelligence?

14 MR. CABANA: There was a number of  
15 individuals, including Ms Ann Alder.

16 MS EDWARDH: And do you know her  
17 to be a woman with -- I know she's a lawyer and  
18 now a member of the judiciary. Do you know her to  
19 be a person with any special expertise in the  
20 nature of Syrian Military Intelligence, its  
21 operations and practices?

22 MR. CABANA: No, ma'am.

23 MS EDWARDH: Right. So that would  
24 leave it with Mr. Pillarella?

25 MR. CABANA: And representatives

1 from CSIS.

2 MS EDWARDH: Right. And we are  
3 not allowed to know who they are.

4 Anyway, you will agree with me if  
5 this is on a Website, sir, this kind of  
6 information was readily available to you as a  
7 member of the RCMP?

8 MR. CABANA: At the time, I'm not  
9 sure whether it was available. I see here it is  
10 marked March 31st, 2003.

11 MS EDWARDH: Yes, and if you turn  
12 to tab --

13 MR. CABANA: Yes.

14 MS EDWARDH: I'm sorry.

15 MR. CABANA: But to answer your  
16 questions, I didn't research this.

17 MS EDWARDH: You didn't research  
18 it.

19 MR. CABANA: No, I did not.

20 MS EDWARDH: So it must then come  
21 as either something -- no, let me ask a question.

22 Does it come to you as a surprise  
23 if I were to inform you that the Syrian human  
24 rights record includes.

25 "(1) continuing serious

1 abuses including the use of  
2 torture in detention, poor  
3 prison conditions, arbitrary  
4 arrest and detention,  
5 prolonged detention without  
6 trial, fundamentally unfair  
7 trials in the security  
8 courts, an inefficient  
9 judiciary that suffered from  
10 corruption and at times  
11 political influence."

12 Is that a surprise to you, or did  
13 CSIS tell you that?

14 MR. CABANA: I have no  
15 recollection whether CSIS told me that. But, no  
16 it is not a surprise to me.

17 Actually, surprisingly, there are  
18 quite a few countries around the world that do not  
19 have the same system as we have in Canada and we  
20 deal with them on a weekly basis.

21 MS EDWARDH: I'm not talking about  
22 the same system, sir.

23 MR. CABANA: No. I'm talking  
24 about other countries with these types of systems.

25 MS EDWARDH: Right. You will

1           agree with me that the information I have just  
2           read to you is a kernel of very important  
3           information that you should have had in your mind  
4           at the time you agreed to share?

5                           It is a piece of information you  
6           needed to have in order to make the decision to  
7           share?

8                           MR. CABANA: I'm really not sure  
9           what to answer to this.

10                           The issues that are identified --  
11           I didn't read this document. Interestingly  
12           enough, this document is prepared by the very  
13           individuals that deported Mr. Arar.

14                           MS EDWARDH: Oh, we will come to  
15           that, too.

16                           MR. CABANA: But the gist of the  
17           information -- I assume the information is  
18           contained in that document -- was subject of  
19           conversations.

20                           MS EDWARDH: And it was subject to  
21           your personal consideration when you agreed or  
22           recommended that the RCMP consider sharing  
23           information?

24                           MR. CABANA: You seem to imply  
25           that the decision to share was my decision, and



1 solely my decision, and I would put to you the  
2 decision to share the information with Syrian  
3 Military was a joint decision that was taken by  
4 parties at the table and it wasn't solely my  
5 decision.

6 MS EDWARDH: You were part of the  
7 decision?

8 MR. CABANA: Yes, I would be part  
9 of the decision, ma'am.

10 MS EDWARDH: If you had refused?

11 MR. CABANA: I would submit to you  
12 that if I had refused and my superiors, who were  
13 at the table, had agreed to it, sharing would  
14 still occur.

15 MS EDWARDH: If your superiors  
16 agreed with you, having considered all the  
17 information, there would be no sharing?

18 MR. CABANA: I don't know. Right  
19 now, these are purely supposition, and we don't  
20 know what would have happened.

21 MS EDWARDH: In any event, we also  
22 know, if you look at Exhibit 29, which is a report  
23 from Amnesty International -- I take it, sir, you  
24 are familiar with that organization?

25 MR. CABANA: Yes, I am.

1 MS EDWARDH: In there, in this  
2 report at page 2, there is a discussion  
3 particularly about a practice of Syrian Military  
4 Intelligence. It is in the right-hand column  
5 under "Torture and Ill Treatment".

6 Do you see that, sir?

7 MR. CABANA: I see the text, yes.

8 MS EDWARDH: It reads:

9 "Torture and ill treatment  
10 continue to be inflicted  
11 routinely on political  
12 prisoners especially during  
13 incommunicado detention at  
14 the Palestine Branch and  
15 Military Interrogation Branch  
16 detention centres."

17 I take it, sir, you would have had  
18 your counterparts at the table discuss that  
19 information and the significance of it in terms of  
20 any proposed sharing of information?

21 MR. CABANA: The discussions  
22 around the table did not include any information  
23 from Amnesty International.

24 MS EDWARDH: How about the fact  
25 that incommunicado interrogation at the Palestine

1 Branch occurred in association with credible  
2 claims of torture during interrogation. Was that  
3 on the table when the decision to share was made?

4 MR. CABANA: What was on the table  
5 when the decision to share was made was the fact  
6 that Syria does not share the same beliefs and the  
7 same practices as we do. That was on the table.

8 MS EDWARDH: Well, sir, a person  
9 can have many different beliefs and many different  
10 judicial systems, and have honourable men and  
11 women conducting investigations and adjudicating  
12 in very different ways, and that is different,  
13 Superintendent Cabana, from a regime that  
14 routinely practices the most serious human rights  
15 violations.

16 You will agree it is different?

17 MR. CABANA: Yes.

18 MS EDWARDH: Now, after the events  
19 of Mr. El Maati were drawn to your attention, it  
20 is within weeks of that fact, his claim to  
21 torture, that the decision to share is made.

22 Do you agree with that?

23 MR. CABANA: No, ma'am.

24 MS EDWARDH: Well, let's take a  
25 look at it.

1                   Your discussion with Mr. Gould  
2                   from ISI occurs on October 21st, 2002, where you  
3                   offer to provide information on the investigation  
4                   to the Syrian officials?

5                   MR. CABANA:    Yes, ma'am.

6                   MS EDWARDH:   Yes.    So maybe  
7                   "weeks" is too long.

8                   Between August, mid August, and  
9                   October 21st, you know, 10, 12 weeks --

10                  MR. CABANA:    Mm-hmm.

11                  MS EDWARDH:  -- you have (1) the  
12                  information about Mr. El Maati, and (2) you have  
13                  made the decision.

14                  As you discussed or considered  
15                  whether you would make the offer in your  
16                  conversation with Mr. Gould at ISI, do you recall  
17                  whether you gave any consideration of what that  
18                  offer meant in light of what happened to Mr. El  
19                  Maati, what that offer might mean?

20                  What might it mean to Syrian  
21                  Military Intelligence?

22                  MR. CABANA:    I'm not sure I  
23                  understand what you are getting at.

24                  MS EDWARDH:   Let me try it from a  
25                  different perspective, sir.

1                   The information you have is that  
2                   Mr. El Maati was tortured, or alleges he was  
3                   tortured, while under -- while in custody, held by  
4                   the Syrian Military Intelligence. Correct?

5                   MR. CABANA: That is my  
6                   understanding, yes.

7                   MS EDWARDH: And 10 weeks later  
8                   you are into a conversation with Mr. Gould at ISI,  
9                   and you are having the issue of your sharing  
10                  raised and discussed.

11                  MR. CABANA: Yes.

12                  MS EDWARDH: And you offer to  
13                  provide information from the Canadian  
14                  investigation.

15                  MR. CABANA: Yes.

16                  MS EDWARDH: Did you consult  
17                  anyone prior to making that offer to Mr. Gould?

18                  MR. CABANA: Yes, ma'am. I  
19                  testified to that yesterday. There was extensive  
20                  consultation that started -- the external  
21                  consultation started in the early summer of 2002.

22                  MS EDWARDH: Right. And you have  
23                  described the stakeholders.

24                  MR. CABANA: Yes.

25                  MS EDWARDH: And do you, sir -- my

1           only comment is: When you made that offer on  
2           October 22nd -- or October 21st, did you expressly  
3           consider the fact of Mr. El Maati's torture and  
4           whether or not that was a matter that should  
5           affect your decision?

6                         MR. CABANA: No, ma'am. The  
7           conversation with Mr. Gould of October 21st was  
8           merely a reiteration of the discussions that had  
9           taken place previously and the fact that the  
10          decision had been made that sharing could occur  
11          and it was merely raising that.

12                        MS EDWARDH: So, sir, what we are  
13          left with then is all the intelligence and wisdom  
14          that you as an officer, and your colleagues as  
15          police officers, and the Department of Foreign  
16          Affairs, and the Department of Justice, that in  
17          the face of a credible history of torture and the  
18          credible claim of a Canadian citizen to recent  
19          torture, are prepared to give information to the  
20          Syrians who are in the process of holding another  
21          Canadian.

22                        That is what you are saying? That  
23          is the effect of it --

24                        MR. CABANA: What I'm saying,  
25          ma'am, is a part of our duties in Canada, and as

1           appalling as it may sound to you, part of our  
2           duties in Canada in trying to protect the Canadian  
3           public means that from time to time we have to  
4           deal with countries that don't necessarily have  
5           the same record as we do and don't necessarily  
6           treat their prisoners the same way as we do.

7                           I would submit to you that if we  
8           didn't consider dealing with these countries, the  
9           security of Canadians would be greatly at risk.

10                          Now, these types of sharing that  
11           occur -- and I submit to you that they occur  
12           fairly regularly with these countries; maybe not  
13           Syria, but with countries with a similar record as  
14           Syria. It does occur fairly regularly.

15                          And when the sharing does occur,  
16           the sharing is reviewed in detail before the  
17           sharing occurs.

18                          I'm a little concerned here that  
19           there is this perception that the sharing with  
20           Syrian Military Intelligence would be the same  
21           kind of sharing that we would have with our  
22           Canadian partner agencies or, for that matter,  
23           even with our U.S. partner agencies.

24                          The sharing would not be to the  
25           same level, would not include the same type of

1 information, and the sharing would be controlled.

2 What we have reviewed yesterday,  
3 and what we are discussing today, was discussions  
4 over the prospect of sharing with one of these  
5 countries.

6 MS EDWARDH: I understand that,  
7 sir, and according to the note put to you  
8 yesterday, you were prepared to share the products  
9 of your investigation, for the Syrians to use it  
10 for their own purposes.

11 MR. CABANA: No, ma'am, I think  
12 what it says, if we were to go back to the  
13 exhibits -- and I don't know what the exhibit  
14 is -- is that we have evidence, we have  
15 intelligence, we have evidence that we are  
16 prepared to share.

17 It doesn't mean we are prepared to  
18 share all of it, but we are prepared to share some  
19 of it.

20 MS EDWARDH: I'm going to see if I  
21 cannot locate the note in question.

22 MR. CABANA: I don't remember what  
23 the number was.

24 MS EDWARDH: It is all right. We  
25 will just take a moment.



1 --- Pause

2 MS EDWARDH: It is Exhibit 166,  
3 Mr. Commissioner.

4 THE COMMISSIONER: I have it.

5 MS EDWARDH: It is page 54, at the  
6 bottom of page 54 over on to the next page, and we  
7 will read together.

8 MR. CABANA: Mine is redacted so  
9 there is part of the text that I'm missing.

10 MS EDWARDH: Thank you very much,  
11 Mr. Cavalluzzo.

12 MR. CABANA: Thank you, sir.

13 MS EDWARDH: It reads as follows,  
14 the bottom line:

15 "Mr. Gould asked whether  
16 there was any other message  
17 we would like conveyed."

18 And I take it "conveyed" means  
19 conveyed to whom?

20 MR. CABANA: Conveyed to the  
21 ambassador.

22 MS EDWARDH: Right.

23 "The writer advised that we  
24 have intelligence/evidence  
25 that we would be prepared --"

1 And you read the rest of it.

2 MR. CABANA: Yes.

3 "... that we would be  
4 prepared to share with Syrian  
5 authorities if they felt it  
6 could be of assistance to  
7 their investigation, this in  
8 light of their sharing info  
9 with us in the past."

10 So like I said, ma'am, what this  
11 says is we are advising DFAIT to remind the  
12 ambassador that we have intelligence/evidence in  
13 relation -- and this conversation was not strictly  
14 in relation to Mr. Arar --

15 MS EDWARDH: But it included him?

16 MR. CABANA: Yes, it did include  
17 him, and that we are prepared to share some of  
18 this information with Syrian authorities.

19 MS EDWARDH: Right. I don't want  
20 to go far from my -- I understand what you are  
21 saying, sir, and I understand that the issue for  
22 you is the protection of Canadian citizens or  
23 members of the Canadian public.

24 MR. CABANA: Yes, ma'am.

25 MS EDWARDH: And I just want to

1           remind you we have one of those sitting in Syrian  
2           detention.

3                           MR. CABANA:   Yes.

4                           MS EDWARDH:  I would like, sir, to  
5           go back to the same period of time when you are  
6           then receiving -- it is within two weeks.  We have  
7           a meeting on November 6th.

8                           Do you recall that meeting?

9                           MR. CABANA:  I believe that's  
10          correct, yes.

11                          MS EDWARDH:  Where you received  
12          the fruits of the efforts of military intelligence  
13          from Syria?

14                          You receive a small document, a  
15          bout de papier?

16                          MR. CABANA:  I'm not sure that we  
17          received that document that day.  The meeting was  
18          with Mr. Pillarella, who briefed us on the nature  
19          of the information that was received.

20                          But I'm not sure we actually  
21          received the document that day.

22                          MS EDWARDH:  Well, you received it  
23          very shortly after --

24                          MR. CABANA:  Very shortly after,  
25          yes.

1 MS EDWARDH: The days don't make a  
2 difference. The 6th or 7th or whatever.

3 In any event, I just want to  
4 confirm with you your evidence, sir, that when you  
5 looked at that document and you spoke to the  
6 ambassador, the principal message you sent to him  
7 is "this is too general", as you said yesterday,  
8 "and that we need more details".

9 MR. CABANA: Again, ma'am, you are  
10 implying that I'm the one that made these  
11 comments.

12 MS EDWARDH: Well, did you --

13 MR. CABANA: The nature of the  
14 discussion around the table which involved, again,  
15 representatives of CSIS, representatives of the  
16 RCMP, including headquarters, was that the  
17 information contained was not specific enough and  
18 did not allow the analysis to determine the  
19 accuracy of the information and, in our view,  
20 there had to be a more detailed statement  
21 available.

22 MS EDWARDH: Right. And so I  
23 understand you had that view, you looked at what  
24 was there, and it was --

25 MR. CABANA: I had that view as

1 well, yes.

2 MS EDWARDH: Right. And you  
3 conveyed that view to the group?

4 MR. CABANA: I think it was a  
5 shared perception -- or a shared belief, yes.

6 MS EDWARDH: It would have come  
7 after conversation, though, Superintendent Cabana.  
8 I just want to establish: Did you or did you not  
9 hold that view and express it to the group?

10 MR. CABANA: I believe I just said  
11 I did, ma'am.

12 MS EDWARDH: And did CSIS, whoever  
13 was sitting at the table, did they hold that view  
14 and express it to the group?

15 MR. CABANA: Yes, ma'am, they did.

16 MS EDWARDH: And who else was  
17 there?

18 MR. CABANA: At that particular  
19 meeting -- unfortunately I don't have my notes --  
20 I believe there was Justice representatives there,  
21 and there was people from ISI, and of course  
22 Mr. Pillarella.

23 MS EDWARDH: Right. And we can  
24 check your notes.

25 But in any event, do I take it

1           that each person who was at that meeting addressed  
2           the issue in their minds of whether this statement  
3           was adequate for the purposes of confirmation and  
4           for use, or was that mostly you and CSIS concerned  
5           with that?

6                           MR. CABANA:  No.  I believe by the  
7           end of the meeting I believe it was a shared  
8           belief.

9                           MS EDWARDH:  So the one  
10          instruction, I take it, the ambassador would have  
11          understood, that to meet the institutional needs  
12          of the force, that being the Mounties, and CSIS,  
13          that he had to go back and he had to seek and try  
14          and obtain a form of a statement -- and you are  
15          smiling.

16                           But, Officer, quite frankly the  
17          only, only conclusion the Ambassador could have  
18          come to, given your advice and the advice of  
19          others, was we need a more thorough, detailed  
20          statement.  Correct?

21                           MR. CABANA:  Unfortunately, ma'am,  
22          you don't have all the information surrounding  
23          that meeting.  I would love to be able to tell you  
24          exactly what was discussed, what was decided, but  
25          that wasn't it.

1 MS EDWARDH: I'm going to put the  
2 question one more time a different way.

3 Did Ambassador Pillarella leave  
4 the meeting with the impression that he should go  
5 back to Syrian Military Intelligence and request  
6 more detailed information?

7 MR. CABANA: No.

8 MS EDWARDH: So if he did that, or  
9 if there were further requests, then I take it  
10 that would come as a surprise to you?

11 MR. CABANA: Yes, it would.

12 MS EDWARDH: Now, would it come as  
13 a surprise to you if the decision was: If he  
14 couldn't do it very well, we will let CSIS do it.

15 Was that the effect of the  
16 conclusion at the meeting?

17 MR. FOTHERGILL: Excuse me,  
18 Commissioner. There is a claim of national  
19 security confidentiality with respect to CSIS'  
20 involvement in this matter beyond that which had  
21 been disclosed in your summary and the additional  
22 information that we provided about the CSIS trip.  
23 Everything else concerning CSIS' involvement in  
24 Project A-OCANADA is subject to a claim of  
25 national security confidentiality.

1 THE COMMISSIONER: Let me say that  
2 these questions, I can assure you, have been asked  
3 in camera. I have the answers.

4 I guess whether those actual facts  
5 will be made public in the context of my report, I  
6 would just make this general comment: I would  
7 hope that the maximum amount of disclosure will be  
8 available at the time of the report.

9 I won't prejudge that particular  
10 issue. But I can tell you that we have canvassed  
11 this area thoroughly in camera. I will  
12 definitely, at the appropriate time, reach  
13 conclusions with respect to it and will be setting  
14 out my conclusions in detail in the report.

15 MR. ATKEY: Commissioner, if I may  
16 interrupt here, I have read the testimony of  
17 Inspector Cabana in camera and am familiar with  
18 the issues raised by Mr. Fothergill, and the  
19 amicus would have submissions to make on national  
20 security confidentiality in this context.

21 I believe this is not the  
22 appropriate time to make those submissions, but I  
23 reserve, and for the record, indicate a different  
24 view on behalf of amicus.

25 THE COMMISSIONER: I appreciate



1           that, and I restrain myself from making comments  
2           now because I don't want to appear to prejudge the  
3           decision that I will eventually make with respect  
4           to what should be disclosed.

5                         But I will certainly welcome your  
6           submissions, Mr. Atkey, at the appropriate time.

7                         It obviously, I understand, is a  
8           matter of importance, importance directly related,  
9           in my view, to the mandate. And I am of the view  
10          that the facts and the conclusions that I  
11          eventually reach with respect to this are matters  
12          of significant consequence to the mandate.

13                        Let me leave it at that.

14                        MS EDWARDH:   Mr. Commissioner,  
15          maybe I'm dreaming too much at night, which is  
16          entirely possible.

17                        THE COMMISSIONER:   Maybe we all  
18          are.

19                        MS EDWARDH:   But I had thought --  
20          and maybe my friends can assist me -- that we had  
21          evidence before us that at this meeting the  
22          Ambassador discussed with the colleagues who were  
23          there the issue of the attendance of CSIS; that it  
24          was agreed that, or the suggestion was, it was a  
25          bad time to go -- I think it was a bad time to go

1 to interview Mr. Arar, but okay to go and deal  
2 with general issues involving international  
3 terrorism.

4 I thought that was all on the  
5 public record, or maybe I'm making it up after a  
6 few nights of sleep.

7 I look over at Mr. Cavalluzzo  
8 plaintively, but I thought that is what the  
9 Ambassador testified to.

10 MR. CAVALLUZZO: I think you may  
11 be partly dreaming.

12 --- Laughter / Rires

13 MR. CAVALLUZZO: I think it may be  
14 better if you proceed and maybe at the break you  
15 can review the transcript. But I don't think you  
16 have captured, in fact, what has been elicited in  
17 public.

18 MS EDWARDH: I have some  
19 assistants who are working hard behind me, so I'll  
20 move on, and if we can revisit this area.

21 THE COMMISSIONER: If need be,  
22 certainly.

23 MS EDWARDH: We will.

24 Around the same time as this  
25 meeting, in fact just two days before, I believe,

1           sir, you are given some important information from  
2           the Department of Foreign Affairs, and that would  
3           be the October 22nd and November 3rd consular  
4           reports.

5                            Could I please have you,  
6           Mr. Registrar, provide to the witness Exhibit 93.

7                            THE COMMISSIONER: Let me add a  
8           comment to the exchange that we just had -- sorry,  
9           Ms Edwardh.

10                           The fact that this witness is  
11           unable to fully answer and answer the questions  
12           that you posed to him because of the Government's  
13           claim for NSC should not indicate one way or the  
14           other any sort of fault to be found or criticism  
15           to be made of the witness.

16                           It is not his difficulty that  
17           leads to him unable to answer the question.

18                           I'm making a neutral comment, but  
19           I'm simply saying that one should not draw any  
20           conclusions with respect to this witness about  
21           what took place at that meeting or those  
22           discussions because he is unable to answer the  
23           question. That is not a problem of his making.

24                           MS EDWARDH: I appreciate that,  
25           Mr. Commissioner, and I think everyone knows that

1 the witness has sought to be more fulsome in his  
2 answers and that the wall that the witness and I  
3 have mutually met is the Government of Canada.

4 Let's turn to Exhibit 93.

5 It is apparent, sir, that sometime  
6 around this -- there are two consular reports, if  
7 I could just draw your attention to them. You'll  
8 find them at Exhibit 93, and then there's an April  
9 22nd report, which you would not have seen because  
10 you would have left your position by then.

11 MR. CABANA: I'm sorry, could you  
12 repeat the question?

13 MS EDWARDH: Can you identify  
14 Exhibit 93 as a document, sir, that came into the  
15 possession of A-OCANADA; and if so, when did it do  
16 so?

17 MR. CABANA: I would say from the  
18 correspondence that as of November 4th, the  
19 document had reached the A-OCANADA team simply  
20 because it is being forwarded to "C" Division from  
21 A-OCANADA.

22 MS EDWARDH: So this is two days  
23 before the November 6th meeting. Correct?

24 MR. CABANA: Yes, it is.

25 MS EDWARDH: Do you recall, sir,

1           whether this document was brought to the November  
2           6th meeting and discussed by anyone?

3                       MR. CABANA:  It wasn't brought by  
4           me, because I didn't bring any documents to that  
5           meeting.  Whether my CROPS officer had a copy, I  
6           don't recall.

7                       MS EDWARDH:  And do you recall,  
8           sir, whether Mr. Pillarella brought or raised it  
9           at the meeting?

10                      MR. CABANA:  Well, that was  
11           basically the nature of the discussion at the  
12           meeting, where he briefed us on the results of his  
13           meeting with Syrian authorities.

14                      MS EDWARDH:  Right.

15                      MR. CABANA:  And although I  
16           haven't read the whole document here, I'm led to  
17           believe that this is an account of that very  
18           meeting.

19                      MS EDWARDH:  No, sir, I don't want  
20           to mislead you.  There is another meeting with the  
21           Syrian authorities which may have been the matter  
22           you refer to when you describe Mr. Pillarella  
23           discussing his conversation with General Khalil.

24                      I'm not talking about that.  This  
25           is the next day or the day after.  This is a

1 consular visit. This involves the attendance by  
2 Leo Martel at the place where -- I was going to  
3 say where he was held but that may not be true;  
4 with an opportunity to actually meet with and talk  
5 to Mr. Arar.

6 MR. CABANA: Yes.

7 MS EDWARDH: And that is a record  
8 of the conversation between Mr. Arar and Leo  
9 Martel, the consular officer in Damascus. But you  
10 got it on November 4th.

11 MR. CABANA: The team received it  
12 on November 4th, yes.

13 MS EDWARDH: And my question, sir,  
14 was: Do you recall it being brought to the  
15 meeting on November 6th in order to assess or  
16 consider the sharing of information in the context  
17 of this consular report?

18 MR. CABANA: No. As I stated,  
19 ma'am, personally, myself, I did not bring any  
20 documents. I don't know whether anybody else did.

21 I could not answer that, I'm  
22 sorry.

23 MS EDWARDH: All right. So the  
24 answer is you do not know.

25 MR. CABANA: No, I don't.

1 MS EDWARDH: Do you recall, sir,  
2 whether you were briefed by the Ambassador?

3 MR. CABANA: Yes, ma'am.

4 MS EDWARDH: As to the contents  
5 of, or the general observations made by Leo Martel  
6 when he met with Mr. Arar just a few days before  
7 the 6th?

8 MR. CABANA: Yes, I believe we had  
9 general discussions over the consular visit, yes.

10 MS EDWARDH: Right. So I want to  
11 ask you, sir, that between those discussions --  
12 oh, one last question.

13 I take it, sir, when this document  
14 was sent to A-OCANADA, in addition to what you  
15 learned from the meeting on the 6th, you would  
16 have had an opportunity at least to review this  
17 document?

18 MR. CABANA: I assume I would  
19 have.

20 MS EDWARDH: Yes.

21 MR. CABANA: Every document that  
22 reached my desk, I always initialled and dated. I  
23 do not see any of my initials or date here. I  
24 don't see my handwriting.

25 But I assume I would have, yes.

1 MS EDWARDH: Let's then assume you  
2 would have.

3 MR. CABANA: Yes.

4 MS EDWARDH: Now, Officer, I would  
5 like to ask you a series of hypothetical  
6 questions.

7 MR. CABANA: Certainly.

8 MS EDWARDH: I would like you to  
9 assume with me you are investigating a very  
10 serious crime. In northern Ontario an arrest has  
11 been made by a member of the RCMP, and because of  
12 inclement weather the accused person, who has now  
13 been charged with serial homicides, has been  
14 detained in a place under the sole control of a  
15 series of RCMP officers, with no access to the  
16 outside world for seven days. Okay? Bad weather.  
17 Terrible weather.

18 MR. CABANA: Okay.

19 MS EDWARDH: No skidoos, nothing.

20 And when you arrive or when you  
21 meet your corporals and ask them to account for  
22 what they have done and, first of all, whether  
23 they have interviewed the suspect, this is what  
24 they produce; okay?

25 Now let's read it -- oh, one other



1 fact I want you to assume. I want you to assume  
2 that you have knowledge of this suspect, because  
3 it has been a long investigation, and the suspect  
4 is a person of intelligence, well-educated and  
5 quite able to assert their rights in most  
6 circumstances, and has done so in the past.

7 Now, let's read this document  
8 together.

9 MR. CABANA: Certainly.

10 --- Off microphone / Sans microphone

11 MS EDWARDH: Oh, thank you. We  
12 have a less redacted version of this document. I  
13 have lost my concordance -- not that I have lost  
14 it. It is just a little hard to work with the  
15 document.

16 MS McISAAC: P-234, tab 3.

17 MS EDWARDH: P-134, Tab 3. Thank  
18 you, Ms McIsaac.

19 Mr. Registrar, has the witness got  
20 the document? And, Mr. Commissioner, have you  
21 found it?

22 THE COMMISSIONER: I have it.

23 MS EDWARDH: And let me add one  
24 other fact -- well, no, I won't even go there.

25 Let's look at paragraph 2, and I

1 would like you to assume this is one of your  
2 corporals.

3 "2. Arrived on site at 100  
4 hours and was greeted by an  
5 officer who declined to give  
6 his identity. Meeting with  
7 Syrian officials was cordial  
8 and took place in one of  
9 their offices. Importance  
10 that Canadian authorities  
11 attach to this high profile  
12 consular case was emphasized  
13 and Martel indicated that it  
14 was in the best interests of  
15 both countries to work  
16 together. Officials took  
17 minutes during this entire  
18 initial period.

19 3. Arar was brought to the  
20 office at 10:30 and meeting  
21 with Martel lasted  
22 approximately one-half hour.  
23 It was not possible to see  
24 where exactly Arar was being  
25 detained. After shaking

StenoTran

1 hands, Arar was shown a seat  
2 at a distance."

3 Now, put your most concerned and  
4 critical lenses on. Why would an officer place a  
5 suspect at a distance if there were no concerns  
6 about possible flight or violence? Why would he  
7 do that?

8 MR. CABANA: Well, ma'am, I  
9 really -- I understand where you are getting at.

10 MS EDWARDH: You do?

11 MR. CABANA: I think I do. But  
12 the circumstances are completely different.

13 You are equating a consular visit  
14 with an investigative interview of a suspect,  
15 which I would submit to you are not the same.

16 You are equating an interview or a  
17 meeting that is taking place in a foreign country  
18 under their rules and regulations to meetings that  
19 would occur in Canada, which I would submit to you  
20 are completely different again.

21 I realize you want me to imagine  
22 and reach some supposition, but I would submit to  
23 you that these are two completely different sets  
24 of facts here.

25 MS EDWARDH: Okay. Well, let's

1 get down to the brass tacks of it.

2 MR. CABANA: Fine.

3 MS EDWARDH: You have read this  
4 document. You have prepared yourself to answer  
5 questions here today too, by reading it, have you  
6 not?

7 MR. CABANA: I read that document  
8 last year, ma'am. I didn't read this document  
9 prior to today, no.

10 MS EDWARDH: Well, last year you  
11 read it.

12 MR. CABANA: Yes.

13 MS EDWARDH: Now, this is a  
14 description, I'm going to suggest to you, sir, of  
15 conditions of extreme oppression. You are a  
16 professional police officer, and when you look at  
17 language that conveys the following:

18 "After shaking hands, Arar  
19 was shown a seat at a  
20 distance. Questioning  
21 started along the lines of  
22 your instructions but it was  
23 obvious subject was not free  
24 to answer all the questions."

25 Right? There's clearly an

1           indication that there's a man in fear. Correct?

2                           MR. CABANA: No. To me it's an  
3           indication that this is a controlled environment.

4                           MS EDWARDH: That is all you get  
5           from it?

6                           MR. CABANA: That is all I get  
7           from it, yes.

8                           MS EDWARDH: So as a controlled  
9           environment, it's an environment where the person  
10          can't speak what they want to say. Correct?

11                          MR. CABANA: Potentially, yes.

12                          MS EDWARDH: And then the  
13          observations:

14                                       "Conversation took place in  
15                                       English and was translated  
16                                       into Arabic immediately."

17                                       That is another part of the  
18          controlled environment. Right?

19                          MR. CABANA: Yes.

20                          MS EDWARDH: Make sure that the  
21          person who is holding someone can understand  
22          exactly what has been said. Right?

23                          MR. CABANA: Yes.

24                          MS EDWARDH: And can stop it, if  
25          necessary?

1 MR. CABANA: Yes.

2 MS EDWARDH: "Notes were taken at  
3 all times..."

4 That is obviously the record that  
5 the captors are keeping. Right?

6 MR. CABANA: Obviously, yes.

7 MS EDWARDH: Difficult to tell if  
8 the suspect is healthy.

9 Do you see that language?

10 MR. CABANA: Yes, I see that.

11 MS EDWARDH: It's also a clear and  
12 obvious fact that the farther away the suspect is  
13 from the individual making the observations, the  
14 harder it is to make the assessment. Agreed?

15 MR. CABANA: Agreed.

16 MS EDWARDH: "He looked resigned  
17 and submissive."

18 What does that tell you, sir, as a  
19 professional policeman? What do you read into  
20 that?

21 MR. CABANA: Again, controlled  
22 environment.

23 MS EDWARDH: And in addition to a  
24 controlled environment, doesn't it open up the  
25 concern to you that not only is this man being

1 controlled, but this unusual resignation and  
2 submission on behalf of Mr. Arar, the man you  
3 know, who said he wouldn't speak to you, raises a  
4 concern that he is being physically or emotionally  
5 abused by the Syrians?

6 He is not a submissive man, is he?

7 MR. CABANA: If what you are  
8 trying to elicit from me is whether or not, in our  
9 minds, the possibility of ill-treatment towards  
10 Mr. Arar had occurred, of course that was in our  
11 minds.

12 MS EDWARDH: Right.

13 MR. CABANA: Of course we  
14 recognized the fact that Mr. Arar might not be in  
15 the best of conditions at that time. Yes.

16 MS EDWARDH: Well, I guess, you  
17 know -- I don't want to use the euphemism, sir. I  
18 want to resile from using language it's not the  
19 best of conditions. We know he's not at the Paris  
20 Hilton.

21 MR. CABANA: Pretty obvious, yes.

22 MS EDWARDH: So what we are  
23 concerned about is just what you said: that you  
24 had identified that there may be a risk of  
25 ill-treatment.

1 MR. CABANA: Yes.

2 MS EDWARDH: And I'm going to  
3 suggest to you that there's nothing in this  
4 consular report, other than assuring you that the  
5 man is alive and can still walk, that would  
6 exclude the existence of ill-treatment?

7 Take a moment. It's an important  
8 question.

9 --- Pause

10 MR. CABANA: The question, again,  
11 ma'am, was ...

12 MS EDWARDH: That other than the  
13 fact that Mr. Arar is clearly alive and can walk,  
14 there is nothing in this report that excludes the  
15 fact that there has been ill-treatment.

16 MR. CABANA: I would submit to you  
17 that it was obvious, reading this report, it was  
18 obvious that Mr. Arar was under very controlled  
19 conditions.

20 If you look at some of the  
21 comments that Mr. Arar made during his interview,  
22 clearly these comments -- well, "clearly"; I'm  
23 assuming. But these comments were dictated by  
24 Syrian authorities. To me, it's clear.

25 MS EDWARDH: Right.



1 MR. CABANA: Whether he was  
2 subjected to severe ill-treatment, again, that  
3 would be subject to discussion, and there's no  
4 indication of that in there.

5 MS EDWARDH: I know we have heard  
6 that statement before, sir, but I disagree with  
7 it.

8 I'm going to put to you this  
9 proposition and it's one that I would ask you to  
10 answer: There's nothing in this report that  
11 excludes the fact that severe ill-treatment may  
12 have occurred?

13 MR. CABANA: Again, it would  
14 depend on the definition of "severe  
15 ill-treatment", ma'am.

16 MS EDWARDH: Assuming it can be  
17 both psychological and physical.

18 MR. CABANA: Exactly.

19 MS EDWARDH: It's not excluded.

20 MR. CABANA: The psychological,  
21 definitely not.

22 MS EDWARDH: Now, I want to talk  
23 about torture. I know that you gentlemen, as  
24 members of the RCMP, probably know less about  
25 torture than any group would -- and I say that out

1 of respect as opposed to criticism.

2 But we have heard from people who  
3 know something about torture that good torturers  
4 often leave few marks.

5 MR. CABANA: Okay.

6 MS EDWARDH: And if that fact is  
7 true, that good torturers are not going to kill  
8 you, but good torturers who just are torturing for  
9 information and don't leave marks, then of course  
10 you'll agree with me that this report doesn't  
11 exclude good torture and psychological torture?

12 MR. CABANA: If that is a fact,  
13 yes, I would agree with you.

14 MS EDWARDH: Thank you. I want to  
15 turn then to the question -- and I know you are  
16 out of the A-OCANADA investigation as of February  
17 2002.

18 MR. CABANA: 2003, ma'am.

19 MS EDWARDH: 2003. I'm dreaming  
20 again. But nonetheless --

21 MR. CABANA: I wish.

22 --- Laughter / Rires

23 MR. CABANA: I would have welcomed  
24 February 2002, ma'am.

25 MS EDWARDH: Thank you. I

1 appreciate the correction.

2 I want, if I could then, to ask  
3 you about the obligation of you as a peace  
4 officer, again, to raise with DFAIT your concern  
5 that you just articulated. Whether they get it or  
6 not, you have the concern. And it troubles me  
7 enormously, as a person who has a very deep  
8 respect for professional policing, that even if  
9 somebody doesn't see what is going on and you have  
10 a concern, why doesn't somebody draw the line with  
11 respect to Mr. Arar because of the concern around  
12 ill-treatment, abuse, torture, and the use of the  
13 Syrians to get information?

14 Why doesn't someone say, "We don't  
15 want to go there"?

16 MR. CABANA: Because -- and I  
17 really do understand your concern. Unfortunately,  
18 and like I said, in the mandate that we are given,  
19 sometimes we have hard decisions to make.

20 If all my supervisors that are  
21 around the table, senior officers of the RCMP, and  
22 a lot more senior than I am, are of the opinion  
23 that it is proper and it will further my mandate  
24 of completing this investigation and protecting  
25 the Canadian public, I will go forward and share

1 the information.

2 MS EDWARDH: And now I want to  
3 stop there and say even if you are going to go  
4 share the information, you certainly do have  
5 members of Syrian Military Intelligence who are  
6 committing a crime cognizable under the Criminal  
7 Code, or you have a credible basis for that  
8 belief. Right?

9 MR. CABANA: We have a -- well, a  
10 credible basis? Do we have any evidence, strong  
11 evidence? We have evidence that there's  
12 potentially ill-treatment, yes.

13 MS EDWARDH: We can jump ahead,  
14 sir, and I know you are out of it, but it does  
15 seem to me really interesting that we have  
16 Mr. Almalki and we have Mr. El Maati, and we have  
17 Mr. Arar back in Canada. Of course they are a  
18 little frightened of you guys because they have  
19 the feeling that there has been some involvement.  
20 Indeed, that is why we are here.

21 MR. CABANA: And that is very  
22 unfortunate.

23 MS EDWARDH: It's not surprising,  
24 though, is it? It's not surprising.

25 MR. CABANA: No, no.

1 MS EDWARDH: But one of the things  
2 that none of them have ever been asked by any  
3 member of the RCMP is: Are you prepared, sir, to  
4 put forward a complaint because we are prepared to  
5 investigate, because we can charge and try and put  
6 those warrants on Interpol and we can prosecute  
7 those men if they ever leave Syria or come here  
8 with their granddaughters to have their children.

9 MR. CABANA: Mm-hmm.

10 MS EDWARDH: Nobody has done that?

11 MR. CABANA: Well, no, ma'am, but  
12 at the same time I would refer you to the  
13 testimony of yesterday. We tried on numerous  
14 occasions to meet with the very individuals that  
15 you have just identified --

16 MS EDWARDH: But they were --

17 MR. CABANA: We also had full  
18 knowledge that they were very well represented,  
19 and if there was a complaint that they wished to  
20 make, I believe that they had proper  
21 representation to make that complaint.

22 MS EDWARDH: The difficulty is, of  
23 course, that they were always presented with the  
24 option of meeting with you as a target. They  
25 thought they were a suspect or a person --

1 MR. CABANA: No, I'm sorry ma'am.  
2 I would submit to you that the majority of the  
3 people that we are looking at here in the Ottawa  
4 area, we wished to meet with them as witnesses,  
5 including Mr. Arar.

6 MS EDWARDH: And that, though --  
7 let's be candid here. There is a big difference  
8 in saying to someone, "I would like you to  
9 participate in a criminal case. You may have to  
10 testify." That is a big difference from saying,  
11 "I have learned while conducting a criminal  
12 investigation that there have been people tortured  
13 and I want to investigate this complaint because  
14 it is a very serious crime."

15 No one has ever said to any of  
16 these three men, "We would welcome a complaint and  
17 we will investigate it", through their counsel?

18 MR. CABANA: And your question  
19 would be ...?

20 MS EDWARDH: You haven't said, or  
21 to your knowledge no other RCMP officer has ever  
22 said, "We would welcome a complaint and we would  
23 investigate it."

24 MR. CABANA: Not to my knowledge.

25 MS EDWARDH: An interesting thing

1 happened on Friday, Superintendent Cabana. A very  
2 courageous magistrate sitting in Milan, in Italy,  
3 issued warrants for the arrest of 13 CIA officers.

4 Were you aware of that?

5 MR. CABANA: No, I was not aware  
6 of that.

7 MS EDWARDH: Those CIA officers  
8 are alleged to be involved in the abduction of an  
9 imam from the streets of Milan and a rendering of  
10 him to Egypt. That is what the reports seem to  
11 indicate.

12 As well, there is a current  
13 investigation of six more CIA officers who were  
14 involved in the operational plans.

15 Now I have a question. In light  
16 of the conduct of your U.S. ally and friends, did  
17 you or did anyone else ever consider conducting a  
18 criminal investigation in respect of their  
19 rendering of Mr. Arar to Syria where he stood a  
20 substantial risk of torture?

21 MR. CABANA: With respect to  
22 myself, ma'am, the mandate I was given up to  
23 February was very clear, and it's not a situation  
24 where I am in charge of a terrorism unit, a  
25 permanent terrorism unit. It is not a situation

1 where my primary mandate is to investigate these  
2 types of offences.

3 It was a situation where I was  
4 volunteered to head this investigation for a  
5 period of in excess of 16 months. The mandate I  
6 was given was very strict and very focused, and I  
7 maintained that focus.

8 With respect to other members of  
9 the RCMP, I am not aware.

10 MS EDWARDH: And I take it, sir,  
11 that if the RCMP had made a decision to conduct a  
12 criminal investigation into the U.S. actors who  
13 had removed Mr. Arar to Syria, taken him in a  
14 plane, or been a participant in the decision, you  
15 would be aware of that today and there is no  
16 serious suggestion that any such investigation has  
17 been considered or undertaken?

18 MR. CABANA: Like I say, whether I  
19 would be aware of it today, I'm not sure, because  
20 I clearly have left the project on February.

21 Presently, I am not aware of that  
22 ever occurring.

23 MS EDWARDH: And indeed it would  
24 be a surprise to you, would it not, if the RCMP  
25 had undertaken a review of its communications and



1 discussions with the CIA and the FBI in respect of  
2 Mr. Arar to determine whether or not any of those  
3 persons should be charged and prosecuted?

4 MR. CABANA: I believe there was a  
5 number of reviews that were conducted over the  
6 communications we had with U.S. agencies. I'm not  
7 aware of any consideration being given for charges  
8 during those reviews, no.

9 MS EDWARDH: You were looking at  
10 what you might have said, or whether there was  
11 anything you could have conveyed that may have led  
12 them to think you were supporting this?

13 MR. CABANA: Exactly.

14 MS EDWARDH: I'm asking a totally  
15 different question, sir.

16 MR. CABANA: I understand that,  
17 ma'am. I am saying I am not aware of that.

18 MS EDWARDH: That's fine. Thank  
19 you very much, sir.

20 Officer, I would like to turn back  
21 to the consular notes for a moment.

22 Are you aware, sir, that when  
23 persons obtain consular access, that the  
24 Department of Foreign Affairs informs people that  
25 their information given to consular officials will

1 be held in the strictest confidence? Were you  
2 aware of that?

3 It's the kind of thing we tell our  
4 children when they go off to Europe, "If you  
5 really get in trouble, phone the Canadian  
6 Embassy."

7 MR. CABANA: No, ma'am, I'm not  
8 aware of that.

9 Actually, I have information that  
10 might indicate the contrary.

11 MS EDWARDH: That is very  
12 important information, sir, because it may be that  
13 just the Website has to be updated. But there is  
14 in fact a concern that a number of us have had  
15 about the propriety of promising a confidential  
16 communication and being a sieve, because usually  
17 the persons who are given the promise are the  
18 persons being held in custody and subject of some  
19 kind of police action in a foreign state.

20 MR. CABANA: Yes, I understand  
21 that.

22 MS EDWARDH: So I would like your  
23 experience, if I could -- and I think it may be a  
24 matter that the Commissioner may want to consider  
25 with respect to his recommendations.

1                   We know, sir, that you got the  
2 products of some consular visits. That was sent  
3 off to A-OCANADA.

4                   MR. CABANA: Yes.

5                   MS EDWARDH: And it was given to  
6 you, of course, not because you were just having a  
7 humanitarian inclination that morning, but in  
8 order to further any investigative needs that you  
9 had. And you have made that very clear.

10                  MR. CABANA: Yes.

11                  MS EDWARDH: And I take it that  
12 there was no concern on your part that if DFAIT is  
13 going to give them to you, you, like any other  
14 police officer, someone consents to the provision  
15 of confidential information, you take it?

16                  MR. CABANA: No, the concern from  
17 my perspective at the time would be, under normal  
18 circumstances, over the admissibility of any  
19 information that was reaching the project. Under  
20 normal circumstances.

21                  Given the mandate that we were  
22 provided with, with the first mandate being  
23 prevention, the admissibility of any of the  
24 information was secondary. The primary concern or  
25 focus at that time for us was to try to address

1           some of the threats that had been very clearly  
2           identified to us.

3                       MS EDWARDH:   That was my point.

4                       In other words, even if you  
5           couldn't call Madam Girvan at a criminal trial in  
6           Canada because the court would say, "Wait a  
7           minute, you have made a promise here," and that  
8           maybe would establish some kind of privilege in  
9           respect of that communication, even if you  
10          couldn't do that, you would want the intelligence  
11          that comes from the visit?

12                      MR. CABANA:   Yes.

13                      MS EDWARDH:   That's all.  We are  
14          not disagreeing.

15                      The problem and issue, sir, for  
16          all of us is:  Was this a one-off, unusual event,  
17          for you to receive consular material?  Had this  
18          ever happened in your experience before?

19                      MR. CABANA:   In my career?

20                      MS EDWARDH:   Yes.

21                      MR. CABANA:   I have never been  
22          involved in anything like this before in my  
23          career, ma'am.  So, yes, it was -- I guess I would  
24          term it a precedent.

25                      MS EDWARDH:   Did you learn, after

1           you first got this piece of intelligence from  
2           DFAIT, did you inquire from them was this the kind  
3           of thing they did in the ordinary course in  
4           respect of important investigations?

5                           MR. CABANA:   No, ma'am.

6                           MS EDWARDH:  You didn't ask them  
7           that?

8                           MR. CABANA:   No.

9                           MS EDWARDH:  So we are left with,  
10          I suppose, one of two conclusions:  You did not  
11          have a lot of experience in national security  
12          investigations before this started, but I suppose  
13          there's no way for the Commissioner to know  
14          whether as a matter of course for intelligence  
15          purposes, DFAIT provides things to CSIS or to  
16          other national security investigations.  Or would  
17          you assume it does?

18                          MR. CABANA:  Well, I don't think I  
19          can speak in relation to other criminal or  
20          national security types of investigations.  I  
21          don't think I can speak to that because I'm not  
22          aware of what takes place in these other  
23          investigations.

24                          I can --

25                          MS EDWARDH:  You are struggling

1 with trying to say something. Maybe I can make my  
2 question --

3 MR. CABANA: What you have to  
4 understand is, as I stated before, there is  
5 information that I would like to refer to, but  
6 that I have been told I'm not allowed to refer to,  
7 which would help me explain probably what the  
8 mindset at the time was --

9 MS EDWARDH: I'm not interested in  
10 the mindset, though, sir. I want to know whether  
11 it has happened before and whether it happened  
12 with Mr. El Maati and whether it happened with  
13 Mr. Almalki.

14 MR. CABANA: Whether it happened  
15 with Mr. Almalki, no, I'm not aware --

16 MS EDWARDH: He never got a visit,  
17 sorry.

18 MR. CABANA: Yes.

19 MS EDWARDH: An opportunity  
20 missed.

21 Did you get anything from Egypt on  
22 Mr. Almalki?

23 MR. CABANA: On Mr. Almalki --

24 MS EDWARDH: El Maati. Sorry,  
25 Mr. El Maati.

1 MR. CABANA: No, I don't believe  
2 so. I don't believe so, ma'am.

3 But we did get other information.

4 MS EDWARDH: Through consular  
5 visits?

6 MR. CABANA: Yes, through some  
7 type of consular visit, yes.

8 MS EDWARDH: With a detained  
9 person?

10 MR. CABANA: With a detained  
11 Canadian.

12 MS EDWARDH: With a detained  
13 Canadian.

14 Are you in a position, sir, to  
15 give us any more detail about it, or is this a  
16 matter over which a claim for national security  
17 has been made and --

18 MR. FOTHERGILL: Well, we are  
19 straying into an area that, in my submission, is  
20 starting to be quite remote from the mandate.

21 You are certainly free to ask a  
22 representative of ISI what their general practice  
23 is, if not in a public forum, then certainly in  
24 camera. And insofar as that might assist you in  
25 your recommendations, I am sure we can provide you

1 with the information.

2 I don't think it's appropriate to  
3 ask this witness these generalized questions  
4 beyond the circumstances of Mr. Arar. I don't  
5 think it is necessary for the mandate. He has  
6 spoken about his knowledge insofar as it relates  
7 to Mr. Arar, and with the greatest of respect, I  
8 think that is where the evidence should lie in  
9 this forum.

10 If we want to look more broadly  
11 from a policy perspective, we can certainly  
12 facilitate that in camera with a representative  
13 from the Department of Foreign Affairs.

14 THE COMMISSIONER: What I hear is  
15 you asserting a claim of national security  
16 confidentiality over the question.

17 Am I right?

18 MR. FOTHERGILL: Yes, sir.

19 THE COMMISSIONER: Mr. Atkey,  
20 please.

21 MR. ATKEY: The amicus would like  
22 to register the opportunity to make submissions on  
23 that -- not in this forum, obviously.

24 As I hear the questions posed,  
25 it's not the substance of the information that was



1 requested but whether information was requested  
2 and received from DFAIT.

3 THE COMMISSIONER: Right. I would  
4 have thought that is important information to  
5 hear.

6 But for the time being, at least,  
7 that is the subject of the claim?

8 MR. FOTHERGILL: Well, I'm at a  
9 slight disadvantage because I don't know precisely  
10 what it is that the witness wishes to say. If it  
11 is important, we can certainly, perhaps under the  
12 auspices of Commission counsel, explore that issue  
13 and I can give you a clearer position.

14 THE COMMISSIONER: Okay. We have  
15 been going an hour and a half. Why don't we take  
16 the morning break for 15 minutes. There are two  
17 matters that are to be discussed with you,  
18 Ms Edward, during the break. Thank you.

19 THE REGISTRAR: Please stand.

20 --- Upon recessing at 10:25 a.m. /

21 Suspension à 10 h 25

22 --- Upon resuming at 10:44 a.m. /

23 Reprise à 10 h 44

24 THE REGISTRAR: Please be seated.

25 MS EDWARDH: Thank you,

1 Mr. Commissioner.

2 I'm pleased to report that it is  
3 not all in my dreams.

4 --- Laughter / Rires

5 THE COMMISSIONER: You don't have  
6 to disclose your dreams, Ms Edwardh.

7 MS EDWARDH: Well, they are pretty  
8 boring, actually.

9 If the witness could please be  
10 given Exhibit P-134, these relate to the exhibits  
11 of the Ambassador, Franco Pillarella.

12 Sir, if you would turn with me to  
13 tab 8 of this volume, this is a memorandum which  
14 you would not necessarily have seen, but the  
15 contents of it reflect the meeting we were  
16 discussing on November the 6th.

17 If I could just take you to the  
18 third line beginning "Arar", it reads:

19 "Arar's situation has been  
20 the subject of great  
21 consultation within the  
22 Government of Canada, both  
23 because of the circumstances  
24 of the case as well as  
25 because of the information

1 thought to be in possession  
2 of Syrian authorities on the  
3 issue of international  
4 terrorism. You will remember  
5 that an interdepartmental  
6 meeting held on Wednesday,  
7 November 6, it was agreed  
8 that it would be useful if  
9 CSIS were to travel to Syria  
10 to speak to Syrian  
11 authorities on international  
12 terrorism."

13 Do you see that?

14 MR. CABANA: Yes, I do.

15 MS EDWARDH: I take it that that  
16 probably records the substance of part of the  
17 discussion about CSIS going, but clearly I'm led  
18 to understand from this document, and from what  
19 the Ambassador said, that there was a consensus  
20 that CSIS should go. And indeed CSIS did go and  
21 meet with military intelligence.

22 MR. CABANA: Yes, ma'am.

23 MS EDWARDH: If I had a newspaper  
24 article -- and someone may object.

25 But there was a recent article

1 published under the name of Mr. Travers, in which  
2 Mr. Travers made the statement that -- and he was  
3 kind of advising everyone to be cautious on  
4 limiting information-sharing in his article. But  
5 he did make the statement and he discussed the  
6 Arar case specifically, and said the purpose of  
7 this meeting in Syria, the purpose the CSIS going,  
8 was to establish a formal information arrangement  
9 with Syrian Military Intelligence.

10 Do you agree or disagree with the  
11 statement of Mr. Travers?

12 MR. FOTHERGILL: Commissioner, I  
13 do object. The fact that something appears in the  
14 media doesn't necessarily put it officially in the  
15 public domain.

16 As you are aware, CSIS is  
17 conducting a review to determine whether  
18 Mr. Travers' source is a government official and,  
19 if so, whether this is a case of unauthorized  
20 disclosure.

21 Let me just reiterate, there is a  
22 claim of national security confidentiality with  
23 respect to CSIS' involvement in this matter beyond  
24 what appears in your summary and the very isolated  
25 details of the Syrian trip, such as we see in this

1 document that Ms Edwardh has just referred to.

2 So I do object to that question.

3 THE COMMISSIONER: Mr. Atkey, yes.

4 MR. ATKEY: Again, Commissioner, I  
5 would reiterate my comment on that from the point  
6 of view of the amicus.

7 THE COMMISSIONER: Right. And  
8 your submission again would be with respect to the  
9 NSC claim that would come later as to whether or  
10 not --

11 MR. ATKEY: That's correct.

12 MS EDWARDH: I understand that the  
13 Government -- it doesn't matter to me whether the  
14 statement of fact exists in the media, but I  
15 understand Mr. Fothergill is saying that the  
16 answer to this question, of whether he agrees or  
17 not, is subject to national security  
18 confidentiality.

19 MR. FOTHERGILL: Yes, that's  
20 correct.

21 THE COMMISSIONER: Mr. Fothergill  
22 also said there was an investigation going on as  
23 to the source of that information.

24 MS EDWARDH: Yes.

25 THE COMMISSIONER: Thank you.

1 Thank you, Ms Edwardh.

2 MS EDWARDH: Then I'll go back to  
3 where I was.

4 We were -- one more question.

5 Sir, do you know the source of the  
6 information in the Travers article?

7 Don't answer that question.

8 MR. FOTHERGILL: If he does, I  
9 would be interested in hearing it.

10 --- Laughter / Rires

11 MR. CABANA: I'm not even aware or  
12 familiar with the article you are referring to,  
13 ma'am.

14 MS EDWARDH: All right. Then let  
15 me go back to my area of concern. We were talking  
16 about consular visits, and we were talking about  
17 information flowing from consular visits into  
18 investigators' hands.

19 We have established, sir, that not  
20 only did this happen in respect of Mr. Arar but  
21 there are other occasions when it has occurred.

22 Fair enough?

23 MR. CABANA: That's correct.

24 MS EDWARDH: Now I want to talk  
25 about Mr. Arar very specifically.

1                   Are you familiar with a gentleman  
2                   who was the Director of Consular Affairs, Mr. Gar  
3                   Pardy? Did you ever have occasion to meet with  
4                   him?

5                   MR. CABANA: No, ma'am, I don't  
6                   believe I did.

7                   MS EDWARDH: He has testified  
8                   here.

9                   For the record, Mr. Commissioner,  
10                  you will find this evidence beginning really at  
11                  page 5090 of Mr. Pardy's testimony and it's my  
12                  cross-examination.

13                  Mr. Pardy says, and I want your  
14                  comment, that when there were discussions about  
15                  the RCMP going themselves -- forget CSIS now -- to  
16                  Syria, that there were very real concerns  
17                  expressed about this as a good idea or a bad idea  
18                  by DFAIT. But more importantly for my purposes,  
19                  whether the RCMP acceded to DFAIT's advice about  
20                  handing questions over, interviewing or sending  
21                  information, that it was a fundamental principle  
22                  for the RCMP to reserve their right to do what  
23                  they chose to do, regardless of DFAIT's position.

24                  MR. CABANA: I'm not familiar with  
25                  what you are referring to, ma'am.

1 MS EDWARDH: So you were never  
2 privy to discussions then when the RCMP reserved  
3 to make its own decision about the propriety of  
4 either travelling to Syria, sending questions, or  
5 whatever was at issue in respect of the  
6 investigation pertaining to Mr. Arar?

7 MR. CABANA: No, ma'am. The  
8 meetings that I participated at, especially the  
9 meeting of November 6th, when I left that meeting  
10 I was clearly under the impression that everybody  
11 present was in agreement with the course of  
12 action.

13 MS EDWARDH: I would like to go to  
14 another issue raised by Mr. Pardy, if I could.

15 That really flows in the few pages  
16 after 5090, Mr. Commissioner, if people wish to  
17 have a reference for it.

18 Mr. Pardy was, I think, acutely  
19 aware of some of the issues surrounding the  
20 sharing of consular information with the RCMP, and  
21 in Mr. Arar's case he made the observation that  
22 the provision of this information to A-OCANADA was  
23 in part done to "carry" the RCMP and to encourage  
24 you to stand down.

25 In other words, by getting



1 consular information from him, on a cost-benefit  
2 analysis it was better to break the confidence of  
3 Mr. Arar than to have you or any of the team  
4 attend in Syria.

5 Do you remember, or do you have  
6 any comment upon that deal?

7 MR. CABANA: About the only  
8 comment I would have is I'm not familiar with that  
9 deal, as you term it, and actually it goes  
10 contrary to the nature of the discussions we had.

11 MS EDWARDH: And certainly you  
12 will acknowledge, sir -- at least it is our  
13 information that the person who made the decision  
14 to give you the information was Gar Pardy. He  
15 approved it.

16 MR. CABANA: I have no idea who  
17 approved the release of the information. I was  
18 meeting with the people from ISI as well as the  
19 Ambassador. I don't know whether they had  
20 obtained prior approval from other individuals. I  
21 don't know.

22 MS EDWARDH: Do you recall, sir,  
23 at least agreeing that the RCMP would stand down  
24 its request to travel to Syria or to send  
25 questions or anything else until after April 22nd?

1           And these were apparently ongoing discussions, so  
2           that would be April 22nd, 2003.

3                           But they were ongoing, according  
4           to Mr. Pardy.

5                           MR. CABANA: Well, if there were  
6           any discussions of that nature, clearly I was not  
7           privy to them.

8                           Again, I would submit to you that  
9           the discussions that took place at the November  
10          6th meeting do not necessarily reflect what you  
11          are telling me here.

12                          In other words, the purpose of the  
13          CSIS trip and the purpose of us not attending at  
14          that point in time, to my knowledge, had nothing  
15          to do with what you are telling me now.

16                          MS EDWARDH: So if I can then  
17          explore with you the decision you made, in  
18          conjunction with your superiors and colleagues,  
19          that you would not send members of the AO team to  
20          Syria, can you please describe what the reasons  
21          were that you would defer to CSIS?

22                          MR. CABANA: Certainly. The  
23          discussions that took place, like I said earlier,  
24          were focused on the -- I should say the lack of  
25          detail in the information that reached us. And as

1           investigators, everybody was in agreement that  
2           this was basically a recount or synopsis of a  
3           detailed interview that had taken place, and in  
4           order for us to be able to conduct a proper  
5           analysis to try to assess -- again, we are not  
6           focusing on Mr. Arar, we are focusing on the  
7           threat in Canada.

8                           To be able to assess the validity  
9           of the information and to see if there was any  
10          more information that would help us focus on this  
11          threat, more information was required.

12                          It was also discussed, and I think  
13          it was an agreed fact, that the RCMP, or law  
14          enforcement agencies in general, I would say, do  
15          not have a habit of establishing relationships  
16          with military intelligence agencies, foreign  
17          military intelligence agencies, including Syria;  
18          that these types of relationships usually occur  
19          through CSIS.

20                          And the decision, the agreement,  
21          was that CSIS was likely better equipped to deal  
22          with this agency than the RCMP.

23                          MS EDWARDH:   And indeed,  
24          Superintendent, we have heard, and maybe this was  
25          also the subject of conversation, that the Syrian

1 Military Intelligence was more inclined towards  
2 other intelligence agencies rather than dealing  
3 with police forces.

4 MR. CABANA: Very much so.

5 MS EDWARDH: Right. So if I can  
6 interpret what you said then, what is important, I  
7 think, for this inquiry is that fact, that the  
8 RCMP wasn't the ideal organization to pursue the  
9 obtaining of a more detailed statement but rather  
10 CSIS was. That fact is troubling for this reason,  
11 and I'm going to put to you this proposition: All  
12 that is going on here is the criminal  
13 investigation that is ongoing in respect of the  
14 Ottawa targets, including Mr. Arar as a person of  
15 interest, has shifted because it is now more  
16 useful to use CSIS. So CSIS is pursuing what is  
17 the legitimate goal, as you have described it, of  
18 obtaining information from the Syrians in order to  
19 further your investigation, and CSIS isn't  
20 supposed to do that?

21 MR. CABANA: No --

22 MR. FOTHERGILL: I'm sorry, I do  
23 have to object again. There is a premise in that  
24 question which, if the witness adopts, would tend  
25 to expand the public record of CSIS' involvement

1 and the purpose of their trip beyond that which is  
2 currently in the public domain.

3 I say again, we are objecting to  
4 particulars of CSIS' involvement in this  
5 investigation if it goes beyond what is in the  
6 summary that has been published by the Commission  
7 and the three facts about the trip, which is that  
8 it was not principally related to Mr. Arar and  
9 that Mr. Arar was not interviewed when CSIS went  
10 to Syria, although he may have been discussed.

11 Beyond that, there is a claim of  
12 NSC.

13 THE COMMISSIONER: I think it is a  
14 fair point. It is the same objection that has  
15 been made before, I guess. The premise of the  
16 question included a fact, and that is something  
17 that we will deal with down the road.

18 MS EDWARDH: Thank you.

19 THE COMMISSIONER: Thanks,  
20 Ms Edwardh.

21 MS EDWARDH: I would like to turn  
22 to an extremely boring area, if I could, for a  
23 moment, Superintendent.

24 MR. CABANA: My pleasure.

25 --- Laughter / Rires

1 MS EDWARDH: I have struggled with  
2 some of the language used in the various reports  
3 to describe persons who are within the ambit of a  
4 criminal investigation. I usually don't have this  
5 trouble, and I thought maybe you would define  
6 these terms for us and clarify it because they  
7 seem to slither a bit.

8 MR. CABANA: Mm-hmm.

9 MS EDWARDH: I take it, sir, that  
10 a person of interest can be or can have a number  
11 of different attributes. A person of interest can  
12 be a person whom you believe could be a witness.

13 Is that correct?

14 MR. CABANA: Yes, most definitely.

15 MS EDWARDH: A person of interest  
16 could simply be someone who you could not even  
17 identify as having the characteristics of a  
18 probable witness, but may have something to say  
19 because they have some connection or association  
20 with a target?

21 MR. CABANA: I would term -- based  
22 on that definition, it would be an associate.

23 MS EDWARDH: Okay. So an  
24 associate is someone about whom all you know is  
25 there is a connection?

1 MR. CABANA: There's a connection.  
2 We might not even know the identity of the person.

3 MS EDWARDH: Right. So a spouse  
4 is an associate.

5 MR. CABANA: A spouse is a spouse.  
6 --- Laughter / Rires

7 MS EDWARDH: I give up,  
8 Mr. Commissioner.

9 MR. CABANA: I'm sorry.

10 MS EDWARDH: Okay. That's all  
11 right.

12 Leaving aside familial bonds, a  
13 friend is an associate?

14 MR. CABANA: Yes.

15 MS EDWARDH: A co-worker is an  
16 associate?

17 MR. CABANA: Yes.

18 MS EDWARDH: So that is what we  
19 mean. You don't necessarily have any information  
20 that would lead you to put them into any category  
21 other than there is a connection you have  
22 established?

23 MR. CABANA: Exactly.

24 MS EDWARDH: Fair enough. That is  
25 an associate.

1                   And then we have this other  
2                   category -- I want to go back to persons of  
3                   interest. Who else fits within the category of  
4                   persons of interest?

5                   MR. CABANA: I'm not sure I  
6                   understand the question, I'm sorry.

7                   MS EDWARDH: Well, I certainly  
8                   understand that a person of interest is someone  
9                   who may have information about an investigation  
10                  that could make them worthy of being a prospective  
11                  witness. That is one category.

12                 MR. CABANA: A person of interest  
13                 is a person, to me, that there's a strong  
14                 indication that the person would have valuable  
15                 information that could further the investigation.  
16                 A person of interest would be a person who, at  
17                 that point in time, we would not have a clear  
18                 understanding of the role of that person.

19                 In other words, it's a person that  
20                 is an associate, but at that point there is  
21                 indication that it might be more than an  
22                 associate.

23                 MS EDWARDH: Right.

24                 MR. CABANA: But is not the main  
25                 focus of the investigation.



1 MS EDWARDH: Before we get to main  
2 focus, which I'm going to take way down the line,  
3 if I could, for a moment, a person for whom you  
4 have a strong suspicion or indication has material  
5 information --

6 MR. CABANA: Yes.

7 MS EDWARDH: -- and therefore it  
8 is unclear just what the totality of that  
9 information is, is still a very long way, sir,  
10 from a suspect. Correct?

11 MR. CABANA: Is a way from a  
12 suspect, yes.

13 MS EDWARDH: So is it fair for the  
14 Commissioner and for those of us who are reading  
15 the RCMP documents to assume that when the  
16 position is taken that the person is a person of  
17 interest, that they are persons who are believed  
18 to have information that could further the  
19 investigation but for whom the RCMP is not at this  
20 stage suggesting that they are either involved in  
21 criminal wrong-doing, targeted as criminal  
22 wrong-doers, or in any way central to an  
23 investigation?

24 MR. CABANA: Let me maybe define  
25 "person of interest" in the context of this

1 particular project, if I may?

2 MS EDWARDH: Certainly.

3 MR. CABANA: During the course of  
4 this investigation, we had identified individuals,  
5 some of which we had indications might be more  
6 than mere associates and might, in fact, be  
7 involved in some nefarious activities, if you  
8 want.

9 But for the purpose of meeting our  
10 mandate and maintaining the focus of the  
11 investigation, these people were being considered  
12 as potential witnesses.

13 MS EDWARDH: Well, that happens in  
14 every criminal investigation, sir.

15 MR. CABANA: Exactly. But there  
16 was a series of individuals, ma'am, that were  
17 clearly identified in this project and which in  
18 fact were identified for future or potential  
19 investigative hearings.

20 MS EDWARDH: Investigative  
21 hearings.

22 MR. CABANA: Yes, under C-36.

23 MS EDWARDH: Now we know a little  
24 bit more about investigative hearings. Have  
25 investigative hearings taken place pursuant to

1 C-36?

2 MR. CABANA: Not that I'm aware  
3 of, at least not while I was attached to this  
4 project, no.

5 MS EDWARDH: And were officers  
6 designated under 25.1 of the Criminal Code by the  
7 Solicitor General, or by you as their superior?

8 MR. CABANA: In relation to ...

9 MS EDWARDH: This investigation.  
10 Do you know what I'm referring to,  
11 25.1?

12 MR. CABANA: Yes.

13 MS EDWARDH: Yes.

14 MR. CABANA: Not that I'm aware  
15 of.

16 MS EDWARDH: All right. Let's go  
17 back then.

18 There is no mystery to this  
19 because in any big criminal investigation, if you  
20 have a hundred people that you may be sifting  
21 through, there will be ten you decide are totally  
22 irrelevant, ten you put into the "probable charge"  
23 category, and others which you are not sure of.

24 MR. CABANA: I realize that. What  
25 I'm getting at, ma'am, is that for us in the

1 context of this project there were individuals  
2 that were identified as persons of interest, but  
3 the fact that they were identified as persons of  
4 interest didn't mean that they were not directly  
5 involved or indirectly involved in any of the  
6 activities.

7 MS EDWARDH: Fair enough.

8 MR. CABANA: But we still  
9 identified them and put them aside as potential  
10 witnesses.

11 MS EDWARDH: All right. That is a  
12 policing decision.

13 MR. CABANA: Exactly.

14 MS EDWARDH: So you can have lots  
15 of crimes where you say, "I'm not going to make  
16 this person a target, I'm going to cultivate them  
17 as a witness in an important prosecution." It  
18 happens all the time.

19 That is why everybody is crazy  
20 about Karla Homolka, too.

21 Let's talk about the letter. I  
22 want to talk about the letter, first of all, that  
23 Mr. Edelson asked you for, because it baffles me,  
24 sir.

25 You told us yesterday that

1 Mr. Arar was sought by you as a potential witness  
2 in respect of an important prosecution. Correct?

3 MR. CABANA: Correct.

4 MS EDWARDH: And when Mr. Edelson  
5 comes to you to ask for some kind of letter, you  
6 say, and the department says, and the RCMP looks  
7 shocked by the very prospect, but your witness is  
8 cooling his or her heels, right, in a prison?

9 MR. CABANA: Yes.

10 MS EDWARDH: And one of the things  
11 that surprises me is you could have easily, if  
12 what you say yesterday was correct, simply written  
13 the following letter: "Dear, Sir: Mr. Maher Arar  
14 is a person who is of interest to the RCMP as a  
15 possible important witness in a very serious  
16 prosecution in Canada. He is a man of no criminal  
17 record, nor are there any outstanding warrants or  
18 charges against him." Period.

19 All of which would have been  
20 totally and absolutely correct. Is that fair?

21 MR. CABANA: Can you repeat the --

22 MS EDWARDH: I knew he was going  
23 to say that.

24 --- Laughter / Rires

25 MR. CABANA: I'm sorry.

1 MS EDWARDH: That Mr. Arar is a  
2 person who the RCMP have identified as a  
3 prospective witness in a very important  
4 investigation in Canada. Period. He is a person  
5 who has no criminal record and for whom there are  
6 no outstanding warrants or charges. Period.

7 That letter could have been  
8 written?

9 MR. CABANA: I would submit to you  
10 that the letter could have been written in a lot  
11 of different ways, and could have said a lot of  
12 different things.

13 I would also submit to you that  
14 the letter that was written, ma'am, disclosed more  
15 information than the RCMP is in the habit of  
16 disclosing, to the point where during the  
17 different reviews that took place I was the  
18 subject of criticism because of that letter,  
19 ma'am.

20 MS EDWARDH: Well, all I'm trying  
21 to establish --

22 MR. CABANA: I understand what you  
23 are trying to establish.

24 MS EDWARDH: I have come to your  
25 Force, sir, and I have gotten letters and they

1 often say: (1) person has no criminal charges; (2)  
2 no outstanding warrants. Right?

3 MR. CABANA: Yes.

4 MS EDWARDH: And you could have  
5 said we need him as a witness. We want him as a  
6 witness to come home.

7 MR. CABANA: I understand what you  
8 are saying, ma'am. The problem I guess with all  
9 of this is there's a lot of attention, of course,  
10 resulting from this Commission, with the  
11 circumstances surrounding Mr. Arar and the events  
12 that led to his deportation.

13 In the context of our  
14 investigation, Mr. Arar was one of several  
15 potential witnesses and there was not the focus  
16 that seems to be put forward by the Commission  
17 here.

18 In other words, Mr. Arar was one  
19 of the many subjects that we had. This request  
20 came in. The request was problematic in the sense  
21 that DFAIT were referring Mr. Arar's counsel, who  
22 we understood to be his counsel at the time --

23 MS EDWARDH: Right.

24 MR. CABANA: DFAIT was telling his  
25 counsel to come to the RCMP and get a letter

1           stating these things. The proper way of doing  
2           this would have been for DFAIT to come to the RCMP  
3           and say "we need this". And those types of  
4           decisions would have been made at a higher level  
5           than myself.

6                           MS EDWARDH: So there was a  
7           fundamental failure of protocol here, too.

8                           MR. CABANA: Well, I --

9                           MS EDWARDH: I don't mean to  
10          denigrate it by suggesting that if Minister Graham  
11          had picked up the phone and spoken to the  
12          Solicitor General, who then had a meeting with  
13          Commissioner Zaccardelli and said "this kind of  
14          communication back in November would be of grave  
15          assistance to us in the consular services we are  
16          providing", that would have been a different  
17          situation, you are saying?

18                          MR. CABANA: I'm not going to  
19          suggest what the process should have been.

20                          MS EDWARDH: All right.

21                          MR. CABANA: All I'm going to  
22          suggest is the process for Mr. Edelson to come  
23          directly to the investigative team and seeking  
24          this kind of release, if you want, was problematic  
25          and inappropriate.



1 MS EDWARDH: Well --

2 MR. CABANA: And the reply to  
3 Mr. Edelson's request was discussed at length with  
4 Justice, and with headquarters and CROPS officer.

5 MS EDWARDH: But, you see, sir,  
6 Mr. Edelson didn't just come to the RCMP. He  
7 embraced within his inquiry for assistance  
8 communications with Ann Alder from the Department  
9 of Justice.

10 MR. CABANA: Yes.

11 MS EDWARDH: It does not appear to  
12 me that anyone ever said to Mr. Edelson, "Excuse  
13 me. You are now stepping into areas of protocol,  
14 and you would be far better off to go back to  
15 Mr. Pardy and say, 'Mr. Pardy, address this  
16 interdepartmentally.'" "

17 MR. CABANA: I don't agree with  
18 you, ma'am. Mr. Edelson was advised of this.

19 MS EDWARDH: He was?

20 MR. CABANA: Yes, ma'am, he was.

21 MS EDWARDH: So that is one  
22 obstacle you have identified, the absence of the  
23 correct process, whatever it ought to have been.  
24 Now let's talk about the substance of it.

25 There would be nothing misleading

1 or inaccurate, given your testimony yesterday,  
2 Officer, to have written a letter making the four  
3 points I outlined: to say that Mr. Arar was a  
4 prospective witness in an important Canadian  
5 investigation; he had no criminal record; there  
6 were no warrants for his arrest; and no charges  
7 outstanding.

8 A simple letter, nothing  
9 misleading. Right? There's nothing misleading  
10 about those factual assertions.

11 MR. CABANA: About those facts?  
12 No, there's nothing misleading about those facts,  
13 no.

14 MS EDWARDH: So surely there's  
15 more than just protocol -- I mean, Edelson may  
16 have done it badly. We defence lawyers do that  
17 badly -- from time to time we do things badly.

18 But, tell me, what is the other  
19 barrier, impediment?

20 MR. CABANA: The other barrier or  
21 impediment is -- well, call it a barrier or  
22 impediment if you want. As a matter of course, by  
23 policy, the RCMP does not provide any information  
24 in relation to subjects that are involved or  
25 surface in the course of our investigations.

1                   And like I say, ma'am -- I don't  
2                   want to term it courtesy, but the response that  
3                   was provided to Mr. Edelson went beyond, I guess,  
4                   what should have been forwarded.

5                   MS EDWARDH:   You mean he got more  
6                   than he deserved in that sense --

7                   MR. CABANA:    I'm not saying he got  
8                   more than he deserved.

9                   MS EDWARDH:   More than he should  
10                  have?

11                  MR. CABANA:   From the  
12                  investigative team, yes.

13                  MS EDWARDH:   Why on earth would  
14                  the RCMP have a policy -- if you are writing  
15                  letters up and down the chain that he is a person  
16                  of interest, why on earth would the RCMP have a  
17                  policy whereby it would not identify, for the  
18                  purposes of the Department of Foreign Affairs, for  
19                  the purposes of their actions, the precise, real  
20                  position that you have just described:  that here  
21                  is a prospective witness; we want him back.

22                  The only conclusion, you see,  
23                  Superintendent Cabana, I come to -- because that  
24                  letter is not a complicated letter; it doesn't  
25                  embarrass the Force.

1                   The only conclusion that you can  
2                   come to with that refusal is this policy, which  
3                   doesn't exist anywhere except in ether, there was  
4                   a greater benefit to having him there than to  
5                   having him back?

6                   MR. CABANA: I'm sorry, ma'am, I  
7                   disagree with you entirely. I realize that is  
8                   your position, and you are entitled to that  
9                   position.

10                  MS EDWARDH: So you have  
11                  identified for the Commissioner, then, the  
12                  barriers you felt: one was the policy and one was  
13                  the method of seeking the Force's assistance by  
14                  Mr. Edelson?

15                  MR. CABANA: What I have  
16                  identified to the Commission is there is a process  
17                  for these requests to go forward. There are also  
18                  responsibilities for individuals that are  
19                  incarcerated abroad. Those responsibilities do  
20                  not fall on the RCMP, ma'am.

21                  MS EDWARDH: I want to tell you a  
22                  story.

23                  MR. CABANA: Certainly.

24                  MS EDWARDH: There is a woman who  
25                  lived in Canada, and she found herself very

1 unhappily arrested with her daughter in Vietnam,  
2 and it was alleged by the Vietnamese that she was  
3 involved in trafficking heroin and she was  
4 arrested at the airport. She was tried and  
5 convicted and sentenced to death.

6 The provision of consular services  
7 to this woman included an actual visit by members  
8 of the Metropolitan Toronto Police Service in  
9 order to share information with a view to giving  
10 evidence of innocence that they wanted their  
11 colleagues in Hanoi to consider.

12 MR. CABANA: Mm-hmm.

13 MS EDWARDH: So the merger of  
14 policing and consular services is not entirely  
15 alien.

16 MR. CABANA: I'm not suggesting it  
17 is, ma'am.

18 MS EDWARDH: Okay. I thought you  
19 were.

20 MR. CABANA: You seem to be  
21 implying that the RCMP has a duty and a  
22 responsibility to look at all actions of foreign  
23 states and to involve themselves if there are  
24 Canadians that are involved in these actions or  
25 that suffer from these actions.

1                   I would submit to you, ma'am, that  
2                   at the time my duties were to the mandate that I  
3                   was provided to conduct this investigation, which  
4                   is exactly what I did.

5                   MS EDWARDH: Well, you have many  
6                   duties, sir. You have duties with respect to your  
7                   mandate. You have duties as a peace officer. You  
8                   bear with you at all times common law duties about  
9                   your office that you hold. I understand that.

10                  But the problem that is very  
11                  simple is there is nothing antithetical to the  
12                  discharge of the nation's duties to its citizens  
13                  to have the RCMP write a simple, factually correct  
14                  letter that can be provided by the Department of  
15                  Foreign Affairs to foreign entities?

16                  MR. CABANA: If your question --  
17                  because I'm really not sure what your question is  
18                  here.

19                  But if your question is, could  
20                  that letter have been written?

21                  MS EDWARDH: Yes.

22                  MR. CABANA: The answer is yes.  
23                  And like I said earlier, many different forms of  
24                  letter could have been written. But the response  
25                  is the letter that was written was the one that

1 was forwarded to Mr. Edelson after consultation.  
2 That is what was done.

3 MS EDWARDH: Let me then turn to  
4 another area, if I could.

5 I perhaps should clarify just a  
6 couple of more terms which I struggled with.

7 MR. CABANA: Certainly.

8 MS EDWARDH: Target. The target  
9 of an investigation; target or targets.

10 --- Background noise / Bruit de fond

11 MS EDWARDH: That is a target. We  
12 will deal with him later.

13 --- Laughter / Rires

14 MS EDWARDH: A target is  
15 someone -- well, you define it for us.

16 MR. CABANA: A target is the  
17 subject of the investigation.

18 MS EDWARDH: And that would mean,  
19 just for the purposes of those who may not have --

20 MR. CABANA: For the purposes of  
21 those who may not have the background or the  
22 understanding, a target is the person or entities  
23 in relation to which the evidence of the  
24 commission of an offence is being sought.

25 MS EDWARDH: And I just want to

1 make one thing clear, because I was a little  
2 confused yesterday.

3 I have read the ITO of the  
4 affiant, Corporal Walsh -- I think it's Corporal  
5 Walsh --

6 MR. CABANA: Yes.

7 MS EDWARDH: -- in respect of the  
8 seven search warrants.

9 MR. CABANA: Yes.

10 MS EDWARDH: And it seems pretty  
11 clear to me that the A-OCANADA investigation had a  
12 single target initially?

13 MR. CABANA: Initially?

14 MS EDWARDH: Yes.

15 MR. CABANA: Yes.

16 MS EDWARDH: Is that correct?

17 MR. CABANA: That's correct.

18 MS EDWARDH: And that is the way  
19 the investigation is described as of January 22nd,  
20 2002, in terms of there being a target --

21 MR. CABANA: As a general -- yes,  
22 I believe you are right.

23 MS EDWARDH: Thank you.

24 Then we get to this other  
25 phraseology that I would like you to explain to



1 us, if I could.

2 We have subject of an  
3 investigation, or peripheral subject of an  
4 investigation.

5 Is a subject of an investigation a  
6 target?

7 MR. CABANA: I guess it depends  
8 who wrote the report you are referring to. To me,  
9 the subject of an investigation is the target,  
10 and I will bring you into the context of the  
11 project, if I may?

12 Tasks were assigned to some of the  
13 investigators. In other words -- and, Mr. Bayne,  
14 pardon me, I'll use your name as an example.

15 An investigator is asked to  
16 conduct background investigation in relation to  
17 Mr. Bayne because Mr. Bayne is an associate or has  
18 surfaced under whatever circumstances in the  
19 project.

20 It is conceivable that the  
21 investigator that is being assigned as a task to  
22 do this in his notes and report will refer to  
23 Mr. Bayne as the subject of the investigation.  
24 It's the subject of the background investigation.

25 So depending on who wrote that

1 term, it has to be taken into context.

2 MS EDWARDH: And in what context  
3 the term was written.

4 MR. CABANA: Yes.

5 MS EDWARDH: Fair enough. I must  
6 admit, I was baffled by the various descriptions  
7 attached to Mr. Arar.

8 MR. CABANA: Yes. And when I went  
9 through the different documents in preparation for  
10 the hearings, I noticed the discrepancies as well.

11 MS EDWARDH: Okay.

12 MR. CABANA: But I think if you  
13 look at the various communications with foreign  
14 agencies and some of the presentations that were  
15 conducted, clearly the role -- or the purpose of  
16 our attention on Mr. Arar is clear.

17 MS EDWARDH: And that was with  
18 respect to him being a witness --

19 MR. CABANA: If a person is  
20 considered as a candidate for an investigative  
21 hearing, clearly he is not considered as a  
22 suspect.

23 MS EDWARDH: And I take it  
24 Mr. Arar was considered as such a candidate.

25 MR. CABANA: Yes, ma'am, he was.

1 MS EDWARDH: I guess now they have  
2 to be held in public.

3 MR. CABANA: Pardon me?

4 MS EDWARDH: I guess now they have  
5 to be held in public.

6 MR. CABANA: How the process, the  
7 procedure would unfold, I have no idea.

8 MS EDWARDH: All right. And to  
9 the best of your knowledge, that is how he has  
10 continued to be viewed, from what you have read  
11 and from what you know?

12 MR. CABANA: To the best of my  
13 knowledge, up to February 4th of 2003, yes, that  
14 is how he was viewed.

15 MS EDWARDH: I want to just turn  
16 to another broad area, and I want to talk about  
17 racial profiling, tunnel vision, and a few things  
18 like that.

19 MR. CABANA: Certainly.

20 MS EDWARDH: As a senior police  
21 officer, sir, you would have been very alive to  
22 the evolution of concerns reflected in Royal  
23 Commissions of Inquiry looking at wrongful  
24 convictions?

25 MR. CABANA: Yes, ma'am.

1 MS EDWARDH: You come from the  
2 East Coast?

3 MR. CABANA: I did most of my  
4 service on the East Coast.

5 MS EDWARDH: So then you would  
6 have been alive to the hearings or the conclusions  
7 of the Marshall Inquiry?

8 MR. CABANA: Very much so.

9 MS EDWARDH: And I assume, sir,  
10 just a matter of general interest as a senior  
11 police officer, alive to the conclusions and  
12 concerns in other commissions of inquiry, like the  
13 Morin Inquiry, et cetera?

14 MR. CABANA: In general terms,  
15 yes.

16 MS EDWARDH: We have learned --  
17 and I want to talk about investigating a sleeper  
18 cell, because the way I read part of the ITO, and  
19 I have some trouble sorting out just what the  
20 framework of the investigation was.

21 First of all, there is reference  
22 to, you know, kind of an investigation into the  
23 logistics of financing al-Qaeda. That is (a).

24 And the other one was (b), a  
25 sleeper cell.

1 MR. CABANA: I would have to refer  
2 back to the ITO. I believe there was more than  
3 that.

4 MS EDWARDH: Okay. Then let me  
5 find you the ITO.

6 MR. CABANA: Thank you.

7 MS EDWARDH: We have a new ITO.  
8 I think it is 167.

9 Mr. Registrar, could you please  
10 give the witness Exhibit 167. It's the affidavit  
11 of Mr. Randy Walsh, and it's a new version.

12 And I think at paragraph -- you  
13 see, mine is redacted, so there may be lots in  
14 here that I can't see, sir.

15 But turn to tab D, paragraph 12 on  
16 page 7.

17 It says:

18 "As much of the information  
19 contained in this Information  
20 refers to a suspected  
21 'sleeper' terrorist cell..."

22 Do you see that reference?

23 MR. CABANA: Yes, ma'am.

24 MS EDWARDH: Then we also heard  
25 you say yesterday that the focus of the

1 investigation related to financial transactions  
2 and matters that were a part of what I term  
3 "logistical support".

4 MR. CABANA: Yes.

5 MS EDWARDH: These are different,  
6 in my view. Logistical support involves actual  
7 actions or omissions on the part of persons that  
8 in fact aid, and sleeper cells are persons who are  
9 asleep, waiting to act.

10 MR. CABANA: That would be your  
11 definition. By my definition, people that are  
12 contributing are part of the term "sleeper cell",  
13 are part of this group.

14 MS EDWARDH: So when we go back to  
15 those great spy stories of the Kim Philby's and  
16 people like that who were placed in significant  
17 positions in Western society and were in fact  
18 Soviet agents, that kind of view of sleeper cell  
19 is not what you are talking about?

20 MR. CABANA: No.

21 MS EDWARDH: That is helpful,  
22 because one of the problems, I felt some sympathy  
23 for how you investigate a sleeper who isn't doing  
24 anything except trying to be invisible in a  
25 society. But you were actually investigating

1 actions and omissions of individuals in respect of  
2 specific transactions.

3 And you don't have to go any  
4 further than that.

5 MR. CABANA: Yes.

6 MS EDWARDH: One of the  
7 difficulties, Officer, I want to chat about for a  
8 moment, and I want to talk about racial profiling.

9 There is an alarming description  
10 of who the enemy is in a document. And let me  
11 just see if I can find it in any kind of handy  
12 way.

13 I have asked my colleague Ms Davis  
14 for the reference here so frequently that she has  
15 just threatened me.

16 Give us one moment.

17 MR. CABANA: Certainly.

18 --- Pause

19 MS EDWARDH: It's Exhibit P-85,  
20 Volume 5, tab 23.

21 MR. CABANA: I'm sorry, which tab,  
22 ma'am?

23 MS EDWARDH: Tab 23, sir, and the  
24 particular description I wish to have a discussion  
25 with you about, sir, is found at page 3 of 6 in

1           this document.

2                           Beginning with the first  
3 paragraph, it says the following:

4                           "The second phase is to  
5                           develop a longer term  
6                           strategy to deal with future  
7                           potential attacks. This  
8                           longer term strategy will  
9                           have to take into account the  
10                          type of adversary we are up  
11                          against. By all accounts the  
12                          hijackers of the four planes  
13                          were men who had lived in the  
14                          United States for some time,  
15                          did not act conspicuously,  
16                          were well spoken, well  
17                          dressed, educated and blended  
18                          in well with the North  
19                          American lifestyle. Similar  
20                          subjects live in Canada, and  
21                          some have been identified  
22                          through the ...  
23                          investigation. These  
24                          identified individuals travel  
25                          internationally with ease,



1 use the Internet and  
2 technology to their  
3 advantage, know how to  
4 exploit our social and legal  
5 situation..."

6 And the only thing missing from  
7 that is "and are Arab/Muslim men".

8 But that is implicit in the  
9 description. Correct?

10 It is implicit in the description.  
11 All of the persons --

12 MR. CABANA: I would say it's a  
13 fact that all of the hijackers were, yes.

14 MS EDWARDH: Yes. And the four  
15 hijackers -- or the hijackers referred to are,  
16 according to this document, the type of adversary  
17 we are up against. Right?

18 That is what it says.

19 MR. CABANA: Yes, that is what it  
20 says. But what meaning do you attach to this?

21 MS EDWARDH: I attach this  
22 meaning: that this description would apply to  
23 many, many North American Arab/Muslim men who have  
24 adjusted and integrated into Canadian -- let's  
25 take Canadian society, by being well-educated,

1 et cetera.

2 MR. CABANA: Yes.

3 MS EDWARDH: And that this  
4 description, as the "type of adversary" is an  
5 express invitation to racially profile people when  
6 you have a mandate, sir, as you had, which is turn  
7 over every stone.

8 MR. CABANA: Mm-hmm.

9 MS EDWARDH: And there may be an  
10 objection to this question, so you'll have to be  
11 patient with me. It allows me to sit down from  
12 time to time.

13 I want to go to the first time you  
14 saw Mr. Arar. I take it, sir, that was October  
15 12th, 2001, when he was picked up while you had  
16 Mr. Almalki under surveillance.

17 Don't answer.

18 MR. FOTHERGILL: I don't think we  
19 re getting into an NSC area necessarily so much as  
20 possibly putting ourselves in a breach of the  
21 direction you gave about the initial interest of  
22 Mr. Arar.

23 But perhaps I could defer to  
24 Mr. Bayne on this point.

25 MR. BAYNE: I have kept a very low

1 profile, as you have noticed. I simply rely upon  
2 the order that you made and the ruling and the  
3 direction of certain areas the witness can't  
4 discuss, for very good reason. He can't give full  
5 answers about them or explain the significance of  
6 them.

7 THE COMMISSIONER: Certainly you  
8 should feel free though, Mr. Bayne -- I think I  
9 have made it clear -- if you have a submission  
10 that there is a question that you consider to be  
11 unfair, I won't necessarily agree with you but I  
12 should hear from you.

13 On this question, I might say, if  
14 it's helpful to you, I don't see the question  
15 itself at this point being unfair. I think  
16 Ms Edwardh is simply asking if the first time this  
17 witness saw Mr. Arar was on October 12th.

18 I'm not sure, but I think the  
19 witness was about to say he didn't see him on that  
20 day.

21 MS EDWARDH: Oh, sorry. Maybe can  
22 I -- like, do this?

23 --- Laughter / Rires

24 THE COMMISSIONER: Maybe I'm  
25 wrong.

1 MR. CABANA: No. You are  
2 absolutely right.

3 THE COMMISSIONER: Okay.

4 MR. BAYNE: All I would say in  
5 reply is I am relatively hampered in making  
6 effective submissions to you. You have heard me  
7 in camera on a number of occasions, maybe far too  
8 much, but you know the thrust of the arguments  
9 that can be made and have been made to you.

10 THE CHAIRPERSON: Right.

11 MR. BAYNE: My ability here to  
12 make submissions is constrained, as is the  
13 officer's, in discussing certain things.

14 So I am taking real pains not to  
15 interrupt the flow of my learned friend's  
16 cross-examination and simply to trust the  
17 directions you gave to me some days ago.

18 And, sir, if it's not in your mind  
19 unfair, we told you we would trust your judgment  
20 on this.

21 THE COMMISSIONER: Well, I  
22 appreciate that.

23 First of all, I think the premise  
24 of the question, as I pointed out now, is not  
25 correct. Why don't you pursue it and see?

1 I don't think there's a problem  
2 with simply asking the question when he first saw  
3 Mr. Arar, if that is --

4 MS EDWARDH: I have a couple of  
5 questions, and I'll be mindful of my learned  
6 friend's concerns and invite him to rise if, of  
7 course, I transgress that.

8 But I want to just take a slice of  
9 that incident.

10 MR. CABANA: Certainly.

11 MS EDWARDH: I'm interested in the  
12 question of the threshold; what is the threshold  
13 in such an investigation.

14 MR. CABANA: Sure.

15 MS EDWARDH: I'll put to you the  
16 propositions one at a time, and if someone  
17 objects, you'll bail out. All right?

18 The first is it's my understanding  
19 that the team would have first identified Mr. Arar  
20 as a result of surveillance conducted on  
21 Mr. Almalki on October 12th.

22 MR. CABANA: No, ma'am --

23 MR. FOTHERGILL: Excuse me. We  
24 are now moving beyond the initial question, just  
25 confirming that this was the first knowledge of

1 Mr. Arar.

2 But the precise reason why that  
3 meeting was of interest to police is subject to a  
4 claim of national security confidentiality.

5 THE COMMISSIONER: Yes, I am aware  
6 that the Government has claimed going behind that  
7 meeting is national security confidentiality.

8 MS EDWARDH: I'm having trouble,  
9 Mr. Commissioner.

10 --- Pause

11 MS EDWARDH: I am going to turn to  
12 a totally different area because I can see I'm on  
13 quicksand here.

14 I want to talk about the  
15 conditions Mr. Edelson put on your interview.

16 MR. CABANA: Yes, ma'am.

17 MS EDWARDH: I'm going to put it  
18 to you, sir, that it is a remarkable thing for a  
19 police officer to do: to ask a person to have  
20 their client sit for an interview that is not  
21 bounded in any way by an understanding of: What  
22 is the purpose of the interview? Is the person  
23 being interviewed qua witness, qua accused? Is  
24 the person -- I mean, there is no information.

25 MR. CABANA: No. Mr. Edelson was

1 fully aware of the purpose of our request for an  
2 interview. He was fully aware of the fact that we  
3 considered Mr. Arar to be a potential witness.

4 MS EDWARDH: And do you have  
5 any --

6 MR. CABANA: And I would submit to  
7 you that the same message was conveyed to Mr. Arar  
8 in his conversation with the investigator.

9 MS EDWARDH: Well, we are going to  
10 look at the notes because there is nothing in the  
11 note of --

12 MR. CABANA: I believe the notes  
13 that we reviewed yesterday indicate that we want  
14 to speak to him because he might have some  
15 information that we are interested in.

16 MS EDWARDH: Oh, well, sir, I'm  
17 far too cagey to accept a police officer's "you  
18 may have some information that I want" as being an  
19 indication of why the officer wants to speak to my  
20 client.

21 That could be a target, that could  
22 be a witness, that could be any of the range of  
23 possible implications.

24 MR. CABANA: That is fair. But in  
25 relation to the discussions that we had with

1 Mr. Edelson, Mr. Edelson knew the purpose.

2 MS EDWARDH: All right. We have a  
3 record, and there is no suggestion that anybody  
4 ever explained to Mr. Edelson that the sole  
5 purpose for the interview was to treat Mr. Arar as  
6 a witness and that he was not at risk of other  
7 things. But you are saying that was done.

8 MR. CABANA: That was done. That  
9 was done very shortly following the searches of  
10 January 22nd where there was a series of  
11 individuals that were identified as potential  
12 witnesses to Mr. Edelson.

13 MS EDWARDH: Therefore, the fact  
14 that he wanted to have you take a statement in his  
15 office is not a problem. That is not a problem  
16 because you have got a witness.

17 MR. CABANA: No. Like I said,  
18 it's not a major problem. We would prefer to have  
19 it in our interview rooms. Not a major problem.

20 MS EDWARDH: We always fight about  
21 this. This is a matter of convenience.

22 MR. CABANA: Exactly.

23 MS EDWARDH: Okay. That is number  
24 1.

25 Number 2. It's not a problem, if



1 he is just a witness, that he wants an induced  
2 statement, because you don't intend to use this as  
3 an admission in any future criminal trial.

4 MR. CABANA: That's fine.

5 MS EDWARDH: Right? So it's not  
6 inconsistent with what you want?

7 MR. CABANA: No.

8 MS EDWARDH: And by an induced  
9 statement, we mean one that is presumptively  
10 inadmissible if you were in fact prosecuting  
11 someone, because you have made an offer, held up a  
12 hope of advantage. Right?

13 MR. CABANA: Yes.

14 MS EDWARDH: So the only issue in  
15 Mr. Edelson's terms that is inconsistent with your  
16 objective, sir, is that he doesn't want it to be a  
17 KGB statement. In other words, he will not allow  
18 you to use the statement in proceedings: you have  
19 to have Mr. Arar testify.

20 That is the only condition he  
21 imposes qua witness.

22 MR. CABANA: No. The problem with  
23 the request or the condition is the fact that we  
24 are being asked, before we know what Mr. Arar or,  
25 for that matter the other potential witnesses have

1 to offer, the kind of information that they hold.

2 And we are being asked, before we  
3 even find out that kind of information, to make a  
4 commitment that we will never use it in any  
5 proceedings against anybody. Then I would submit  
6 it defeats the purpose of the interview.

7 MS EDWARDH: I don't want anybody  
8 here to misunderstand what Mr. Edelson and you are  
9 talking about.

10 There is no suggestion that all of  
11 the information you obtained could have been used  
12 and investigated and developed in your  
13 investigation. There's nothing prohibiting that  
14 in the agreement. Correct?

15 MR. CABANA: Correct.

16 MS EDWARDH: So you could have  
17 said "tell me about these financials transactions,  
18 tell me about this meeting, tell me about" -- you  
19 could have done all of that in the terms of your  
20 agreement and furthered your investigation.  
21 Correct?

22 MR. CABANA: Correct.

23 MS EDWARDH: What you couldn't do  
24 was make that statement itself stand alone as  
25 evidence regardless of whether Mr. Arar was here.

1 MR. CABANA: The purpose of our  
2 request to interview these individuals as  
3 witnesses was specifically that.

4 MS EDWARDH: Right.

5 MR. CABANA: To locate potential  
6 witnesses for future proceedings. Some of these  
7 individuals had been involved in transactions that  
8 we were already aware of.

9 MS EDWARDH: Well, that is why you  
10 have the interview.

11 MR. CABANA: Exactly. So the  
12 purpose is to ensure that we have some witnesses.

13 MS EDWARDH: My problem is, sir,  
14 yesterday you testified that the interview was  
15 worthless. You and I both have a long history in  
16 the administration of criminal justice. And if it  
17 is truly an interview with a witness, that  
18 interview isn't worthless at all, because you can  
19 take every factual matter, investigate it and  
20 check it.

21 The only thing it's useless for is  
22 a stand-alone admissible piece of evidence that  
23 can be used even if Mr. Arar is gone or dead,  
24 i.e., a KGB statement?

25 MR. CABANA: Yes.

1 MS EDWARDH: And it wasn't worth  
2 your while then to obtain from him all the details  
3 of all the factual matters you were interested in  
4 even if you couldn't use it as a stand-alone piece  
5 of evidence admissible in a criminal trial. It  
6 wasn't worth your while?

7 MR. CABANA: No.

8 MS EDWARDH: He is pretty  
9 peripheral?

10 MR. CABANA: Pardon me?

11 MS EDWARDH: He is pretty  
12 peripheral?

13 MR. CABANA: He is peripheral,  
14 yes.

15 MS EDWARDH: I take it, sir, that  
16 it is of no dispute that after this failure to  
17 make any agreements with terms and conditions  
18 around an interview, that no further efforts were  
19 made to interview Mr. Arar until he left for  
20 Tunisia?

21 MR. CABANA: That's correct.

22 MS EDWARDH: And indeed, so people  
23 understand it, that is most appropriate protocol.  
24 You have rejected the terms, as you are entitled  
25 to do, and that means he has exercised his right

1 to counsel and you stand back.

2 MR. CABANA: Exactly.

3 MS EDWARDH: The other thing that  
4 I just want to ask you about, and there may be an  
5 objection.

6 It's apparent from the documents  
7 that a surveillance package is prepared on or  
8 about March 20th, 2002, with respect to Mr. Arar.

9 MR. CABANA: The -- well, the  
10 surveillance package was in fact prepared -- there  
11 was a number of surveillance packages that were  
12 prepared, and they evolved over time. That was  
13 the case for the surveillance package for Mr. Arar  
14 as well.

15 It goes back to what I explained  
16 earlier, where investigators were assigned  
17 specific tasks.

18 MS EDWARDH: Right.

19 MR. CABANA: It was investigators  
20 that were assigned to prepare these packages and  
21 they would work on them over a period of time.

22 MS EDWARDH: We have a reference  
23 to one in respect of the date March 20th, 2002.

24 MR. CABANA: Okay.

25 MS EDWARDH: But it seemed

1           apparent from a number of other matters that that  
2           was, quote, a task for someone who prepared the  
3           surveillance package, but it was clear to me that  
4           no one had Mr. Arar under surveillance.

5                         MR. FOTHERGILL: Mr. Commissioner,  
6           so I can state clearly the parameters of our  
7           national security confidentiality claims in this  
8           area, we can acknowledge that the Mango's meeting  
9           on October 12th was the subject of RCMP  
10          surveillance.

11                        Beyond that, the extent to which  
12          Mr. Arar was the subject of surveillance, and what  
13          that surveillance may have revealed, is subject to  
14          a claim of NSC.

15                        MS EDWARDH: May I put the  
16          question differently, and if there's a claim, I  
17          would like you to have an opportunity to consider  
18          it even if there are no answers that can be given  
19          in this forum.

20                        THE COMMISSIONER: Okay.

21                        MS EDWARDH: And I'll put it just  
22          generally.

23                        It is obvious that there is no  
24          surveillance on Mr. Arar, because had there been,  
25          it would not have escaped your surveillance team's

1 attention that Mr. Arar's wife and child left the  
2 country at the end of May and that indeed there  
3 had been a garage sale associated with their  
4 departure.

5 A surveillance team in the  
6 ordinary course would be expected to detect those  
7 events?

8 I mean, we are getting silly if  
9 this can't be answered.

10 MR. FOTHERGILL: Whether it's  
11 silly or not, to the extent to which there was  
12 surveillance and what that surveillance may have  
13 revealed is subject to a claim of NSC.

14 MR. BAYNE: And I would add on  
15 that score, whether it's silly or not, there is  
16 all kinds of information that we canvassed on this  
17 subject about what the investigator knows or  
18 believes about that departure that he cannot  
19 discuss.

20 MS EDWARDH: I wasn't going to  
21 deal with that. I wasn't going to deal with the  
22 departure.

23 THE COMMISSIONER: No. I  
24 understand that.

25 MS EDWARDH: I'll move on.

1 THE COMMISSIONER: Thank you,  
2 Ms Edwardh.

3 MS EDWARDH: I will take you to  
4 Exhibit 140, tab 12, page 5.

5 --- Pause

6 MS EDWARDH: I'm going to put to  
7 you what you knew in -- what's the date of this?  
8 This is July 5th, on page 5.

9 That is what I'm concerned about.  
10 Superintendent Cabana, could you  
11 turn to page 5 of the document?

12 MR. CABANA: I'm at page 5 now.

13 MS EDWARDH: And there's a  
14 reference to a number, 7132, under the date July  
15 5th, at 8:47?

16 MR. CABANA: Yes, ma'am.

17 MS EDWARDH: It says:

18 "As no new information has  
19 surfaced regarding Maher  
20 ARAR, it has been decided by  
21 A-OCanada investigators that  
22 we will use the services of a  
23 [blank]"

24 And all I want to establish  
25 really, sir, is a couple of things with you.



1                   Certainly in July of 2002, you  
2                   had really no more information about Mr. Arar than  
3                   you had when you formed the view that he was a  
4                   person of interest qua witness?

5                   MR. BAYNE: Well, that one I have  
6                   to object to because there is an entire body of  
7                   evidence that had been developed that had come to  
8                   this investigator's attention. He can't discuss  
9                   it, and he can't fairly answer that question.

10                  The proposition that he is being  
11                  invited to come to the conclusion of would  
12                  necessarily lead to "no and this is why".

13                  MS EDWARDH: I'll try it this way,  
14                  Mr. Commissioner: that the information that you  
15                  had received, which may have been additional to  
16                  what you knew months and months before, did not  
17                  change your view that Mr. Arar was a person of  
18                  interest qua witness?

19                  I'm not asking why.

20                  MR. BAYNE: To Canadian  
21                  authorities.

22                  MS EDWARDH: To Canadian  
23                  authorities.

24                  MR. CABANA: Yes, that would be  
25                  accurate.

1 MS EDWARDH: Thank you.

2 I would like, if I could, sir, to  
3 jump ahead to September 26th. I just want to  
4 cover a few points. They were covered in detail  
5 with you by Mr. Cavalluzzo yesterday and there are  
6 just a couple of points that he did not advert to  
7 that I want to touch base with you on.

8 First of all, I want to deal with  
9 your assertion yesterday that between October(sic)  
10 26th and October 1st that "you assumed that  
11 Mr. Arar had access to a lawyer".

12 Where, sir, did you get that  
13 information?

14 MR. CABANA: I testified yesterday  
15 that between September 26th and October 1st, I was  
16 of the belief that Mr. Arar had access to counsel?

17 MS EDWARDH: You assumed he had  
18 access to a lawyer and maybe there was a  
19 miscommunication --

20 MR. CABANA: I believe that was in  
21 fact the following weekend. I know that Mr. Arar  
22 had access to counsel. I do not recall the date.  
23 But I believe it was over the course of the  
24 following weekend sometime.

25 MS EDWARDH: You certainly know,

1           sir, do you not, and you knew at the time, that he  
2           was held in circumstances where he was deprived of  
3           access to counsel by the Americans?

4                       MR. CABANA:  No, I did not know  
5           that, ma'am.

6                       MS EDWARDH:  Did you know anything  
7           about the MDC?

8                       MR. CABANA:  No.  Actually, I  
9           found out through Mr. Edelson.

10                      MS EDWARDH:  Do you know that it  
11           is a facility that houses persons, at least on its  
12           ninth floor, who are alleged to be involved in  
13           "terrorist activities" and persons are kept in  
14           isolation and shackled, et cetera, et cetera?

15                      MR. CABANA:  No, ma'am.  I have  
16           never been there.

17                      MS EDWARDH:  I want to deal  
18           specifically with the issue of where Mr. Arar was  
19           going.

20                      MR. CABANA:  Yes.

21                      MS EDWARDH:  I have heard you,  
22           sir, very clearly say that your initial  
23           communications with American authorities led you  
24           to believe he was going to go back directly to  
25           Zurich.  That is what initially they told you.

1 MR. CABANA: That was the initial  
2 message that we received, yes.

3 MS EDWARDH: And that would, of  
4 course, have been consistent with your knowledge  
5 that persons who are not admitted to the nation  
6 can be turned around on an aircraft and sent back  
7 to the point from which they had come?

8 MR. CABANA: Up to October 9th,  
9 that was my belief, that that was a normal course  
10 of action.

11 MS EDWARDH: And the other course  
12 would have been, and this evolved shortly  
13 thereafter in your communications with the  
14 Americans: Well, you know, they could spend all  
15 the money shipping him back to Zurich but it might  
16 be just as fast and just as cheap to move him  
17 forward to Canada because he is a national or a  
18 citizen, of this country?

19 MR. CABANA: Yes, you are right.  
20 But in deportation cases, also the country of  
21 origin has to accept the person back. So if the  
22 country of origin doesn't accept him back, well  
23 then often the country that is deporting will  
24 forward the person or send them to their country  
25 of origin, if you want.

1 MS EDWARDH: So Switzerland can --  
2 it was your understanding that the Swiss could say  
3 "no way".

4 MR. CABANA: Yes.

5 MS EDWARDH: And therefore the  
6 U.S. government would be obliged to forward him to  
7 the country of which he is a national?

8 MR. CABANA: That's correct.

9 MS EDWARDH: So it must have been  
10 a huge surprise to you when the Americans -- or  
11 the issue arose and there was some sniff that  
12 Syria was on the board, because you did know, sir,  
13 or people were concerned that Syria was out there  
14 as a possible destination.

15 MR. CABANA: Well, I wasn't --  
16 honestly, ma'am, I wasn't surprised. The issue  
17 arose in the context, if I remember correctly, of  
18 a consular visit with Mr. Arar.

19 Mr. Arar rose the issue of his  
20 concern, identified his concern of going to Syria.  
21 If memory serves me right, similar concern was  
22 also identified when the family members,  
23 Mr. Arar's family members, were interviewed in  
24 Montreal.

25 But from my perspective, and I

1 would suggest from the RCMP's perspective, that  
2 was not in keeping with the norm and in 20-some  
3 years of police work, I had never seen anything  
4 like -- it's not something -- it's something that  
5 had never been done before.

6 So the fact that Mr. Arar or his  
7 family raised the prospect of Syria, we understood  
8 the concern, but we didn't hold that as a  
9 possibility.

10 --- Pause

11 MS EDWARDH: Sorry. I'm just  
12 looking for something.

13 I understand that in most  
14 circumstances one would kind of calm the anxieties  
15 of persons who may never have been deported and  
16 say, "It's all right. You are not being sent back  
17 to", you know, wherever.

18 MR. CABANA: Mm-hmm.

19 MS EDWARDH: But this was  
20 different, and it is interesting that you were  
21 aware of it.

22 This is different because Mr. Arar  
23 is saying that he has been told by the INS that  
24 they are going to send him to Syria. This  
25 isn't --

1                   MR. CABANA: I'm not sure that is  
2 the way it was relayed to me.

3                   I believe the way it was relayed  
4 to me was the fact that Mr. Arar, in meeting with  
5 a consular officer in New York, advised that he  
6 was concerned that he would be sent to Syria.

7                   MS EDWARDH: You do agree, sir,  
8 that if you were advised that it wasn't Mr. Arar  
9 just musing upon this as a matter of concern, that  
10 if he in fact conveyed that two immigration  
11 officers had told him that he would be sent to  
12 Syria, that is a different matter, isn't it?

13                  MR. CABANA: Yes, it would be.  
14 But at the same time, ma'am, I would question why  
15 that comment would have been made to Mr. Arar and  
16 whether it was to elicit anything.

17                  But I would not really look at it  
18 seriously. In the context of prior to October 9th  
19 this is not something that I even considered would  
20 be an option for the Americans to do. I didn't  
21 believe that their laws would allow them to do  
22 that.

23                  MS EDWARDH: Well, they may not,  
24 but we will have that dealt with in another  
25 context.

1                   In any event, what you are saying,  
2           sir, just so I can understand you, is: (1), you  
3           had no knowledge of the program of rendition?

4                   MR. CABANA: Not prior to October  
5           9th.

6                   MS EDWARDH: It never crossed your  
7           mind that any suggestion that he was going to  
8           Syria made by the Americans was anything other  
9           than some useful incentive for him to speak.

10                  MR. CABANA: Like I say, the way  
11           the information came to us, the suggestion wasn't  
12           originating from the Americans; it was originating  
13           from Mr. Arar and from his family in Montreal.

14                  And while we understood, or I  
15           understood the concern, I didn't think it was even  
16           a possibility.

17                  MS EDWARDH: Why is it then that  
18           at least some of your colleagues -- and maybe we  
19           have to track this through some of the documents.

20                  But certainly by October the 4th,  
21           2002 -- let's start with that date -- you have  
22           requested access to Mr. Arar to conduct an  
23           interview. Is that fair?

24                  MR. CABANA: On October 4th we  
25           made an official request; yes, that's fair.



1 MS EDWARDH: And on the same day  
2 you meet Mr. Edelson.

3 MR. CABANA: Yes, on October the  
4 4th.

5 MS EDWARDH: And he raises his  
6 concern that you are complicit in Mr. Arar's  
7 detention by the Americans and you make certain  
8 comments to him?

9 MR. CABANA: Yes, we do.

10 MS EDWARDH: You know, as well,  
11 that Mr. Almalki has been tortured in Syria by  
12 this date -- I'm sorry, Mr. El Maati has been  
13 tortured in Syria?

14 This is October 2002.

15 MR. CABANA: Yes.

16 MS EDWARDH: Or believe that the  
17 complaint has been made with respect to that.

18 MR. CABANA: Yes, exactly.

19 MS EDWARDH: I didn't mean to  
20 overstate it.

21 So then when we move to your  
22 concerns about an interview, let's start with  
23 Exhibit P-85 and what you know.

24 Exhibit P-85, Volume 5, I'm sorry,  
25 tab 27, page 9.

1 MS McISAAC: What tab?

2 MS EDWARDH: Tab 27, Ms McIsaac,  
3 and page 9.

4 And at 8:30 in the morning, it's  
5 fair to say that your U.S. colleagues, first of  
6 all, are requesting you -- telling you that they  
7 do not have enough evidence to charge Arar. Is  
8 that in effect what they are saying, too, as well  
9 as -- or is that the Canadians don't?

10 No, it's the Americans, at 8:30.  
11 Is that your --

12 MR. CABANA: Your question is ...?

13 MS EDWARDH: That the Americans  
14 are conveying to you that they do not have  
15 sufficient evidence to lay a criminal charge  
16 against Mr. Arar?

17 MR. CABANA: Based on this report  
18 here, yes.

19 MS EDWARDH: Sir, as someone who  
20 deals with American policing authorities, would  
21 you agree with me that the standard or threshold  
22 of probable cause in the U.S. is similar to the  
23 threshold of reasonable and probable grounds in  
24 Canada?

25 MR. CABANA: Yes.

1 MS EDWARDH: And the issue then --  
2 sorry.

3 Excuse me for a moment,  
4 Mr. Commissioner.  
5 --- Pause

6 MS EDWARDH: The issue for you in  
7 the early morning hours of October 7th is your  
8 team is still pursuing an interview; right?

9 This is at 8:30.

10 MR. CABANA: As of the early  
11 morning hours of the 7th, yes.

12 MS EDWARDH: Right. And then if  
13 we go to the Edelson documents, which are Exhibit  
14 140, tab 11, page 8.

15 That is 140, Mr. Commissioner, tab  
16 11, page 8.

17 MR. CABANA: P-140?

18 MS EDWARDH: Yes, it is -- no, I'm  
19 sorry, it's Exhibit 140.

20 I'm sorry, Mr. Registrar. Yes,  
21 Exhibit 140.

22 THE COMMISSIONER: P-140.

23 MR. CABANA: P-140, tab 11.

24 MS EDWARDH: Tab 11, sir, page 8.

25 And just so I can understand the

1 date, at this twelve o'clock date, what date does  
2 that relate to? It relates to the 10th -- I'm  
3 sorry, the 2nd of October -- no, I'm sorry, the  
4 7th of October.

5 MR. CABANA: I believe it would  
6 relate to the 7th, yes.

7 MS EDWARDH: Right. And at twelve  
8 o'clock on the 7th, it says:

9 "... discussed the interview  
10 of ARAR with Insp. CABANA.  
11 Insp. CABANA was advised that  
12 it was extremely important to  
13 find out the results of  
14 the..."

15 Obviously the interview.

16 "... with ARAR. We needed to  
17 speak with the [blank]  
18 Mike Cabana is advised that  
19 [blank] informed that ARAR  
20 would likely be released and  
21 refused entry to the USA.  
22 Apparently [blank] plan on  
23 sending him to Canada."

24 And then there was this reference  
25 to -- I think it was brought to your attention

1           yesterday -- numerous calls to Air Services.

2                           The next paragraph:

3                                       "[blank] contacted [blank]  
4                                       and advised him of the need  
5                                       to know the results of the  
6                                       interview..."

7                           Which of course was based in part  
8           upon your questions. Right?

9                           Sorry, you have to say yes or no.

10                          MR. CABANA: Pardon me?

11                          MS EDWARDH: The interview with  
12           Mr. Arar was in part based upon the questions you  
13           sent?

14                          MR. CABANA: In part, yes.

15                          MS EDWARDH: And then:

16                                       "[blank] returned a call to  
17                                       [blank] and [blank] was asked  
18                                       to have [blank] call us  
19                                       directly.

20                                       A [blank] of the need to know  
21                                       the response by ARAR to the  
22                                       questions we had sent and the  
23                                       need to speak with [blank]  
24                                       He suggested we wait to hear  
25                                       from [blank]"

1                   Now, despite all those blanks,  
2                   sir, you certainly are looking for the results of  
3                   the U.S. interview with Mr. Arar.

4                   MR. CABANA:   Of course we are.

5                   MS EDWARDH:   And at the same time  
6                   you are looking at possible routes of access into  
7                   the United States.

8                   MR. CABANA:   Yes, as of the 7th,  
9                   we are still exploring the possibility, yes.

10                  MS EDWARDH:   That is all I'm  
11                  saying.

12                  MR. CABANA:   Yes.

13                  MS EDWARDH:   And now you think  
14                  that, you know, you have been told he may go to  
15                  Zurich; he may go to Canada.   Right?

16                  MR. CABANA:   Exactly.

17                  MS EDWARDH:   And I want to look at  
18                  the problems you have already got yourself into if  
19                  I were advising you as Crown counsel for a moment.

20                  You have a person who is detained  
21                  by foreign authorities.   Correct?

22                  MR. CABANA:   Correct.

23                  MS EDWARDH:   You have a Supreme  
24                  Court of Canada decision in 1988 called Regina v.  
25                  Cook which makes you bear the Charter on your back

1 if you go and interview an accused person, or a  
2 person?

3 MR. CABANA: Correct.

4 MS EDWARDH: And what you know is  
5 you have a duty to ensure, as best you can, that  
6 the person who you are interviewing is not held  
7 without the benefit of counsel. And if that means  
8 you having to hand a phone to somebody and say  
9 "phone your lawyer", you have got to do that.

10 Is that correct?

11 MR. CABANA: Yes.

12 MS EDWARDH: The other problem you  
13 have is that you never told the Americans, when  
14 you gave them your questions, that there were  
15 restrictions put on your interview in Canada; that  
16 when Mr. Arar had exercised his constitutional  
17 right to remain silent, he said "I will speak on  
18 conditions".

19 And you never told the U.S. what  
20 those conditions were, did you?

21 MR. CABANA: Not true.

22 MS EDWARDH: Oh, you did tell  
23 them?

24 MR. CABANA: Of course we did.

25 MS EDWARDH: You explained to the

1 U.S. authorities before Mr. Arar, or during his  
2 interrogation by those authorities with your  
3 questions, what the conditions were that had been  
4 imposed by Mr. Edelson?

5 MR. CABANA: The relationship with  
6 the American authorities was such that, as I  
7 explained yesterday in my testimony, they were  
8 participants in multi-agency meetings, regular  
9 multi-agency meetings, where these agencies and  
10 participants were briefed on every development of  
11 this investigation.

12 The mandate we had received  
13 initially is: You are working together on this  
14 file.

15 So I would submit to you that very  
16 shortly -- actually, on January 31st, at the  
17 multi-agency meeting, the conditions placed on any  
18 interview, not just of Mr. Arar but of the other  
19 individuals, was discussed at that meeting and  
20 those agencies were very well aware of the  
21 restrictions.

22 MS EDWARDH: Well, I understand  
23 the agencies may know, but there's a real  
24 difference between institutional memory -- I mean,  
25 if I tell one RCMP --



1 MR. CABANA: We are dealing with  
2 the same people here, ma'am.

3 MS EDWARDH: Oh. Well, that is  
4 different. That is my next question.

5 So I take it you are strongly of  
6 the view that the individual persons responsible  
7 for Mr. Arar's interrogation in the U.S. knew full  
8 well that in putting the questions to him from the  
9 Mounties that they were not complying with  
10 Mr. Edelson's request? They knew that full well.

11 MR. CABANA: Yes, ma'am, they did.

12 MS EDWARDH: The other barrier or  
13 problem you created for yourself was that the -- I  
14 don't mean created for yourself, sir, but that  
15 there were barriers --

16 MR. CABANA: I would say somebody  
17 else created these barriers for us. And it's  
18 interesting that you are acting as our counsel  
19 because there was extensive consultation during  
20 that period of time, and R. v Cook was --

21 MR. FOTHERGILL: I'm sorry. As  
22 you know -- and perhaps this is an opportunity for  
23 me to say this in the public forum how we dealt  
24 with matters of solicitor-client privilege in the  
25 in camera proceedings.

1                   Bearing in mind that this is an  
2 inquiry and not an adversarial process, we agreed  
3 that it would be permissible for a witness to say  
4 that certain decisions were taken with the benefit  
5 of legal advice.

6                   However, we do object to  
7 disclosure of what the advice actually was. And I  
8 want to make it absolutely clear that by  
9 permitting questions on whether certain decisions  
10 were taken with the benefit of legal advice, we  
11 are not thereby putting that advice in issue or  
12 waiving any privilege that would attach to it.

13                   I would ask this witness not to  
14 disclose what advice he in fact received from  
15 Department of Justice counsel.

16                   MS EDWARDH: With respect,  
17 Mr. Commissioner, I did not ask the witness  
18 whether he had obtained legal advice.

19                   THE COMMISSIONER: Right.

20                   MS EDWARDH: Duly respecting his  
21 right to claim solicitor-client privilege. And it  
22 may well be that officers who undoubtedly struggle  
23 with Charter boundaries within which they must  
24 work, talk about precedents all the time without  
25 running to lawyers, and I dare say that they also

1 teach courses.

2 THE COMMISSIONER: Let me just say  
3 this, in fairness to the witness. It's not the  
4 witness who claimed the solicitor-client  
5 privilege. I think the witness would dearly love  
6 to tell about the advice that he received. It's  
7 the Government that has claimed it.

8 MR. FOTHERGILL: I'm not finding  
9 fault with Ms Edwardh's question. Her question  
10 was perfectly reasonable. The witness began to  
11 volunteer the actual advice he received, and I  
12 don't criticize him for doing so. But I am  
13 objecting to his answer.

14 THE COMMISSIONER: I agree. I  
15 think the question was perfectly proper.

16 MS EDWARDH: I was just getting a  
17 little frustrated here, Mr. Commissioner.

18 THE COMMISSIONER: I think the  
19 question was fine.

20 MR. CABANA: I apologize,  
21 Mr. Commissioner.

22 MS EDWARDH: I don't know whether  
23 we can --

24 THE COMMISSIONER: By the way, I  
25 don't mean any criticism of you. I think it was a

1 natural response.

2 MR. CABANA: That's fine.

3 THE COMMISSIONER: Go ahead.

4 MS EDWARDH: Certainly I'm going  
5 to suggest to you, sir, that: (1), the well-known  
6 framework -- I mean it was the Mounties who were  
7 involved in Charose v Campbell. It sent echoes  
8 through the administration of justice for policing  
9 and, as well as cases like Cook were important  
10 policing boundaries. You didn't need lawyers.  
11 You had to look at those issues yourself.

12 Is that fair? I mean, answer "no"  
13 if it's not fair.

14 MR. CABANA: Well, whether we  
15 needed lawyers or not, they were part of the team.  
16 --- Laughter / Rires

17 MS EDWARDH: That may be one of  
18 the best answers.

19 In any event, I'm going to just  
20 put to you that the decision to not go to the  
21 United States was a reflection of multiple  
22 factors --

23 MR. CABANA: Yes.

24 MS EDWARDH: -- ranging from the  
25 ability to give effect to your duties under the

1 Charter given the circumstances of the detention.

2 MR. CABANA: It would be one of  
3 the factors, but I'm not sure that it weighed that  
4 heavily in the decision.

5 MS EDWARDH: That is good to know.

6 Then we go to the issue of the  
7 restrictions that had been placed upon you by  
8 Mr. Edelson. That would have been a factor.

9 MR. CABANA: Not really, ma'am.

10 MS EDWARDH: Then there would be  
11 the fact that Mr. Arar was in detention.

12 MR. CABANA: No.

13 MS EDWARDH: Okay. I'm going to  
14 ask you then: Other than the cost of airfare,  
15 what were the other factors?

16 MR. CABANA: Factor was the fact,  
17 like I explained yesterday, was mostly I guess a  
18 perception issue: that if Mr. Arar was to be  
19 returning to Canada, we would have an opportunity  
20 to interview him if he agreed at our leisure upon  
21 his return.

22 The concern and the reason why --  
23 and, actually, if you look at the timeline, if you  
24 look on the 7th, we are, for lack of a better  
25 term, wavering over the need to go or not go.

1                   And the decision that we had to  
2                   make, or the concern that we had that weighed  
3                   fairly heavily in the balance at the time was our  
4                   belief that if he does not come to Canada, we will  
5                   never be able to interview him, even in the  
6                   context of an investigative hearing.

7                   MS EDWARDH:   And then if he does  
8                   come to Canada, you will look foolish going down  
9                   to the States when he is being detained.   Right?

10                  MR. CABANA:   Yes, very much so.

11                  MS EDWARDH:   And then there is a  
12                  third factor I am going to throw in here, and you  
13                  only get a taste of it by turning to tab 83,  
14                  Volume 3, page 72 -- I'm sorry.

15                  I think this is the -- just a  
16                  second.

17                  --- Pause

18                  MS EDWARDH:   Yes, it is tab 83.  
19                  We are looking at some interviews --

20                  THE COMMISSIONER:   We are at P-83?

21                  MS EDWARDH:   I'm sorry, it's  
22                  Exhibit 83.

23                  THE COMMISSIONER:   Yes, Exhibit  
24                  83.

25                  MS EDWARDH:   My apologies.   Volume

1           3.

2                           THE COMMISSIONER:   Tab 3?

3                           MS EDWARDH:   Yes, page 72.

4                           MR. CABANA:   Thank you.

5                           MS EDWARDH:   Unfortunately, sir, I  
6           am unable to tell you, because it's redacted, who  
7           this is.  But this is a person who was at the  
8           meeting where you are struggling with these issues  
9           about:  Do you go?  Do you not go?  Is he going to  
10          Zurich?  Will you lose an investigational hearing?

11                           Let me take you down two-thirds of  
12          the way on page 72, B. Garvie:

13                           "Now, what was discussed at  
14                           this particular meeting?

15                           Ah, there were several issues  
16                           that I would discuss but with  
17                           respect to Arar, ah, ah, the  
18                           fact that he had dual  
19                           citizenship was brought up  
20                           and that he was a Syrian as  
21                           well as a Canadian and then  
22                           there were also some  
23                           questions that were asked:  
24                           Where will he go, Syria or  
25                           Canada?  Uh, what was he in

1 custody for? What --"

2 I think it should say, "What has  
3 he said?"

4 "Is this a [blank] case?"

5 So at least one of your colleagues  
6 who was present at the meeting describes the issue  
7 as really being a pretty clear recognition that  
8 there may be a choice at play right now at this  
9 moment that Mr. Arar may go to Syria or Canada.

10 Do you know who this person is?  
11 Can you take a look at this, from his interview?  
12 I'm not going to ask you who it is. I just want  
13 to see if you can identify the person in your own  
14 mind.

15 MR. CABANA: I don't know who it  
16 is, but I can tell you that this is not somebody  
17 from the A-OCANADA team. This is somebody from  
18 headquarters.

19 MS EDWARDH: But he is at the  
20 meeting?

21 MR. CABANA: Well, obviously.

22 MS EDWARDH: So there are musings  
23 on October 7th at the meeting of A-OCANADA  
24 recognizing that there are choices in play --  
25 let's not put it any higher than that; choices in



1 play. But that choice does include --

2 MR. CABANA: Ma'am, in the context  
3 of any investigation -- I would say even more  
4 specifically in this one -- when there was  
5 investigators meeting, especially involving  
6 persons from other agencies, including Justice,  
7 including headquarters, it was a habit -- and it's  
8 something that I have always invited in all the  
9 teams that I have managed over the years. I want  
10 every option, every issue discussed in these  
11 meetings.

12 Syria had surfaced through  
13 information we received through DFAIT. Through  
14 information -- actually, I believe the information  
15 that we received from interviews in Montreal came  
16 to us the following day -- or the 9th even.

17 So at that point in time, what we  
18 had was the comment from our liaison officer from  
19 DFAIT advising us that Mr. Arar had raised this as  
20 a potential. Of course it would be discussed, but  
21 myself, personally, I didn't look at this as a  
22 possibility.

23 MS EDWARDH: Who from headquarters  
24 was in attendance, sir? Can you tell from any  
25 record or notes you have? Who would be there?

1           Would it be someone who was in a supervisory  
2           capacity in respect of the decisions the team  
3           made?

4                       MR. CABANA: I can look in my  
5           redacted notes here to see if I have an entry.

6                       May I?

7                       MS EDWARDH: I think this is an  
8           important issue, Mr. Commissioner.

9                       MR. CABANA: This is October 7th?

10                      MS EDWARDH: Yes, correct. It's  
11           October 7th, 2002.

12                      MR. FOTHERGILL: Commissioner, if  
13           it assists the process, some of these redactions  
14           might be somewhat out of date, and I'm instructed  
15           that this is likely the statement of Mr. Lauzon,  
16           who we anticipate will be a public witness.

17                      So if that assists Superintendent  
18           Cabana, there is certainly no objection if he  
19           wants to identify that individual.

20                      Another individual who may have  
21           been present at the meeting would be Corporal  
22           Flewelling, who will also be a public witness.  
23           And again if that assists the witness'  
24           recollection, he is at liberty to name him.

25                      THE COMMISSIONER: Do you know,

1 Mr. Cavalluzzo, who it is?

2 MR. CAVALLUZZO: Yes, it is  
3 Mr. Lauzon, who will be called.

4 There may be some confusion in  
5 respect of that particular statement because  
6 you'll notice the reference is to October 7th.

7 THE COMMISSIONER: Yes.

8 MR. CAVALLUZZO: And I think  
9 Mr. Lauzon's public evidence will be it was  
10 October 8th that that meeting occurred.

11 I noted just for the first time  
12 that the statement before Mr. Garvie says October  
13 7th, so I don't know if that is going to lead to a  
14 great line of questioning.

15 THE COMMISSIONER: I think it's  
16 important to clarify, and if you can help us, if  
17 you have any notes, Superintendent Cabana.

18 MR. CABANA: I didn't for the 7th.

19 THE COMMISSIONER: Okay. Do you  
20 have a meeting on the 8th, where there is either  
21 Flewelling or Lauzon there on the 8th?

22 MS EDWARDH: I'm sorry, we don't  
23 have any notes from the 8th, it appears.

24 THE COMMISSIONER: You don't.

25 MR. CABANA: No, sir, I don't have

1 any notes.

2 MR. CAVALLUZZO: If it may assist  
3 the matter, perhaps at the luncheon break we can  
4 attempt to find out who was at that meeting, if  
5 that would assist counsel.

6 I note that the witness does not  
7 have notes for either October 7th or October 8th.

8 THE COMMISSIONER: Are there any  
9 notes or other indications in the documents -- is  
10 that a fair question -- to indicate?

11 MR. CAVALLUZZO: It's not a fair  
12 question at this time, but I can undertake to  
13 investigate.

14 THE COMMISSIONER: Well, we will  
15 get it straight and deal with it.

16 --- Pause

17 MS EDWARDH: I just want to make  
18 one observation, Mr. Commissioner.

19 I know everyone is working hard,  
20 but it puts us at a rather significant  
21 disadvantage if there are documents that should be  
22 further redacted that would identify, and if no  
23 one has any objection that they are in the public  
24 domain, to not have that information.

25 THE COMMISSIONER: I'm not aware

1           that this document has been further unredacted,  
2           has it?

3                       MS EDWARDH:  I gather just that  
4           there is -- no, I don't believe it has been, but I  
5           think the statement that was made was that it  
6           could be because of the evolution of things.

7                       It is just that no one has had the  
8           time to do it.

9                       THE COMMISSIONER:  I understand  
10          your frustration.

11                      MS EDWARDH:  So it's just a little  
12          difficult.

13                      MR. CAVALLUZZO:  I want to make  
14          clear that Mr. Lauzon will be testifying publicly,  
15          and at that time you may have a full opportunity  
16          to cross-examine him.

17                      MS EDWARDH:  I would like to just  
18          try and finish this area, Mr. Commissioner.  I  
19          have kind of been taken offside a few times, so I  
20          may ask that we break at the end of this and I'll  
21          try and reduce this.

22                      THE COMMISSIONER:  That's fine.

23                      MS EDWARDH:  Let's go back,  
24          Officer, and try again.

25                      I take it, sir, that -- no.

1                   Do you or do you not have any  
2                   recollection of a meeting on October 7th, 2002, in  
3                   which A-OCANADA, or aspects of it, mused about a  
4                   possible deportation to Syria?

5                   MR. CABANA: No, ma'am, I don't.

6                   You have to understand that there  
7                   might have been meetings, but I didn't attend all  
8                   meetings.

9                   --- Pause

10                  MS EDWARDH: I was thinking there  
11                  was another document that captured this meeting,  
12                  but I'm not able to locate it, Mr. Commissioner.

13                  I know it's early, but --

14                  THE COMMISSIONER: No, that's  
15                  fine.

16                  MS EDWARDH: I need to get  
17                  relocated, wherever I was, thinking the evidence  
18                  was different than I thought it was.

19                  THE COMMISSIONER: Can you give me  
20                  an estimate or can I get estimates from people? I  
21                  have a conference call that I have to do at four  
22                  o'clock.

23                  Do you have any idea, Ms Edwardh,  
24                  at this point, how much longer you might be?

25                  MS EDWARDH: I would like, if I

1           could -- I said I would be -- I can't remember  
2           what I said, actually.

3                         THE COMMISSIONER:   Four and a half  
4           hours.

5                         MS EDWARDH:   I would like another  
6           hour to an hour and a half.  Sometimes when you  
7           lose whole threads of it, it's different to  
8           reconstitute quickly.

9                         THE COMMISSIONER:  No.  That's  
10          fine.

11                        Mr. Fothergill, you are next.  How  
12          long will you be?

13                        MR. FOTHERGILL:  My estimate  
14          hasn't changed; approximately half an hour.

15                        THE COMMISSIONER:  Half an hour.  
16                        Mr. Bayne, has your estimate  
17          changed?

18                        MR. BAYNE:   I might be 14 to 20  
19          minutes.

20                        MS EDWARDH:   It's growing.  
21          --- Laughter / Rires

22                        MR. BAYNE:   Well, your question  
23          was predicated on as of that point.

24                        THE COMMISSIONER:  Why don't we  
25          break until 2:00?  Do you think it makes sense, or

1 should we do it earlier?

2 MR. CAVALLUZZO: I think we should  
3 do it earlier.

4 THE COMMISSIONER: Until 1:30?  
5 All right. We will resume at  
6 1:30.

7 THE REGISTRAR: Please stand.

8 --- Upon recessing at 12:22 p.m. /

9 Suspension à 12 h 22

10 --- Upon resuming at 1:30 p.m. /

11 Reprise à 13 h 30

12 THE COMMISSIONER: Ms Edwardh.

13 MS EDWARDH: Thank you,  
14 Mr. Commissioner. We appear to have some moving  
15 air.

16 THE COMMISSIONER: We do. It is  
17 an improvement.

18 MS EDWARDH: Yes, it is.

19 Superintendent Cabana, I have just  
20 a point of clarification, because I am using  
21 sometimes terms and short forms that you and I may  
22 be more than familiar with but perhaps others are  
23 not, and I just want to make something clear.

24 MR. CABANA: Sure.

25 MS EDWARDH: We had talked -- or,



1           rather, I had posed a series of questions around  
2           Mr. Edelson's conditions, particularly those  
3           conditions that speak to a witness, and you will  
4           recall that I put to you the proposition that what  
5           he really was excluding was that the statement  
6           taken would not and could not be used as a KGB  
7           statement.

8                           I have had a couple of people ask  
9           me whether we were referring to the old Soviet spy  
10          system, and I thought I would just spell out our  
11          mutual understanding of what this term has come to  
12          mean for both police officers and counsel working  
13          in the administration of criminal justice.

14                          It is clear that even if a KGB  
15          statement is not available to you as a peace  
16          officer conducting an investigation, there is  
17          nothing about the contents of the statement that  
18          could not be the subject matter of an  
19          investigation.

20                          So you would be free to  
21          investigate any facts asserted, but you could not  
22          use the statement in substitution of a witness'  
23          testimony.

24                          Is that a fair analysis?

25                          MR. CABANA: It's a fair analysis

1 in the sense that in criminal proceedings, a  
2 witness statement, other than KGB, a pure witness  
3 statement is in itself not admissible.

4 MS EDWARDH: Right. That is what  
5 I want to establish. So in the ordinary course,  
6 perhaps to state the obvious, in the ordinary  
7 course in undertaking a criminal investigation  
8 witnesses would be interviewed, statements taken,  
9 but they are not necessarily the kinds of  
10 statements that would be admissible on their own  
11 right in substitution of the actual witness  
12 testifying?

13 MR. CABANA: Exactly.

14 MS EDWARDH: All right. But  
15 certainly the conditions that Mr. Edelson imposed  
16 with respect to no KGB would not have precluded  
17 you from calling Mr. Arar to an investigative  
18 hearing?

19 That is one thing it wouldn't have  
20 precluded. Correct?

21 MR. CABANA: Correct.

22 MS EDWARDH: Would not have  
23 precluded calling him as a witness in a criminal  
24 matter if charges had ultimately been laid against  
25 one of the persons who were targeted?

1 MR. CABANA: Correct.

2 MS EDWARDH: Thank you, sir. And  
3 it has nothing to do with the KGB --

4 MR. CABANA: No.

5 MS EDWARDH: -- the old Soviet  
6 style. It is in fact the initials of a decision  
7 of the Supreme Court of Canada?

8 MR. CABANA: Exactly.

9 MS EDWARDH: Thank you.

10 We have numerous documents, sir,  
11 that indicate -- and I can take you to them; I  
12 would rather not and maybe I framed the question  
13 badly -- that the date of October 12th is the date  
14 that Mr. Arar becomes a person of interest to the  
15 investigation, or an associate.

16 MR. CABANA: I'm not sure I  
17 understand your question.

18 Is the question: Is October 12th  
19 the first time that we became aware of Mr. Arar?

20 MS EDWARDH: That date; that he  
21 became a person who was either an associate or a  
22 person of interest in respect of the investigation  
23 of A-OCANADA?

24 MR. CABANA: Yes. I would say  
25 October 12th is a fair statement, yes.

1 MS EDWARDH: Right. And that of  
2 course was the day of the surveillance that we  
3 have heard about, although we know there was  
4 pre-information provided to the police there would  
5 be a meeting.

6 MR. CABANA: That's correct.

7 MS EDWARDH: Let's leave that and  
8 move on to another area, if I could.

9 I had some confusion with some  
10 areas Mr. Cavalluzzo covered about the post-9/11  
11 sharing of information, and I want to review them  
12 with you.

13 MR. CABANA: Certainly.

14 MS EDWARDH: I take it, sir, that  
15 your position is that the decision made by your  
16 superiors, indeed at the highest levels of  
17 government, was that there would be a full sharing  
18 of information and indeed open-book investigations  
19 conducted between Canada and the United States?

20 MR. CABANA: That's correct.

21 MS EDWARDH: And it would be  
22 naive, I suppose, to assume that the list stops  
23 with Canada and the U.S., because indeed there are  
24 other allies, like U.K., France, et cetera. And  
25 I'm going to assume that that policy may extend to

1 Western democratic states in Europe as well.

2 Can you confirm that, or is that  
3 the subject --

4 MR. CABANA: No, I wouldn't be  
5 aware of that, and I was never made aware of that.

6 Basically the agreement, as I  
7 understood it, included a number of agencies.

8 MS EDWARDH: And they existed  
9 within the boundaries of North America, or their  
10 home offices were --

11 MR. CABANA: Canada and the U.S.

12 MS EDWARDH: Fair enough.

13 As I understood your evidence,  
14 this fulsome sharing of information was really  
15 designed to maximize intelligence-gathering and  
16 the comprehension of intelligence information?

17 MR. CABANA: I guess you could say  
18 that. The requirement for the open sharing I  
19 would submit likely came from the type of offence  
20 or the type of investigation that was being  
21 conducted.

22 I mean, terrorism is not -- is  
23 borderless, basically.

24 MS EDWARDH: And, indeed, at the  
25 risk of -- I'm not trying to minimize it, but many

1 of the offences that your Force now deal with are  
2 borderless offences?

3 MR. CABANA: Very much so, ma'am.

4 MS EDWARDH: So let us go to my  
5 next question.

6 You made an observation, and I  
7 want to be very sure we understand it.

8 I am going to suggest to you that  
9 if we interpret the statement "caveats are down"  
10 to mean there are no controls of any kind, that is  
11 in fact a misnomer, Officer, and I put it to you  
12 for this reason.

13 You also said if the information  
14 was to be used, there was a clear procedure known  
15 and available to the agencies.

16 MR. CABANA: The term "caveats are  
17 down" is not a term that I coined. It doesn't  
18 emanate from me in the context of this  
19 investigation. This is something that came from  
20 headquarters.

21 As I understood the agreement that  
22 had been negotiated, the agencies, the parties to  
23 this agreement, knew exactly what the parameters  
24 were and basically -- I mean, the parameters had  
25 not changed.

1                   It is just that the need for  
2                   timely sharing, for immediate sharing, indicated  
3                   that there was no requirements to put caveats.  
4                   Everybody understood what the sharing was for,  
5                   what it was to be used for, under which  
6                   circumstances, and if it was to be used in  
7                   criminal proceedings, what procedure had to be  
8                   followed.

9                   MS EDWARDH: I want to take you  
10                  back because I'm going to submit to you that -- or  
11                  put to you the question that that control on use  
12                  was not merely confined to criminal proceedings --

13                 MR. CABANA: Well --

14                 MS EDWARDH: Let me just put my  
15                  question to you.

16                 MR. CABANA: Certainly.

17                 MS EDWARDH: It relates to  
18                  proceedings of any kind where there might be an  
19                  administrative adjudication, or a trial judge, or  
20                  a civil lawsuit. It wouldn't have mattered that  
21                  to put this out of the intelligence arena required  
22                  that there be a procedure followed.

23                 MR. CABANA: I guess to try to put  
24                  it in context, and I would assume -- this is pure  
25                  assumption on my part. I would assume that U.S.

1 authorities basically received the same directions  
2 that we received with respect to the sharing.

3 MS EDWARDH: Fair enough.

4 MR. CABANA: And I lost my train  
5 of thought. I apologize.

6 MS EDWARDH: No, no. It's been  
7 very hot in here. I'm sorry.

8 What you were saying was -- I had  
9 asked you about your understanding of caveats are  
10 down and the use factor, the foreign use factor --

11 MR. CABANA: Yes, yes.

12 MS EDWARDH: And you had said,  
13 assuming that they got the same instructions as  
14 you.

15 What were your instructions?

16 MR. CABANA: Our instructions --  
17 and actually it's not very different from  
18 conducting major investigations in relation to  
19 organized crime.

20 It was to use any tool -- and here  
21 I'm speaking of legislative tools -- at our  
22 disposal to prevent any further attacks, which  
23 would explain the makeup, really, the composition  
24 of our team, which would explain why we had  
25 representatives from Revenue Canada, why we had



1           representatives from Immigration that were  
2           seconded to our team.

3                           In other words, we weren't  
4           confined by the boundaries of the Criminal Code.

5                           I would assume that the Americans  
6           were operating under the same premise.

7                           That being said, the understanding  
8           was that this sharing of information was in that  
9           context. So it means if there are no criminal  
10          charges that can be laid, or for whatever  
11          reason -- and here I'm referring to the heydays of  
12          Proceeds of Crime, I guess, where prior to the  
13          proceeds legislation it was Revenue Canada that  
14          was trying to attack organized crime through the  
15          revenue legislation; the same type of approach.

16                          MS EDWARDH: I'm sorry, I'm not  
17          sure I have, though, an answer to this question:  
18          You made a statement that the information was to  
19          be used. There was a clear procedure available  
20          for --

21                          MR. CABANA: Yes.

22                          MS EDWARDH: All right. I took  
23          from that the following proposition: that the  
24          information was understood by all to be an  
25          intelligence-sharing activity.

1 MR. CABANA: Yes.

2 MS EDWARDH: The second  
3 proposition I took from that, sir, was that if the  
4 information was to find its way into a use  
5 different from intelligence-sharing, a criminal  
6 trial, a civil trial, an administrative  
7 tribunal -- whatever that might mean -- that that  
8 would require going through procedures.

9 I want to ask you very simply: If  
10 that is the case, what were the procedures?

11 MR. CABANA: Basically it was the  
12 normal procedures.

13 In other words, routinely law  
14 enforcement agencies share information with  
15 foreign agencies, very much so with U.S. agencies  
16 in the context of criminal investigations.

17 The understanding is, when this  
18 sharing takes place, is if the information is to  
19 be used in any proceedings, criminal or otherwise,  
20 there has to be a formal request through the MLAT  
21 process to be able to use the information.

22 My understanding is here in Canada  
23 if the information is to be admissible in court,  
24 it has to be obtained through that process. My  
25 understanding is in the U.S. the same applies.

1                   It hasn't changed. Prior to 9/11,  
2                   that was the process that was in place. After  
3                   9/11, it was the same procedure that was to be  
4                   followed.

5                   MS EDWARDH: I'm sorry, I didn't  
6                   mean to cut you off.

7                   MR. CABANA: Again, I don't know  
8                   if that falls within the parameters of NSC, but in  
9                   Canada --

10                  MS EDWARDH: Speak slowly.

11                  MR. CABANA: I will. That is why  
12                  I'm slowing down here.

13                  --- Laughter / Rires

14                  MR. CABANA: In Canada, as well as  
15                  in the U.S., it was specific individuals that were  
16                  identified within the Justice Departments to  
17                  facilitate these formal requests as quickly as  
18                  possible.

19                  MS EDWARDH: Right. So that I  
20                  understand exactly what you are saying, in order  
21                  for the information to be used in a tribunal, it  
22                  was your understanding that there would have,  
23                  first of all, to be consent from the agency who  
24                  had provided it; and, second of all, an MLAT  
25                  request?

1 MR. CABANA: Yes, ma'am.

2 MS EDWARDH: Certainly it's clear  
3 that many of the caveats involved consent, the  
4 ordinary caveats?

5 MR. CABANA: Yes.

6 MS EDWARDH: But I'm going to  
7 suggest to you, sir, that the MLAT doesn't come to  
8 bear on this issue for the following reason. We  
9 provide information routinely in criminal matters  
10 to the United States, and we do not require the  
11 Americans to go through MLAT.

12 Indeed, I have just spent several  
13 months trying to stop the provision of information  
14 in a U.S. murder case and forced them into MLAT  
15 and can announce I have been entirely  
16 unsuccessful. And if you as a police officer or  
17 as a Force decide to travel to the United States  
18 to testify at proceedings, to provide evidence at  
19 a U.S. trial, there is nothing that can stop you  
20 if it is a decision of your Force, and you cannot  
21 be required to go through MLAT.

22 MR. CABANA: No. You are talking  
23 here of testimony from a Canadian official. What  
24 I'm referring to is exchange of evidence,  
25 documentary evidence.

1 MS EDWARDH: Well, I have tried  
2 that, too.

3 In any event, leaving the issue of  
4 MLAT aside, I understand if you are in possession  
5 of documentary evidence and are willing and  
6 consenting to participate in a U.S. process, you  
7 can get on an aircraft with your documents, be a  
8 witness and file your documents.

9 You would agree with that?

10 MR. CABANA: Well, to some extent.

11 I would submit that prior approval  
12 would be required from head office.

13 MS EDWARDH: Of course. I'm  
14 sorry. I'm assuming always that there's agency  
15 approval.

16 MR. CABANA: If agency approval is  
17 there, yes, you are absolutely right.

18 MS EDWARDH: One of the questions  
19 about this approval: I take it the approval is  
20 not given at large. The approval is given in  
21 respect of specific uses?

22 MR. CABANA: Yes.

23 MS EDWARDH: So you wouldn't hand  
24 the CIA or the FBI information and preapprove  
25 their use of the information anywhere they want to

1 use it?

2 MR. CABANA: No, absolutely not.

3 MS EDWARDH: And where would the  
4 locus of approval be within the RCMP?

5 Would you, sir, have authority, as  
6 the OIC of A-OCANADA, to make a decision about  
7 approval, or would you have to go up the chain to  
8 your superiors to seek approval for a sharing of  
9 information that involved use in a court or a  
10 tribunal?

11 MR. CABANA: In the context of  
12 this particular -- in the functions that I  
13 occupied in relation to this file?

14 MS EDWARDH: Yes.

15 MR. CABANA: I would definitely  
16 have to go to my superiors.

17 MS EDWARDH: And where would the  
18 ultimate locus of decision be?

19 MR. CABANA: I would submit to you  
20 that it would be at the Criminal Operations  
21 Officer level.

22 MS EDWARDH: Please forgive me,  
23 it's late in afternoon. Who was that in respect  
24 of the relevant time period? Is it Couture?

25 MR. CABANA: I believe it was

1 still Mr. Couture at that time.

2 MS EDWARDH: We can check that.

3 MR. CABANA: It was either  
4 Mr. Couture or Mr. Watson, but I believe it was  
5 Mr. Couture.

6 MS EDWARDH: All right. Do we  
7 then understand, sir, that when the U.S. INS  
8 refers to evidence or information used in the  
9 deportation "proceedings", that Couture or someone  
10 above him expressly authorized its use?

11 MR. CABANA: The request for  
12 information reached us through headquarters,  
13 through CID.

14 MS EDWARDH: Yes.

15 MR. CABANA: So considering the  
16 fact that we were asked by CID to provide this  
17 information to American authorities, I would  
18 submit to you that the approval was there.

19 MS EDWARDH: Well, I'm sorry, sir,  
20 at the time you are asked for information, much of  
21 the information is provided in circumstances where  
22 Mr. Arar is either living in Ottawa or abroad;  
23 right?

24 All the information passed before  
25 the CD-ROMs were passed or the disks. All that

1           went without --

2                           MR. CABANA:  You are referring  
3 here to the exchange of the CDs, I assume.

4                           MS EDWARDH:  No, I'm doing more  
5 than that.

6                           MR. CABANA:  Okay.

7                           MS EDWARDH:  I'm actually going to  
8 track the units of information.

9                           There were CDs exchanged while  
10 Mr. Arar was in Ottawa?

11                           MR. CABANA:  Yes.

12                           MS EDWARDH:  There were hard  
13 drives that may or may not have information about  
14 him -- you don't have to tell me.  But they were  
15 exchanged while he was in Ottawa?

16                           MR. CABANA:  Yes.

17                           MS EDWARDH:  Documents that were  
18 scanned in and distributed were done while he was  
19 in Ottawa?

20                           I think you said it took longer,  
21 but it was --

22                           MR. CABANA:  Yes.  You mentioned  
23 this morning that Mr. Arar left Ottawa with his  
24 family, I believe it was in May?

25                           MS EDWARDH:  End of June.  The



1 children and wife left in May.

2 MR. CABANA: I'm not familiar with  
3 the date. But that being the case, yes.

4 MS EDWARDH: Right. And that  
5 event, as we have established, sir, that  
6 information was given to expand the relevant  
7 agencies' information base or intelligence base?

8 MR. CABANA: That was done to make  
9 sure, for us to analyze this information in  
10 isolation, considering the global aspect of the  
11 threat. The information was shared to make sure  
12 that we didn't misinterpret any of the  
13 information.

14 MS EDWARDH: I understand.

15 MR. CABANA: Okay.

16 MS EDWARDH: Now, I want to move  
17 closer. When Mr. Arar is detained in the United  
18 States and you are notified that he's about to  
19 land and could you send your questions and/or  
20 package of information.

21 MR. CABANA: Initially all we were  
22 asked to provide was a series of questions.  
23 Clearly they were planning on interviewing  
24 Mr. Arar, so the fact that we were sending  
25 questions or not sending questions would not have

1 changed that. And the only thing we were asked  
2 was for the series of questions that had been  
3 prepared for January 22nd searches.

4 MS EDWARDH: All right. The  
5 questions were modified post-January 22nd because  
6 they refer to Mr. Arar's departure from Canada in  
7 June.

8 MR. CABANA: Mm-hmm.

9 MS EDWARDH: And the documentary  
10 record will show that at that time, or moments  
11 thereafter, A-OCANADA also submitted a summary,  
12 even though they said, "Hey, we have given you  
13 this or you have it all, but here's the summary."

14 In any event, my question is:  
15 When you came to this proceeding, the INS  
16 hearing if it was a hearing. Let's assume it was  
17 for a moment.

18 MR. CABANA: Yes.

19 MS EDWARDH: Was there any  
20 explicit approval given by your superiors to the  
21 use of this information in that particular  
22 deportation hearing?

23 MR. CABANA: Again, ma'am, if you  
24 look at the correspondence that reached the  
25 project, the request had been channelled through

1           headquarters, and I believe that it had the  
2           approval of Assistant Commissioner Proulx.

3                       MS EDWARDH:   So then if we were to  
4           ask the Assistant Commissioner, then, did you give  
5           explicit approval to the use of A-OCANADA's  
6           information in the deportation hearing in New  
7           York, would we expect him to both say yes and have  
8           a record of that?

9                       MR. CABANA:   I believe the record  
10          already exists.   Now, whether he would say yes,  
11          you would have to ask him the question.

12                      MS EDWARDH:   But that is your  
13          understanding?

14                      MR. CABANA:   That is my  
15          understanding, ma'am.

16                      MS EDWARDH:   In this open sharing  
17          of intelligence, this new environment you have  
18          described, the RCMP shared intelligence with its  
19          American counterparts.

20                      I take it, sir, you realized that  
21          the U.S. has interests and policing concerns that  
22          perhaps are a little larger than Canada.   It's a  
23          bigger nation.   It's one of the world's super  
24          powers, and it has interests that go beyond their  
25          borders and our borders in respect of these kinds

1 of investigations?

2 MR. CABANA: Yes.

3 MS EDWARDH: And in the agreement  
4 you reached, once you were an open book for the  
5 U.S. administration towards the policing entities  
6 to look at the investigation, was there any  
7 control placed upon them with respect to the  
8 distribution of this information to those allies  
9 other than Canada they chose to work with?

10 MR. CABANA: First of all, just to  
11 clarify, I was not privy to this agreement. This  
12 agreement was conveyed to me. So I did not  
13 participate in these discussions.

14 MS EDWARDH: Fine.

15 MR. CABANA: But what I can tell  
16 you is prior to the sharing -- and here we are  
17 talking about the sharing of the scanned documents  
18 and the sharing of the CDs -- the team managers,  
19 the A-OCANADA team managers, did have meetings  
20 with U.S. authorities just to remind them and make  
21 sure that they understood what the agreement, as  
22 it was relayed to us, was.

23 MS EDWARDH: Well, so far I  
24 understand the agreement included getting your  
25 approval for the use of the information in any

1 kind of tribunal.

2 Was there anything in the  
3 agreement that prevented the FBI or the CIA to  
4 hand it off to British intelligence?

5 MR. CABANA: Like I said, I was  
6 not privy to the agreement. I have never seen any  
7 written form of this agreement. My understanding  
8 was that, yes, there was.

9 MS EDWARDH: Yes, there was  
10 something that prevented it?

11 MR. CABANA: Yes.

12 MS EDWARDH: So it's your  
13 understanding, whatever this agreement says, at  
14 least your understanding of the agreement is once  
15 the information was transmitted to the U.S.  
16 agencies involved, they were not permitted to  
17 transmit it for intelligence purposes to other  
18 nations?

19 MR. CABANA: Well, they would have  
20 to obtain prior approval.

21 MS EDWARDH: It's still an  
22 intelligence use.

23 MR. CABANA: Yes.

24 MS EDWARDH: It's not a court use  
25 or a tribunal use.

1 MR. CABANA: No.

2 MS EDWARDH: So I take it while  
3 the U.S. entities could share it among themselves,  
4 they could not share it with other nations or  
5 other intelligence entities without coming back to  
6 the RCMP?

7 MR. CABANA: That was my  
8 understanding, ma'am.

9 MS EDWARDH: Do you recall at any  
10 time, while you were in charge of the  
11 investigation, where permission was sought to  
12 provide this information to intelligence agencies  
13 from other nations?

14 MR. FOTHERGILL: Again, I'm not  
15 quite sure what his answer is. It may raise an  
16 NSC concern.

17 But without knowing what he would  
18 answer the question, I can't state my objection  
19 one way or the other.

20 MS EDWARDH: With respect,  
21 Mr. Commissioner, I think that Mr. Fothergill  
22 either objects or he doesn't object. He should be  
23 given an opportunity to do so. But if he's not  
24 going to, then...

25 THE COMMISSIONER: Is this a

1           neither confirm nor deny?  If the answer is "no",  
2           would the witness be free to answer?

3           --- Laughter / Rires

4                       MR. FOTHERGILL:  I think that is  
5           the difficulty.  If I had to be forced one way or  
6           the other, I will object.

7                       THE COMMISSIONER:  You will  
8           object?

9                       MR. FOTHERGILL:  Yes.

10                      THE COMMISSIONER:  Okay.

11                      MR. ATKEY:  Mr. Commissioner, the  
12           usual.

13           --- Laughter / Rires

14                      THE COMMISSIONER:  Thank you,  
15           Mr. Atkey.

16                      MS EDWARDH:  I would like to say  
17           ditto.

18                      When did you become aware of the  
19           U.S. CIA policy of covert rendering of people to  
20           places where they may be at risk of interrogation  
21           and torture?

22                      MR. CABANA:  I would say my first  
23           indications would be at 10:35 on the 9th of  
24           October.

25                      MS EDWARDH:  Fair enough.  And I

1           guess if I were in your shoes, sir, I would get on  
2           the phone to my boss and then up the chain, or to  
3           my colleagues at CSIS, and say -- forgive my  
4           phraseology -- "What has happened here?"

5                       MR. CABANA: I basically had the  
6           same reaction, ma'am, but not immediately with my  
7           supervisors. My first reaction was to contact my  
8           counterparts at the U.S. Embassy with the same  
9           question.

10                      MS EDWARDH: And I want to just  
11           reflect on -- because we are not allowed to ask  
12           certain questions about this particular case, I  
13           want to ask about policy.

14                      You have conveyed to the  
15           Commissioner a sense of the need for being alert  
16           to threats to Canada's security.

17                      MR. CABANA: Yes.

18                      MS EDWARDH: And I just wonder  
19           whether you have any recollection of any occasion,  
20           while you were in charge as OIC of A-OCANADA, of  
21           sitting down with your colleagues and saying, "Do  
22           we need to revisit the nature of the  
23           information-sharing if in fact the U.S. feels free  
24           to operate outside the boundaries of what we  
25           understand to be reasonable and expected?"



1                   You look like you are angsting  
2                   over that question. Let me try it again.

3                   Did you sit down and say --

4                   MR. CABANA: I understand the  
5                   question, ma'am. I'm trying to formulate an  
6                   answer.

7                   Yes, but not necessarily in the  
8                   sense of -- not necessarily in that sense.

9                   Throughout the course of  
10                  progression of the investigation, there was a  
11                  number of issues that surfaced with U.S. agencies  
12                  over the agreement that had been in place and over  
13                  the, I guess it would be their interpretation of  
14                  the open sharing. And those issues were raised on  
15                  a number of occasions with my supervisors.

16                  MS EDWARDH: I'm not sure that  
17                  gets me to the --

18                  MR. CABANA: I understand that.

19                  MS EDWARDH: It may not go -- it  
20                  maybe you can't go any further.

21                  Certainly the world of rendition  
22                  to the risk of torture is, I'm going to suggest,  
23                  new to Canadian police strategies and I'm going to  
24                  put to you that the sharing of information that  
25                  may contribute to that is something that must now

1 be very carefully considered if its use could so  
2 profoundly jeopardize human rights?

3 MR. CABANA: I would suggest it  
4 is, ma'am.

5 MS EDWARDH: It's being  
6 reconsidered? Or it must be considered?

7 MR. CABANA: Must be considered.

8 MS EDWARDH: Thank you, sir.

9 I want to ask some random  
10 questions because they are left over as  
11 curiosities from my friend's examination-in-chief.

12 You made the point, sir, of saying  
13 in A-OCANADA there was an effort to include a  
14 Muslim police officer as a participant in the  
15 investigation, and the particular person you  
16 identified, first of all, was a Muslim person who  
17 was brought in from the Ottawa Police Force?

18 MR. CABANA: That was one of them,  
19 yes.

20 MS EDWARDH: Do you know, sir,  
21 whether this person is an Arab Muslim, or is he or  
22 she is a Muslim from another nation, such an  
23 Indonesia or Somalia?

24 MR. CABANA: I believe he is an  
25 Arab Muslim, ma'am.

1 MS EDWARDH: And you also made the  
2 observation that he had lasted only for a couple  
3 months.

4 MR. CABANA: Yes. The exact time  
5 period of when he left, I don't know. I couldn't  
6 tell you when he left, but it was for a short  
7 period of time, a few months.

8 MS EDWARDH: Do you know why he  
9 chose to leave the unit or the team?

10 MR. CABANA: It wasn't his choice.  
11 It was his department that required his assistance  
12 in other capacities.

13 MS EDWARDH: Fine. And with  
14 respect to the other Muslims that were brought in  
15 from the Sûreté du Québec, were they Arab Muslims  
16 or were they Muslims from other countries?

17 MR. CABANA: I wouldn't know,  
18 ma'am.

19 MS EDWARDH: I want to now deal  
20 with the hard drives, the seven hard drives.

21 I take it we have part of the  
22 information to obtain, but the seven warrants  
23 resulted in the seizure of 26 hard drives?

24 MR. CABANA: That was part of the  
25 items that were seized, yes.

1 MS EDWARDH: Yes. And you said  
2 hundreds of CD disks and tens of thousands of  
3 documents?

4 MR. CABANA: That's correct.

5 MS EDWARDH: I'm going to suggest  
6 to you, sir, that but for the sense of pressure or  
7 urgency around the sharing of information, while  
8 that is a huge volume, it's not the kind of volume  
9 that would ordinarily overwhelm the RCMP in  
10 conducting a criminal investigation.

11 It has to be a big investigation,  
12 but it wouldn't be overwhelming, if there wasn't  
13 urgency?

14 MR. CABANA: I wouldn't agree with  
15 that statement, ma'am.

16 Twenty-six hard drives and  
17 hundreds of CDs is a huge amount of data. In just  
18 one hard drive, you are talking about millions of  
19 pages, potentially, of information that has to be  
20 analyzed.

21 MS EDWARDH: It seems to me,  
22 though, even if I accede to your suggestion that  
23 the volume was overwhelming, that the principal  
24 concern of the team was that you couldn't be sure  
25 that you would identify what was relevant because

1           you have an image, I take it, Officer, that the  
2           puzzle transcends borders and nations. So you  
3           could be looking at an important piece of a puzzle  
4           but not have any picture in which to put it in.

5                       MR. CABANA: Yes. But in addition  
6           to that, in a normal criminal case, if you know  
7           the offence, you know the elements of the offence,  
8           you know what you are looking for, you can conduct  
9           an analysis and a search of the material that you  
10          are seizing in a much more focused approach.

11                       Considering the type of  
12          investigation, financial investigation we were  
13          conducting, we could not specifically research  
14          this information in that fashion. So the search  
15          had to be extremely wide.

16                       MS EDWARDH: Right. But still it  
17          could not be so broad as to fall outside the  
18          requirements of the Criminal Code and/or section 8  
19          of the Charter, which requires some specificity?

20                       MR. CABANA: Yes.

21                       MS EDWARDH: Now, I want to ask  
22          about the distribution of these hard drives, and  
23          you may not be able to tell me who they were given  
24          to, but I just want to be clear.

25                       I got the impression they were

1 mirrored and provided to any of the other agencies  
2 who were willing to take on the task of an  
3 analysis?

4 MR. CABANA: They were a mirror  
5 image.

6 MS EDWARDH: Yes?

7 MR. CABANA: And they were offered  
8 to the agencies that were participants in this  
9 investigation.

10 MS EDWARDH: U.S. and Canadian?

11 MR. CABANA: That's correct.

12 MS EDWARDH: And without intending  
13 to suggest that everyone doesn't understand that,  
14 you might just take 30 seconds and describe what  
15 the process of mirroring is.

16 MR. CABANA: What the process of  
17 mirror imaging is?

18 MS EDWARDH: Yes. What does it  
19 mean?

20 MR. CABANA: You are talking to  
21 the wrong person here.

22 --- Laughter / Rires

23 MS EDWARDH: Sorry,  
24 Mr. Commissioner.

25 You will agree with me, sir, that

1           mirroring a hard drive involves the taking of a  
2           forensically accurate copy of everything on the  
3           hard drive?

4                         MR. CABANA:  Yes, and there's  
5           software that is used and there's an identical,  
6           exact copy of the hard drive that is created on --

7                         MS EDWARDH:  Another disc?

8                         MR. CABANA:  Exactly.  A second  
9           hard drive.

10                        MS EDWARDH:  So literally  
11           everything on one drive is transferred or copied  
12           on to the other drive?

13                        MR. CABANA:  Exactly.  And there's  
14           a process that is done to preserve the integrity  
15           of all the data, but I'm not familiar with exactly  
16           what that is.

17                        MS EDWARDH:  One of the things  
18           that process does is it allows you to look very  
19           exhaustively even at information that may be  
20           deleted from a computer, as long as it has not  
21           been written over?

22                        MR. CABANA:  That's correct.

23                        MS EDWARDH:  I was waiting for an  
24           objection.

25                        MR. CABANA:  So was I.

1 MS EDWARDH: We deal with them in  
2 criminal cases too.

3 When you offered the hard drives,  
4 can you tell us, sir, whether there was any  
5 mechanism in place to coordinate the analysis?

6 In other words, if you give to the  
7 FBI the seven hard drives and you are analysing  
8 the seven hard drives, so you have two pieces of  
9 the puzzle and they decide down in West Virginia,  
10 or wherever they are, that they have another piece  
11 of the puzzle. What was the coordinating  
12 mechanism and who was it and how was it managed?

13 MR. FOTHERGILL: Commissioner,  
14 sorry, I haven't fallen asleep.

15 --- Laughter / Rires

16 MS EDWARDH: Thank you, sir.

17 MR. FOTHERGILL: The first  
18 question I think was an acceptable answer  
19 regarding technological investigative technique.

20 I think this second question takes  
21 us into a realm where we do assert a claim of  
22 national security confidentiality for a  
23 confidential investigative technique.

24 MS EDWARDH: I'm sorry, I'm not  
25 sure I understand.



1                   The first technique, mirroring the  
2                   hard drive, is standard, Mr. Commissioner, in any  
3                   criminal proceeding to deal with pornography or  
4                   stuff like that.

5                   THE COMMISSIONER: Right.

6                   MS EDWARDH: But I'm not sure that  
7                   I was talking about technique. I was asking about  
8                   how they intended to coordinate the different  
9                   pieces of information that might flow from the  
10                  distribution of the hard drives.

11                  I wasn't asking about techniques  
12                  or technology; I was asking about the management  
13                  structure of who was doing it.

14                  MR. FOTHERGILL: So long as there  
15                  is no reference to technology, I think the witness  
16                  can answer.

17                  THE COMMISSIONER: Okay. Go ahead  
18                  then.

19                  MR. CABANA: There was a mechanism  
20                  that was put in place, and the mechanism goes back  
21                  to -- if I can call it a mechanism -- goes back to  
22                  the agreement to share any pieces of information  
23                  back and forth.

24                  So as information was surfacing,  
25                  things that we felt were of relevance, it was

1 shared.

2                   Unfortunately, based on the  
3 conversations that I have had, I believe we are  
4 getting into the actual relationship with the  
5 American agencies that was created post-9/11. And  
6 I'm not sure, but I think that this might be  
7 problematic.

8                   MR. FOTHERGILL: Certainly if it's  
9 a proposal to name the involvement of other  
10 agencies other than the FBI, I would object.

11                   THE COMMISSIONER: All right. And  
12 I think that is the case.

13                   MR. CABANA: Well -- okay, let me  
14 say that, first of all, as I have stated, there  
15 were regular meetings with our counterparts where  
16 all of this information -- this was from the  
17 inception of the project -- where this information  
18 was shared.

19                   There was also information  
20 reaching us from our American counterparts on the  
21 results of their analysis.

22                   MS EDWARDH: You have described  
23 some of those meetings, but would the meetings be  
24 as regular as, you know, once a month or once  
25 every six weeks?

1 MR. CABANA: In general?

2 MS EDWARDH: Yes.

3 MR. CABANA: They would be several  
4 times a week.

5 MS EDWARDH: I see. So what you  
6 are really then describing, without telling any  
7 secrets, is there's a joint management meeting, so  
8 information will be flowing from all the entities  
9 into this management meeting which is  
10 multi-agency?

11 MR. CABANA: I believe that is a  
12 very good way of phrasing it.

13 MS EDWARDH: And, of course, I  
14 know that no computers were used so ...

15 Don't answer that.

16 So when you answered the  
17 question -- the reason I asked these questions,  
18 Officer, is you answered the question to  
19 Mr. Cavalluzzo that all you expected was a letter  
20 back. I obviously misunderstood you.

21 There was a regular reporting  
22 relationship from all the agencies involved about  
23 the results of their investigations?

24 MR. CABANA: That's correct.

25 MS EDWARDH: I want to deal with

1 another area that Mr. Cavalluzzo asked you about.

2 You were asked a number of  
3 questions about visits to Syria, and as I recall,  
4 Commission counsel proposed the question and you  
5 answered the RCMP did not send questions to the  
6 Syrian Military Intelligence on Mr. Arar.

7 Do you recall that question and  
8 that answer?

9 MR. CABANA: Yes, I believe so.

10 MS EDWARDH: And that RCMP  
11 officers did not go to Syria to interview  
12 Mr. Arar?

13 MR. CABANA: Not to my knowledge,  
14 no.

15 MS EDWARDH: And I take it, sir,  
16 you are not suggesting that in the same time frame  
17 that RCMP officers may not have travelled to Syria  
18 to deal with other persons.

19 MR. CABANA: I am not aware of any  
20 RCMP officer travelling to Syria.

21 MS EDWARDH: There was one that  
22 you intimated you believed was travelling to  
23 Syria.

24 If the witness could be provided  
25 Exhibit 173, I want to refer you, sir, to page 6

1 of 14.

2 This is a document you were  
3 referred to yesterday, and it is a fax to  
4 headquarters from the liaison office in Rome.

5 MR. CABANA: Yes, and you are  
6 absolutely right. I believe the liaison officer  
7 travelled to Syria. My comment referred to  
8 members of the A-OCANADA team --

9 MS EDWARDH: That is what I wanted  
10 to clarify.

11 MR. CABANA: Yes. Obviously the  
12 liaison officer, I would presume from this report  
13 here, did travel to Syria.

14 MS EDWARDH: Just for the record,  
15 this document is a fax in respect of Mr. Arar --  
16 or part of it? It's a summary involving him?

17 I'm sorry, I'm mistaken. Let me  
18 just recalibrate that one.

19 This is an answer to a series of  
20 questions obviously posed by the liaison officer  
21 to Brian Garvie in the course of his work, but  
22 it's quite clear that he is describing receiving  
23 information pertaining to Arar.

24 I take it, sir, your assumption is  
25 the liaison officer can, if he wishes, or has

1 business, travel to those areas in the world that  
2 he is accredited to and does do that?

3 MR. CABANA: Yes, I believe that  
4 is their function.

5 MS EDWARDH: Yes. And the liaison  
6 officer in Rome, wherever else he is accredited,  
7 we certainly know he is accredited to Damascus?

8 MR. CABANA: That's correct.

9 MS EDWARDH: So he represents --  
10 in some embassies there is a permanent  
11 accreditation, and in others the liaison officer  
12 travels regularly.

13 Is that fair?

14 MR. CABANA: That's fair.

15 MS EDWARDH: And do you know  
16 whether or not the liaison officer ever provided  
17 materials to Syrian Military Intelligence?

18 MR. FOTHERGILL: Commissioner, I'm  
19 sorry, I must object.

20 As I have said previously, we will  
21 permit disclosure of the fact that certain  
22 investigative avenues were explored, but whether  
23 certain investigative avenues were actually taken  
24 and whether they produced results, we object to on  
25 the grounds of national security confidentiality.

1 THE COMMISSIONER: There we go.

2 MR. ATKEY: Same observation.

3 THE COMMISSIONER: Thank you,  
4 Mr. Atkey.

5 MR. FOTHERGILL: I'm sorry,  
6 Commissioner, I may have overstated the objection.  
7 If it's limited to information  
8 about Mr. Arar, there is no objection.

9 MS EDWARDH: I believe,  
10 Mr. Commissioner, although perhaps others can  
11 correct me if I'm wrong, but I believe Ambassador  
12 Pillarella testified that the liaison officer  
13 travelled to Damascus and met and discussed Mr. El  
14 Maati.

15 Have I dreamt this up again,  
16 Mr. Cavalluzzo?

17 MR. CAVALLUZZO: But that was the  
18 year before. That was in January of 2002, if it  
19 happened.

20 MS EDWARDH: That's fair enough.

21 MR. CAVALLUZZO: In January of  
22 2003, Mr. El Maati obviously was in Egypt.

23 MS JACKMAN: Only from January  
24 26th.

25 MR. CAVALLUZZO: I'm sorry?

1 MS EDWARDH: From January 24th,  
2 2003.

3 THE COMMISSIONER: 2002.

4 MS EDWARDH: Two. 2002.

5 So I take it the first trip  
6 described by Mr. Pillarella is on the record but  
7 the second trip is off the record in respect of  
8 Mr. Arar?

9 MR. FOTHERGILL: May we just have  
10 a moment, please?

11 --- Pause

12 MR. FOTHERGILL: Commissioner,  
13 without knowing what the witness would say, I  
14 can't get clear instructions. So out of an  
15 abundance of caution, I must restate my objection.

16 THE COMMISSIONER: I have an idea  
17 what the witness would say, I think, as I recall.  
18 We have heard evidence about this, unless I'm  
19 misinterpreting, mis-recollecting.

20 Why don't we put that question to  
21 one side? There will be a break at some point,  
22 and you can consider it then, Mr. Fothergill.

23 Thank you.

24 MS EDWARDH: I wonder if I could  
25 just clarify?



1                   I thought the parameters were that  
2                   there was no objection if the information related  
3                   to Mr. Arar, the provision of information to the  
4                   Syrians in respect of Mr. Arar.

5                   Is that correct?

6                   THE COMMISSIONER: That is the  
7                   case. So you can pursue that line of questioning,  
8                   as I understand.

9                   MS EDWARDH: I do have a  
10                  supplementary, which then gets us right into the  
11                  problem. So let me reserve that one question.

12                 THE COMMISSIONER: The question  
13                 that I'm referring to then would relate to someone  
14                 other than Mr. Arar.

15                 MS EDWARDH: Thank you. I will  
16                 put those two questions on to the back burner  
17                 then.

18                 --- Pause

19                 MS EDWARDH: When Mr. Arar was in  
20                 the United States from September the 26th through  
21                 to his departure for Jordan and Syria, were you  
22                 aware, sir, of any Canadian police force having a  
23                 person, whether a liaison officer or not, present  
24                 during that interrogation?

25                 MR. CABANA: No, ma'am.

1 MS EDWARDH: But I take it the LO,  
2 liaison officer, in Washington, in the same way  
3 the liaison officer in Rome is free to conduct  
4 himself, assuming it's appropriate, without  
5 direction from headquarters in respect of such a  
6 matter as appearing at an interrogation?

7 MR. CABANA: Well, I believe  
8 actually the liaison officers, when they travel,  
9 seek authority to travel, even within their  
10 territory.

11 MS EDWARDH: But assuming the  
12 liaison officer is there in the foreign  
13 jurisdiction, he would be free, would he not, to  
14 attend an interview with a Canadian citizen if he  
15 was so invited?

16 MR. CABANA: Yes.

17 MS EDWARDH: And I take it from  
18 what you're saying, sir, that the -- you have no  
19 information that any liaison officer was present  
20 during the interviews conducted in respect of  
21 Mr. Arar?

22 MR. CABANA: I don't believe that  
23 he was, no.

24 MS EDWARDH: You were quite candid  
25 in answering a question posed by Mr. Cavalluzzo

1           yesterday that as far as you were concerned you  
2           were discharging your mandate in receiving  
3           information from Mr. Pillarella or any other  
4           source in respect of Mr. Arar. You were quite  
5           simply, Officer, building a case, if one could be  
6           made. That was your job and that's what you were  
7           doing.

8                           MR. CABANA: Yes, ma'am.

9                           MS EDWARDH: We have heard  
10           evidence, sir, that there may have been some  
11           understanding of the purposes of the RCMP being  
12           other than that, but rather designed to assist the  
13           Department of Foreign Affairs in helping Mr. Arar  
14           defend himself, and I think you put it yesterday  
15           that it would be pretty naive to think that that  
16           is what you were doing?

17                          MR. CABANA: I think by the nature  
18           of the conversations that surrounded this exchange  
19           of information, yes, it would be very naive.

20                          MS EDWARDH: And I want to ask one  
21           other question, if I could?

22                          MR. CABANA: Certainly.

23                          MS EDWARDH: Which goes to the  
24           direction not just of building a case and much  
25           more specific than just being of general use.

1                   I want to ask whether or not  
2 anyone ever said to you, "Listen, the Syrians are  
3 alleging that Maher Arar is a member of the Muslim  
4 Brotherhood, and he may stand trial on that as a  
5 charge in Syria, and indeed in some cases it's a  
6 death penalty offence.

7                   Did anyone ever ask you, sir, as a  
8 result of your investigations of Mr. Arar, "Do you  
9 have any information that can be transmitted to  
10 his defence counsel in Syria should that be the  
11 charge that goes forward"? Did anybody ask that  
12 question?

13                  MR. CABANA: Not in those specific  
14 terms, no, but the extent and the nature of the  
15 information that we had on Mr. Arar was clearly  
16 communicated to the different parties of the  
17 meetings. So, in other words, the representatives  
18 from DFAIT knew exactly the extent of the  
19 information that we had.

20                  MS EDWARDH: No, but Mr. Arar  
21 faces a more difficult challenge. If he had been  
22 charged in Syria, and if DFAIT knew the extent of  
23 the information, and we've heard Mr. Pardy kind of  
24 comment somewhat derisively about the validity of  
25 such an allegation, I want to know whether anybody

1           talked about your role as a police force in going  
2           over and putting forward evidence in defence of  
3           such an allegation?

4                       MR. CABANA:   With myself?  No,  
5           nobody ever approached me with this.

6                       MS EDWARDH:   And I take it, sir,  
7           if they didn't approach you, then the person to  
8           whom you handed your authority to in February of  
9           '03 would be -- who took over?  It moves into the  
10          INSET, the A-INSET?

11                      MR. CABANA:   Yes, it was  
12          integrated into the INSET.

13                      MS EDWARDH:   And who would be  
14          responsible for that?

15                      MR. CABANA:   It would be Inspector  
16          Warren Coons.

17                      MS EDWARDH:   And we have, I take  
18          it, no record that would indicate that Inspector  
19          Warren Coons was asked whether he would prepare a  
20          brief that could be used to defend the allegations  
21          in Syria?

22                      MR. CABANA:   I wouldn't have any  
23          knowledge of that.

24                      MS EDWARDH:   But certainly you  
25          weren't?

1 MR. CABANA: No.

2 MS EDWARDH: Now, I want to turn  
3 to an area in which I will just pose some  
4 questions.

5 You said that you first became --  
6 of Maher Arar -- aware of him on October the 12th,  
7 generally. That's really when he comes within the  
8 framework of your investigation, A-OCANADA's  
9 investigation?

10 MR. CABANA: Yes.

11 MS EDWARDH: And I want to go back  
12 to the issue of racial profiling for a moment.

13 Mr. Arar has a meeting with a  
14 Mr. Almalki for a relatively short period of time,  
15 where he is seen, for a period of time, standing  
16 in the rain having a conversation that is not the  
17 subject of an interception.

18 Now, you can object, but it's on  
19 the record. Not the subject of an interception.

20 And my concern, sir, is whether or  
21 not that series of observations -- you can't  
22 answer why, because I don't want you to, but  
23 whether or not the series of observations reported  
24 to you --

25 --- Laughter / Rires

1 MS EDWARDH: I'm sorry. Mr. Bayne  
2 has his finger ...

3 --- Off microphone / Sans microphone

4 THE COMMISSIONER: It's sort of an  
5 intimidating factor.

6 MS EDWARDH: I take it that I am  
7 clearly going into an area where Mr. Bayne has  
8 some objection on the basis of fairness to the  
9 witness.

10 You, Mr. Commissioner, have the  
11 gist of where I'm going, I think.

12 I am concerned about the  
13 thresholds at which people are swept up and the  
14 understanding. There may be an answer, you will  
15 hear it, I will not. I will not pursue the area  
16 any further.

17 THE COMMISSIONER: Okay. Thank  
18 you. And I can say, as I've said before, this is  
19 an area that in the in-camera evidence was  
20 canvassed thoroughly by Mr. Cavalluzzo.

21 MS EDWARDH: I have a few more. I  
22 want to put my questions so that -- in general,  
23 and so I know for certain that I can't go there.

24 THE COMMISSIONER: Right.

25 MS EDWARDH: On October 30, 2001,

1           sir, do I understand that a member of the RCMP  
2           obtained from Minto a copy of Mr. Arar's lease?

3                         MR. CABANA:  No, ma'am.  It was a  
4           person seconded.

5                         THE COMMISSIONER:  I think that  
6           question itself is not objectionable, is it?

7                         MR. BAYNE:  Well, I thought it  
8           was, given the directions we received the other  
9           day because of what naturally follows from it --

10                        THE COMMISSIONER:  But nothing has  
11           followed yet.  That may be the end of it.

12           --- Laughter / Rires

13                        THE COMMISSIONER:  The next  
14           question may well be objectionable.

15           --- Laughter / Rires

16                        MS EDWARDH:  Did you have  
17           reasonable and probable grounds to execute, or did  
18           the team have reasonable and probable grounds to  
19           execute a search warrant in respect of this lease?

20                        THE COMMISSIONER:  Okay, I think  
21           that is a question that the witness can't answer.  
22           He would have to refer to information over which  
23           the Government claims NSC.

24                        MS EDWARDH:  Certainly, leaving  
25           aside the answer to that question, on January



1 10th, when you considered getting a search warrant  
2 in respect of Mr. Arar's home, you conclude you  
3 did not have RPG in respect of him or his home?

4 MR. CABANA: That's correct.

5 THE COMMISSIONER: There's more  
6 than one way.

7 --- Laughter / Rires

8 MS EDWARDH: Now, this is probably  
9 one of the last two or three questions there may  
10 be some dispute about, and then I will give up. I  
11 want to talk about the border.

12 The team you have described was  
13 created, sir, to accommodate the perceived needs  
14 for the investigation included persons who were  
15 part of CCRA?

16 MR. CABANA: That's correct.

17 MS EDWARDH: And I think you've  
18 described that.

19 MR. CABANA: Yes.

20 MS EDWARDH: And through access,  
21 ordinary access ...

22 --- Pause

23 MS EDWARDH: I have provided this  
24 to all of my -- Mr. Registrar, I'm looking for  
25 this document and it is called a watch list or

1 something -- "the list".

2 THE COMMISSIONER: 174.

3 EXHIBIT NO. P-174: List of  
4 the occasions that Mr. Arar  
5 travelled across the  
6 international border between  
7 Canada and elsewhere, from  
8 September 12, 2000 to January  
9 24, 2002

10 MS EDWARDH: Exhibit 174?

11 THE COMMISSIONER: Yes, it is.

12 MS EDWARDH: Thank you very much,  
13 Mr. Commissioner.

14 I understand this to be, and  
15 perhaps you could just confirm its character, a  
16 list of the occasions that Mr. Arar travelled  
17 across the international border between Canada and  
18 elsewhere?

19 MR. CABANA: It could very well  
20 be, ma'am. I've never seen this document.

21 MS EDWARDH: Well, let's look at  
22 the very last few entries of the document and see  
23 if you can help me with them.

24 This document was disclosed  
25 pursuant to Access, and I understand it to be a

1 document in respect of Mr. Arar's travels across  
2 the Canadian border -- oh, I believe there may be  
3 a more redacted version, but this is our Access.

4 Now, you see in the second page,  
5 sir --

6 MR. CABANA: Yes?

7 MS EDWARDH: -- there is a  
8 reference in respect of two dates that I'm curious  
9 about. The first -- the top would be the date of  
10 December 20, 2001. Do you see that?

11 MR. CABANA: Yes, I see that.

12 MS EDWARDH: And then another  
13 date, which would be January 24, 2002?

14 MR. CABANA: Appears to be, yes.

15 MS EDWARDH: Yes. And assuming  
16 this is the document described, as I've just  
17 suggested to you, just to the right of those  
18 entries it's clear the word "terrorism" is  
19 written?

20 MR. CABANA: Yes, I see that.

21 MS EDWARDH: And can you, sir,  
22 indicate whether or not A-OCANADA and the  
23 investigators had placed Mr. Arar on a watch list  
24 for his travels where he had been designated by  
25 A-OCANADA as a person to whom that label ...

1 MR. FOTHERGILL: Go ahead.

2 MS EDWARDH: ... applied?

3 MR. FOTHERGILL: Commissioner, the  
4 ability of the RCMP to request lookouts for  
5 individuals both in Canada and the United States  
6 is acknowledged.

7 There is, however, a claim of  
8 National Security Confidentiality with respect to  
9 thresholds, characterizations, particular  
10 individuals and the like, so I do object to the  
11 witness answering that question.

12 THE COMMISSIONER: Okay. Thank  
13 you.

14 MS EDWARDH: Should anyone care,  
15 Commissioner, the more redacted version of this  
16 document is Exhibit P-85, tab 91, volume 3.

17 THE COMMISSIONER: Thank you,  
18 Ms Edwardh.

19 MS EDWARDH: As a result of  
20 Mr. Arar's passage through the border on December  
21 20th, and leaving aside any description of how you  
22 got it, did you or did you not receive copies of  
23 his personal papers, his cards he was carrying, et  
24 cetera?

25 MR. FOTHERGILL: Again,

1 Commissioner, I must object.

2 MR. ARAR: Well, sorry. This is  
3 too much -- there is evidence. There is evidence  
4 in the RCMP documents. Come on.

5 MS EDWARDH: Can I have one  
6 moment?

7 MR. ARAR: This is just going too  
8 much.

9 MS EDWARDH: Can I take a  
10 five-minute break?

11 THE COMMISSIONER: We'll rise for  
12 15 minutes.

13 THE REGISTRAR: Please stand.

14 --- Upon recessing at 2:33 p.m. /

15 Suspension à 14 h 33

16 --- Upon resuming at 2:56 p.m. /

17 Reprise à 14 h 56

18 THE REGISTRAR: Please be seated.

19 MS EDWARDH: Thank you,  
20 Mr. Commissioner, for your indulgence.

21 In addition to the most recent  
22 exhibit, Exhibit 179, I would like to file for  
23 your consideration three other documents, if I  
24 could have Mr. Registrar hand them out. Each of  
25 my colleagues have been provided with copies of

1           them, and they may be of some assistance to you.

2                       MR. BAYNE: May I just state for  
3           the record, I understand, due to a conversation my  
4           friend and I had before you came in,  
5           Mr. Commissioner, that the purpose of where we're  
6           going now is to examine matters on which you ruled  
7           in your ruling, and in the directions you gave and  
8           that I believe are covered in the opening of  
9           Mr. Cavalluzzo, and I'm reading:

10                        "In the meantime, we have  
11                       determined that because of  
12                       the Government's NSC claims,  
13                       the investigative steps taken  
14                       in the fall of 2001 cannot be  
15                       fairly canvassed in the  
16                       public hearings."

17                       Now, I'm somewhat constrained in  
18           the public forum.

19                       I don't want to mislead the  
20           Canadian public in any way that this investigator  
21           is unwilling to discuss fully this matter. He  
22           would like very much to be free to explain  
23           everything, but I think we're coming -- an attempt  
24           through the back door to do what can't be done  
25           through the front door.

1 THE COMMISSIONER: I must say I'm  
2 in the dark at this point. I'm not sure what  
3 we're attempting to do.

4 MR. BAYNE: Well, I think we're  
5 attempting to deal with issues on which you have  
6 ruled about --

7 THE COMMISSIONER: I don't even  
8 know what issue we're dealing with at this point.  
9 Should I read something?

10 MR. BAYNE: Perhaps my friend can  
11 broadly explain.

12 MS EDWARDH: Mr. Commissioner, I  
13 intend to do examination in this area. These are  
14 documents which I do not know if you have. It may  
15 be of assistance to you when you review the  
16 in-camera evidence.

17 These are not documents produced  
18 by the Government of Canada, the RCMP --

19 THE COMMISSIONER: You're just  
20 seeking to file the documents.

21 MS EDWARDH: I am simply seeking  
22 to file the documents so that you and  
23 Mr. Cavalluzzo will have access to them along with  
24 the handwritten notes of the officer.

25 THE COMMISSIONER: And they are

1 documents that are obviously in the public domain.

2 MS EDWARDH: They are documents  
3 produced by the Government of Canada through  
4 Access to Information.

5 THE COMMISSIONER: I can't imagine  
6 there's any difficulty with that.

7 MR. BAYNE: You're right.

8 --- Laughter / Rires

9 MS EDWARDH: The first -- just so  
10 that we all have them in order, they are  
11 handwritten notes and --

12 THE COMMISSIONER: The handwritten  
13 notes will be 175.

14 MS EDWARDH: Exhibit 175.

15 EXHIBIT NO. P-175: Notes in  
16 relation to Canada border  
17 seizure of Mr. Arar's  
18 belongings

19 MS EDWARDH: And without expanding  
20 on them at all, Mr. Commissioner, I would draw  
21 your counsel's attention to page 2 of the  
22 handwritten notes under the period of time marked  
23 1910, and the reference, "Value and possible  
24 viewing by NSIS." That's why the document is  
25 being filed and that's why we --



1 THE COMMISSIONER: That's helpful.

2 Thank you.

3 MS EDWARDH: And this is obviously  
4 in relation to the seizure.

5 This is, as well, two Customs  
6 cards, one pertaining to November 29th, '01, and  
7 the other to December 20th. I am particularly  
8 interested in showing to you the document which  
9 has "SimComms" on the top left-hand corner, which  
10 relates -- do you see that?

11 MR. CABANA: Yes.

12 MS EDWARDH: And I'm sure if your  
13 counsel draws to your attention that this card we  
14 believe is the subject of a profile correction in  
15 the profile.

16 Ask that that be marked as the  
17 next exhibit?

18 THE COMMISSIONER: That's 176.

19 EXHIBIT NO. P-176: Customs  
20 Declaration Card for  
21 Mr. Maher Arar, dated  
22 November 29, 2001

23 MS EDWARDH: And then just for  
24 your reference, because it ties to the original  
25 document, the next document, I'd ask that it be

1 filed as Exhibit 177.

2 THE COMMISSIONER: 177.

3 EXHIBIT NO. P-177: Customs

4 Declaration Card for

5 Mr. Maher Arar, with

6 Mr. Arar's business card

7 MS EDWARDH: Thank you,

8 Mr. Commissioner, and I'm instructed that I have

9 no further questions to ask. Thank you very much.

10 THE COMMISSIONER: Okay. Thank

11 you Ms Edwardh?

12 Mr. Fothergill?

13 EXAMINATION

14 MR. FOTHERGILL: Thank you,

15 Commissioner.

16 Superintendent Cabana, I'd like to

17 begin by seeking some clarification of a term that

18 you've used on a couple of occasions to

19 characterize the approach of the RCMP to the

20 conduct of national security investigations

21 post-9/11, and you referred, I think at least

22 twice, to a concept of zero tolerance.

23 MR. CABANA: Yes, sir.

24 MR. FOTHERGILL: At the same time

25 I think you've told us that there was a shortage

1 of resources, and I'm wondering if you could  
2 explain for us how you reconcile the approach of  
3 zero tolerance with finite resources.

4 MR. CABANA: The term, or the  
5 concept of zero tolerance, was in terms of  
6 investigative avenue, so it -- basically the  
7 directives that we were given is to look at all  
8 available avenues, not to disregard anything, and  
9 like I've also said, I think yesterday in my  
10 testimony, to leave no stones unturned.

11 The lack of resources following  
12 9/11, I'm not sure I'm following your question  
13 because I think they are two separate things. I  
14 mean, every agency -- I would suggest probably  
15 around the world, but definitely in Canada, and  
16 certainly with respect to the RCMP, lacked  
17 sufficient resources and had to redistribute --  
18 there was over 2,000 investigators, resources,  
19 that were redistributed post-9/11 immediately  
20 after the attacks to try to address the crisis.

21 So clearly the lack of resources  
22 was in terms of dedicated national security  
23 resources.

24 MR. FOTHERGILL: What I'm  
25 suggesting is that zero tolerance doesn't mean

1           that you pursue every single lead.  There's some  
2           exercise of judgment, I assume, in that you will  
3           pursue credible leads, not every single lead you  
4           ever receive?

5                         MR. CABANA:  Well, what the zero  
6           tolerance was, it required us to have a look at  
7           everything and determine the credibility, which  
8           would, like I stated I believe a little earlier  
9           today, which would also include any information or  
10          statement reaching us where the -- before any  
11          investigative action or investigative steps are  
12          developed based on this information, it has to be  
13          analyzed, it has to be looked at.  But if it  
14          offers a possibility, we have to look at that  
15          possibility.

16                        MR. FOTHERGILL:  But you wouldn't  
17          say that the zero tolerance approach meant that  
18          you suspended all judgment about whether a lead  
19          was worth pursuing?

20                        MR. CABANA:  Oh no, definitely  
21          not.

22                        MR. FOTHERGILL:  I'd like to ask  
23          you some questions about the national security  
24          policy of the RCMP, and I think the one that was  
25          in effect during the establishment of Project

1 A-OCANADA we can find at Exhibit P-12, tab 34.

2 --- Pause

3 MR. FOTHERGILL: Now, this is the  
4 national security investigations policy of the  
5 RCMP, and I think you've told us that, from your  
6 perspective, this policy did not apply to Project  
7 A-OCANADA because Project A-OCANADA was a criminal  
8 investigation. Is that right?

9 MR. CABANA: That's correct.

10 MR. FOTHERGILL: Regardless of  
11 whether you considered this policy to apply to  
12 your investigation, I'd just like to ask you if,  
13 in fact, you complied with it, and I am going to  
14 do that with reference in particular to the  
15 reporting requirement in section E.2, which I  
16 think is the second page.

17 So again, regardless of whether  
18 this policy applied to Project A-OCANADA, we see  
19 that in E.2 reporting, E.2.a, with respect to the  
20 responsibility of the CROPS officer, that was to  
21 immediately notify national headquarters of a  
22 potential threat to national security of a known  
23 or suspected criminal extremist, or instance  
24 affecting national security.

25 Can you tell us whether that was,

1 in fact, done in respect of Project A-OCANADA?

2 MR. CABANA: Yes, I believe I  
3 testified to that in the sense that daily SITREPs  
4 were being forwarded to CID, to headquarters, who  
5 holds really the responsibility with respect to  
6 national security matters.

7 They were kept abreast of all  
8 developments in the file, and all the information,  
9 and here I'm speaking of the work product of the  
10 file, was being uploaded to SCIS on a daily basis.

11 On top of that, CID was advised of  
12 all the multi-agency meetings that we were having,  
13 and for the most part were attending those  
14 meetings as well.

15 MR. FOTHERGILL: So if we look at  
16 section E.2.a.2, to the extent that there were any  
17 operational plans, would national headquarters  
18 have been aware of them?

19 MR. CABANA: They would be  
20 approved by them, sir.

21 MR. FOTHERGILL: And we see that  
22 an initial report should be made within 14 days.  
23 I'm referring now to number 3.

24 MR. CABANA: Yes.

25 MR. FOTHERGILL: I take it you

1 would say that that was complied with?

2 MR. CABANA: That was done on a  
3 daily basis, sir.

4 MR. FOTHERGILL: So again, when we  
5 see in the next paragraph: "At least once a  
6 month, update ongoing investigations," you would  
7 say that you, in fact, exceeded that requirement?

8 MR. CABANA: We had daily  
9 requirements that were imposed on us by Criminal  
10 Operations Officer. All of our reports were being  
11 forwarded to CID.

12 I guess -- I can try to clarify  
13 when I stated that the national security policy  
14 didn't apply. I think it's more in the sense of  
15 reporting structure. It's more in the sense that  
16 the direction of the file, the development of the  
17 file, was the responsibility of the Criminal  
18 Operations Officer and was done in the same  
19 context as other criminal investigations.

20 MR. FOTHERGILL: From your  
21 perspective, did you detect a change in approach  
22 on the part of headquarters over the month that  
23 Project A-OCANADA was in operation? I don't mean  
24 necessarily just in relation to that project, but  
25 an evolution of national security program at

1 national headquarters?

2 MR. CABANA: Oh, very much so.

3 MR. FOTHERGILL: Could you tell us  
4 something of what you observed of the evolution?

5 MR. CABANA: Well, indeed the  
6 policy that we are reviewing here was modified,  
7 the training that was available for the members  
8 was modified. Over time, and I would submit that  
9 it's probably as CID -- that the people in CID  
10 were getting a handle on all the SHOCK tips,  
11 because as of November, I believe it was November  
12 2001, there was still 10,000 tips that had to be  
13 processed. So there's a huge volume of  
14 information flowing into CID.

15 Once they managed to get control  
16 of this -- get it under control, that's the best  
17 way I can describe it, then the coordination  
18 aspect of the different projects CID became a lot  
19 more involved in coordinating.

20 Now, in that respect, though, the  
21 coordination was done, although it was direct  
22 contact with the team, there was direct contact  
23 with me, the direction still coming from Criminal  
24 Operations.

25 MR. FOTHERGILL: If I can ask you



1 to address your mind to the days and weeks  
2 immediately post-9/11, and, in fact, just prior to  
3 9/11, is it fair to say that the national security  
4 program of the RCMP was quite decentralized in  
5 that it typically was the responsibility of the  
6 divisions to investigate threats of national  
7 security?

8 MR. CABANA: I believe that the  
9 reporting structure was still in place in the  
10 sense that the NSIS units were reporting to CID,  
11 but I believe the way you're phrasing it is a good  
12 description of what the situation was. The work  
13 that was being performed was directed mostly by  
14 the divisions.

15 MR. FOTHERGILL: And then 9/11  
16 massively increased the priority that the RCMP  
17 attached to national security and, in particular,  
18 what is sometimes referred to as Sunni Islamic  
19 extremism. Is that right?

20 MR. CABANA: Very much so, yes.

21 MR. FOTHERGILL: And did you  
22 perceive an increased attention to the program on  
23 the part of the RCMP, and in particular, CID?

24 MR. CABANA: Yes. Since 9/11, the  
25 national security program of the RCMP, and still

1 to this day, I'm responsible for that program for  
2 the Province of Quebec, is still at the forefront  
3 of the priorities of the RCMP.

4 MR. FOTHERGILL: Now, you're  
5 aware, I take it, that in November of 2003, there  
6 were some new ministerial directives that were  
7 issued to the RCMP by the Solicitor General?

8 MR. CABANA: Yes, sir.

9 MR. FOTHERGILL: And would you say  
10 that those served to even further increase the  
11 centralization of the national security program?

12 MR. CABANA: Very much so.

13 MR. FOTHERGILL: So when we hear  
14 about disagreements or tensions between Project  
15 A-OCANADA and CID, in your view, can we attribute  
16 any of that to the evolving role of CID in matters  
17 of national security?

18 MR. CABANA: To some extent, yes.  
19 But as I stated, I've been involved in major  
20 crime -- major crime investigations --  
21 --- Laughter / Rires

22 MR. CABANA: -- for the best part  
23 of 20 years, and as soon as you're getting  
24 involved in multijurisdiction types of  
25 investigations, there is always conflicts that

1 will surface.

2 So the conflicts that were  
3 surfacing in this investigation here were not  
4 necessarily unusual. It's very common for  
5 investigative teams that have commonalities that  
6 are looking at the sometimes same organization --  
7 maybe not the same individuals, but the same  
8 organizations -- to have a difference of opinion,  
9 or to express concern over investigative steps  
10 that are being undertaken by another team.

11 These are always resolved, and do  
12 not create any negative impact per se to the  
13 investigation.

14 So this was not a situation  
15 where that was out of the ordinary.

16 MR. FOTHERGILL: I'm going to ask  
17 you a few questions now about training of the  
18 investigative team members, and I think you said  
19 that post-9/11, there wasn't really training  
20 available. Could you elaborate on that, please?

21 MR. CABANA: Well, I think there  
22 was a basic -- there was training that was  
23 available with respect to national security  
24 investigations. I think personally, from my  
25 discussions with members that took that training

1 pre-9/11, it was basic training, looking at policy  
2 and looking at information exchange and things of  
3 that nature.

4 It wasn't training -- the same  
5 type of training as you follow or you get when  
6 you're getting involved, for example, and I'm  
7 always making reference to Proceeds of Crime  
8 because I spent so many years there, but in the  
9 advanced type of training that you get in Proceeds  
10 of Crime, looking at international relations and  
11 the obtaining or securing of evidence in foreign  
12 jurisdictions and things of that nature. It  
13 wasn't as evolved.

14 MR. FOTHERGILL: I don't know if  
15 you can help us with this, but can you tell us to  
16 what extent the criminal extremism training  
17 available pre-9/11 would have addressed, in  
18 particular, the Sunni Islamic extremist threat?

19 MR. CABANA: Would have addressed  
20 the Sunni Islamic extremist ...

21 MR. FOTHERGILL: Threat. As  
22 distinct from other forms of criminal extremism  
23 that we might encounter in Canada.

24 MR. CABANA: I don't think it  
25 would have changed anything, personally.

1 MR. FOTHERGILL: Changed or  
2 addressed. I'm asking you whether the syllabus,  
3 to your knowledge, and you may not know, but  
4 whether the criminal extremism syllabus addressed  
5 Sunni Islamic extremism in any great --

6 MR. CABANA: In the training that  
7 was provided pre-9/11?

8 MR. FOTHERGILL: That's right.

9 MR. CABANA: I have no knowledge.

10 MR. FOTHERGILL: All right. Fine.  
11 Do you know whether, in fact, the criminal  
12 extremism course was significantly altered after  
13 9/11?

14 MR. CABANA: That's my  
15 understanding, yes.

16 MR. FOTHERGILL: All right. Can  
17 you comment on whether members of your  
18 investigative team engaged in what I might call  
19 on-the-job learning or training?

20 MR. CABANA: I would submit to  
21 you, sir, that we all did.

22 MR. FOTHERGILL: All right. Could  
23 you elaborate on that, please?

24 MR. CABANA: Well, in the sense in  
25 that there was questions and comments that were

1           made with respect to the Muslim investigators that  
2           joined our team, and some of the lectures that  
3           were followed, and I hope I'm not going to offend  
4           anybody here, but 9/11 and immediately post-9/11,  
5           there was a large number of us that were faced  
6           with a new phenomenon.

7                                 First of all, we had the events  
8           themselves, and the type of investigation and  
9           criminal offenses that we were being asked to  
10          investigate, some of which we could easily,  
11          especially with the financial aspect, the members  
12          that we had, the investigators, could easily use  
13          the expertise that they had accumulated over the  
14          previous years.

15                                We were faced with -- well,  
16          frankly, there was names that we couldn't  
17          interpret the names. Looking at the names, we  
18          didn't know if it was a first name or if it was a  
19          family name. Things of that nature. It was  
20          something new for us.

21                                And one of the purposes of having  
22          people that could explain the meaning and the  
23          nature of the relationships and all that. That's  
24          why those people were there.

25                                MR. FOTHERGILL: And did you, in

1 fact, have people with that sort of expertise as  
2 part of your team?

3 MR. CABANA: Yes, we did.

4 MR. FOTHERGILL: And did they have  
5 the opportunity to mentor others about some of  
6 these ideas?

7 MR. CABANA: Yes, very much so.  
8 Prior to the searches of January 22nd, again, we  
9 had concerns, trying not to offend anybody, in the  
10 manner in which these searches were conducted, and  
11 we had a consultation process in place to see what  
12 we could and couldn't do. Was there anything that  
13 we normally do in these types of searches that we  
14 shouldn't be doing here that might be offensive,  
15 and we didn't know. So there was people there to  
16 advise us.

17 MR. FOTHERGILL: Moving on to  
18 another subject. Ms Edwardh asked you about the  
19 proper definition of certain terms that we have  
20 heard, such as "person of interest," "a witness,"  
21 "a suspect," or "a subject of the investigation,"  
22 and my question to you is: How well-defined are  
23 these terms? Does everybody use them  
24 consistently, or is there a variation --

25 MR. CABANA: No. No, not at all.

1 To my knowledge, they're not well-defined.

2 MR. FOTHERGILL: So we could, for  
3 example, have somebody who was a person of  
4 interest but on a particular day a target of  
5 surveillance?

6 MR. CABANA: Oh, very much so. As  
7 I say, you have to look at the context that the  
8 term is used in. And if a person was tasked to do  
9 something specific, in the reports that are  
10 generated in relation to that task, they might  
11 refer to the person as a target, he's a target of  
12 surveillance, but he's not necessarily the target  
13 of the project. So that's what I mean is, people  
14 have different definitions of the terms and you  
15 have to look at the context in which these terms  
16 are used.

17 MR. FOTHERGILL: I'd like to ask  
18 you now some questions about your relationship  
19 with the Department of Foreign Affairs.

20 MR. CABANA: Yes, sir.

21 MR. FOTHERGILL: You've been asked  
22 extensively about what's been termed an offer to  
23 share information with Syria. But let me just  
24 make sure we have your evidence clearly.

25 Your offer was made to the



1 Department of Foreign Affairs, correct?

2 MR. CABANA: Yes, sir.

3 MR. FOTHERGILL: And as I  
4 understand it, the offer was never accepted -- or  
5 at least you never --

6 MR. CABANA: To -- no, it was  
7 never accepted, to my knowledge --

8 MS EDWARDH: I'm going to object  
9 because I don't think the witness can answer the  
10 question. He certainly can within the purview of  
11 his direction and control over the project, which  
12 gets us to February 2003, but not beyond that.

13 MR. FOTHERGILL: That's perfectly  
14 fine. If you would please, Superintendent Cabana,  
15 limit your answer to your personal knowledge.

16 MR. CABANA: While I was attached  
17 to Project A-OCANADA, the project never made any  
18 direct offer of sharing information with Syrian  
19 authorities. Now, whether, based on discussions  
20 with DFAIT, DFAIT extended this offer, I have no  
21 knowledge of that.

22 MR. FOTHERGILL: All right. Now,  
23 you did mention that you received some information  
24 that originated in Syria through the Department of  
25 Foreign Affairs, and I'm referring here

1 specifically to either consular reports or the  
2 summary of what Mr. Arar was alleged to have told  
3 the Syrians, correct?

4 MR. CABANA: Yes, sir, that's  
5 correct.

6 MR. FOTHERGILL: Just as a point  
7 of clarification, because I think at one point it  
8 was suggested that you received these items from  
9 Mr. Pillarella. In fact you received these items  
10 from ISI, correct? The intelligence branch of the  
11 Department of Foreign Affairs?

12 MR. CABANA: I don't know who I  
13 received them from. I didn't receive them from  
14 Mr. Pillarella at that meeting, like I said, I  
15 believe that this information reached us  
16 subsequent to the meeting, I believe.

17 MR. FOTHERGILL: And you are  
18 referring to the November 6th meeting?

19 MR. CABANA: Yes.

20 MR. FOTHERGILL: Okay.

21 Now, I think you told us that from  
22 a police perspective, when you receive this  
23 information, your interest is in furthering your  
24 investigation as opposed to assisting Mr. Arar,  
25 for example?

1 MR. CABANA: Yes.

2 MR. FOTHERGILL: Now, is it  
3 possible that from the Foreign Affairs  
4 perspective, they may have a couple of reasons for  
5 giving that information to you --

6 MS EDWARDH: Objection. I don't  
7 think the witness is competent to answer what the  
8 Foreign Affairs perspective is.

9 MR. FOTHERGILL: With respect,  
10 Commissioner, that seems a very, very technical  
11 objection. This is an inquiry, and he can express  
12 to us his knowledge, such as it is.

13 THE COMMISSIONER: Yes, if he has  
14 any knowledge --

15 MR. FOTHERGILL: If he has any.

16 THE COMMISSIONER: -- as a result  
17 of his dealings with Foreign Affairs which would  
18 indicate.

19 MR. FOTHERGILL: Exactly.

20 THE COMMISSIONER: Yes, we  
21 wouldn't want you to guess what may be there, but  
22 if there's any indication you had, or inferences  
23 that you drew or something of that sort, I think  
24 that would be fair.

25 MR. FOTHERGILL: What I'd like to

1 do, Commissioner, is perhaps put to the witness  
2 two possible purposes that Foreign Affairs might  
3 have in sharing the information, and if he  
4 believes that these are not, in fact, the  
5 purposes, he can certainly tell us.

6 THE COMMISSIONER: So long as it's  
7 understood, based on his interaction with Foreign  
8 Affairs.

9 MR. FOTHERGILL: Exactly.

10 THE COMMISSIONER: Rather than --

11 MR. CAVALLUZZO: If I might  
12 interject, Commissioner. I think that's a rather  
13 leading way to ask this witness the question as to  
14 his knowledge. Perhaps he should ask him what his  
15 knowledge is --

16 THE COMMISSIONER: I think that  
17 would be fair, too. I mean, given -- as I've said  
18 before to counsel who are examining witnesses who  
19 are aligned in interest with counsel's interests,  
20 it's much more of assistance to me if the witness  
21 is not led.

22 MR. FOTHERGILL: All right. Thank  
23 you.

24 THE COMMISSIONER: Because then --  
25 in any event, for all the reasons litigators know.

1 MR. FOTHERGILL: In that case,  
2 Superintendent Cabana, do you in fact know what  
3 the purpose, from the Foreign Affairs perspective  
4 is, of giving information to the police?

5 MR. CABANA: Based on the  
6 conversations that I had with them?

7 MR. FOTHERGILL: Based on anything  
8 that you wish to refer to.

9 MR. CABANA: The belief that I had  
10 was it was in furtherance of the threat to Canada.

11 MR. FOTHERGILL: All right. Thank  
12 you.

13 Now, you mentioned that at this  
14 November 6th meeting, consular reports were  
15 discussed, and Ms Edwardh referred you to the  
16 October 23rd consular report. Do you recall her  
17 doing that?

18 MR. CABANA: Yes.

19 MR. FOTHERGILL: And I think you  
20 agreed that that report was in the hands of  
21 Project A-OCANADA in advance of the November 6th  
22 meeting. Is that correct?

23 MR. CABANA: That's correct.

24 MR. FOTHERGILL: I think you also  
25 told us that, quite apart from that, consular

1 reports, updates, were discussed as part of that  
2 meeting?

3 MR. CABANA: Yes, that's correct.

4 MR. FOTHERGILL: Could I ask you  
5 to refer to the October 29th consular report.  
6 This can be found at Exhibit 134, tab 4.

7 --- Pause

8 MR. FOTHERGILL: Do you have that  
9 in front of you, Superintendent?

10 MR. CABANA: Tab 4, sir?

11 MR. FOTHERGILL: Tab 4, yes. It's  
12 an e-mail transmission, and the subject is  
13 Mr. Maher Arar, October 29th visit.

14 MR. CABANA: Yes, sir, I have it.

15 MR. FOTHERGILL: Now, I see that  
16 your initials aren't on this document. Could you  
17 take a moment to look at it and advise us whether  
18 that would have been provided to Project A-OCANADA  
19 in advance of the November 6th meeting.

20 MS EDWARDH: Sorry, I'm going to  
21 again object. It's quite clear from the record we  
22 have that there are three documents we were  
23 provided, unless perhaps CSIS provided Exhibit 93,  
24 94, and 95, and one -- or two of them the officer  
25 would not have seen because they post-date his

1 tenure, I believe, and Exhibit 93 is the November  
2 22nd and November 3rd report, found in Exhibit 93.

3 MR. FOTHERGILL: Now this one is  
4 dated October 29th, so I don't think it falls  
5 outside this officer's tenure.

6 MS EDWARDH: No, it doesn't, but  
7 we've established that it was not sent.

8 THE COMMISSIONER: I'll ask, I  
9 think, the question that would be proper. It may  
10 be that this officer would have a different  
11 recollection and say it was sent. I don't know.

12 MR. FOTHERGILL: Otherwise we can  
13 proceed on the basis of his earlier testimony that  
14 a consular update was provided on November 6th, in  
15 which case I was simply asking whether any of the  
16 points addressed in this consular report were  
17 discussed at that meeting.

18 THE COMMISSIONER: Okay. Well,  
19 first of all, let's find out if the officer has  
20 any recollection as to whether or not this was  
21 sent.

22 MR. CABANA: I have never seen  
23 this document, sir.

24 THE COMMISSIONER: Okay.

25 MR. FOTHERGILL: If I can address

1 your attention to the first paragraph?

2 MR. CABANA: Certainly.

3 MR. FOTHERGILL: There is a  
4 description of a delivery to Mr. Arar of a letter  
5 from his wife, and then towards the bottom of the  
6 paragraph, it continues:

7 "The reading caused him to  
8 become very emotional but he  
9 soon presented his comments  
10 for transmission to his wife.  
11 The Syrians did not make any  
12 attempt to restrain him on  
13 what he wished to convey."

14 MR. CABANA: Mm-hmm.

15 MR. FOTHERGILL: Do you recall  
16 whether that aspect of a recent consular visit was  
17 mentioned during the November 6th discussion?

18 MR. CABANA: Yes, sir, I believe  
19 it was.

20 MR. FOTHERGILL: Can you provide  
21 any further details of the discussion on that  
22 point?

23 MR. CABANA: This, sir, would be  
24 strictly from memory, okay.

25 MR. FOTHERGILL: All right.



1                   MR. CABANA: But I believe there  
2 was discussions to the effect that there had been  
3 a consular visit, everything appeared to be in  
4 order, and in the view of the people that were at  
5 the table, as long as these consular visits  
6 continued, there shouldn't be any problems with  
7 respect to Mr. Arar.

8                   MR. FOTHERGILL: Can I ask you to  
9 address your attention to paragraph 5, please, of  
10 this report? It reads:

11                   "Two changes were noticed in  
12 Maher's presentation. He did  
13 not seem to be disoriented  
14 anymore and he seemed to be  
15 able to speak freely and  
16 without fear."

17                   Do you recall whether that aspect  
18 of the consular visit was mentioned during the  
19 November 6th meeting?

20                   MR. CABANA: I don't recall, sir.

21                   MR. FOTHERGILL: I want to ask you  
22 a question about the conditions placed by  
23 Mr. Edelson on the -- of any possible interview  
24 with Mr. Arar. I don't have Ms Edwardh's  
25 experience in criminal matters, nor yours, so my

1 question may seem a little bit naive.

2 But I understand that one of the  
3 effects of the conditions was that any information  
4 Mr. Arar gave you in the course of an interview  
5 would not be admissible in any legal proceeding.  
6 Is that correct?

7 MS EDWARDH: I'm sorry. I think  
8 the answer was the statement would not be  
9 admissible.

10 THE COMMISSIONER: I didn't  
11 understand it to be any information.

12 MS EDWARDH: Absolutely not.

13 THE COMMISSIONER: I understand  
14 the statement.

15 MR. FOTHERGILL: Only the  
16 statement itself. It may be that this line of  
17 questioning leads nowhere. As I said, I'm  
18 betraying my ignorance here.

19 From your perspective, would the  
20 conditions imposed by Mr. Edelson make it  
21 difficult, or even impossible, for you to use the  
22 information derived from the interview in an  
23 application for judicial authorization, such as  
24 for a search warrant, an application to intercept  
25 private communications, or some other judicially

1 authorized investigative measure?

2 MR. CABANA: The information  
3 received directly from Mr. Arar, from my  
4 perspective, with these conditions, could not be  
5 used for anything.

6 We could use it as investigative  
7 leads and try to develop evidence surrounding some  
8 of the points that he would have given us, but  
9 really, it was problematic.

10 The purpose and the focus of our  
11 interest at the time was to identify potential  
12 witnesses. As I've stated, the focus of our  
13 investigation was not Mr. Arar, it was another  
14 individual, and we were trying to locate potential  
15 witnesses that were involved, or had been  
16 involved, in some transactions.

17 MR. FOTHERGILL: But from your  
18 perspective, you understood that you couldn't use  
19 any information that he gave you in an application  
20 for judicially authorized investigative technique.

21 MS EDWARDH: I object,  
22 Mr. Commissioner. That's not what the witness has  
23 said. He can't use the statement. It's very  
24 different.

25 THE COMMISSIONER: I think --

1 MR. FOTHERGILL: But this is what  
2 I'm seeking to clarify.

3 THE COMMISSIONER: I think it's a  
4 fair question to seek to clarify.

5 MR. CABANA: From my perspective,  
6 like I said, the information, in other words, the  
7 statement that was provided to us could not be  
8 used for anything. That, in my perspective, would  
9 include search warrants if we agreed to this with  
10 Mr. Edelson.

11 MR. FOTHERGILL: All right. Now,  
12 this was a financial investigation, or at least  
13 had a financial component?

14 MR. CABANA: Yes, it had a  
15 financial nature to it, yes.

16 MR. FOTHERGILL: I can probably  
17 make my question less sensitive if I just ask you  
18 to draw on your experience as a member of the  
19 Integrated Proceeds of Crime section.

20 MR. CABANA: Yes, sir.

21 MR. FOTHERGILL: Can you comment  
22 on to what extent judicially authorized measures  
23 such as search warrants and wiretaps are important  
24 to furthering an investigation of that nature?

25 MR. CABANA: They're an integral

1 part of obtaining and securing the necessary  
2 evidence of financial transactions.

3 MR. FOTHERGILL: My final subject  
4 area relates to caveats and the  
5 information-sharing arrangement that you  
6 understood existed between certain partner  
7 agencies --

8 MR. CABANA: Yes, sir.

9 MR. FOTHERGILL: -- following  
10 9/11, and I will, I think, Commissioner, lead the  
11 witness for a moment, because I don't think this  
12 is controversial, but I do want to make it clear  
13 that my understanding is the same as the  
14 witness's.

15 There was to be a free flow of  
16 information-sharing within the partner agencies  
17 for intelligence purposes only?

18 MR. CABANA: Yes, sir.

19 MR. FOTHERGILL: But if any  
20 partner agency wished to use the information or  
21 share it outside the partnership, consent of the  
22 originator was required, correct?

23 MR. CABANA: Yes, sir.

24 MR. FOTHERGILL: Now, I wonder if  
25 I could ask you to look at Exhibit P-172.

1 THE COMMISSIONER: Sorry, the  
2 number again?

3 MR. FOTHERGILL: P-172.

4 THE COMMISSIONER: Thank you.

5 --- Pause

6 MR. FOTHERGILL: This is the  
7 document that was sent to the United States on  
8 October 4, 2002. It's dated October 2nd, but I  
9 think it's acknowledged that that date is  
10 incorrect. And you'll see at the top of the page  
11 what appears to be an explicit caveat. This is  
12 the top of the attachment.

13 MR. CABANA: Yes.

14 MR. FOTHERGILL: See that?

15 MR. CABANA: Yes.

16 MR. FOTHERGILL: And the caveat  
17 reads:

18 "This document is the  
19 property of the Royal  
20 Canadian Mounted Police. It  
21 is loaned to you in  
22 confidence and is not to be  
23 reclassified, distributed or  
24 acted upon without the prior  
25 authorization of the

1                                   originator."

2                                   MR. CABANA:   Yes.

3                                   MR. FOTHERGILL:  So based on that,  
4                                   would you expect the U.S. government to be under  
5                                   any sort of obligation to seek the consent of the  
6                                   RCMP before acting on the information contained in  
7                                   this document?

8                                   MR. CABANA:   Yes, sir, I would  
9                                   expect they would.

10                                  MR. FOTHERGILL:  And to your  
11                                  knowledge did that ever happen?

12                                  MR. CABANA:   No, sir.

13                                  MR. FOTHERGILL:  Now, I think I  
14                                  need to seek further clarification from the  
15                                  witness because the reason I'm asking you this,  
16                                  Superintendent Cabana, is I thought you gave a  
17                                  somewhat different response to my friend,  
18                                  Ms Edwardh.  I understood you to say to her that  
19                                  he felt some sort of consent might have been  
20                                  implied by CID's direction that the American  
21                                  request be responded to.

22                                  MR. CABANA:   No, what I testified  
23                                  to is the fact that the request for us to provide  
24                                  this information, and it doesn't appear in this  
25                                  exhibit here, but the actual request that reached

1 us, that was channelled through CID, clearly makes  
2 reference that the information is to be used --

3 MR. FOTHERGILL: Okay, I'm sorry.  
4 It puts me in an awkward position, but I have to  
5 stop you.

6 MR. CAVALLUZZO: I object on the  
7 basis of NSC.

8 --- Laughter / Rires

9 MR. FOTHERGILL: People laugh, but  
10 I think that's an entirely appropriate thing for  
11 Commission counsel to do.

12 I just want to make sure that when  
13 you give us the answer, that to your knowledge no  
14 consent was ever sought. You understand that to  
15 be --

16 MR. CABANA: I understand that the  
17 information was requested for a specific purpose.

18 MR. FOTHERGILL: Yes?

19 MR. CABANA: And that CID, or  
20 headquarters, forwarded that request for us to  
21 comply with it.

22 MR. FOTHERGILL: In that case,  
23 what is the point of this caveat on the response  
24 if it was your view that the information could  
25 then be freely used?



1                   MR. CABANA: The information could  
2 be freely used in relation to the purpose for  
3 which it was sought.

4                   MR. FOTHERGILL: All right. Thank  
5 you. Those are my questions.

6                   THE COMMISSIONER: Are there any  
7 questions from further counsel? No?

8                   Mr. Bayne then, you're next.

9                   --- Pause

10                  MR. CAVALLUZZO: Mr. Commissioner,  
11 just before Mr. Bayne commences, I just want to  
12 ensure that counsel is aware that if questions  
13 should be asked of this witness in public, they  
14 should be asked today and not when the witness may  
15 return in camera. I just want to ensure that  
16 counsel is aware of that rule.

17                  THE COMMISSIONER: That's right.  
18 If they are questions that can be asked in public,  
19 they should be asked in public. I agree.

20                  MR. BAYNE: I understand that.

21                  THE COMMISSIONER: Thank you,  
22 Mr. Bayne.

23 EXAMINATION

24                  MR. BAYNE: I have eight areas  
25 that I want to briefly touch with you in my

1 examination.

2 Number 1, Superintendent, you  
3 referred throughout your evidence, both in chief  
4 and cross, to the top priority of your mandate,  
5 which was the prevention of further attacks, and  
6 you detailed some of the efforts, including  
7 information-sharing, to achieve the result of  
8 protection of Canadian lives, right?

9 MR. CABANA: Yes, sir.

10 MR. BAYNE: You said to  
11 Mr. Cavalluzzo this was even an international  
12 effort beyond Canada's borders, right?

13 MR. CABANA: Very much so.

14 MR. BAYNE: But as a Canadian  
15 policeman, I take it the protection of Canadian  
16 lives was uppermost in your mind?

17 MR. CABANA: First and foremost,  
18 sir.

19 MR. BAYNE: What I'd like to know,  
20 at and after 9/11, what was your, and global,  
21 intelligence telling you about whether this was  
22 over, this was the end?

23 MR. CABANA: No, the intelligence  
24 that we were -- that we had received and continued  
25 to receive, and actually still to this day

1 continue to receive, is that this was not the end.  
2 This was the first of many, many attacks.

3 There was a number of countries  
4 that had been identified, Canada being one of  
5 them, and over the course of many months, similar  
6 attacks or attacks occurred in some of the  
7 countries that had been identified.

8 MR. BAYNE: I'm going to come to  
9 that. Was there, however, a Canadian and  
10 international fear based on intelligence of more  
11 attacks?

12 MR. CABANA: The intelligence,  
13 sir, was very clear, that there was more attacks  
14 coming, and Canada was one of the primary targets.

15 MR. BAYNE: All right. I want to  
16 turn to that. So there wasn't just a fear of  
17 generalized attacks.

18 Can you detail for us, what was  
19 the nature of the specific threat against Canada?

20 MR. FOTHERGILL: Sorry, sir, to  
21 the extent that that answer calls for the witness  
22 to disclose foreign intelligence received in  
23 confidence, he cannot answer.

24 THE COMMISSIONER: Yes, I would  
25 agree with that.

1 MR. BAYNE: What about public  
2 statements? If you don't know --

3 MR. CABANA: I'm not sure I  
4 understand your question.

5 MR. BAYNE: Maybe there's a  
6 different way to go at this: How did you learn of  
7 the specific threat to Canada and Canadians? Did  
8 you learn it from a source you can't disclose  
9 here?

10 MR. CABANA: I learnt it from a  
11 number of sources that I'm not able to disclose  
12 here, as well as, of course, like every other  
13 Canadian, through reading media articles on the  
14 subject.

15 MR. BAYNE: Were you aware, sir,  
16 of public statements broadcast on the TV news  
17 purporting to be, appearing to be, from Osama bin  
18 Laden?

19 MR. CABANA: Yes. Like I said,  
20 the media articles, and media would include TV,  
21 where the threat was very clearly identified by  
22 bin Laden, who identified Canada as one of the  
23 primary targets.

24 MR. BAYNE: All right. So we have  
25 you in this preventative/protective effort, we

1 have the fear of more attacks, and we now have  
2 Canada specifically targeted.

3 In fact, are you aware, sir, that  
4 since 9/11, there has been a terrorist attack in  
5 Bali, leaving 202 innocent people dead?

6 MR. CABANA: Yes. I don't have  
7 recollection of the actual numbers, but -- of  
8 victims, but I know that there's been quite a few  
9 number of attacks.

10 MR. BAYNE: And a subsequent  
11 attack in Istanbul, leaving 60 innocent civilians  
12 dead?

13 MR. CABANA: Yes, sir.

14 MR. BAYNE: And in Casablanca,  
15 killing 33 more innocent people?

16 MR. CABANA: Yes.

17 MR. BAYNE: And in Jakarta,  
18 killing 12 more innocent people?

19 MR. CABANA: Yes.

20 MR. BAYNE: And in Madrid, killing  
21 191 more innocent people?

22 MR. CABANA: Yes, sir.

23 MR. BAYNE: How many attacks, sir,  
24 while you were in your preventative mandate,  
25 occurred in Canada, and how many innocent Canadian

1 lives were lost under this threat while you headed  
2 A-OCANADA?

3 MR. CABANA: Other than the  
4 attacks of 9/11 -- that occurred in Canada?

5 MR. BAYNE: Yes, sir?

6 MR. CABANA: There hasn't been any  
7 attacks in Canada to this day, sir.

8 MR. BAYNE: The second area I'd  
9 like to deal with, sir, in the course of this  
10 protective mandate against terrorist attack on  
11 Canadians, you indicated to Mr. Cavalluzzo you  
12 were prepared to consider going to New York to  
13 interview a person of interest to you there.

14 MR. CABANA: Yes, sir, I was.

15 MR. BAYNE: All right. And you  
16 indicated to Mr. Cavalluzzo that that would be  
17 with that detained person's written consent?

18 MR. CABANA: It would have to be.

19 MR. BAYNE: All right. Were you  
20 in consultation with DOJ counsel about this  
21 consideration?

22 MR. CABANA: You have to -- again,  
23 you have to look at the composition of the team.  
24 DOJ counsel were an integral part of the team.

25 MS EDWARDH: I'm going to rise to

1 object because it seems to me that I can't get  
2 into solicitor-client communications because  
3 there, of course, is a privilege to respect, but  
4 isn't my friend doing just that?

5 If legal advice is provided as to  
6 the need for consent by DOJ counsel advising the  
7 team, isn't that -- I mean, if that's a waiver,  
8 that's fine. If it's designed to be a waiver,  
9 it's a highly selective waiver.

10 MR. BAYNE: We've never asserted  
11 solicitor-client privilege, and I don't think I'm  
12 breaching it.

13 THE COMMISSIONER: I'll hear from  
14 those that have.

15 MR. FOTHERGILL: Commissioner, our  
16 position I think is very clear.

17 The fact that certain decisions  
18 were taken with benefit of legal advice we don't  
19 object to. The actual advice provided, we do.

20 But I think Ms Edwardh makes a  
21 good point, and perhaps I wasn't sufficiently  
22 attentive. As she rephrased the question or at  
23 least repeated it, if the question was designed to  
24 elicit whether approval was given by DOJ counsel,  
25 then I would endorse Ms Edwardh's objection and I

1 would adopt it.

2 THE COMMISSIONER: I think that  
3 is, as I understand it, a consistent position that  
4 the Government has taken, that Mr. Fothergill  
5 articulates.

6 MR. BAYNE: And I don't intend to  
7 go there. I was simply trying to clarify with the  
8 witness whether this decision was taken in  
9 consultation with senior Justice counsel.

10 THE COMMISSIONER: Full stop.

11 MR. BAYNE: Full stop.

12 THE COMMISSIONER: Okay.

13 MR. CABANA: I'm sorry?

14 MR. BAYNE: Whether this decision  
15 to consider or to be prepared to interview this  
16 detained person in New York was taken with senior  
17 Department of Justice counsel input?

18 THE COMMISSIONER: I think, rather  
19 than the decision taken with, taken after  
20 consultation would be more consistent with what  
21 Mr. Fothergill said.

22 MR. BAYNE: Fine.

23 MR. CABANA: Yes, sir.

24 MR. BAYNE: Sir, I know I've been  
25 doing this defence work for about 33 years. This



1           was eight months after the sort of enunciation of  
2           Mr. Edelson's conditions, as I call them, and I  
3           will come back to those conditions because I don't  
4           think the problems are as minute as painted by  
5           Ms Edwardh. But I will deal with that later.

6                           In your experience, sir, as an  
7           investigator, do many people change their minds  
8           about whether they want to talk to the police?

9                           MR. CABANA: All the time, sir.

10                          MR. BAYNE: Sir, in the eight  
11           months that had passed, were you aware of any  
12           prohibition against police -- it drives defence  
13           counsel crazy; Ms Edwardh and I know it -- but any  
14           prohibition when a defence lawyer sets down  
15           certain conditions for a detained person to be  
16           interviewed, particularly as a witness by a police  
17           officer?

18                          MR. CABANA: No, sir. The  
19           prohibition voiced by defence counsel in police  
20           interviewing their clients, and like you point  
21           out, especially in relation to a witness, I would  
22           submit that the prohibition is on the part of  
23           their client.

24                          MR. BAYNE: Sir, the Cook case  
25           that was discussed by Ms Edwardh with you, was

1           that a witness or an accused?

2                       MR. CABANA:   That was in relation  
3           to an accused, sir.

4                       MR. BAYNE:   And would you, sir --  
5           this isn't about advice you did or didn't get.  
6           This is about what you would do.

7                       If senior Justice counsel had in  
8           dealing with this thorny legal issue of whether  
9           the Charter applied in these circumstances, if you  
10          had been instructed, if there ever had been such  
11          an interview in New York, to give a 10(b) right  
12          prior to conducting such an interview, would you  
13          have?

14                      MR. CABANA:   Of course, sir.

15                      MR. BAYNE:   Number 3.  Ms Edwardh  
16          asked today, sir, this morning, about potential  
17          U.S. and Syrian crimes related to section 169.1 of  
18          the Code and the fact, the proposition that was  
19          put to you, Mike Cabana, did not initiate a  
20          torture investigation of Syrians and Americans in  
21          respect of them.

22                      Do you remember those questions,  
23          sir?

24                      MR. CABANA:   Yes, I do.

25                      MR. BAYNE:   Or invite any of the

1 people here who are represented to come forward  
2 and make a complaint.

3 Do you remember those?

4 MR. CABANA: Yes, I remember that,  
5 sir.

6 MR. BAYNE: Are you aware, sir, in  
7 your role as a humble Canadian cop, whether the  
8 Canadian Prime Minister or Solicitor General or  
9 Attorney General or Commissioner of the RCMP or  
10 any cabinet member or any Member of Parliament  
11 initiated such a complaint or sought such an  
12 investigation or charges to be brought?

13 MR. CABANA: No, sir. As I  
14 pointed out, I believe it was this morning, to my  
15 knowledge there was never any complaint made.

16 MR. BAYNE: Is Mr. Edelson, who  
17 was dealing with and on behalf of Mr. Arar as far  
18 as four years ago -- and you know him, I take it,  
19 to be a prominent, experienced criminal lawyer  
20 here in Ottawa?

21 MR. CABANA: Yes, sir, I do.

22 MR. BAYNE: And I take it you know  
23 Ms Edwardh's reputation as a leading criminal  
24 lawyer in Toronto?

25 MR. CABANA: Yes, sir.

1 MR. BAYNE: In the years that  
2 those two lawyers have represented Mr. Arar, has  
3 she, to your knowledge, or Mr. Edelson, either  
4 registered a complaint with you or an offer on  
5 behalf of their clients that they want to come  
6 forward to initiate an investigation of a torture,  
7 a criminal investigation against these foreign  
8 authorities?

9 MR. CABANA: No, sir, not to my  
10 knowledge.

11 MR. BAYNE: Number 4. Ms Edwardh  
12 today, in discussing with you the prospect of a  
13 New York City interview that we have dealt with  
14 briefly in these questions, suggested to you a  
15 proposition that, among other things, you wanted  
16 to know the results of the Arar interview in the  
17 U.S. and she added -- which was based on your  
18 questions. And you added the caveat "well, maybe  
19 a part of it".

20 Do you remember that?

21 MR. CABANA: Yes, I do.

22 MR. BAYNE: Do you know if the  
23 U.S. authorities used those questions in their  
24 interrogation?

25 MR. FOTHERGILL: I'm sorry, again

1 I have to object.

2 MR. BAYNE: Fair enough. I can  
3 deal with the next question. I don't need an  
4 answer to that.

5 The questions that you sent down,  
6 in answers to Mr. Cavalluzzo yesterday, when  
7 dealing with September 27th, on the 27th you  
8 learned, having thought Mr. Arar was gone, you  
9 told Mr. Cavalluzzo, that in fact he was still  
10 there that morning and they were flying in  
11 investigators --

12 MR. FOTHERGILL: I object. I'm  
13 sorry, Commissioner, I object.

14 This is inappropriate questioning.  
15 This is subject to a claim of national security  
16 confidentiality.

17 THE COMMISSIONER: Yes.

18 MR. BAYNE: It's evidence he gave  
19 yesterday. It's on the record here. There was no  
20 objection. He gave this evidence yesterday.

21 MR. FOTHERGILL: With the greatest  
22 of respect, I don't think this is on the record.

23 MR. BAYNE: It is. It absolutely  
24 is on the record. I'm not making it up.

25 THE COMMISSIONER: We can check it

1 at the break then. Somebody can. I must  
2 confess -- I won't say anything.

3 Carry on.

4 MR. BAYNE: Well, I can't carry on  
5 with this --

6 THE COMMISSIONER: Go to your next  
7 point and we can check it.

8 MR. BAYNE: I will.

9 Five. Let's return to what are  
10 called the Edelson conditions, and let me just  
11 track the evolution a little of the evidence here.

12 When Ms Edwardh first put this to  
13 you this morning, it was put on the basis that all  
14 you really lost, according to the conditions  
15 imposed by Mr. Edelson on an Arar interview, were  
16 the evidentiary KGB value of the statement.

17 That was in the morning. Do you  
18 remember that?

19 MR. CABANA: Yes, sir.

20 MR. BAYNE: By the afternoon,  
21 Ms Edwardh, after the break, qualified it to say,  
22 well, it would not preclude calling Mr. Arar at an  
23 investigative hearing or, she said, calling him as  
24 a witness at trial.

25 Do you remember those comments by

1 her?

2 MR. CABANA: Yes, I do, sir.

3 MR. BAYNE: Now, apart from what  
4 Mr. Fothergill dealt with you about, you couldn't  
5 use this for search warrants or other situations,  
6 of what value is a witness to a police officer who  
7 you can't count on or control; in other words, a  
8 witness who can change his or her testimony at  
9 will? You haven't got them nailed down with a  
10 statement.

11 MR. CABANA: Very little value,  
12 sir.

13 MR. BAYNE: And let me ask you,  
14 based on that: Could you cross-examine, with  
15 these conditions, if you even -- to follow  
16 Ms Edwardh's proposition that you could use this  
17 man at trial, what kind of value as a witness  
18 would he be if you couldn't cross-examine him on  
19 his own statement, if he changed his evidence?

20 MR. CABANA: Like I said, the  
21 interview was pointless at that point in time.

22 I agree with the proposition that  
23 was put forward. We weren't prevented from  
24 calling him as a witness. No, we weren't.

25 MR. BAYNE: But of what worth --

1 MR. CABANA: But in the  
2 proceedings we wouldn't be able to use the  
3 statement that was provided to us in his  
4 testimony.

5 MR. BAYNE: And an even greater  
6 problem arises that criminal lawyers are aware of.  
7 If these conditions were imposed, not only could  
8 you not use it to cross-examine but defence  
9 counsel.

10 THE COMMISSIONER: Is that a  
11 question or a statement?

12 --- Laughter / Rires

13 MR. BAYNE: Could defence counsel  
14 use such a statement?

15 MR. COPELAND: I object to this  
16 witness being able to answer that question. He  
17 has no expertise in this area, I would suggest.

18 MR. BAYNE: Can you answer the  
19 question, sir?

20 THE COMMISSIONER: I guess what  
21 the witness can do is say that, if he considered  
22 this, whether that was part of his understanding  
23 of what Mr. Edelson was requesting.

24 MR. BAYNE: And I would just  
25 add --



1 THE COMMISSIONER: But what he  
2 can't do -- and let me just finish the point.

3 What he can't do is obviously give  
4 an opinion in law as to what would be entitled --

5 MR. BAYNE: Right. Mr. Copeland  
6 had no problem with the witness answering  
7 Ms Edwardh's questions about this.

8 MR. COPELAND: That is because I  
9 have no standing whatsoever to make the objection.  
10 --- Laughter / Rires

11 THE COMMISSIONER: In any event,  
12 go ahead.

13 But I think it should be confined,  
14 if the witness thought about this type of  
15 circumstance at all, whether or not that was his  
16 understanding of the agreement, would be the  
17 proper question.

18 MR. CABANA: Based on my  
19 understanding of the agreement, any information  
20 stemming from any interview with Mr. Arar could  
21 not have been used for anything.

22 MR. BAYNE: Okay. And with that  
23 in mind, are you aware of section 7 of the Charter  
24 and the Stinchcombe decision requiring police in  
25 this country to disclose all witness statements to

1 the defence?

2 MR. CABANA: Trust me, sir, I'm  
3 fully aware of it.

4 MR. BAYNE: All right. Would you  
5 have been able to comply -- would this condition  
6 have enabled you to comply or put you in breach of  
7 the Charter?

8 MR. CABANA: That would be a legal  
9 issue, sir.

10 MR. BAYNE: Would you have seen it  
11 as a problem?

12 MR. CABANA: Oh, definitely.

13 MR. BAYNE: So there are many more  
14 serious problems created by these conditions --

15 MR. CABANA: Which led us to move  
16 away from this interview.

17 MR. BAYNE: Number 6. Just to  
18 clarify, sir, there was -- and I say "clarify"  
19 because I understood your evidence to  
20 Mr. Cavalluzzo given yesterday, when he took you  
21 day by day through the events in October, to be  
22 that on the morning of October 8th, at 9:45 a.m.,  
23 you learned for the first time through the DFAIT  
24 LO named Roy that Syria first surfaced on the  
25 radar map.

1                   Even though you said it was an  
2                   unrealistic possibility, that was the first  
3                   surfacing for you or A-OCANADA.

4                   MR. CABANA:   Yes, sir.

5                   MR. BAYNE:   That was your  
6                   evidence.

7                   Then today Ms Edwardh was putting  
8                   to you a proposition and then Mr. Lauzon's name  
9                   came up.

10                  Is there any uncertainty about  
11                  your evidence in that regard?

12                  MR. CABANA:   No, sir.

13                  MR. BAYNE:   All right.  You are  
14                  aware now at what time on the 8th Mr. Arar was  
15                  spirited out of the United States behind your  
16                  back?

17                  MR. CABANA:   General knowledge,  
18                  yes.  Three or four in the morning, apparently.

19                  MR. BAYNE:   Which would be about  
20                  six and three quarter hours before this  
21                  possibility even arose with you.

22                  MR. CABANA:   Yes, sir.

23                  MR. BAYNE:   Number 7.  And this is  
24                  just three points to follow up a number of  
25                  questions that Ms Edwardh followed up about

1 Mr. Cavalluzzo's questioning.

2 (a) the RCMP. Did you ever go to  
3 New York City, or any member of the RCMP, to  
4 interview Mr. Arar?

5 MR. CABANA: Not to my knowledge,  
6 sir.

7 MR. BAYNE: (b), did you ever go  
8 to Syria, or any member of the RCMP, to interview  
9 Mr. Arar?

10 MR. CABANA: No, sir.

11 MR. BAYNE: And (c), did you ever  
12 share, you or any member of A-OCANADA, any  
13 information whatsoever from your investigation  
14 with the Syrians on Mr. Arar?

15 MR. CABANA: Not to my knowledge,  
16 sir.

17 MR. BAYNE: Finally, sir, you were  
18 asked yesterday -- and I wonder, Mr. Registrar, if  
19 we could give the witness P-172?

20 MR. CABANA: I have it here.

21 MR. BAYNE: You were asked  
22 yesterday by Mr. Cavalluzzo: Didn't you feel  
23 responsible -- and that was his word -- for what  
24 the U.S. had done to Mr. Arar? And you answered  
25 in two ways.

1 But I want to follow that up.

2 You said, no, that the information  
3 shared in your preventative mandate was not  
4 sufficient even to get a search warrant in Canada,  
5 let alone to justify what the Americans did to  
6 him.

7 Do you remember that answer?

8 MR. CABANA: Yes.

9 MR. BAYNE: And you referred,  
10 without detailing it, to a body of evidence that  
11 you weren't allowed to reveal to Canadians. But  
12 you made a comment in your answer to him that it  
13 suggested to you that the U.S. had evidence to  
14 which you were not privy on which they relied?

15 MR. CABANA: Yes, sir.

16 MR. BAYNE: Mr. Cavalluzzo then  
17 directed you to what we call P-20, which  
18 purports -- and I use that word carefully -- to  
19 record the formal American decision denying  
20 Mr. Arar entry.

21 MR. CABANA: The INS decision.

22 MR. BAYNE: Yes.

23 MR. CABANA: Yes.

24 MR. BAYNE: So leaving aside the  
25 limited nature of the evidence that Canadians had

1 given to the Americans that you said couldn't even  
2 justify a search warrant --

3 MS EDWARDH: That doesn't mean it  
4 was limited.

5 MR. BAYNE: And leaving aside --  
6 well, it's limited if you can't even get a search  
7 warrant. That was your proposition about --

8 THE COMMISSIONER: Setting aside  
9 the information that is not -- we don't need to  
10 quarrel about it. I know what it was.

11 MR. BAYNE: I want to deal with  
12 the P-20 that Mr. Cavalluzzo had directed you to  
13 and the conclusion in it. You don't need it. I  
14 don't think any of us need it at this point.

15 That the Americans concluded he  
16 was clearly and unequivocally a member of  
17 al-Qaeda.

18 MR. CABANA: Yes.

19 MR. BAYNE: Do you remember  
20 that conclusion?

21 MR. CABANA: Yes, sir, I remember  
22 that.

23 MR. BAYNE: It reappears  
24 throughout this document.

25 MR. CABANA: Yes.

1 MR. BAYNE: They find he is  
2 clearly -- on the evidence they were relying on,  
3 he is clearly and unequivocally a member of  
4 al-Qaeda.

5 Could you look at P-172, sir?

6 MR. CABANA: Yes, sir.

7 MR. BAYNE: By the way, that P-20  
8 is dated October 7th.

9 MR. CABANA: Yes.

10 MR. BAYNE: And of course you  
11 were at this point --

12 MR. CAVALLUZZO: Just let me make  
13 an objection here.

14 You are running too quickly for  
15 me. Could you tell me in P-20 where it says that  
16 he is clearly a member of al-Qaeda?

17 MR. BAYNE: It's under: "Decision  
18 of the Regional Director".

19 MR. CAVALLUZZO: Right. That's  
20 what I'm looking at.

21 MR. BAYNE: "As a result of this  
22 review, I have concluded on  
23 the basis of classified  
24 information that Arar is  
25 clearly and unequivocally

1                   inadmissible to the United  
2                   States --"

3                   Under a whole bunch of sections  
4           here.

5                   "... in that he is a member  
6                   of an organization ..."

7                   Et cetera, et cetera.

8                   "... to wit al-Qaeda..."

9           MR. CAVALLUZZO: It says:

10                   "I have determined that Arar  
11                   is a member of the designated  
12                   foreign organization known as  
13                   al-Qaeda. He is a clear and  
14                   imminent threat to --"

15           THE COMMISSIONER: That's what it  
16           says.

17                   Mr. Bayne was telescoping the  
18           language a bit, but go ahead, please.

19                   MR. BAYNE: Mr. Commissioner, if  
20           you think it's unfairly telescoping -- if you  
21           think the Americans are coming to any other  
22           conclusion than that, please --

23                   THE COMMISSIONER: I've read that  
24           many times. I'm familiar with the language.

25                   MR. BAYNE: So that appears, in my



1 reading of it, and there are other references in  
2 here -- maybe I had better go to them.

3 At page 4, under "Evidence of  
4 Inadmissibility":

5 "The documentation I have  
6 reviewed, including  
7 information received from  
8 other agencies, clearly and  
9 unequivocally reflects that  
10 Arar is a member of a foreign  
11 terrorist organization, to  
12 wit al-Qaeda..."

13 Am I misstating that,  
14 Mr. Commissioner?

15 THE COMMISSIONER: That's fine.

16 MR. BAYNE: All right. The  
17 American finding is clearly and unequivocally that  
18 this man is a member of al-Qaeda, a terrorist  
19 organization.

20 MR. CABANA: Yes, sir.

21 MR. BAYNE: That's on October 7th.

22 And on October 7th, of course, you  
23 are still in the dark about all this process,  
24 expecting an October 9th hearing. That's what  
25 they are telling you?

1 MR. CABANA: Very much so, sir.

2 MR. BAYNE: And your A-OCANADA  
3 team sends down, on October 4th, information to  
4 them?

5 MR. CABANA: Yes.

6 MR. BAYNE: This is very timely  
7 information to them about the state of the  
8 Canadian investigation.

9 And would you look at the final  
10 page 4 of 5?

11 MR. CABANA: Yes, sir.

12 MR. BAYNE: A-OCANADA and the  
13 Canadians, the RCMP, by contrast with the American  
14 conclusion, appear to be telling the Americans in  
15 number 5 "we are unable to indicate links to  
16 al-Qaeda".

17 MR. CABANA: Yes, sir, and that  
18 was a fact.

19 MR. BAYNE: So we are telling  
20 them, well, if it's not the direct opposite of  
21 their conclusion, it's pretty far removed from the  
22 conclusion they reach on whatever evidence they  
23 are relying on?

24 MR. CABANA: Yes, sir.

25 MR. BAYNE: In light of that, sir,

1 do you feel responsible for what the Americans did  
2 in the wee small hours of the morning on the 8th  
3 to Mr. Arar?

4 MR. CABANA: As I testified  
5 yesterday, sir, no, I don't.

6 MR. BAYNE: Those are my  
7 questions, sir, subject to --

8 THE COMMISSIONER: Your item  
9 number 4.

10 MR. BAYNE: Right.

11 THE COMMISSIONER: We have to take  
12 a break now because I have a conference call. We  
13 will probably be, I think, about 20 minutes, and  
14 then we will deal with Question 4 and any  
15 re-examination by Mr. Cavalluzzo.

16 THE REGISTRAR: Please stand.

17 --- Upon recessing at 3:59 p.m. /

18 Suspension à 15 h 59

19 --- Upon resuming at 4:22 p.m. /

20 Reprise à 16 h 22

21 THE REGISTRAR: Please be seated.

22 MR. FOTHERGILL: Commissioner, a  
23 number of participants have consulted their notes  
24 and there does seem to be a consensus that there  
25 was a passing reference to investigators being

1           flown in to participate in the questioning of  
2           Mr. Arar in New York.

3                           From my perspective, any  
4           information we hold about investigative steps  
5           taken by the Americans, we received through  
6           foreign intelligence channels and we received in  
7           confidence, and I am not at liberty to consent to  
8           the disclosure of this information.

9                           So notwithstanding the fact that  
10          there was this, what I would describe as  
11          inadvertent disclosure -- and I want to make it  
12          clear I don't fault Superintendent Cabana for  
13          that. I think he is in a difficult position, as  
14          we all are.

15                           I must, with regret, maintain my  
16          claim of national security confidentiality and  
17          object to any further questioning that may arise  
18          from what I think was, through my own fault,  
19          something that should not have been in the public  
20          record.

21                           THE COMMISSIONER: Then that  
22          completes your examination, Mr. Bayne?

23                           Mr. Cavalluzzo.

24                           Just a moment, Mr. Cavalluzzo, for  
25          a second.

1                   Mr. Waldman, I just recalled now,  
2                   asked me to wait to begin and I got tied up in  
3                   something else and came ahead.

4                   Would you like to have a 5-minute  
5                   break?

6                   MS EDWARDH: I think that I ought  
7                   to request that. I am terribly sorry  
8                   Mr. Commissioner.

9                   THE COMMISSIONER: I'm sorry.  
10                  That was my oversight. There was a number of  
11                  people talking to me.

12                  MS EDWARDH: We will take steps to  
13                  retrieve him.

14                  THE COMMISSIONER: Why doesn't  
15                  everybody stay here so we don't -- ah, great.

16                  MS EDWARDH: I think we are now  
17                  ready to proceed. Thank you for your indulgence.

18                  THE COMMISSIONER: Thank you.  
19                  That was my oversight.

20                  Mr. Cavalluzzo?

21                  EXAMINATION

22                  MR. CAVALLUZZO: Thank you,  
23                  Commissioner. I just have a few questions. It  
24                  should take about 15 or 20 minutes.

25                  Mr. Cabana, I would like to deal,

1 first of all, with a couple of questions that  
2 Ms Edwardh asked you about the Department of State  
3 Website review of the human rights record of  
4 Syria, and you told us that you didn't have access  
5 to that, didn't see it.

6 Do you know if any member of  
7 A-OCANADA ever accessed the Department of State  
8 Website in respect of the human rights record of  
9 Syria, political conditions within Syria?

10 MR. CABANA: No, sir, I have no  
11 knowledge of that.

12 MR. CAVALLUZZO: I would like to  
13 point out to you that in the information to  
14 obtain, which is Exhibit 167, and if you go to --  
15 these pages are difficult because many of them  
16 have been redacted.

17 If you go to page 23, which is  
18 paragraph 23 --

19 MR. CABANA: Of tab D?

20 MR. CAVALLUZZO: Of tab D, yes,  
21 paragraph 23.

22 You will see that the affiant  
23 here, who is a member of the A-OCANADA:

24 "... reviewed a printout of  
25 the U.S. Department of State

1 web site called  
2 'Comprehensive List of  
3 Terrorists and Groups  
4 Identified Under Executive  
5 Order 13224', which was  
6 signed by President George W.  
7 Bush..."

8 So you would agree with me that  
9 the Department of State record on Syria and other  
10 countries was clearly available to members of  
11 Project A-OCANADA, and indeed was relied upon --

12 MR. CABANA: I don't believe I've  
13 testified that it was not.

14 MR. CAVALLUZZO: I would like to  
15 move on to certain questions that were asked of  
16 you regarding Mr. Arar, and you seem to indicate  
17 through the questioning by Ms Edwardh that  
18 Mr. Arar was only a potential witness.

19 Do you recall that testimony?

20 MR. CABANA: Yes, sir.

21 MR. CAVALLUZZO: I want to put to  
22 you that Mr. Arar was more than a potential  
23 witness. Indeed Project A-OCANADA wanted to  
24 gather as much information as possible so as to  
25 charge Mr. Arar, to build a case against Mr. Arar.

1                   Isn't that correct?

2                   MR. CABANA: No, sir.

3                   MR. CAVALLUZZO: No? Let me show  
4 you some documents then.

5                   Let's start with a chronology,  
6 which is Exhibit P-84.

7                   This was the e-mail that we  
8 discussed with you.

9                   THE COMMISSIONER: Page?

10                  MR. CAVALLUZZO: Page 32.

11                  This is the e-mail of on or about  
12 October the 7th of 2002.

13                  MR. CABANA: Yes, sir.

14                  MR. CAVALLUZZO: And just the  
15 second paragraph there, the second sentence:

16                         "We would most certainly want  
17 to know when he is coming and  
18 any information obtained by  
19 U.S. authorities which would  
20 assist in building a case  
21 against Arar."

22                  MR. CABANA: Yes.

23                  MR. CAVALLUZZO: Doesn't that  
24 indicate to you that you are looking to Mr. Arar  
25 being more than a potential witness; indeed you



1 are looking for information in order to -- let me  
2 finish the question --

3 MR. CABANA: Certainly.

4 MR. CAVALLUZZO: -- build the case  
5 against Mr. Arar? That's the question.

6 MR. CABANA: Very well. As I  
7 testified yesterday, this e-mail did not originate  
8 from our team, sir. This e-mail originated from  
9 CID, from within CID.

10 Second, although it's redacted and  
11 I don't think there's a date on this e-mail, this  
12 e-mail stemmed from, or occurred, was sent, around  
13 the period of time where Mr. Arar was detained in  
14 the U.S.

15 MR. CAVALLUZZO: That's correct.

16 MR. CABANA: And I would submit to  
17 you, sir, that at that point in time we were  
18 starting to question ourselves as far as what was  
19 going on.

20 Now, I can't speak to the mindset  
21 of the individual that sent this e-mail.

22 MR. CAVALLUZZO: This e-mail went  
23 to a member of Project A-OCANADA, indeed a manager  
24 of A-OCANADA.

25 MR. CABANA: Yes, sir, it did.

1 MR. CAVALLUZZO: Do you know if  
2 that manager sent any correction back to  
3 headquarters, saying, "What are you talking about,  
4 building a case against Mr. Arar?"

5 MR. CABANA: I'm not aware, sir.

6 MR. CAVALLUZZO: Let's look at  
7 another document, then, sir. Let's look at  
8 Exhibit P-85, Volume 5.

9 Look at, if you would, please, tab  
10 27.

11 This, once again, is from  
12 Mr. Couture, who is your CROPS officer, and it's a  
13 fax sent to Mr. Loepky on October 22nd.

14 It says in the middle paragraph:

15 "Our investigative efforts on  
16 this individual continue and  
17 while we have no evidence to  
18 pursue a prosecution, we are  
19 of the opinion that he has  
20 significant involvement with  
21 targets of this project and  
22 his activities are of  
23 concern."

24 Doesn't that suggest to you that,  
25 at least at this point in time, and lo and behold

1 he is in Syria, that Project A-OCANADA and the  
2 RCMP is interested in Mr. Arar more than just as a  
3 potential witness?

4 MR. CABANA: I would submit to  
5 you, sir, that by the 22nd of October, considering  
6 the actions taken by the Americans, it was pretty  
7 obvious to us that we were missing something.

8 MR. CAVALLUZZO: Right.

9 MR. CABANA: Right.

10 MR. CAVALLUZZO: And would you  
11 agree with me, at least at that point in time,  
12 that Mr. Arar was more than a potential witness?

13 MR. CABANA: At that point in  
14 time, as of the 22nd of October, I would suggest  
15 that Mr. Arar was not the main focus of our  
16 investigation -- far from it.

17 MR. CAVALLUZZO: I'm not asking --

18 MR. CABANA: I understand you are  
19 not suggesting that. I'm just saying that we  
20 still, aside from Mr. Arar, had a lot of other  
21 concerns that we were focusing our attention on,  
22 especially in light of the fact Mr. Arar was no  
23 longer around.

24 Of course, our interest in  
25 Mr. Arar, considering the events, was increased,

1           yes.

2                           MR. CAVALLUZZO:  But you are not  
3           answering my question.  I'm putting it to you that  
4           you would like to get information on Mr. Arar so  
5           that you could build a case against him and you  
6           could charge him.

7                           Isn't that correct?

8                           MR. CABANA:  No, sir.  I would  
9           submit to you that, as of the 22nd of October, we  
10          were still trying to focus on the main aspect of  
11          our investigation, which was a threat to Canada.

12                          MR. CAVALLUZZO:  Well, you know,  
13          that's fine.  That's not inconsistent.

14                          What I'm putting to you is that  
15          that e-mail, which talks about building a case on  
16          October the 7th, and Mr. Couture on October the  
17          22nd, the way he frames that, are investigative  
18          efforts.  And I think he has significant  
19          associations.

20                          I'm putting it to you, quite  
21          simply, that at this point in time you are  
22          interested in getting as much information as  
23          possible to charge Mr. Arar.

24                          MR. CABANA:  At that point in  
25          time, sir, we are definitely interested in getting

1 the information that led to his deportation.  
2 Definitely.

3 But our focus still remained the  
4 financial investigation, sir.

5 MR. CAVALLUZZO: So at this point  
6 in time, on October the 21st, 22nd, is Mr. Arar  
7 still -- I'm using your words now -- of peripheral  
8 interest?

9 MR. CABANA: As far as his role?

10 MR. CAVALLUZZO: Yes.

11 MR. CABANA: No, he's probably  
12 more than that.

13 MR. CAVALLUZZO: He is more than  
14 peripheral but less than a target.

15 MR. CABANA: Yes.

16 MR. CAVALLUZZO: What would he be?

17 MR. CABANA: He is somebody that  
18 obviously has a -- how can I phrase this?

19 He is obviously somebody that,  
20 according to some people, has a greater  
21 involvement in the subject matter of our  
22 investigation.

23 MR. CAVALLUZZO: And so --

24 MR. CABANA: As far as what that  
25 is, sir, as of that date, we don't know.

1 MR. CAVALLUZZO: You don't know.

2 He certainly isn't a target.

3 MR. CABANA: No.

4 MR. CAVALLUZZO: He is not a  
5 target. So there's a difference at least between  
6 a target and whatever status Mr. Arar has at that  
7 particular point in time.

8 MR. CABANA: I would suggest to  
9 you, sir, that as far -- and we are playing with  
10 terms here.

11 MR. CAVALLUZZO: But they are not  
12 my terms, and I'm trying to understand --

13 MR. CABANA: No, I understand  
14 that, sir.

15 I am suggesting to you that as of  
16 that date he is a person of interest for us.

17 MR. CAVALLUZZO: Okay. Let's look  
18 at what happened on that date, on October the  
19 21st.

20 You told us, and your notes  
21 indicate, that you had that conversation with  
22 Mr. Gould. Correct?

23 MR. CABANA: Yes, sir.

24 MR. CAVALLUZZO: And you said  
25 through Mr. Gould that you were prepared to offer

1 the Syrians intelligence and information which  
2 could be of assistance to them in their  
3 investigation. Correct?

4 MR. CABANA: I believe I have  
5 already testified to that, sir.

6 MR. CAVALLUZZO: Okay. And you  
7 said that that offer related both to Mr. Arar and  
8 Mr. Almalki?

9 MR. CABANA: That's correct.

10 MR. CAVALLUZZO: The question that  
11 I have for you is that when you were preparing to  
12 offer information or intelligence in respect of  
13 both of these individuals -- one being peripheral,  
14 a person of peripheral interest, one being a  
15 target -- did you distinguish between them at all?

16 MR. CABANA: I would submit that  
17 we did in the sense that, again, all of the steps  
18 that we were contemplating had one goal, and the  
19 goal was prosecution of the main subject of our  
20 investigation.

21 MR. CAVALLUZZO: But I am putting  
22 it to you there doesn't seem to be any kind of  
23 qualification, distinction, or anything else in  
24 that offer.

25 MR. CABANA: What you are

1 referring to here, sir, are notes that I made  
2 following a phone call with a representative from  
3 DFAIT. You are not making reference to a formal  
4 offer.

5 I would suggest to you, sir, that  
6 if the prospect would have escalated to the point  
7 of making a formal offer, I would submit to you  
8 that there would have been a distinction.

9 MR. CAVALLUZZO: The next question  
10 is: Do you think it appropriate, knowing -- at  
11 this point in time you just had a general  
12 knowledge, you told us a layman's knowledge of  
13 what was going on in Syria at that point in time.

14 I am putting it to you: Do you  
15 think it was appropriate to share information with  
16 this regime, and you knew it was a dictatorial  
17 regime --

18 MR. CABANA: I believe I answered  
19 that yesterday, sir.

20 MR. CAVALLUZZO: No, listen to the  
21 question.

22 MR. CABANA: Certainly.

23 MR. CAVALLUZZO: Sharing  
24 information about a Canadian who was only of  
25 peripheral interest?



1 MR. CABANA: I believe I have  
2 answered that yesterday, sir.

3 MR. CAVALLUZZO: And you think  
4 that is appropriate?

5 MR. CABANA: Yes, sir, I do.

6 MR. CAVALLUZZO: Okay. In some  
7 answers to Ms Edwardh, I just want to make sure I  
8 understand your answer.

9 And that is that you never  
10 considered Syria a possibility to be the country  
11 to which Mr. Arar was deported? Did I understand  
12 you correctly?

13 And if I didn't, please clarify  
14 that.

15 MR. CABANA: I never considered  
16 Syria as a serious possibility.

17 MR. CAVALLUZZO: A serious  
18 possibility?

19 MR. CABANA: Yes.

20 MR. CAVALLUZZO: But you knew that  
21 it was a possibility?

22 MR. CABANA: It had been raised,  
23 yes, of course.

24 MR. CAVALLUZZO: Because there  
25 were discussions you had on October the 8th

1 relating to that and the conditions that you would  
2 impose resulting from that.

3 Do you recall that evidence?

4 MR. CABANA: The conditions?

5 MR. CAVALLUZZO: Yes. The  
6 evidence was that you were concerned about  
7 tarnishing the RCMP's reputation --

8 MR. CABANA: That was an issue  
9 that was surfaced within the investigative team,  
10 yes.

11 MR. CAVALLUZZO: Right. And that  
12 related to, obviously, the possibility of him  
13 going to Syria?

14 MR. CABANA: Yes, and his present  
15 situation, or his situation at the time in New  
16 York.

17 MR. CAVALLUZZO: I just want to  
18 make sure we understand, and that is that the  
19 possibility of going to Syria was fully discussed  
20 in the team?

21 MR. CABANA: Yes, of course there  
22 was discussions over that possibility.

23 MR. CAVALLUZZO: Next point.

24 You told Ms Edwardh, when she  
25 asked about his deportation from the United

1 States, that -- and I just want to make sure I  
2 understand you on this; that is that you felt that  
3 the U.S. laws didn't permit them to do what they  
4 did?

5 MR. CABANA: That was my  
6 understanding.

7 MR. CAVALLUZZO: Right, okay.

8 With this in mind -- and I'm using  
9 the state of your knowledge.

10 With this in mind, and that is  
11 knowing that your partner, the Americans, with  
12 whom you have shared information as part of the  
13 understanding that you talked about, knowing that  
14 this partner with whom you shared information, in  
15 your view, has illegally sent Mr. Arar, a  
16 Canadian, to Syria, a country which you know  
17 generally does not have a good human rights  
18 record, and which at this point in time on October  
19 the 21st is illegally detaining Mr. Arar.

20 So on the one hand we have the  
21 Americans, in your view, illegally removing him or  
22 rendering him; we have the Syrians, with a very  
23 poor human rights record, illegally detaining him.

24 And in light of the fact that the  
25 RCMP had this sharing arrangement with the

1 Americans, I have three questions:

2 First of all, in those  
3 circumstances, do you think that the RCMP should  
4 have used its best efforts in getting Mr. Arar, a  
5 Canadian, back to Canada?

6 MR. CABANA: I believe, sir, that,  
7 first of all, the DFAIT was involved at that point  
8 in time, and DFAIT holds the responsibility, it is  
9 part of their mandate, to look after Canadians  
10 that are incarcerated abroad. It is not an RCMP,  
11 role, sir.

12 MR. CAVALLUZZO: So that the RCMP  
13 has no responsibility whatever in this situation  
14 that I've just cited to you. That's DFAIT's  
15 problem; let them solve it?

16 MR. CABANA: No. What I'm  
17 suggesting, sir, is that DFAIT is involved. If  
18 they require the assistance of the RCMP, I'd  
19 submit to you that a request would be made, and I  
20 would also submit to you that a request wouldn't  
21 be made to the investigative team.

22 MR. CAVALLUZZO: Well, didn't --  
23 I'm not going to review the evidence, but I  
24 thought DFAIT attempted to get the RCMP's  
25 involvement, not only in the letter of Mr. Edelson

1 of October 31st but also Mr. Pardy's evidence in  
2 2003. Throughout that whole period, it seemed to  
3 me, DFAIT tried to get the RCMP's best efforts --

4 MR. CABANA: I can't speak to  
5 Mr. Pardy's testimony, and I would submit to you  
6 that Mr. Pardy's testimony is not in relation to  
7 any action or involvement of myself.

8 MR. CAVALLUZZO: Okay. You've  
9 answered the first question.

10 Now, assuming the same facts,  
11 illegal rendering by the Americans, illegal  
12 detention by a dictatorial regime in Syria of a  
13 Canadian -- okay?

14 Second question is that, should  
15 the RCMP ensure, in light of all of these  
16 circumstances, particularly in light of the fact  
17 that some of the information was shared with the  
18 Americans, should the RCMP ensure that no  
19 information is given to the Syrian Military  
20 Intelligence?

21 MR. CABANA: That no information  
22 is given by whom?

23 MR. CAVALLUZZO: By the RCMP.

24 MR. CABANA: I would submit, sir,  
25 that this is a consideration, but whether or not

1 the -- a decision is made for the sharing to occur  
2 would involve extensive consultation with  
3 agencies, other agencies, to make that  
4 determination, and I also submit that that's  
5 exactly what took place, sir.

6 MR. CAVALLUZZO: Okay. Third  
7 question --

8 MR. CABANA: Yes.

9 MR. CAVALLUZZO: -- assuming those  
10 facts. In light of the fact, once again, illegal  
11 rendering --

12 MR. CABANA: Mm-hmm.

13 MR. CAVALLUZZO: -- by your  
14 partner with whom you've been sharing this  
15 information.

16 MR. CABANA: Yes?

17 MR. CAVALLUZZO: Illegal  
18 detention, dictatorial regime. The question is:  
19 In these circumstances, when we have a Canadian  
20 citizen in this situation, should the RCMP ensure  
21 that any information which comes from Syria  
22 relating to this individual not be used against  
23 him?

24 MR. CABANA: Not be used against  
25 him? Where?

1 MR. CAVALLUZZO: Against him --

2 MR. CABANA: I'm not sure I'm  
3 following your question.

4 MR. CAVALLUZZO: Against him in  
5 respect of your mandate, that is, against him in  
6 your investigation, used against him so that you  
7 can build a case against him, used against him in  
8 charging him.

9 MR. CABANA: Then I would suggest  
10 that we're looking at a question of admissibility  
11 of this information in legal proceedings, if it  
12 was to be used.

13 MR. CAVALLUZZO: But you don't  
14 feel any obligation on the part of the RCMP --

15 MR. CABANA: Sir, I --

16 MR. CAVALLUZZO: Can I finish the  
17 question?

18 MR. CABANA: Certainly.

19 MR. CAVALLUZZO: Okay. You don't  
20 feel any obligation on the part of the RCMP, once  
21 again in these circumstances, that is, shared  
22 information with their American partners --

23 MR. CABANA: Mm-hmm.

24 MR. CAVALLUZZO: -- who illegally  
25 render him to a place that illegally detains him

1 with a terrible human rights record, you don't  
2 feel any obligation in respect of getting  
3 information from that regime and saying, "Can't  
4 use it"? Never mind admissibility; I'm talking  
5 about propriety. That's the question.

6 MR. CABANA: I would suggest, sir,  
7 that considering the threat that had been  
8 identified, considering the mandate that we had  
9 been given, if there is information reaching  
10 investigators in Canada, that might -- and here  
11 again, these are all suppositions -- that might  
12 prevent the loss of Canadian lives here in Canada,  
13 I would suggest to you, sir, that if we were to  
14 disregard that information strictly based on the  
15 source of the information, without any  
16 verification, we would stand to be highly  
17 criticized if anything did occur in Canada.

18 MR. CAVALLUZZO: That's always an  
19 easy response, Mr. Cabana. It's always an easy  
20 response.

21 MR. CABANA: Okay.

22 MR. CAVALLUZZO: But the problem  
23 is, is that we have a Canadian who is in this  
24 situation.

25 MR. CABANA: Yes, sir.



1 MR. CAVALLUZZO: And you've  
2 answered the question --

3 MR. CABANA: Yes, I have.

4 MR. CAVALLUZZO: -- and I won't  
5 pursue it any further.

6 Now, you mentioned that on the  
7 Project A-OCANADA was an Immigration member, in  
8 response to a question from Ms Edwardh?

9 MR. CABANA: Yes, there was.

10 MR. CAVALLUZZO: Okay. Now, the  
11 question -- I'm going to ask the Government for  
12 that person's name and you need not say it in  
13 public.

14 MR. CABANA: I couldn't because I  
15 don't remember who it was.

16 MR. CAVALLUZZO: Well, we'll find  
17 out who it was.

18 The question that I have in  
19 relation to that is, was this member called upon  
20 during Mr. Arar's stay in the United States to  
21 assess what might happen to him in terms of the  
22 options the Americans had?

23 MR. CABANA: Not to my knowledge.  
24 I don't know.

25 MR. CAVALLUZZO: Okay. On to

1 Mr. Fothergill now. He's asked some questions  
2 about training, and he talked about the Muslim  
3 orientation course, and could you tell us, do you  
4 know of any members that attended any of the --

5 MR. CABANA: Which Muslim  
6 orientation course?

7 MR. CAVALLUZZO: Well, the  
8 tutorial that we talked about yesterday, the  
9 e-mail that gave an opportunity.

10 MR. CABANA: Again, I believe I  
11 testified to that yesterday. To my knowledge --  
12 well, the message was relayed to the team leaders.

13 MR. CAVALLUZZO: Right.

14 MR. CABANA: The presentation was  
15 open to the investigators. How many positions we  
16 were allocated on that workshop -- because it  
17 wasn't a training, it was a presentation -- I have  
18 no knowledge, and whether we had anybody that  
19 attended, I have no knowledge.

20 MR. CAVALLUZZO: I would ask  
21 Government counsel if they could confirm that  
22 either way, as to who attended? Thank you.

23 Now, just a couple of final  
24 questions relating to -- I think you're happy.  
25 It's been a long two days, Mr. Cabana, and we're

1 almost at the end.

2 Your counsel, Mr. Bayne, asked you  
3 a number of questions, and there's a couple that I  
4 would raise. I'm venturing into an area here that  
5 is not my expertise, so -- but I think that these  
6 questions make a lot of common sense.

7 In any event, let me ask you --  
8 and that's concerning once again what's been  
9 called the Edelson conditions?

10 MR. CABANA: Yes, sir.

11 MR. CAVALLUZZO: Okay? And the  
12 questions that I had would be the following:

13 First of all, if you went ahead  
14 with the interview, complying with Edelson's  
15 condition --

16 MR. CABANA: Yes.

17 MR. CAVALLUZZO: -- you told us  
18 that Mr. Arar could be called as a witness,  
19 correct?

20 MR. CABANA: Correct.

21 MR. CAVALLUZZO: So that Mr. Arar  
22 could be called as a witness at an investigative  
23 hearing?

24 MR. CABANA: Investigative  
25 hearings are different than normal proceedings,

1 and the impact of interviewing somebody prior to  
2 an investigative hearing, I would have to actually  
3 research that to see if the investigative hearing  
4 avenue would still be available.

5 MR. CAVALLUZZO: Do you know  
6 whether -- did you ever check whether Mr. Arar  
7 could have been subpoenaed to be compelled to  
8 appear before an investigative hearing?

9 MR. CABANA: In relation  
10 specifically to Mr. Arar?

11 MR. CAVALLUZZO: Right.

12 MR. CABANA: We had general --  
13 well ...

14 We had general conversations or --  
15 we had detailed conversations with our legal  
16 advisors but not specifically to Mr. Arar. It was  
17 in relation to this new -- this new avenue or this  
18 new tool that resulted from C-36, the  
19 investigative hearing, just to try to get an  
20 understanding of what were the circumstances and  
21 what were the mechanics, because, to my knowledge,  
22 and I'm not even sure whether there has been one  
23 in Canada so far.

24 MR. CAVALLUZZO: Well, let us just  
25 move on then. In any event, if he was compelled

1 to testify -- I understand there has been, but in  
2 any event ...

3 If he was compelled to testify,  
4 you would have had a statement at the  
5 investigative hearing. And the same thing is  
6 true, for example, if you or if he was subpoenaed  
7 to be a witness at a preliminary hearing. You  
8 would get a statement from him, obviously, if he  
9 was compelled to testify?

10 MR. CABANA: Not necessarily.

11 MR. CAVALLUZZO: Well, you have  
12 his testimony. You would have what he said under  
13 oath.

14 MR. CABANA: And when did we get  
15 what he said under oath? You're talking about  
16 through the investigative hearing?

17 MR. CAVALLUZZO: No, no. Either  
18 compelled to testify at an investigative hearing,  
19 compelled to testify at a preliminary hearing; he  
20 would be forced to testify.

21 MR. CABANA: Yes. Might be a  
22 hostile witness.

23 MR. CAVALLUZZO: Absolutely,  
24 absolutely.

25 MR. CABANA: Yes.

1 MR. CAVALLUZZO: The other thing  
2 that I don't quite understand is that, it would  
3 seem to me that, leaving aside all these technical  
4 criminal law matters, that if he gave you a  
5 statement, it would be useful as intelligence.

6 You're a national security --  
7 you've got a national security opponent. You  
8 think he's associated with people --

9 MR. CABANA: Yes.

10 MR. CAVALLUZZO: -- that statement  
11 could be used as intelligence?

12 MR. CABANA: Yes.

13 MR. CAVALLUZZO: Whether he  
14 testified or not?

15 MR. CABANA: Yes.

16 MR. CAVALLUZZO: Indeed, when we  
17 come to 2002, in September, when you thought that  
18 this was your last chance to interview him, he  
19 would never be a witness, but you were willing to  
20 go down to the States to interview him.

21 MR. CABANA: Yes, very much so.

22 MR. CAVALLUZZO: Then why wouldn't  
23 you just go across the street to Mr. Edelson's  
24 office and interview him since you'd be getting  
25 the same thing: Intelligence? That's the

1 question.

2 MR. CABANA: That's the question?

3 MR. CAVALLUZZO: Yes.

4 MR. CABANA: Simply because, as of  
5 January 22nd, we were faced with a huge amount of  
6 information to analyze and we were looking at the  
7 different priorities. We had, again, these  
8 investigative hearings that were possibilities.  
9 There was a number of individuals that were  
10 identified for potential interviews, and, to my  
11 knowledge, it was only a very small number of  
12 interviews that were conducted, and I would say  
13 probably one or maybe two that were conducted, and  
14 the interviews were delayed until later so that we  
15 had a better idea of what we had in our possession  
16 and also so that we had a better idea of what the  
17 investigative hearing could provide us.

18 MR. CAVALLUZZO: Right. But you  
19 would agree with me that if you flew down to New  
20 York to interview him --

21 MR. CABANA: Oh, as of October  
22 2002?

23 MR. CAVALLUZZO: Yes.

24 MR. CABANA: Yes.

25 MR. CAVALLUZZO: All you would be

1 getting was intelligence?

2 MR. CABANA: Yes.

3 MR. CAVALLUZZO: All right. Now,  
4 finally --

5 MR. BAYNE: I didn't rise to  
6 interrupt my friend's flow, but I don't want my  
7 silence to be taken as assent to the proposition  
8 that it's just a criminal law technicality that  
9 you would be in breach of section 7 of the Charter  
10 if you fail to disclose the statement and the  
11 conditions required that you couldn't.

12 THE COMMISSIONER: Thank you,  
13 Mr. Bayne.

14 MR. CAVALLUZZO: Then there's  
15 substance and a technicality.

16 Finally, Mr. Cabana, you were  
17 asked questions by Mr. Bayne concerning whether  
18 Project A-OCANADA ever shared information on  
19 Mr. Arar with the Syrian Military Intelligence.  
20 Do you recall that? And your answer was "No."

21 MR. CABANA: Yes, sir.

22 MR. CAVALLUZZO: We do know that  
23 you shared information with the Americans;  
24 correct?

25 MR. CABANA: Yes, sir.



1 MR. CAVALLUZZO: Do you know if  
2 the Americans ever shared this information on  
3 Mr. Arar with the Syrians?

4 MR. FOTHERGILL: To the extent  
5 that the witness must draw on foreign intelligence  
6 to answer that question, I object. If he can  
7 answer without drawing on foreign intelligence,  
8 there's no objection.

9 MR. CAVALLUZZO: Did you  
10 understand that objection?

11 MR. CABANA: Yes, I believe I did.

12 MR. CAVALLUZZO: Okay. Answer if  
13 you can answer.

14 THE COMMISSIONER: Then you can  
15 answer the question.

16 --- Pause

17 MR. CABANA: No, sir, I can't.

18 MR. CAVALLUZZO: All right. Thank  
19 you.

20 Final question then, Mr. Cabana,  
21 is: Mr. Bayne read to you a number of portions of  
22 P-20, saying that the American INS person said  
23 that Mr. Arar was clearly and unequivocally a  
24 member of al-Qaeda.

25 Now, do you know that -- of

1 course, these are the same people that said it was  
2 clear that there were weapons of mass destruction  
3 in Iraq, but let's move on from that one.

4 Let me ask you the following  
5 question: Are you aware that in the United States  
6 it is a serious crime to be a member of al-Qaeda?

7 MR. CABANA: Yes, sir, I am.

8 MR. CAVALLUZZO: And you're aware  
9 that on October the 5th, that the words you got  
10 from the Americans through the head office --  
11 headquarters person, was that they didn't have  
12 enough to charge Mr. Arar, isn't that correct?

13 MR. CABANA: Not myself directly  
14 but through head office, yes.

15 MR. CAVALLUZZO: Thank you. I  
16 have no further questions.

17 THE COMMISSIONER: Well, let me  
18 thank you. That completes your evidence,  
19 Superintendent Cabana. Thank you very much --

20 MR. CABANA: My pleasure.

21 THE COMMISSIONER: -- for the time  
22 and effort you put in to preparing. Not everybody  
23 has seen it, but you've been here twice --

24 MR. COPELAND: I remind you, it  
25 doesn't complete his evidence and I think we have

1           some opportunity to cross-examine him at some  
2           point?

3                           THE COMMISSIONER:   Yes.  Thank  
4           you.  Possibly, depending on if they're relevant  
5           questions.

6                           But I want to express my gratitude  
7           now for the time and effort that you've spent and  
8           the straightforward way that you've answered the  
9           questions and in a clear fashion, and I appreciate  
10          that.

11                          MR. CABANA:   Thank you, sir.

12                          THE COMMISSIONER:  It makes my  
13          task simpler when witnesses do that.  So thank you  
14          very much.

15                          MR. FOTHERGILL:  Commissioner,  
16          just before we break for the weekend.  I know  
17          these have been an exceptionally difficult two  
18          days, and I want to express on behalf of the  
19          Government my sincere appreciation first and  
20          foremost to your counsel, Mr. Cavalluzzo, who I  
21          know worked very, very hard to fashion an  
22          examination-in-chief that managed to accommodate  
23          our NSC concerns, and I appreciate that he didn't  
24          always agree with them, but he was respectful,  
25          highly professional.  It was very difficult.  And

1 we are grateful.

2 And I also want to express my  
3 appreciation both to Ms Edwardh and to Mr. Bayne  
4 and indeed to the witness. I know this has been  
5 frustrating at times, and I am grateful for the  
6 consideration and, again, the professionalism with  
7 which all counsel and the witness have responded  
8 to my objections.

9 THE COMMISSIONER: Thank you very  
10 much, Mr. Fothergill. I think those comments are  
11 appropriate, and I appreciate the spirit in which  
12 they're offered.

13 We are going to be breaking now  
14 until July 27th, is it?

15 MR. CAVALLUZZO: Yes. We will be  
16 sitting on July 27th, 28th, and 29th, three  
17 days --

18 THE COMMISSIONER: Those will be  
19 public hearings so they'll be here.

20 MR. CAVALLUZZO: That's correct.

21 THE COMMISSIONER: We'll be rising  
22 until then.

23 Just one matter, an informal  
24 matter, before we break -- yes, Mr. Copeland?

25 MR. COPELAND: Can I ask a

1 question? When we were discussing the matter  
2 yesterday of the possible cross-examination of --  
3 I'm sorry, I don't remember your rank, Mr. Cabana.

4 THE COMMISSIONER: Superintendent  
5 Cabana.

6 MR. COPELAND: Superintendent  
7 Cabana. We were discussing August the 10th as a  
8 potential date. I just need to know whether that  
9 is when we're looking at. As I indicated to you,  
10 I have obligations at the Law Society that I can  
11 escape from.

12 THE COMMISSIONER: Is that  
13 something that we can work out in the hearing  
14 room, Mr. Cavalluzzo, or is that --

15 MR. CAVALLUZZO: I am advised by  
16 my partner here that we can't make that decision  
17 now because there will be a series of public and  
18 in-camera witnesses, and we have to have the same  
19 witnesses for public on one day and in camera. So  
20 what we're going to have to do is we're going to  
21 have to look at our calendar seriously and speak  
22 to both counsel and hopefully come up with a date  
23 that will accommodate.

24 THE COMMISSIONER: That's good.  
25 Let me, just before we close, something that I

1 overlooked mentioning last week.

2 I think on behalf of all of us who  
3 are in the inquiry, we want to extend our  
4 congratulations to Mr. Cavalluzzo for receiving  
5 the Law Society of Upper Canada Medal, which is a  
6 great honour for his contributions to the  
7 profession and to the public over many years. Our  
8 heartfelt congratulations to him.

9 Okay. With that, we'll rise until  
10 July 27th.

11 THE REGISTRAR: Please stand.

12 --- Whereupon the hearing adjourned at 4:58 p.m.,  
13 to resume on Wednesday, July 27, 2005,  
14 at 10:00 a.m. / L'audience est ajournée  
15 à 16 h 58, pour reprendre le mercredi  
16 27 juillet 2005 à 10 h 00

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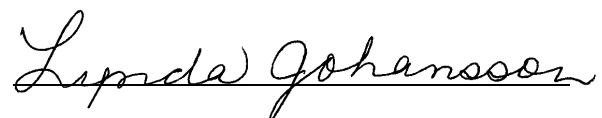
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Lynda Johansson,

C.S.R., R.P.R.

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