

**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 28 juillet 2005

Held at:

Algonquin Room
Old City Hall
111 Sussex Drive
Ottawa, Ontario

Thursday, July 28, 2005

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1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Thursday, July 28, 2005

3 at 10:00 a.m. / L'audience reprend le jeudi

4 28 juillet 2005 à 10 h 00

5 THE COMMISSIONER: Good morning,
6 everyone.

7 MR. DAVID: Good morning,
8 Mr. Commissioner.

9 I would like to begin by filing
10 two additional documents.

11 THE COMMISSIONER: All right.

12 MR. DAVID: The first would be
13 what we could refer to as the Quirion affidavit.
14 This is the affidavit that was used to obtain
15 search warrants with regard to the O'Neill leak.
16 We have identified several paragraphs that we
17 believe are relevant to your mandate in terms of
18 the leak.

19 This document clearly establishes
20 that the RCMP are investigating the matter;
21 clearly establishes that at one point they had
22 reasonable probable grounds to believe that an
23 offence had been committed under the Securities of
24 Information Act.

25 Therefore, insofar as this

1 document establishes those grounds, we believe it
2 is relevant to your mandate.

3 THE COMMISSIONER: All right.

4 MR. DAVID: Could we file the
5 document, please.

6 THE COMMISSIONER: That will be
7 187.

8 MR. DAVID: Thank you.

9 EXHIBIT NO. P-187: Quirion
10 Affidavit on search warrants
11 re O'Neill leak

12 MR. DAVID: I will just give the
13 Clerk a moment.

14 THE COMMISSIONER: The Clerk has
15 been getting a workout.

16 MR. DAVID: I suggested he wear
17 running shoes yesterday.

18 Second, I would like to file by
19 way of a document three admissions with regard to
20 Mr. Gaetan Lavertu of the Department of Foreign
21 Affairs.

22 Mr. Lavertu at the relevant time
23 was the Deputy Minister of DFAIT.

24 As you well know, Mr. Lavertu was
25 in Syria on May 19th of 2003 and the intention at

1 the time was that he would raise with his
2 counterpart, the Syrian counterpart, the issue of
3 Mr. Arar's detention in Syria.

4 Mr. Lavertu will not be testifying
5 before you viva voce but, by agreement, we will
6 file this document in lieu of his testimony to
7 establish the three points that are indicated.

8 For your knowledge, there will be
9 an in camera version of this document as well.

10 THE COMMISSIONER: That will be
11 P-188.

12 MR. DAVID: P-188; thank you.

13 EXHIBIT NO. P-188: Document
14 entitled: "Testimony by way
15 of Admissions for Deputy
16 Minister Gaetan Lavertu -
17 DFAIT"

18 MR. DAVID: Finally,
19 Mr. Commissioner, I announced this week's schedule
20 yesterday. Part of next week's agenda is the
21 testimony of Mr. Dan Killam, who is an RCMP
22 officer at headquarters, or was at the relevant
23 time.

24 We are calling Mr. Killam with
25 regard to an issue where you have already heard

1 some evidence. You have heard this evidence from
2 Ms Roberta Lloyd and it has to do with the fact
3 that a course was given to federal government
4 civil servants. It was a course that was given in
5 January of 2003.

6 As you know, Ms Lloyd testified
7 with regard to certain discussions and certain
8 comments Mr. Killam is said to have made at this
9 conference.

10 Mr. Killam will be testifying
11 before you as to that area. We feel that it is
12 relevant for you to hear testimony.

13 There is a debate that will be
14 raised before you this morning. Ms Edwardh would
15 like the opportunity to examine Mr. Killam in
16 terms of a larger scope. So I will allow counsel
17 to address you in that regard.

18 THE COMMISSIONER: All right.

19 Ms Edwardh?

20 MS EDWARDH: Thank you,
21 Mr. Commissioner.

22 I might just indicate that all
23 counsel have had an opportunity to discuss what
24 the issues are that Mr. Killam might be asked to
25 address, and indeed your counsel kindly set

1 someone the task yesterday of identifying what
2 might be the relevant documents, generally, that
3 would fall within those issues.

4 I have a list and I believe
5 Mr. Fothergill has a list.

6 Initially this issue was engaged
7 when I approached Commission counsel and said
8 there were some other areas I believed were
9 important to explore.

10 Let me just give a couple of
11 examples before we go into them in detail.

12 First of all, as you know,
13 Mr. Killam was the first officer to undertake a
14 review of the involvement of the RCMP in
15 Mr. Arar's arrest and deportation. He reported to
16 Mr. Loepky. As I understand, his conclusions are
17 different than those reached by Mr. Garvie.

18 I believe it is relevant to
19 understand why those conclusions are different.
20 It may just be a function of the review that he
21 undertook and the resources and time he had to
22 apply to the question, or he may have a third or
23 different view of what role the caveats were to
24 have or play in the environment of post-9/11.

25 I think that is important to you,

1 because we now have on the public record evidence
2 which is quite contradictory. I would expect
3 Mr. Killam, given his position, to be able to shed
4 some light on the understanding, in the course of
5 national security investigations, of what role
6 caveats have or should play.

7 The real issue I think is: Does
8 the list of documents that we now have given to
9 Mr. Fothergill not as of today's date provide him
10 with an adequate opportunity to fairly apprise the
11 officer of the areas?

12 I don't think there is certainly
13 any issue that the areas have relevance in the
14 sense that every one of the proposed issues is
15 reflected in a documentary record before you, and
16 the questions would be inviting the witness to
17 speak to that record to amplify or clarify it.

18 So the traditional view -- and I
19 am not quite sure what the position is. I
20 understand Commission counsel was going to touch
21 briefly on these areas as well. But whether he
22 does or not, it is simply my view that, given that
23 these areas have now been identified and the
24 documents identified, that gives to the witness an
25 ample opportunity to consider and reflect if he

1 can add anything to it and answer the questions
2 fairly.

3 So the principal issue, in my
4 respectful submission, should not be whether I
5 should ask the questions or whether Commission
6 counsel should ask the questions, but rather are
7 the questions relevant and, given the notice the
8 witness has, has he had a reasonable opportunity
9 to inform himself so that he is not caught by
10 surprise.

11 THE COMMISSIONER: How much
12 questioning are we talking about?

13 MS EDWARDH: Maybe 40 minutes. It
14 might go to an hour, depending on answers given.

15 Certainly there is nothing about
16 the proposed area or areas that could not be dealt
17 with in the one day we have set aside for
18 Mr. Killam. I have no expectation that it would
19 be more demanding of both the Commission's time
20 and the witness' time to answer in these areas.

21 So in my respectful submission,
22 and subject to what others have to say, I think
23 the issues of fairness to the witness have been
24 met and indeed relevance is derived from the mere
25 fact that these are all issues before you as part

1 of the record.

2 THE COMMISSIONER: One of the
3 things that occurs to me is it was not Commission
4 counsel's intention to call Mr. Killam, except for
5 the one issue that has arisen, and that is why he
6 is being called.

7 The process, as you probably know,
8 of Commission counsel preparing witnesses is that
9 if they are going to call a witness on an area,
10 then they interview thoroughly the witness about
11 that so that the witness is informed in advance.

12 Commission counsel also make
13 decisions about what evidence they will or will
14 not call. I can fairly say that they have erred
15 on the side of inclusion as the result of an
16 instruction generally from me that if there is
17 some possible assistance to me, then the evidence
18 should be called.

19 That said, they clearly have not
20 called every conceivable witness. They have
21 avoided duplications and made decisions that where
22 it would take an unnecessary amount of time, it is
23 not necessary to call them. We would be here
24 forever if we called every witness who somehow had
25 a hand that touched these matters.

1 I approach this application sort
2 of with that background. I am not prejudging it;
3 I am just saying that that is the process that
4 Commission counsel have followed.

5 MS EDWARDH: If I could respond in
6 some way, Mr. Commissioner, this Commission of
7 Inquiry also has some other unusual features
8 which, I am sure, you have heard more witnesses in
9 camera than you have as part of the public record.

10 THE COMMISSIONER: That's true.

11 MS EDWARDH: And I know that that
12 duplication for you sometimes is probably tedious,
13 but quite frankly we have not had a lot of RCMP
14 witnesses. It is my understanding that Detective
15 Killam would be the third. There are some very
16 important differences that have evolved as between
17 Mr. Cabana and Mr. Loepky. I intend to explore
18 some of them this morning.

19 And I would like to take a third
20 point, if I could.

21 As someone who has been granted
22 standing by you, while I acknowledge that the
23 general role of Commission counsel is as you have
24 identified, certainly, in my respectful
25 submission, Mr. Arar's interests may sometimes

1 carry the questions in a different direction that
2 has not been the subject of objection.

3 I have not handed my
4 cross-examination to anyone to vet at any time,
5 even if I may raise areas that have not been
6 discussed, but I have lived assiduously by the
7 rules created, which is if there is a document,
8 and it is new, I have an obligation to make sure
9 the other side is aware.

10 I don't see any unfairness, in my
11 respectful submission, in these limited areas. I
12 will identify them in detail for you, if you wish.

13 THE COMMISSIONER: If you can do
14 it generally.

15 MS EDWARDH: Well, some relate to
16 personal notes made by Mr. Loeppky of
17 communications with Mr. Killam. There is the
18 internal review and the differences reached.
19 There is the receipt by Mr. Killam of information
20 from the liaison officer, Mr. Roy, on Mr. Arar.
21 There is Mr. Killam's work with respect to the
22 leaks.

23 I don't know that I need to go
24 into any detail, but they are all issues that have
25 in one way or another been dealt with from a

1 specific perspective. But Mr. Killam has direct
2 information and knowledge bearing on those issues.

3 THE COMMISSIONER: Thank you.

4 Mr. Fothergill?

5 MR. FOTHERGILL: Thank you,
6 Commissioner.

7 I think you have anticipated at
8 least some of the concerns that I have about what,
9 from our perspective, is a very late request to
10 expand the scope of Chief Superintendent Killam's
11 testimony.

12 I think that the issue here raises
13 two distinct considerations: one being the role
14 of Commission counsel; and the other, which I
15 think is more fundamental from my perspective, the
16 rules of administrative fairness.

17 So let me begin by endorsing what
18 you said: that in the first instance it is the
19 responsibility of Commission counsel to marshal
20 and present relevant evidence and to make an
21 informed assessment of how your time and the
22 taxpayers' resources are best spent examining this
23 sort of issue.

24 Were it not for Commission
25 counsel's decision to hear the evidence of Roberta

1 Lloyd, Chief Superintendent Killam would not be
2 coming at all.

3 So it is certainly open to
4 Commission counsel to, quite independently of
5 Roberta Lloyd's allegations, decide that there is
6 relevant information that Chief Superintendent
7 Killam could give you. But I think it is very
8 significant that Commission counsel have not
9 reached that conclusion.

10 So as a result, Chief
11 Superintendent Killam has been interviewed by
12 Commission counsel, but only with respect to the
13 allegations made by Ms Roberta Lloyd.

14 As you know, the Inquiries Act
15 provides under section 13 that before there can be
16 an adverse finding by you in a report, formal
17 notice should be given to the person against whom
18 that finding might be made. We know from the
19 Supreme Court of Canada's decision in the blood
20 inquiry case that, in the ordinary course, such
21 notice should be given before a witness testifies.

22 The only way that that can happen,
23 in my submission, is that if Commission counsel
24 interviews the witness, determines their role, and
25 makes an assessment, possibly even in consultation

1 with you, about whether the individual is likely
2 to face an adverse criticism in your final report.
3 And in the normal course, if there is such a
4 danger, the notice is given before the individual
5 testifies.

6 Clearly that hasn't happened in
7 this case in relation to anything other than
8 Ms Lloyd's allegations. There has been no
9 opportunity for Commission counsel to discuss with
10 Chief Superintendent Killam any other involvement
11 he may have had, or whether any of actions or
12 omissions might result in an adverse finding.

13 In my submission, it is not
14 sufficient for me to be provided sometime in the
15 course of today with a list of documents to which
16 he might be referred.

17 And just as a simple point of
18 clarification, I haven't received this list, but
19 that can obviously be cured in the next few
20 moments.

21 That doesn't address the concern.

22 First of all, I may feel that
23 there are other documents that we have in our file
24 holdings that might bear on the situation. We
25 would possibly have to reconsider the redactions

1 that we have made up to this point, because of
2 course we don't reconsider everything if we don't
3 think it is going to be used in the public forum.
4 All of this would have to take place.

5 In my submission, if we want to
6 hear from Chief Superintendent Killam on other
7 matters, we certainly can, but there is a process
8 to be followed. And to put it very simply, we
9 would have to start all over again.

10 We would have to start by
11 identifying the documents, maximizing disclosure
12 of the documents, meeting with Commission counsel,
13 reviewing Chief Superintendent Killam's proposed
14 testimony in total. Commission counsel would
15 determine whether any of this might result in an
16 adverse finding. We would have a section 13
17 notice, or not, as the case may be. And then
18 Chief Superintendent Killam would come to testify,
19 knowing whether he was facing any jeopardy.

20 None of this has happened and,
21 with the greatest of respect, it will not happen
22 in the one business day that remains between now
23 and Tuesday.

24 So we have, in my submission, a
25 couple of alternatives.

1 Chief Superintendent Killam I
2 think should come on Tuesday, and I think he
3 should address the subject matter that has
4 previously been discussed. There is nothing to
5 prevent Ms Edwardh at any time in the proceeding
6 from bringing an application, as any party can do,
7 for further evidence to be called, either from
8 Chief Superintendent Killam or somebody else on
9 any matter that she feels has not been adequately
10 canvassed.

11 THE COMMISSIONER: Is that not in
12 effect what she is doing today?

13 MR. FOTHERGILL: Indeed. But she
14 would like the testimony to be heard on Tuesday,
15 and in my submission that can't happen.

16 THE COMMISSIONER: Right.

17 MR. FOTHERGILL: Certainly, there
18 is nothing wrong, if she feels strongly enough
19 about it. First of all, she can approach
20 Commission counsel to say we need to hear Chief
21 Superintendent Killam on some other subjects, and
22 then we will go through the process. He will be
23 interviewed, Commission counsel will determine
24 whether they agree or not, and he will be called
25 at the appropriate time with the proper procedural

1 safeguards being respected.

2 The other thing I want to point
3 out though is we haven't had much RCMP evidence so
4 far, but there is more to come. And if we are
5 interested in a CID perspective, which of course
6 is what Chief Superintendent Killam would offer
7 us, we do have Mr. Flewelling coming, would was a
8 member of CID at the relevant time. We have
9 Mr. Lauzon coming; he was a member of CID at the
10 relevant time.

11 And when I say "relevant time",
12 that is quite important here because Chief
13 Superintendent Killam, I think you may know,
14 enters the picture quite a bit later.

15 So if we are chiefly interested in
16 the CID perspective at the time that most
17 interests us -- and I think that is when the
18 investigation began, the information-sharing
19 understanding, all that sort of thing -- first of
20 all, we have two witnesses yet to come who will be
21 able to address that.

22 If you really wanted somebody at
23 Chief Superintendent Killam's level, it wouldn't
24 necessarily be him. I think it would actually be
25 Chief Superintendent Pilgrim, who occupied his

1 role at the relevant time.

2 This, to me, highlights the
3 importance of letting Commission counsel determine
4 what is most relevant for your purposes, marshal
5 and present the evidence, and at the conclusion of
6 that, if the parties feel there is a gap that
7 needs to be filled, their first recourse is to
8 address Commission counsel and ask for a witness
9 to be called.

10 It may be Chief Superintendent
11 Killam. I think frankly probably it would not be.

12 If Commission counsel don't call
13 the evidence, then of course Ms Edwardh at that
14 time can say we need to hear Chief Superintendent
15 Killam on a particular point. And if you agree,
16 then of course he will be brought but he will be
17 brought after he has been interviewed and after
18 there has been an assessment made of whether he
19 needs to be informed of any potential jeopardy he
20 faces.

21 So in my submission, the only
22 thing he can testify to on Tuesday, which I think
23 he should testify to, is the issues raised in
24 Roberta Lloyd's testimony, and then perhaps after
25 we have heard the other CID evidence Commission

1 counsel can make a determination of whether you
2 need any further evidence from CID.

3 THE COMMISSIONER: Anybody else
4 want to speak to this?

5 Ms Edwardh, response?

6 MS EDWARDH: I do not share my
7 friend's view that the Supreme Court of Canada
8 decision in the blood inquiry stands for the legal
9 proposition that he has put forward.

10 Obviously a witness must have an
11 opportunity to respond to any potential adverse
12 findings at some time during the process. It is
13 obviously better to give the witness, if they are
14 going to have an adverse finding made, the most
15 notice that is possible. But there is nothing
16 about the rule and the concern articulated by
17 Mr. Fothergill that in my respectful submission is
18 supported by the court's decision.

19 Nor is there anything in the
20 handful of areas that have been identified that
21 presumptively raise issues of a potential section
22 13 notice. In my respectful submission, we have
23 not as yet taken witnesses who may have general
24 information and said you can't go there with them
25 because Commission counsel has not themselves

1 decided there will be something relevant.

2 In my respectful submission,
3 Mr. Commissioner, Mr. Arar's interest is broad.
4 If the subject matter of the question is relevant
5 from his perspective, I think it should be put to
6 the witness now.

7 It is not as though this is
8 thousands of pages of information that Mr. Killam
9 has to read. There is a simple list of about ten
10 documents, and anyone could prepare themselves
11 reasonably to deal with these issues with an hour
12 or so of referencing and work, especially with
13 counsel's assistance.

14 To suggest that he should be
15 brought back or re-interviewed by Commission
16 counsel is, in my submission, to put us all
17 through artificial hoops. I would like to ask
18 these questions.

19 No one objected when I asked
20 Mr. Cabana whether he had considered laying a
21 criminal charge against the American law
22 enforcement agencies who were involved in
23 Mr. Arar's rendition. No one stood up and said,
24 "Well, we haven't had a chance to consider that."

25 And while I appreciate that the

1 approach of Commission counsel with respect to
2 this witness is narrow, I submit that I should not
3 be precluded from asking 20 minutes' to 40
4 minutes' worth of questions in areas that counsel
5 has now identified for them.

6 Those are my submissions.

7 THE COMMISSIONER: Thank you,
8 Ms Edwardh.

9 I appreciate the submissions. We
10 will go ahead with Chief Superintendent Killam's
11 evidence next Tuesday on the issue that was
12 previously contemplated. It may involve more
13 work, but I think we should stick to the process
14 that Commission counsel has followed to this
15 point, and if there is going to be examinations of
16 this witness on other areas, then I think there
17 should be an interview with the witness and
18 Commission counsel should become involved in
19 preparing that evidence.

20 I think it is different,
21 Ms Edwardh, with respect, than simply questions
22 here and there of which notice had not been given.
23 As I understand the discussion, it seems to me it
24 actually relates to other matters and to matters
25 that it was not contemplated this witness would

1 testify about.

2 So I am not ruling that you may
3 not examine Chief Superintendent Killam on the
4 areas that you wish to; I am simply indicating
5 that that will not happen next Tuesday.

6 I encourage counsel to sit down
7 and discuss how these issues may be addressed.

8 There may be merit to the point,
9 Ms Edwardh -- and you are at a disadvantage
10 because you haven't heard all of the evidence --
11 that the issues you wish to raise about CID and
12 headquarters might be more productively canvassed
13 through witnesses from CID who were there at the
14 time.

15 As Mr. Fothergill pointed out,
16 there will be two of those witnesses called, and I
17 would expect that Commission counsel will
18 cooperate fully with you -- and I expect
19 government counsel as well -- to assist so that
20 you do get an opportunity to canvass these areas
21 fully. And if at the end of the day it needs to
22 be through Chief Superintendent Killam, then that
23 is the way we will go.

24 Thank you for raising it. That is
25 the way we will proceed.

1 Are there any other preliminary
2 matters?

3 MR. DAVID: No, Mr. Commissioner.

4 THE COMMISSIONER: Then Ms
5 Edwardh?

6 PREVIOUSLY SWORN: GARRY LOEPPKY
7 EXAMINATION

8 THE COMMISSIONER: Good morning,
9 Mr. Loepky.

10 MS EDWARDH: Good morning,
11 Mr. Loepky.

12 As you know, my name is Marlys
13 Edwardh and I represent Mr. Arar.

14 I do not propose, sir, to refer
15 you to many, many documents that you referred to
16 yesterday, but if for some reason I mention a
17 conclusion I have drawn from the documents that
18 you looked at yesterday and you would like to see
19 them again, please stop me and we will find them
20 among the many that are buried there.

21 I would like to start, if I could,
22 with one of the very initial comments you made:
23 that after 9/11, Project OCanada got started
24 really with a series of advisory letters from
25 CSIS?

1 MR. LOEPPKY: Yes.

2 MS EDWARDH: And it is my
3 understanding, sir, that those advisory letters
4 also led to the creation of A-OCANADA?

5 MR. LOEPPKY: Yes.

6 MS EDWARDH: Could you just take a
7 moment, because I don't believe anyone has defined
8 what an advisory letter is and what it contains,
9 to describe these letters?

10 MR. LOEPPKY: I haven't read the
11 advisory letters, but they are advisory letters
12 that are provided to the RCMP by the Canadian
13 Security Intelligence Service wherein they
14 identify individuals who, from their assessment,
15 are involved in activities which would be
16 considered criminal in nature and require a law
17 enforcement response.

18 MS EDWARDH: So would we be
19 correct in concluding, then, that the organization
20 of CSIS is really then handing over the
21 investigation to the RCMP for follow-up criminal
22 investigation?

23 MR. LOEPPKY: Yes.

24 MS EDWARDH: And in addition to
25 identifying targets, do these letters set out in

1 some form acceptable to CSIS the substance of the
2 information that they have gleaned about that
3 person, so you are not starting with a blank
4 slate?

5 MR. LOEPPKY: I assume they do. I
6 haven't read advisory letters.

7 MS EDWARDH: I take it you haven't
8 read them in this case, but you have read them in
9 general?

10 MR. LOEPPKY: No. I know what the
11 substance is and the messaging, but I haven't read
12 them. They would be reviewed by our policy area.

13 MS EDWARDH: And somewhere along
14 the line -- I don't know whether it is in a
15 document or not -- I got the understanding that
16 the advisory letter could contain reference to
17 material facts about a person that CSIS was
18 content could move out of the domain of CSIS and
19 into the investigative format.

20 Does that conform with your
21 understanding?

22 MR. LOEPPKY: That is what the
23 advisory letters would generally contain.

24 MS EDWARDH: Okay. Then I want to
25 go to another area, which is joint management

1 teams.

2 You have described, sir, that the
3 OCanada investigation that was rooted in Toronto
4 slipped under the pre-existing management of the
5 joint management team?

6 MR. LOEPPKY: Yes.

7 MS EDWARDH: Could you just take a
8 moment on the public record to describe who would
9 be the members of that joint management team in
10 the Toronto area and what their functions would
11 be?

12 MR. LOEPPKY: It would be
13 comprised of a senior officer of the RCMP and
14 senior representatives from police departments
15 that had resources dedicated to the Combined
16 Forces Special Enforcement Unit. I believe it is
17 at the chief level, but it in some cases could be
18 at the deputy chief level.

19 They would meet from time to time
20 to talk about broad issues in terms of mutual
21 cooperation in terms of concerns that might have
22 been raised to them by their individual members,
23 by their individual officers within the CFSEU.

24 So it is a very high-level body
25 that really is there to provide very strategic

1 direction but to also look at issues and resolve
2 them.

3 MS EDWARDH: And we could conclude
4 fairly that that body, with respect to the OCanada
5 investigation, would have members with extensive
6 investigative experience?

7 MR. LOEPPKY: The joint management
8 team?

9 MS EDWARDH: Yes.

10 MR. LOEPPKY: Well, they are
11 senior people in the organizations that have come
12 up through the organizations.

13 MS EDWARDH: Therefore, they would
14 have extensive investigation experience?

15 MR. LOEPPKY: I anticipate, yes.

16 MS EDWARDH: And they would be
17 persons who were accustomed to dealing with issues
18 about cooperation and integrated policing issues?

19 MR. LOEPPKY: Yes.

20 MS EDWARDH: And they would also,
21 of course, be somewhat skilled and concerned about
22 information-sharing? That would be one of the
23 other areas that they would have expertise in?

24 MR. LOEPPKY: Yes.

25 MS EDWARDH: Now, this high-level

1 guidance that a joint management team could
2 provide, if there was a problem, they could
3 provide guidance on operational and tactical
4 issues if the members sought their advice?

5 MR. LOEPPKY: Yes.

6 MS EDWARDH: And indeed they did
7 that, or do that, in the Toronto area from time to
8 time?

9 MR. LOEPPKY: Yes.

10 MS EDWARDH: Further, this
11 high-level guidance that you described in answer
12 to Commission counsel's questions yesterday is the
13 kind of guidance you would expect if, in fact,
14 there was an issue about information-sharing with
15 foreign nations. They would provide that kind of
16 guidance?

17 MR. LOEPPKY: If it was raised to
18 their level.

19 MS EDWARDH: Right. And I will
20 come to this again, but I will leave you with this
21 thought, if I could, Mr. Loepky: that when the
22 Project A-OCANADA opted to share the information
23 in the manner that they did with their U.S.
24 counterparts, such a decision might well be the
25 kind of decision that would be brought to an

1 active joint management team?

2 MR. LOEPPKY: No. I think there
3 are many investigations that are ongoing all the
4 time, and unless there is a unique challenge where
5 there is a disagreement within the operational
6 team about information-sharing, it wouldn't be
7 raised.

8 MS EDWARDH: Well, let me just
9 tell you what Mr. Cabana said to us. He said
10 after the search warrants were executed on January
11 22nd, the volume of material obtained as a result
12 of the execution of the warrants overwhelmed
13 completely A-OCANADA. They did not have the
14 resources nor the time to undertake an examination
15 of the products of the search.

16 And in order to do an examination
17 of the products of the search, they took some
18 unusual steps -- and I am going to submit to you
19 they are unusual.

20 For example, they mirrored all of
21 the 26 or 27 hard drives that were seized and
22 invited all of the agencies who were stakeholders,
23 including the U.S. agencies, to just take a copy.
24 Now, that's unusual.

25 MR. LOEPPKY: Yes.

1 MS EDWARDH: And that's the kind
2 of unusual decision that, in my respectful view,
3 would be taken to a high-level active joint
4 management team when you are going to take a step
5 like that?

6 MR. LOEPPKY: If there was a
7 disagreement within the organizations involved in
8 that investigation and they raised it to their
9 respective leaders, it would go to the joint
10 management team.

11 MS EDWARDH: We will come back to
12 them again in a little bit, if I could.

13 I would like to take you to a
14 comment that you made. You may wish to see the
15 document, or you may be content to have me
16 paraphrase it.

17 Commission counsel took you to a
18 document that was a briefing note of a December
19 19th, 2001, A-OCANADA meeting, when the group
20 determined to constitute themselves as a criminal
21 investigation.

22 Do you recall that document? It
23 is P-83.

24 MR. LOEPPKY: Not specifically. I
25 wouldn't mind having a look at it.

1 MS EDWARDH: It is P-83, tab 1,
2 page 3.

3 --- Pause

4 MS EDWARDH: At the very bottom of
5 that page, just before the unredacted portion, it
6 says:

7 "Until now, the impetus of
8 the investigation has been an
9 intelligence-gathering
10 exercise."

11 Do you see that language?

12 MR. LOEPPKY: Yes.

13 MS EDWARDH: "But it will now
14 shift to a criminal
15 investigation so that
16 detailed information can be
17 gathered in a manner suitable
18 for court purposes."

19 You made the observation, sir, and
20 I think it is a very important observation, which
21 was regardless of what is being said here and what
22 was understood by the officers, they were always
23 engaged in a criminal investigation?

24 MR. LOEPPKY: Yes.

25 MS EDWARDH: And indeed they were

1 never entitled to engage in a mere
2 intelligence-gathering operation; correct?

3 MR. LOEPPKY: It is always a
4 criminal investigation when you are pursuing a
5 matter such as this. Intelligence forms part of
6 the basis for the investigation.

7 MS EDWARDH: Of course. We have
8 heard about the role of intelligence. Indeed,
9 sir, you were quite eloquent about it at the very
10 initial hearings. Intelligence has a role in any
11 criminal investigation, the most complex or
12 sometimes the most simple investigation.

13 But my question is quite
14 different. Should A-OCANADA have thought they
15 were conducting a mere intelligence operation,
16 they were dead wrong because they had no authority
17 to do that; correct?

18 And if the answer is they had
19 authority, then could you --

20 MR. LOEPPKY: No.

21 MS EDWARDH: -- please explain
22 what CSIS is supposed to do.

23 MR. LOEPPKY: You gather
24 intelligence in order to undertake further steps
25 in a criminal investigation. For example, part of

1 their intelligence-gathering process may have been
2 to gather information to support a Part VI
3 affidavit. That's what I would read into their
4 comments.

5 So they were preparing to get into
6 the active part of the investigation.

7 MS EDWARDH: You would agree with
8 me that should they have understood that they were
9 doing anything different than a criminal
10 investigation, they were wrong. They were not
11 entitled to conduct a pure intelligence operation?

12 MR. LOEPPKY: That's correct. But
13 I don't see this as a pure intelligence operation.
14 I see that as a preamble to doing some additional
15 steps in the criminal investigation.

16 MS EDWARDH: As long as they
17 understood that, I understand what you are saying,
18 Mr. Loepky.

19 Let me jump to another area.

20 Perhaps we could look at this
21 particular document. It is P-85, volume 1, tab
22 21.

23 --- Pause

24 MS EDWARDH: P-85, volume 1, tab
25 21. I intend not to give all of us too much

1 exercise.

2 MR. LOEPPKY: Yes.

3 MS EDWARDH: When you need to read
4 it, please tell me.

5 Now, this document is a briefing
6 note to the Commissioner?

7 MR. LOEPPKY: Yes.

8 MS EDWARDH: Can you tell me, sir,
9 whether the Commissioner got it?

10 MR. LOEPPKY: I don't believe so.

11 MS EDWARDH: Did you get it?

12 MR. LOEPPKY: I didn't -- I
13 probably didn't see it at the time, or else it
14 would have my initials on it. I initial
15 everything that I read. But it was brought to my
16 attention, I believe.

17 MS EDWARDH: I am sorry. Would it
18 have been brought to your attention at the time
19 that it was created and, I suppose, shown to
20 others or the contents were known to others?

21 MR. LOEPPKY: Yes.

22 MS EDWARDH: It would have?

23 MR. LOEPPKY: It would have been.

24 MS EDWARDH: So the substance of
25 it would have been brought to your attention?

1 MR. LOEPPKY: It would have been
2 briefed to me by Assistant Commissioner Proulx.

3 MS EDWARDH: And while this
4 document contemplates sharing between agencies,
5 sharing of information between agencies as a
6 matter of course, it is sufficiently redacted that
7 it is unclear to me whether or not, on the face of
8 this document, it would be your understanding that
9 this was a discussion about sharing with domestic
10 Canadian agencies.

11 This was not intended by you, or
12 anyone else, to be an invitation to share with any
13 international agency in the world?

14 MR. LOEPPKY: Are you asking what
15 I am reading into the part that is not redacted?

16 MS EDWARDH: I am asking you
17 whether this document, that talks about
18 information-sharing between agencies as a matter
19 of course, was understood by you to relate to
20 domestic Canadian law enforcement or intelligence
21 agencies?

22 MR. LOEPPKY: No. The document to
23 me would speak about sharing internationally and
24 domestically.

25 MS EDWARDH: That's not what I

1 understood you to say yesterday. All right.

2 So this document then does what:
3 announces the intention of the Force? The
4 intention of who to share information?

5 MR. FOTHERGILL: Commissioner,
6 just so that we don't proceed under a false
7 understanding, I think we should take note of the
8 date of the document. It is a retrospective
9 document that I think was prepared in 2004.

10 THE COMMISSIONER: In January.

11 MR. FOTHERGILL: It is not a
12 forward-looking document.

13 MR. LOEPPKY: It is a piece of
14 information that was brought to my attention
15 later, and it relates to an information-sharing
16 practice that had taken place in the past.

17 MS EDWARDH: So is there a
18 document that was generated after 9/11, provided
19 to CID or to A-OCANADA, that specifically dealt
20 with their rules and responsibilities around
21 information-sharing other than general RCMP
22 policy?

23 MR. LOEPPKY: No.

24 MS EDWARDH: Perhaps now I
25 understand this better than I did yesterday,

1 Mr. Loepky.

2 This description of a past
3 practice is a practice -- and I made a note --
4 that you were not involved in defining or
5 sanctioning.

6 Is that correct?

7 MR. LOEPPKY: That is correct. I
8 was not aware of it.

9 MS EDWARDH: And I believe you
10 said in your testimony yesterday that not only
11 were you not aware of it, to the best of your
12 knowledge, Proulx was not aware of it.

13 Is that correct?

14 MR. LOEPPKY: That's correct.

15 MS EDWARDH: And I take it, being
16 that this is kind of a retrospective discussion,
17 might we assume that this would not have been a
18 practice known to the Commissioner of the RCMP
19 prior to this document being at least brought to
20 your attention?

21 MR. LOEPPKY: Yes.

22 MS EDWARDH: Who was the senior
23 operational officer for the Royal Canadian Mounted
24 Police?

25 MR. LOEPPKY: I was.

1 MS EDWARDH: I understood you
2 yesterday, sir, to say that the object of
3 post-9/11 information-sharing was to share
4 information quickly, fully, but within existing
5 RCMP policy.

6 Is that correct?

7 MR. LOEPPKY: Yes.

8 MS EDWARDH: Now, let me just go
9 to a few questions, if I could, about what
10 happened in this case, because I am going to
11 assume from what you have said that, sir, you
12 neither were told nor sanctioned what has been
13 regarded as the data dump, or described as the
14 data dump, of A-OCANADA to whatever other agencies
15 were involved, including U.S. agencies?

16 MR. LOEPPKY: I became aware of it
17 later.

18 MS EDWARDH: Right. And we have
19 been told by Inspector Cabana that not only on
20 April 2nd did all of the SUPERText materials get
21 provided, but indeed -- and that information
22 included the following: (1) notes from officers;
23 (2) interagency communication and correspondence;
24 (3) he made it clear that all of the documents
25 that were seized on January 22nd pursuant to the

1 search warrants were digitized and uploaded I
2 guess on the SUPERText.

3 So the product of the search, the
4 officers' notes, interagency communication, all
5 gets handed over in a voluminous, obviously,
6 handover; and also, for anyone's taking, the hard
7 drives, although that seems to be handed over as a
8 result of an interagency meeting on January the
9 30th.

10 You said, sir, that the practice
11 of the RCMP was to share, after information was
12 examined and known to be relevant -- known to be
13 important to share.

14 MR. LOEPPKY: Yes.

15 MS EDWARDH: Would you agree with
16 me that when you share, or offer for sharing, 26
17 or 27 hard drives because you don't have the
18 capacity to analyze them, and thousands of pieces
19 of paper seized at a number of residential sites,
20 that it can hardly be said that things were shared
21 after they were examined and found to be relevant?

22 MR. LOEPPKY: Yes. As I have
23 testified in the past, the normal procedure would
24 be that you share relevant information. I don't
25 know how much of that information was relevant,

1 how much of it was appropriate to share, but the
2 normal practice would be that the information
3 would be reviewed, it would be assessed, a
4 determination made what was appropriate to share,
5 and then that would be shared.

6 That would be the standard process
7 that would take place.

8 Certainly this was an
9 international investigation with mutual interests,
10 and therefore I can't say what was relevant to
11 that other part of the investigation.

12 MS EDWARDH: And you'll agree with
13 me, given what we know about the sharing of the
14 hard drives in January, neither did the officers
15 who shared. They would not have known either,
16 because they didn't have the capacity, according
17 to Mr. Cabana, to fully examine the data, the
18 electronic data, and determine whether it was or
19 was not relevant and should be shared?

20 MR. LOEPPKY: That's my
21 understanding.

22 MS EDWARDH: So some of the
23 information may have been relevant; it may have
24 been 1 per cent. But in any event, we can say
25 this: Huge amounts of personal information of

1 individuals whose computer hard drives were taken,
2 their families, their private records, were made
3 available to a multitude of agencies, including
4 U.S. agencies.

5 That is your understanding?

6 MR. LOEPPKY: I think I responded,
7 I don't know what was shared. I don't know what
8 the information was. Therefore, I can't agree
9 with you that it had all family information on it,
10 unless you can provide that. But I don't know
11 what was on the hard drives.

12 MS EDWARDH: If you are told that
13 the computer hard drives are removed from persons'
14 residences, it is a logical inference, is it not,
15 Mr. Loepky, to draw the conclusion that at least
16 some of that information is personal information
17 that would be unrelated completely to criminal --
18 to anything that would be of interest in a
19 criminal investigation?

20 MR. LOEPPKY: It is possible. I
21 would agree with that.

22 MS EDWARDH: Thank you.

23 Now, had you been asked, as the
24 senior operational officer of the RCMP, to provide
25 additional resources to A-OCANADA in order that it

1 could come to a determination of whether the
2 evidence that they would like to share was
3 relevant, would you have assured that they were
4 properly resourced so that that could be done,
5 they could evaluate it and share it in a timely
6 manner?

7 MR. LOEPPKY: Well, it is easy to
8 pose the question today, but what one has to
9 assess is the pressures that the organization was
10 facing at the time, the other investigations that
11 were ongoing, and where do you pull resources from
12 and stop doing to do this.

13 So you would have to do an
14 assessment based on judgment, based on
15 information. I mean, a whole lot of factors come
16 into it before you can say categorically that,
17 yes, we would have done this.

18 MS EDWARDH: You would have had to
19 prioritize that application of resources against
20 others?

21 MR. LOEPPKY: Yes.

22 MS EDWARDH: Were you ever asked
23 to?

24 MR. LOEPPKY: No.

25 MS EDWARDH: I take it had you

1 been asked, you would have given it careful
2 consideration because that is your duty and role?

3 MR. LOEPPKY: Yes.

4 MS EDWARDH: You were asked a
5 number of questions about the failure to attach
6 caveats to the information.

7 Do you recall those questions
8 yesterday?

9 MR. LOEPPKY: Yes.

10 MS EDWARDH: I would like to deal
11 with that.

12 Certainly it is apparent that your
13 view, that there was a failure to properly attach
14 caveats, was shared by Mr. Garvie. That was
15 pointed out to you in his report.

16 MR. LOEPPKY: Yes.

17 MS EDWARDH: He made those
18 observations. And you do not disagree with his
19 conclusions in that respect?

20 MR. LOEPPKY: I do not disagree
21 with his conclusions, but I have also said that
22 the absence of a written caveat on a piece of
23 information does not necessarily exclude the fact
24 that within the law enforcement community, when
25 information is exchanged, there is an implied

1 caveat. There is an implied understanding that
2 you will go back to the organization that provided
3 the information to assess whether it can be
4 disclosed further.

5 So those are implied as well as
6 written.

7 MS EDWARDH: We will come to the
8 implied one, because yesterday you cast it
9 slightly differently. You said there is an
10 implied caveat that it will be used for the
11 purpose it was given.

12 MR. LOEPPKY: I believe that's
13 just what I said.

14 MS EDWARDH: Okay.

15 MR. LOEPPKY: That there is an
16 implied caveat on information exchange.

17 MS EDWARDH: It is the content of
18 the caveat I am trying to identify.

19 Is the caveat that the receiving
20 organization promises to use it solely for the
21 purposes in which it was given, or are they
22 promising not to use it until they come back and
23 get consent or approval?

24 MR. LOEPPKY: Well, my
25 understanding of an implied caveat, when you

1 exchange information, is that it is provided to
2 you for your information and before you put it to
3 further use, such as using it in evidence or
4 whatever purpose you might want, sharing it with
5 another agency, that you would come back to the
6 agency that provided it to seek their concurrence.

7 MS EDWARDH: That helps me
8 considerably, because really what you are saying
9 is there is an implied no-use caveat without
10 further consent and permission. It is really
11 intelligence information until consent is given
12 by, in this case, the RCMP, for it to be used in
13 any proceeding or for any purpose.

14 MR. LOEPPKY: Yes.

15 MS EDWARDH: Or transmitted to
16 another entity?

17 So we have got the caveat clear
18 then.

19 I want, then, to turn to without
20 caveats.

21 So if there is no caveat, if the
22 United States passed the information on to Syria,
23 it was in breach of any obligation to you, the
24 implied caveat?

25 MR. LOEPPKY: It would be in

1 breach of the understanding of what an implied
2 caveat is, yes.

3 MS EDWARDH: And did you ever
4 learn that the information provided by the RCMP to
5 the U.S. agencies was handed on by those agencies
6 to Syrian Military Intelligence?

7 MR. FOTHERGILL: Mr. Commissioner,
8 much as I had to object when the question was
9 asked to superintendent Cabana, I must object to
10 the question because it may elicit an NSC
11 response.

12 MS EDWARDH: I am a little
13 concerned with "may". I understand an objection.
14 I will move on if there is an objection that the
15 answer necessarily will breach National Security
16 Confidentiality. But if there is any way, in a
17 general way, that the witness can answer the
18 question about whether information from the RCMP
19 was handed on to Syrian Military Intelligence, I
20 would be very appreciative. I think it is a very
21 important question, Mr. Commissioner.

22 MR. FOTHERGILL: If I were to be
23 that specific, I would essentially answer the
24 question for him.

25 The point is, we cannot confirm or

1 deny whether we have intelligence from Syria that
2 would tend to suggest that they used information
3 from Canada. So that is why I said "may".

4 THE COMMISSIONER: I think that's
5 the answer, if the Government has raised the
6 objection, Ms Edwardh.

7 I repeat what I have said many
8 times, but I understand the difficulty you have.
9 We have heard a good deal of evidence in camera,
10 and that doesn't necessarily --

11 MS EDWARDH: I wish you could tell
12 me in secret.

13 --- Laughter / Rires

14 MS EDWARDH: In any event, if the
15 U.S. handed information to Syria, they could only
16 have done so in the context of appropriately
17 respecting the implied caveats by getting RCMP
18 permission?

19 MR. LOEPPKY: Yes.

20 MS EDWARDH: Did you give such
21 permission?

22 MR. LOEPPKY: No.

23 MS EDWARDH: Are you aware of
24 whether any other officer gave such permission?

25 MR. LOEPPKY: No.

1 MS EDWARDH: If the information
2 provided by the RCMP was used to interrogate
3 Mr. Arar in Syria, that, I am going to suggest,
4 would be a breach of the implied undertaking and
5 as a matter of practice, my question is: What
6 would you, as the senior operational officer, do
7 if such a breach took place?

8 What is your recourse?

9 MR. LOEPPKY: I think I have given
10 testimony before that if we became aware that an
11 implied caveat or a written caveat had not been
12 respected, it would ultimately be raised with the
13 agency that had disclosed information without our
14 consent.

15 MS EDWARDH: Maybe you can't
16 answer this: Are you aware, sir, of whether this
17 issue has been raised by the RCMP with either the
18 CIA or the FBI in respect of Mr. Arar?

19 MR. FOTHERGILL: Mr. Commissioner,
20 this is a neither confirm nor deny sort of
21 objection on NSC grounds.

22 THE COMMISSIONER: Okay.

23 MS EDWARDH: Thank you,
24 Mr. Fothergill.

25 In any event, once it is out of

1 the bag, your remedies are pretty limited.

2 MR. LOEPPKY: Yes.

3 MS EDWARDH: And it is also the
4 case that that general breach of a promise that
5 policing agencies give to one another is viewed as
6 a very serious breach in the policing community,
7 is it not?

8 MR. LOEPPKY: Yes, it is, because
9 it underpins the level of trust that exists
10 between organizations and which must exist to
11 share information appropriately.

12 MS EDWARDH: Now, let me go to if
13 the caveats were on.

14 It is your evidence clearly, sir,
15 that the caveats ought to have been placed on
16 these documents and the material; correct?

17 MR. LOEPPKY: Yes.

18 MS EDWARDH: And if in fact U.S.
19 authorities -- INS, CIA, or anybody else -- had
20 wanted to use the information, they would have
21 come back to you, in the ordinary course,
22 respecting the caveats, and would have said they
23 wished to use it; correct?

24 MR. LOEPPKY: Yes.

25 MS EDWARDH: And in order to make

1 an informed decision about whether they would be
2 permitted to use it, I am going to suggest that
3 you would have gone through a number of steps.

4 The first step would be what part
5 of the information provided comes from other
6 agencies? And you would then have sought directly
7 the permission of those other agencies, or
8 directed the U.S. entity or organization to those
9 other agencies.

10 Is that correct?

11 MR. LOEPPKY: That's one of the
12 considerations, yes.

13 MS EDWARDH: Then the next thing
14 you would say to yourself is what kind of process
15 do you want to use it in? Is it a tribunal? Is
16 it a court? And how will this information be
17 used?

18 You would have asked yourself that
19 question, would you not?

20 MR. LOEPPKY: Yes.

21 MS EDWARDH: And you would have
22 asked yourself as well, what is the nature of the
23 process and can the information be protected?

24 MR. LOEPPKY: Yes. You would look
25 at your own interests.

1 MS EDWARDH: Yes, of course. And
2 then you would have asked yourself what is the
3 possible outcome of this process?

4 MR. LOEPPKY: Yes.

5 MS EDWARDH: So, for example, in
6 an ordinary criminal case, if you found yourself
7 giving a lot of information, you might ask the
8 prosecutor "is this a death penalty case" because
9 you might want to know that?

10 MR. LOEPPKY: You would ask those
11 kind of questions, yes.

12 MS EDWARDH: So if the caveats had
13 been there, I am going to suggest to you that you
14 would have had a conversation with U.S.
15 authorities that would have run along those lines:
16 What are you going to use Canadian information
17 for? What is the nature of the hearing? Can the
18 information be adequately protected? Will our
19 sources be exposed? And what is the possible
20 result of this process?

21 Correct? We have just outlined
22 that.

23 MR. LOEPPKY: Well, yes. And as I
24 said, implied caveats or written caveats carry the
25 same obligation.

1 MS EDWARDH: But I am going now to
2 express caveats where you have a colleague in the
3 States looking at a document saying "this is the
4 property of the Government of Canada".

5 MR. LOEPPKY: Yes.

6 MS EDWARDH: That tends to get
7 people's attention?

8 MR. LOEPPKY: Yes.

9 MS EDWARDH: So if in fact you
10 were told that there was a process going on in the
11 United States that was a hearing, that could
12 result in Mr. Arar's -- if you ask the questions
13 of your colleagues: What are you going to do?
14 What's the possible result here? And they had
15 told you, "Well, we are considering rendering
16 Mr. Arar to the Government of Syria for further
17 investigation of his alleged al-Qaeda
18 connections," I am going to suggest to you,
19 Mr. Loepky, that you could not have consented to
20 the use of that information in that forum, because
21 to give your consent in the face of that knowledge
22 would do nothing more than amount to aiding and
23 abetting an offence of torture. You would know it
24 and it would hit you in the face in a second.

25 MR. LOEPPKY: Yes, I would agree

1 that if you were told that it was going to be used
2 to send someone to a country with a
3 less-than-acceptable human rights record, that
4 would certainly become an issue.

5 MS EDWARDH: Yes, of course. We
6 now know -- and I will admit to being troubled by
7 your answer yesterday that nothing had changed,
8 given what we know of our colleagues' practices.

9 Now that you know them, it seems
10 to me that you have a duty to inquire, if you are
11 dealing with an investigation that is a national
12 security investigation, where there are alleged
13 connections with al-Qaeda. You now know a fair
14 bit about how our colleagues in the States respond
15 to those allegations.

16 Would you agree with me that there
17 is a duty to inquire?

18 MR. LOEPPKY: When I said that
19 nothing had changed, I was talking about the
20 policy in terms of information-sharing. What has
21 changed is certainly our awareness that this
22 practice was something that had taken place.

23 As I have earlier testified, I was
24 not aware at that time, immediately post-9/11,
25 that this was even a practice that was

1 contemplated in the United States, and certainly
2 our awareness has changed and certainly I think we
3 are much more thorough in terms of how we approach
4 these types of things; but recognizing that the
5 practice now, that it is more in the public
6 domain, is certainly the subject of a lot of
7 debate as well.

8 MS EDWARDH: And when you say you
9 are more thorough in how you approach these
10 matters, I take that to mean that you have
11 accepted that there is a burden of inquiry resting
12 upon your shoulders, or the shoulders of your
13 colleagues in the RCMP, to ascertain whether or
14 not shared information could be used in
15 circumstances where someone was rendered or sent
16 to a place where their human rights would not be
17 respected?

18 MR. LOEPPKY: There is a higher
19 level of awareness in our organization today that
20 that was a practice that took place, an
21 organizational awareness that wasn't there --

22 MS EDWARDH: Of course.

23 MR. LOEPPKY: -- immediately
24 post-9/11. So when we share now, I think there is
25 a greater sensitivity about the potential impacts

1 of that information.

2 MS EDWARDH: And in the context of
3 discussing with you the issue of what you would
4 know in the ordinary case to decide whether to
5 waive or to say that the caveat was not binding
6 and to permit the use of information, you would
7 agree with me that one of the things you would
8 want to know today, before you ever consented, if
9 it was a national security investigation involving
10 allegations about al-Qaeda, is: Was this going to
11 result in a rendering?

12 MR. LOEPPKY: It would be a
13 consideration, absolutely.

14 MS EDWARDH: And you would ask the
15 question? I want to know that people will ask the
16 question. That's really the issue.

17 Do you accept there is a duty to
18 make inquiry in those circumstances?

19 MR. LOEPPKY: There is certainly a
20 duty to ensure that any subsequent use that that
21 information is going to be put to is brought to
22 our attention and that we have an opportunity to
23 respond.

24 I want to make sure that I respond
25 to your question in terms of do we in every case

1 ask, "Is this information going to be used to
2 render?"

3 You could take that literally and
4 say that the hundreds of investigations that we
5 have ongoing every day -- a Canadian is arrested
6 in Detroit, he is from another country in an
7 organized crime file. I wouldn't expect under
8 those circumstances they would ask the question.
9 But certainly in national security investigations
10 with this type of a scenario, I would expect that
11 that would be a higher consideration.

12 MS EDWARDH: And the question
13 would be asked?

14 MR. LOEPPKY: Yes.

15 MS EDWARDH: And if answered in
16 the affirmative, I take it you would agree with
17 me, that that would be a clear basis for a member
18 of the RCMP to say, "In those circumstances, we
19 will not waive the caveat. The information cannot
20 be used."

21 MR. LOEPPKY: That's correct.

22 MS EDWARDH: So I take it from all
23 of your evidence, sir, that if Mr. Cabana believed
24 that the policy with respect to caveats need not
25 be implied, it is a view that did not originate

1 with you?

2 MR. LOEPPKY: Yes, that's exactly
3 what I have said, and I have also outlined the
4 environment that existed, and the --

5 MS EDWARDH: We will come to the
6 environment.

7 MR. LOEPPKY: Good.

8 MS EDWARDH: Because one of the
9 scary things about environments is that it can
10 generate responses because of the intensity of the
11 pressure, where fundamental principles get set
12 aside. That's an issue whenever there is a lot of
13 pressure within an environment.

14 I will come to ask you that
15 question in a moment.

16 We have established that there is
17 no such policy that is written with respect to
18 caveats not applying.

19 I want to just understand this.
20 Is it the case that an individual RCMP officer is
21 entitled to view RCMP policy as a matter of
22 discretion, or is each and every officer bound by
23 the policies of the Force in the operational
24 manual?

25 MR. LOEPPKY: Policies are

1 guidelines in terms of how an organization
2 operates and the expectations that exist in
3 respect of how investigations are conducted, how
4 members conduct themselves, and how the
5 organization functions to maintain public respect.

6 MS EDWARDH: So then let me ask
7 this question: In a policy as important as the
8 need to place caveats on to protect sources and
9 protect CSIS sources, et cetera, is a breach of
10 that kind of policy an offence under the code of
11 conduct of the RCMP?

12 MR. LOEPPKY: No, I would not
13 consider that a breach of conduct.

14 MS EDWARDH: And let me just ask
15 this: Would it ever amount to a breach of the
16 code of conduct?

17 MR. LOEPPKY: Well, each case is
18 assessed on its own merits. I mean, in my role as
19 the deputy of operations, I would see where a
20 member had perhaps been in breach of policy but
21 had in fact acted in very good faith and done the
22 right thing. Therefore, you have to look at each
23 one of those on a case-by-case basis.

24 MS EDWARDH: And in this case,
25 having learned somewhat or well after the fact of

1 the kind of sharing that had gone on, were you
2 concerned?

3 MR. LOEPPKY: It was a concern,
4 but it was a joint international operation with
5 mutual interests, and it was understandable where
6 members, working on that joint operation, would
7 have had an understanding that they could share
8 information without -- unless they were going to
9 further use that information outside their
10 organizations.

11 I can understand where that
12 environment existed, but it was not within the
13 parameters of the policy.

14 MS EDWARDH: I am going to suggest
15 to you, sir, that the holus-bolus data dump, as we
16 have come to call it, is in fact a real indictment
17 of the management of A-OCANADA.

18 For them to have gone from January
19 the 30th to handing over hard drives without
20 knowing the contents to handing over the whole
21 database on April the 2nd, CDs, is a staggering
22 lack of connection by senior officers to
23 fundamental RCMP policy.

24 MR. LOEPPKY: Well, I have
25 testified that I would expect the policy would be

1 followed.

2 MS EDWARDH: Do you know whether
3 any steps were taken internally within the RCMP to
4 deal with those individuals who made those
5 decisions in violation of RCMP policy?

6 MR. LOEPPKY: Not that I am aware
7 of.

8 MS EDWARDH: And I take it you
9 would know if such steps had been taken?

10 MR. LOEPPKY: Yes.

11 MS EDWARDH: Did the CROPS
12 officer, Couture, Mr. Cabana, or Mr. Proulx have
13 the authority to look at individual members of the
14 Force, or a group like A-OCANADA, and say, "You
15 can ignore this policy"?

16 MR. LOEPPKY: No, I don't believe
17 you can simply say "ignore the policy".

18 MS EDWARDH: I want to go back to
19 a statement that was explored with you yesterday.

20 I take it, sir, you do not dispute
21 that the information provided by A-OCANADA was
22 used, at least in part, as a basis to effect the
23 arrest and rendering of Mr. Arar, including his
24 interrogation in the United States?

25 It is clear evidence that that

1 evidence was relied upon and used?

2 MR. LOEPPKY: I don't know what
3 evidence, what information was used for the U.S.
4 to make the decision that they did, and I think I
5 have given evidence to that in the past.

6 MS EDWARDH: Yes, you have, sir,
7 but it is also clear, while you may not know the
8 whole body of evidence -- because no one in Canada
9 may know it -- it is also clear that they used
10 information, such as Mr. Arar's lease, discussions
11 about his connection to Mr. Almalki, the genesis
12 of which clearly came from RCMP investigations?

13 MR. LOEPPKY: Yes.

14 MS EDWARDH: And so information
15 from the RCMP was, at least in part, the basis of
16 his arrest, interrogation, and rendering to Syria?
17 There is no doubt about that. I just want to make
18 clear what your evidence is.

19 MR. LOEPPKY: My evidence is that
20 there was information exchanged, but what
21 information was used to make the decision that was
22 ultimately taken, I don't know, and the assumption
23 that it was based on information that we provided,
24 and only on that information, I think is
25 erroneous. I don't know what information was

1 used.

2 MS EDWARDH: Certainly --

3 MR. LOEPPKY: I just think it is
4 important to understand that.

5 MS EDWARDH: I understand that.
6 We will look at the decision for a moment.

7 It is very, very clear that
8 Mr. Arar was interrogated by U.S. officials using
9 things like his lease?

10 MR. LOEPPKY: Yes.

11 MS EDWARDH: And one of the
12 reasons that was a potent piece of evidence, of
13 course, was Mr. Abdullah Almalki's name was on the
14 lease; correct?

15 MR. LOEPPKY: That's my
16 understanding, yes.

17 MS EDWARDH: And Mr. Abdullah
18 Almalki was the principal target of A-OCANADA when
19 it was set up?

20 I think we have heard that
21 evidence from Mr. Cabana.

22 MR. LOEPPKY: Okay. Yes.

23 MS EDWARDH: So, I am just going
24 to suggest to you, sir, it is obvious -- and
25 although I can't suggest that there may not have

1 been some other piece of evidence, because we
2 don't know it, certainly significant portions of
3 the information provided to the U.S. seemed to
4 have been relied upon in Mr. Arar's interrogation
5 and in the decision, significant portions. It
6 wasn't trivial.

7 Have you read the decision of the
8 INS?

9 MR. LOEPPKY: I agree that there
10 was information that may have emanated from
11 Canadian sources, from the RCMP. But to go the
12 next step and say that was the information that
13 was relied upon for the deportation, I don't think
14 there is anything that we have that can
15 substantiate that.

16 MS EDWARDH: I think that's open
17 for the Commissioner to find on this record, and
18 he will have to deal with that issue.

19 But there is nothing that you can
20 point to that suggests that there was not at least
21 some reliance on Canadian information. That's all
22 I am saying.

23 MR. LOEPPKY: Yes.

24 MS EDWARDH: I want to go back, if
25 I could, to a simple question about Mr. Cabana's

1 understanding.

2 Was there an MOU or an interagency
3 agreement in place permitting the general sharing
4 of intelligence information between the RCMP and
5 the FBI at the relevant time period?

6 MR. LOEPPKY: With respect to this
7 case?

8 MS EDWARDH: A general one. Let's
9 ask about a general one first.

10 MR. LOEPPKY: We share information
11 as a matter of good law enforcement practice. We
12 have agreements with the FBI in a number of areas.

13 MS EDWARDH: With respect to this
14 case, was there -- leave aside any oral
15 discussions or this is a joint investigation,
16 therefore we will share. Was there an MOU or an
17 interagency agreement dealing with the A-OCANADA
18 investigation?

19 MR. LOEPPKY: No.

20 MS EDWARDH: After Mr. Arar was
21 removed to Syria, you made brief reference
22 yesterday to a trip you and Mr. Proulx took to
23 Washington.

24 MR. LOEPPKY: Yes.

25 MS EDWARDH: At which time you

1 raised your concerns, or I think it is fair to say
2 you raised at least the issue of Mr. Arar's
3 removal to Syria.

4 Is that correct?

5 MR. LOEPPKY: Yes.

6 MS EDWARDH: With whom were you
7 meeting?

8 MR. LOEPPKY: With the Deputy
9 Director of the FBI very briefly, and then with
10 some of his other staff thereafter.

11 MS EDWARDH: You made the
12 interesting comment, Mr. Loepky, that you
13 discussed his situation, and I think in general
14 you said you weren't satisfied with the nature of
15 the responses you got.

16 MR. LOEPPKY: That's correct.

17 MS EDWARDH: Can you amplify on
18 why you were not personally satisfied?

19 MR. FOTHERGILL: Commissioner, I
20 am afraid he can't. This is something we
21 discussed at some length with Mr. David before the
22 question was posed in examination in-chief.

23 The difficulty here is that the
24 information communicated in a meeting such as this
25 by a foreign official is something that we need to

1 treat as confidential, and that was why I think
2 Mr. David quite artfully asked him simply for his
3 impression as opposed to the details of what was
4 discussed. You, of course, have the full story in
5 camera.

6 THE COMMISSIONER: Thank you.

7 MS EDWARDH: I take it that's an
8 objection?

9 MR. FOTHERGILL: That's an
10 objection.

11 THE COMMISSIONER: Thank you.

12 MS EDWARDH: I would like then,
13 sir, to invite you to turn to a document with me,
14 if I could, P-85, volume 5, tab 24.

15 And it is no criticism of my
16 colleague, Commission counsel, but I had some
17 trouble understanding the nature of the conflict
18 that you were having or that "A" Division was
19 having, with headquarters.

20 MR. LOEPPKY: Which tab, ma'am?

21 MS EDWARDH: It is tab 24. So it
22 is P-85, volume 5, tab 24, sir.

23 This is a document that you
24 reviewed yesterday.

25 MR. LOEPPKY: Yes.

1 MS EDWARDH: I am not really
2 interested in the specifics of the conflict. I
3 have some general questions, and I would like to
4 pose them to you, if I could.

5 "A" Division ran A-OCANADA;
6 correct?

7 MR. LOEPPKY: Yes.

8 MS EDWARDH: And what I am trying
9 to understand is whether or not the concerns for
10 pushing for more control from headquarters related
11 to a fundamental discomfort to the autonomy that
12 A-OCANADA had in circumstances where you knew it
13 really did not have a joint management team.

14 MR. LOEPPKY: First of all, with
15 respect to the joint management team, I think I
16 commented on that yesterday in terms of the
17 informal structure that was in place.

18 With respect to the role of the
19 headquarters and the service delivery which is in
20 the division, there is a natural tension which
21 exists and which is healthy.

22 In this particular environment, we
23 at the headquarters level were certainly pursuing
24 the notion of very much centralized coordination,
25 and that was a change in the organization with

1 respect to the national security side of it versus
2 some of the other types of investigations.

3 Therefore, there were ongoing
4 discussions, I believe, by Richard Proulx with his
5 counterparts across the country in terms of
6 bringing that change about.

7 MS EDWARDH: All right. So I am
8 going to interpret what you are saying, and you
9 tell me if I am wrong, Mr. Loepky.

10 The particular environment in
11 question is the post-9/11 national security
12 environment we are talking about?

13 MR. LOEPPKY: Yes.

14 MS EDWARDH: And the concern of
15 Mr. Proulx was to centralize and bring under
16 headquarters' control sufficiently the national
17 security investigations that were going on across
18 the country?

19 MR. LOEPPKY: In essence, yes. To
20 ensure that he and his people were aware of all
21 investigations and the progress being made in each
22 one of those, given their national interest and
23 given their importance from a national security
24 perspective.

25 MS EDWARDH: And would his role

1 have included giving direction and guidance on
2 tactical and operational matters if he felt it
3 were important to do so in respect of those
4 investigations?

5 MR. LOEPPKY: If it was something
6 where his advice was sought. Otherwise the
7 investigations would take place by trained
8 investigators at the division level.

9 MS EDWARDH: And what was sought
10 after, then, was a more complete and direct
11 accounting by the investigative teams of what was
12 going on on a daily or weekly basis so
13 headquarters had a handle on it?

14 MR. LOEPPKY: That was sought by
15 headquarters.

16 MS EDWARDH: Yes. Through Proulx?

17 MR. LOEPPKY: Yes.

18 MS EDWARDH: And because A-OCANADA
19 was somewhat different than OCanada, would it be
20 fair to say that you understood from Proulx that
21 he had concerns about the autonomy that A-OCANADA
22 had?

23 MR. LOEPPKY: Well, before I
24 respond to the question, I think I commented
25 yesterday that A-OCANADA and OCanada were really

1 very similar and were focused on the same
2 investigation, so I don't necessarily agree that
3 A-OCANADA was more autonomous than OCanada.

4 They were both national security
5 investigations and coordination by CID, so there
6 wasn't an inconsistency there.

7 But as I have pointed out, we
8 wanted to make sure that at the headquarters level
9 Assistant Commissioner Proulx would have the
10 information, as investigations progressed, to keep
11 him apprised of how they were going, and we wanted
12 to make sure that took place on a timely basis.

13 MS EDWARDH: If the investigations
14 were centralized in the way -- this is how
15 Assistant Commissioner Proulx envisaged?

16 MR. LOEPPKY: Centrally
17 coordinated.

18 MS EDWARDH: Centrally
19 coordinated. You would have expected him to be
20 very alive to the issue of the kind of
21 information-sharing that was undertaken at the end
22 of January with the provision of the hard drives
23 as well as the data dump on April 2nd?

24 He would have known that?

25 MR. LOEPPKY: He would have been

1 informed of the progress of the investigations.
2 Would he have been informed of the actual exchange
3 of a particular piece of information, or the data
4 dump, as you refer to it as? I don't believe so.
5 It may have been reported in, but I don't know if
6 that piece would have been --

7 MS EDWARDH: But it is not a
8 particular -- you see, it is not a particular
9 piece of information that is being exchanged. It
10 is the unusual step of part of an investigation
11 saying, "We really don't know what we have here,
12 but let's give it to other agencies and the U.S.,
13 and they will help us maybe -- maybe -- figure it
14 out."

15 And that's unusual. That's not
16 the way an ordinary investigation is undertaken,
17 as I understand it.

18 So I am just putting to you the
19 proposition that if Proulx had the centralized
20 coordination that he sought, it is very likely
21 that he would have been alive to the discussions
22 contemplating that kind of information-sharing and
23 at least addressed the propriety of them and the
24 application of caveats?

25 MR. LOEPPKY: He may have been,

1 but recognizing that there are a lot more
2 investigations ongoing than A-OCANADA and OCanada.

3 MS EDWARDH: Of course. When you
4 say he may have been, I just want to be clear I
5 understand you: that if he had the control, he
6 might have then been aware?

7 Is that what you are saying?

8 MR. LOEPPKY: If it was an issue
9 that was deemed important enough for him to be
10 engaged from a policy centre perspective, and
11 there would be an evaluation not only at the
12 investigative level but if it was reported in at
13 his analytical level, it might come to his
14 attention. But there would be people making
15 judgment decisions along the way.

16 MS EDWARDH: I think we are
17 talking at cross-purposes. I am sorry,
18 Mr. Loepky.

19 My question is this: Had
20 Mr. Proulx had the centralized coordination that
21 he was seeking, that coordinating role would have
22 ensured that he likely was aware of the
23 information-sharing that was undertaken by
24 A-OCANADA with the U.S.?

25 MR. LOEPPKY: My response would be

1 yes. And putting that into context in terms of
2 the resources that we had within CID at the time
3 versus what we have today in terms of capacity to
4 address those kinds of issues.

5 MS EDWARDH: I became a little
6 confused in another area, and I want, first of
7 all, to take you to your personal notes and ask
8 you to clarify something.

9 They are Exhibit 178,
10 Mr. Commissioner.

11 I would like to go back to this
12 notation at page 5.

13 THE COMMISSIONER: I see it is
14 11:30. Is this a convenient time to take the
15 break?

16 MS EDWARDH: Absolutely. I am
17 shifting areas and I would be pleased to break
18 now. Thank you, sir.

19 THE COMMISSIONER: We will rise
20 for 15 minutes.

21 THE REGISTRAR: Please stand.

22 --- Upon recessing at 11:30 a.m. /

23 Suspension à 11 h 30

24 --- Upon resuming at 11:50 a.m. /

25 Reprise à 11 h 50

1 THE REGISTRAR: Please be seated.

2 THE COMMISSIONER: We will just
3 have pictures for a moment, Ms Edwardh.

4 MS EDWARDH: I don't want to
5 interfere with your photo op, Mr. Commissioner.

6 THE COMMISSIONER: They usually
7 focus on Mr. David.

8 MR. DAVID: I have been pretty low
9 profile.

10 THE COMMISSIONER: One of the
11 differences between a public inquiry and a court
12 proceeding. They don't do that after every
13 recess, of course.

14 --- Laughter / Rires

15 MR. LOEPPKY: I often wondered,
16 Mr. Commissioner, if my appearance changes that
17 much in two hours.

18 MS EDWARDH: If I may,
19 Mr. Commissioner?

20 THE COMMISSIONER: Please.

21 MS EDWARDH: I am sorry, I am not
22 going to go immediately to page 5 of your notes.
23 I had a thought -- it is always dangerous to have
24 a break, and I would like to pursue a couple of
25 the thoughts with you.

1 Rightly or wrongly, Mr. Loepky, I
2 am a firm believer in the existence of
3 professional policing, and I take it you are too?

4 MR. LOEPPKY: Yes.

5 MS EDWARDH: And so when one is
6 dealing with an officer who is also a senior
7 professional police officer, you have some
8 confidence, I take it, that they understand
9 implied caveats?

10 MR. LOEPPKY: Yes.

11 MS EDWARDH: So I would like to
12 just ask then about other entities who have kind
13 of stepped into either direct or peripheral
14 enforcement roles that are neither well-trained
15 police officers and may have a series of other
16 objectives.

17 For example, if you were dealing
18 with the INS, I am going to suggest to you that
19 you could not necessarily have the same confidence
20 that there is a shared understanding of an implied
21 caveat, such as you have described earlier in your
22 testimony.

23 You don't know their background.
24 You don't know their purposes. They may not be
25 the ones you are familiar with. So you cannot

1 assume that the universe is shared as completely
2 as it would be by sitting down with your
3 counterpart with the FBI?

4 MR. LOEPPKY: No. But I would
5 assume that an organization like the INS does have
6 its own rules. I don't know what they are, but
7 they would have their own rules on
8 information-sharing, information exchange.

9 MS EDWARDH: Sure. If they are at
10 the table when you are sharing information, you
11 would have to agree with me that because they are
12 not the entities with which you deal on a daily
13 and weekly basis, their rules or their willingness
14 to respect your rules is really a bit of an
15 unknown commodity?

16 MR. LOEPPKY: It is unknown, but I
17 think it is accurate to portray the INS, with my
18 limited knowledge, as an organization that does
19 have standards. It does have professionalism. I
20 would think that they would understand the rules
21 of information-sharing.

22 MS EDWARDH: Well, all I really
23 wanted to draw from you, Mr. Loepky, is the
24 following proposition. It is one thing to trust a
25 senior professional police officer, whether in the

1 U.K. or the FBI, knowing that the standards that
2 you would apply to information shared with you are
3 similar to the ones they might apply with
4 information shared from the RCMP, even if there is
5 no expressed written caveat?

6 MR. LOEPPKY: Yes.

7 MS EDWARDH: But today, looking
8 back at the agencies who found themselves involved
9 in quasi-enforcement activities, we cannot, with
10 assurance, say that the INS adopted the same
11 understanding of an implied caveat that you would
12 expect the FBI to have understood in the
13 circumstances of this case?

14 MR. LOEPPKY: I don't know the
15 answer to that.

16 MS EDWARDH: And I think that's
17 the answer.

18 Second, I want to talk about the
19 CIA.

20 We heard from Mr. Cabana that it
21 was not customary, indeed I don't think -- I may
22 overstate this and my friend will correct me. But
23 I don't believe he had any substantial previous
24 dealings with the CIA. And you made the
25 observation yesterday, Mr. Loepky, that the CIA

1 moved more into an enforcement capacity after 9/11
2 than it had otherwise historically occupied.

3 So I want to deal with their
4 understanding.

5 Have you, sir, directly dealt with
6 a situation so that you can say with confidence
7 that the CIA understands the implied caveat when
8 no express caveat is on, or are they the same as
9 the INS?

10 MR. LOEPPKY: No. I believe that
11 they work with a system of caveats with respect to
12 information-sharing.

13 MS EDWARDH: I understand they do.
14 That's not quite the question, though.

15 In the situation where there was
16 no express caveat placed on information shared
17 with them, would you have the belief that they
18 would treat it in the same way the FBI would,
19 knowing that there was an implied caveat that was
20 very express in its meaning about further use?

21 MR. LOEPPKY: Yes.

22 MS EDWARDH: You would. So really
23 then the only unknown quantity here is the INS.
24 We don't know whether they shared the same view as
25 a professional police officer?

1 MR. LOEPPKY: Yes, that's correct.

2 MS EDWARDH: I probably can't ask
3 you about specific details of the CIA or
4 Mr. Fothergill will rise, so I will move on from
5 there.

6 We have talked about Mr. Proulx
7 and his concerns about needing more centralized
8 coordination, and I may have left a
9 misunderstanding on the record and I want you to
10 comment.

11 You have also testified, sir, that
12 you believe Mr. Proulx had the same understanding
13 that you had that caveats were to be applied to
14 information shared. We have got both of those
15 things on the record now.

16 MR. LOEPPKY: Yes.

17 MS EDWARDH: Here's my problem.
18 Mr. Proulx, as I understand it, is in headquarters
19 and is head of the CID.

20 MR. LOEPPKY: Yes.

21 MS EDWARDH: And we understand,
22 sir, that when decisions were made simply to
23 distribute to whoever wanted them the hard drives,
24 and to go ahead and give the full database to
25 foreign agencies, that he was either directly at

1 the table or approved it.

2 Do you have any comment, sir?

3 And I am not saying he has
4 testified; I am not quoting him. But that's the
5 suggestion that is left by Mr. Cabana's evidence.

6 MR. LOEPPKY: Well, perhaps I can
7 start by outlining my expectations.

8 My expectations of Assistant
9 Commissioner Proulx is that he provides broad
10 policy guidelines in terms of how we are going to
11 conduct investigations. He sets the direction.
12 His area is involved in making sure we have all
13 the information at headquarters.

14 He doesn't get involved directly
15 in specific investigations. It is a higher level
16 than that. I don't know if that responds to your
17 question.

18 MS EDWARDH: Well, I draw from
19 that the following: that it is unlikely, given
20 your description of the type of involvement he
21 had, that he was privy to or at the actual table
22 when decisions were being made, operational
23 decisions, about, for example, sharing the hard
24 drives?

25 MR. LOEPPKY: No, by and large he

1 wouldn't be there.

2 MS EDWARDH: And he would not have
3 been at the table when, on April 2nd, 2002, there
4 was a decision to hand over the CD-ROMs with the
5 full database?

6 MR. LOEPPKY: No, I have -- I have
7 testified that I see his role as a policy centre
8 and not involved in those actual tactical
9 operations. We have very competent people in the
10 organization that do that --

11 MS EDWARDH: Sorry. I didn't mean
12 to cut you off. Have you answered the question?

13 MR. LOEPPKY: Yes.

14 MS EDWARDH: So I take it then it
15 would it be fair to say that you would be very
16 surprised to learn that he was either privy to and
17 sanctioned that decision to proceed without the
18 application of caveats, in accordance with policy?

19 MR. LOEPPKY: That would be news
20 to me.

21 MR. FOTHERGILL: Mr. Commissioner,
22 it might assist Ms Edwardh questioning if I say
23 something about what I anticipate Mr. Flewelling's
24 testimony might be in this area, and I do offer
25 this simply in the spirit of cooperation.

1 Mr. Flewelling, of course, is a
2 member of CID, and he was at the table when the
3 proposition to share search results --

4 THE COMMISSIONER: January 31st?

5 MR. FOTHERGILL: -- on January
6 31st was raised, and I think there is a
7 situational report that bears on this as well.

8 I think an interesting line of
9 inquiry when he is here is what he understood to
10 be the extent of the sharing and whether it went
11 beyond the search results. I do anticipate we
12 will have evidence in a public forum that CID was
13 at least aware of an approved decision to share
14 the fruits of the search, if I can put it that
15 way.

16 THE COMMISSIONER: Yes.

17 MS EDWARDH: Perhaps my friend
18 would just clarify that Mr. Flewelling was aware.
19 My question is designed to explore whether the
20 person who had responsibility for CID at
21 headquarters was aware, and I think Mr. Loepky
22 has answered that to the best of his knowledge he
23 was not aware, and it would be unlikely that he
24 would approve the flow of information without
25 caveats.

1 THE COMMISSIONER: That's right.

2 MR. LOEPPKY: That is my evidence,
3 and it is based on the role that he plays and the
4 fact that he is not involved in day-to-day types
5 of operational decision-making.

6 MS EDWARDH: Thank you. I think
7 that answers as best you can, and I appreciate
8 your help.

9 Now, let me then turn to the area
10 that I was going to start with when we came back
11 after our break, which is page 5 of your notes.
12 You are having a conversation with Proulx, who I
13 understand has brought an issue to you on February
14 the 2nd -- no, February the 28th, 2002.

15 Is that correct?

16 MR. LOEPPKY: Yes.

17 MS EDWARDH: And the issue that he
18 wishes to discuss -- and I think you have fairly
19 characterized that you give advice on this issue.

20 Is that correct?

21 MR. LOEPPKY: Yes.

22 MS EDWARDH: Is whether or not
23 questions can be asked of a person detained in a
24 foreign jurisdiction by the RCMP, or on behalf of
25 the RCMP?

1 MR. LOEPPKY: Yes.

2 MS EDWARDH: And,

3 Mr. Commissioner, we have danced around this
4 somewhat, but I think it is patently clear, given
5 the timeframe, that this is a reference to Mr. El
6 Maati in Egypt, and I wish to ask some questions
7 based upon the fact that it is him.

8 MR. FOTHERGILL: Commissioner, I
9 am not prepared to confirm that. I don't think
10 that Mr. El Maati was necessarily the only person
11 detained abroad who was of interest to the
12 investigators at that time.

13 So to state clearly the parameters
14 of the NSC objection, we will not confirm that
15 particular individuals were identified as worthy
16 subjects of questioning or interviews, and we will
17 not confirm whether questions in fact were sent or
18 interviews in fact took place.

19 I also think that for the purposes
20 of the mandate of this Commission, we can still
21 deal effectively with the process for asking
22 questions or interviewing people, particularly
23 given that Mr. Arar himself was not himself
24 interviewed and no questions were sent to him.

25 THE COMMISSIONER: Ms Jackman.

1 MS JACKMAN: Mr. Commissioner, now
2 that the issue has come up, I sent a letter
3 yesterday indicating that with respect to
4 disclosure or testimony relating to Ahmad El
5 Maati, that Mr. El Maati gives full permission to
6 have his name not blocked out on any document. In
7 fact, he wants his name left in the record because
8 he needs to know if it is him or someone else.

9 I am acting on Mr. Copeland's
10 behalf today as well, because he couldn't be here
11 today or tomorrow, and I have the same
12 instructions from Abdullah Almalki, as well, with
13 respect to documentation.

14 I have some difficulty with the
15 national security claim because I think that it is
16 evident who it was. There was only one Canadian
17 detained in another country at that time that
18 wasn't Syria, and that was Mr. El Maati.

19 So I think it is ridiculous to
20 claim national security -- I mean, that was
21 detained for these purposes in relation to this
22 kind of issue.

23 MR. FOTHERGILL: Commissioner, I
24 don't necessarily agree with Ms Jackson's factual
25 assertion that this was the only Canadian detained

1 in a country other than Syria that might be of
2 interest to the investigation.

3 I appreciate your comments about
4 the privacy issue, but I want to make it clear
5 that this is a National Security Confidentiality
6 objection which I am maintaining.

7 THE COMMISSIONER: All right.

8 Ms Jackman, thank you for your
9 comments with respect to the privacy concern. The
10 process, I am sure as you are aware by now, that
11 we have adopted for national security concerns is
12 if the Government makes an objection, we simply
13 don't deal with it in the public hearing.

14 I will be, as I have said
15 frequently, in my report -- first of all, I can
16 tell you that we have heard evidence in camera
17 relating to these matters that we are concerned
18 about, and I will be in my report submitting a
19 report that sets out those matters that, in my
20 view, in my opinion, should be made public.

21 If there are going to be disputes,
22 those disputes will take place on the basis of the
23 report rather than at this stage.

24 But thank you for raising that
25 point.

1 Ms Edwardh.

2 MS EDWARDH: Thank you.

3 The advice you give, Mr. Loepky,
4 is that in general, in respect of this particular
5 case that is under discussion with Mr. Proulx, it
6 is okay to go ahead and pose questions of the
7 detainee, either directly or indirectly?

8 MR. LOEPPKY: It is an option that
9 we would consider.

10 MS EDWARDH: Yes. We have agreed,
11 I think, as part of our hypothetical yesterday,
12 that this fact situation that remains unnamed also
13 occurred in the context of a country that did not
14 have a good human rights record. I think we
15 agreed on that, did we not?

16 Mr. Fothergill is nodding "yes".

17 Now, here's my question then: One
18 of the things that you said yesterday,
19 Mr. Loepky, was that in approaching the issue of
20 whether questions should be asked through a
21 foreign entity or the RCMP should go to a country,
22 you said you would consider the human rights
23 record of that country in reaching this decision.

24 Do you recall that testimony?

25 MR. LOEPPKY: Yes.

1 MS EDWARDH: And in giving your
2 advice to Mr. Proulx, do you recall whether you
3 had any advice given to you about the conditions
4 of confinement and human rights record of the
5 country in which this Canadian was detained?

6 MR. LOEPPKY: Not at this point,
7 no.

8 MS EDWARDH: Do you know, sir,
9 whether, on the basis of your advice -- well, was
10 this issue brought back to you by Mr. Proulx?

11 MR. LOEPPKY: No.

12 MS EDWARDH: And do you know
13 whether, on the basis of your advice, he went
14 ahead and adopted this operational step in respect
15 of this unknown Canadian detained abroad?

16 MR. FOTHERGILL: Again,
17 Commissioner, we object to questions that seek to
18 elicit whether in fact questions were sent to
19 detainees abroad.

20 THE COMMISSIONER: Even in
21 general?

22 MR. FOTHERGILL: Another concern
23 that's been brought to my attention is I know that
24 I previously said we can proceed on the assumption
25 that this is a country that does not necessarily

1 share Canada's respect for human rights.

2 THE COMMISSIONER: Right.

3 MR. FOTHERGILL: It has since been
4 brought to my attention that we may actually be
5 dealing with someone who is detained under the
6 authority of the United States.

7 MS EDWARDH: That doesn't change
8 my view. Sorry.

9 MR. FOTHERGILL: So I think we can
10 pause and I can try and clarify, or alternatively
11 we can leave it in the hypothetical domain and
12 continue to discuss the process, which I think is
13 what is principally of interest to you.

14 MS EDWARDH: Is this a person
15 detained in continental U.S., or are they detained
16 in another place? That has a huge bearing on how
17 I would proceed.

18 MR. FOTHERGILL: I think the point
19 is we are not entirely sure who it is. So if it
20 is important, we can find out.

21 But equally, I think we could have
22 a useful discussion just using a reasonable
23 hypothetical of a country with a poor human rights
24 record, or if it is of use to you, somebody
25 detained under the provisional authority in

1 Afghanistan. There are a number of possibilities.

2 I don't know frankly how this
3 relates to Mr. Arar, but I leave that with you.

4 MS EDWARDH: I will try at a very
5 general level to ask my questions. At some point
6 the level of generality defeats the purpose of the
7 question, Mr. Commissioner.

8 THE COMMISSIONER: Thank you.

9 MS EDWARDH: I am interested in
10 the process of knowledgeable input into the
11 decision-making structure of the investigation
12 team.

13 When you give your first-level
14 approval, in a sense, your discussion with
15 Mr. Proulx --

16 MR. LOEPPKY: It was not an
17 approval type of discussion. It was looking at
18 options. That's really what the discussion was.

19 MS EDWARDH: But, Mr. Loepky, as
20 the senior operational officer of the RCMP, when
21 you advise him, in your own words, that this is
22 okay to consider, I am sure he would consider that
23 to be significant advice.

24 MR. LOEPPKY: He would then use
25 that to further discussions.

1 MS EDWARDH: Right. And since
2 they didn't further the discussions with you, I
3 want to just ask you this: The advice you gave,
4 sir, I take it was without having direct input
5 from anyone who had clear knowledge of the human
6 rights record of those countries in respect of the
7 entity detaining the person and the location of
8 the detention.

9 You didn't have that before you in
10 any textured, detailed sense?

11 MR. LOEPPKY: No. This was a
12 high-level discussion in terms of an option to
13 further an investigation, and whether that might
14 further the investigation, and clearly then one of
15 the next steps, given that it was a country with a
16 poor human rights record, that we would involve
17 the Foreign Affairs people and that process to
18 address those issues.

19 MS EDWARDH: If the Foreign
20 Affairs persons were to say to you, "We believe
21 that using the entity in question to ask RCMP
22 questions, or even seeking direct access yourself
23 could raise a risk" -- let's call it just a risk
24 -- "that that person could be subjected to
25 physical abuse as a result of the process", would

1 you ever consider proceeding in the face of that
2 advice?

3 MR. LOEPPKY: Yes, if there was an
4 imminent threat. If it involved something that we
5 felt could further an investigation where the
6 safety of Canadians was at stake on an urgent
7 basis, then we would further the discussions. But
8 ultimately we would take direction from the
9 ambassador's advice in terms of, is it something
10 that we can actually with managing the risk?

11 MS EDWARDH: And certainly you
12 would agree with me that, imminent or not, all
13 national security investigations do raise a
14 risk --

15 MR. LOEPPKY: Yes.

16 MS EDWARDH: -- of threat to the
17 public safety?

18 MR. LOEPPKY: Yes.

19 MS EDWARDH: So are we to be left,
20 Mr. Loepky, then with this proposition: that the
21 RCMP, in the course of discharging its duties and
22 undertaking national security investigations, is
23 prepared to take an operational step that could
24 result in an increased risk of torture or abuse to
25 a detainee who is a Canadian citizen?

1 Is that what we are left with?

2 MR. LOEPPKY: No, that isn't what
3 I said.

4 MS EDWARDH: I know. That's how I
5 interpret you, so, please, sir --

6 MR. LOEPPKY: It is an option we
7 are prepared to consider based on the seriousness
8 of the threat, based on the information about the
9 immediacy of the threat. There is a number of
10 factors that would come into it.

11 So certainly not every case would
12 result in an approach. We use judgment, we use
13 discussion with Foreign Affairs, and there is a
14 process in place that addresses it.

15 MS EDWARDH: There is a doctrine
16 that has been used in the State of Israel to
17 justify the use of certain coercive measures. It
18 is also now being used in the United States to
19 justify the use of coercive measures.

20 Is there a mechanism in place, a
21 committee in place with the RCMP, to look at this
22 issue at a high level and decide in a particular
23 investigation whether the risk of coercive
24 measures is one you are prepared to run, or is it
25 something that an officer in the field would be

1 entitled to decide?

2 MR. LOEPPKY: There is no
3 committee that looks at it. As the issue becomes
4 more sensitive, as it evolves, and if it is
5 something that's going to have a broad impact,
6 then there is a chain of command and it is raised
7 in terms of where the decision can be made and
8 what level of input is required.

9 So there is a process that's used
10 in every investigation in terms of --

11 MS EDWARDH: But the process is
12 the regular chain of command?

13 MR. LOEPPKY: That's correct. And
14 in the scenario that you use, we would obviously
15 consult our other clients in terms of that
16 decision, such as the Department of Justice,
17 Foreign Affairs.

18 MS EDWARDH: All right. We may
19 come back to that. But let me move on to another
20 area.

21 I want to deal with the general
22 area pursued by Commission counsel yesterday of
23 the decision of the RCMP to respond to the United
24 States' request for both information and questions
25 once Mr. Arar was detained on September 26th,

1 2002. It is a general area.

2 I don't want to cover the fact
3 that the RCMP made a decision to send information
4 and questions. I want to explore with you your
5 observation that there was no need to either
6 notify consular affairs -- no, to notify consular
7 affairs of the fact that you knew -- and "you" I
8 use in the corporate sense of the RCMP -- that
9 there was a detained Canadian, Mr. Arar, in New
10 York.

11 You made an interesting
12 observation: that you neither needed to notify
13 them nor did you need to consult them in the
14 course of cooperating with the U.S. entities or
15 agencies.

16 Let me deal with notification
17 first.

18 You testified yesterday, sir, that
19 there was no need to notify DFAIT; indeed it could
20 be counterproductive. That was the language you
21 used.

22 I am going to put to you a series
23 of propositions about how and when it would be
24 counterproductive.

25 You are aware, sir, that the

1 provision of consular services is aimed at
2 providing a detainee with knowledge of the reasons
3 why they are detained? You are aware of that?

4 MR. LOEPPKY: Yes.

5 MS EDWARDH: You are aware, sir,
6 that the provision of consular services is also
7 targeted and aimed at ensuring that a detainee has
8 counsel if that detainee wishes counsel; correct?

9 MR. LOEPPKY: I believe that's
10 part of their duties, yes.

11 MS EDWARDH: Indeed, we have heard
12 that the whole of DFAIT sighs a sigh of relief
13 when counsel finally is brought on board to give
14 legal advice and to act directly on behalf of a
15 detainee.

16 Now, I want to explore your
17 language of "counterproductive".

18 Is it your view, sir, that one of
19 the reasons notification of consular affairs can
20 be counterproductive is, of course, when they step
21 up to the plate, the first thing they are going to
22 do is lawyer up the detainee?

23 MR. LOEPPKY: Not at all.

24 MS EDWARDH: Why would it be
25 counterproductive then, sir?

1 MR. LOEPPKY: If an individual --
2 I will use a hypothetical situation.

3 If an individual is detained and
4 somebody from Foreign Affairs shows up
5 unannounced, based on police advice, based on
6 police information, and says to the individual, "I
7 am here to assist you because you are under
8 investigation by the police," that simply isn't
9 something that contributes to effective
10 investigations.

11 The individual may not know at
12 that point that he is under investigation, and
13 that is appropriate police practice. So you need
14 to be careful about the reason why you would share
15 that type of information.

16 MS EDWARDH: Well, surely that is
17 different than notifying consular affairs that it
18 has come to your attention that there is a
19 Canadian located in custody at the MDC, period.
20 "Thank you. Your job, you take over."

21 And with the greatest of respect
22 it seems odd to say that you are worried about
23 consular representatives alerting people to an
24 investigation when they are already in a situation
25 where they are in custody and undergoing

1 interrogation. I mean, it doesn't make sense to
2 me. The person surely knows they are under
3 investigation.

4 What they need are the things that
5 our constitution, our Charter, and supposedly the
6 U.S. Constitution, provides. They need access to
7 information, access to counsel, and access to a
8 court.

9 MR. LOEPPKY: And that is what the
10 expectations would be in the United States, that
11 they would be provided that access.

12 MS EDWARDH: But my point, though,
13 is, the only way I can see consular services being
14 counterproductive to an investigation is it would
15 deprive the investigating agency of an opportunity
16 to have, you know, unsupervised access, no
17 counsel, no way to stop the process. What
18 realistically would make it counterproductive
19 other than that?

20 MR. LOEPPKY: Before I answer the
21 question, maybe I can just go back to my comments
22 yesterday.

23 MS EDWARDH: Sure.

24 MR. LOEPPKY: There are any number
25 of investigations that are going on at all times.

1 There are any number of Canadians that are
2 detained, whether in the United States or abroad.
3 The United States is not a country that
4 traditionally we would have a concern about that
5 would not extend the proper consular privileges or
6 the consular rights of someone detained in
7 custody, and we expect the process will work; that
8 they will follow the accepted protocols, and that
9 the individual will be extended those.

10 That is the mandate of Foreign
11 Affairs, to intervene at that point. Our mandate
12 is to further a criminal investigation. And if we
13 had any indication that those rights were being
14 abused, then I think we have an obligation.

15 That wasn't our sense in this
16 case.

17 MS EDWARDH: You know,
18 Mr. Livermore has a huge amount of respect for the
19 knowledge of the RCMP in respect of their everyday
20 working understanding of situations involving
21 human rights, because I put to him a question
22 about the need for expertise from Foreign Affairs
23 in certain decisions.

24 But, sir, you have just given us a
25 perfect example. The United States, as a western

1 democratic country, has probably the worst
2 reputation for protecting consular rights, and in
3 particular in respect of the 9/11 events and those
4 persons who were just detained for investigation
5 the Inspector General of the United States has
6 issued a fairly critical report of the failure to
7 give effect to Geneva Convention and consular
8 rights.

9 So when you say there is no reason
10 to suspect, the question is: Are you making due
11 inquiry?

12 You were aware, for example -- the
13 Mounties were aware that Mr. Arar had no consular
14 access. When Mr. Roy comes in after six days, the
15 report he gives is there has not been any consular
16 access. Now, we know it happened shortly
17 thereafter.

18 MR. LOEPPKY: Yes, it happened
19 shortly thereafter.

20 MS EDWARDH: But when he reports,
21 you have six days of someone held in detention
22 incognito.

23 MR. LOEPPKY: But that would not
24 have been brought to our attention. We would have
25 expected that would happen.

1 MS EDWARDH: You would not have
2 expected that to happen --

3 MR. LOEPPKY: No. I would have
4 expected that the processes would have taken place
5 that one would expect from the United States.

6 MS EDWARDH: The process you
7 expect to take place, Mr. Loepky, is the process
8 you are familiar with in an ordinary criminal
9 accusation. Someone is read their Miranda rights,
10 given a constitutional right to counsel,
11 et cetera, in a process that is not dissimilar to
12 our own.

13 That is what you expected to take
14 place.

15 MR. LOEPPKY: I would expect that
16 if the individual, whoever is detained, asks to be
17 put in contact with a Canadian official, then that
18 would happen.

19 MS EDWARDH: And if the individual
20 requested counsel, he would be given counsel.

21 MR. LOEPPKY: That would be my
22 expectations.

23 MS EDWARDH: Because that's what
24 you understand to be the process --

25 MR. LOEPPKY: Yes.

1 MS EDWARDH: -- in an ordinary
2 criminal investigation in the United States.

3 MR. LOEPPKY: That is the process
4 I understand that works within the Foreign Affairs
5 domain in terms of consular access and privileges.

6 MS EDWARDH: Well, I am not
7 talking about --

8 MR. LOEPPKY: I am talking about a
9 criminal investigation. I think I mentioned
10 yesterday our mandate is criminal investigation
11 and the pursuit of criminal evidence.

12 MS EDWARDH: Right. I am not
13 really talking about consular affairs. We know
14 what consular access is, the protected right of
15 access under the Geneva Convention, et cetera.

16 But your expectations, when you
17 look at your American counterparts and the
18 ordinary criminal justice system in the United
19 States, is that if someone is arrested and they
20 are brought into a situation where they are in
21 custody, interrogation will follow only after
22 someone receives Miranda rights, and that they
23 will have a right to counsel.

24 That's what you understand the
25 process to be.

1 MR. LOEPPKY: Yes.

2 MS EDWARDH: And you'll agree with
3 me, from what you now know, none of that happened
4 with Mr. Arar?

5 MR. LOEPPKY: That's my
6 understanding.

7 MS EDWARDH: Nor was he given
8 prompt access to consular service by way of a
9 notification to the Canadian government that he
10 was there.

11 No, maybe that misstates the
12 evidence. I will leave that last point.

13 It concerns me, sir, and this is
14 why I raise this issue of not telling DFAIT, in
15 the world of post-9/11, you'll agree that things
16 have become fairly murky sometimes, particularly
17 in the American jurisdiction?

18 MR. LOEPPKY: Yes.

19 MS EDWARDH: And in looking at
20 this change or this movement to measures,
21 operational measures used by American policing and
22 intelligence agencies, I just want to put to you
23 the question: Is it not better practice today,
24 even if it is a joint investigation, to make sure
25 that as soon as you are alive to the detention of

1 a Canadian citizen, that consular affairs is
2 notified to ensure that ordinary human rights of
3 that person are respected within the
4 administration of justice in the States?

5 Isn't it better practice to do
6 that today?

7 MR. LOEPPKY: It is a
8 consideration, but it is not something that we
9 would do in the initial instance in every case
10 because, as I pointed out, there may be
11 individuals that don't want to be notified, that
12 don't want that notification. There may be a
13 variety of reasons.

14 I still expect democracy to work.
15 I expect that the individual's rights will be
16 respected in the United States and that the due
17 process will be followed.

18 MS EDWARDH: One of the ways you
19 can ensure that your assumptions about democratic
20 functioning are correct is to at least notify
21 consular services, and if the person doesn't want
22 their services, they can simply tell consular
23 services they want nothing to do with them. But
24 that way you can ensure that some basic rights are
25 respected.

1 But I take it from what you are
2 saying is that even in the context of national
3 security investigations, you would not be prepared
4 to recommend that in every case the Department of
5 Foreign Affairs and consular services should be
6 notified if the RCMP learns there is a detained
7 Canadian?

8 MR. LOEPPKY: Well, as I said, I
9 think the experience of the last three or four
10 years has been an education, and we have certainly
11 learned from that. And if we were to have any
12 suspicion that an event would occur like occurred
13 last time, obviously we would do that. We would
14 notify Foreign Affairs.

15 MS EDWARDH: Were you aware that
16 there were Canadians, dual nationals, languishing
17 at the MDC without access to consular rights? Was
18 the RCMP aware of that?

19 MR. LOEPPKY: No, not that I
20 am aware of.

21 MS EDWARDH: One other aspect of
22 your relationship with sharing information of
23 notification of DFAIT, if I could, sir.

24 You testified yesterday, and I got
25 a little confused, about what you would share.

1 You said that sharing information, if it was
2 relevant to protecting consular rights, would be
3 agreeable. There would be no bar to doing that.

4 Do you recall that evidence?

5 MR. LOEPPKY: Yes.

6 MS EDWARDH: And we explored some
7 comments by, I believe it was Mr. Proulx, that he
8 would refuse to share any operational and tactical
9 information, but I understood you to be saying
10 that if the sharing of that information was
11 necessary to protect consular rights, then you
12 would share it.

13 MR. LOEPPKY: Yes. I was
14 referring when I said -- and I think in the
15 briefing note, when we talked about
16 operational/tactical information, it would be
17 information that would be very operationally
18 specific, information that is not critical to --
19 not important nor relevant to their
20 decision-making process.

21 Things about surveillance you
22 conduct, methods of investigation you use, Part
23 VI, whatever that is, we wouldn't share that
24 outside of the investigative unit --

25 MS EDWARDH: I want to test that

1 hypothesis, though. I understand I think the
2 principles you are engaging.

3 But I am going to put to you the
4 following proposition. The discharge of consular
5 functions is more than just a right of access by
6 consular affairs to a detained person.

7 MR. LOEPPKY: Yes.

8 MS EDWARDH: Do you agree with
9 that?

10 MR. LOEPPKY: Yes.

11 MS EDWARDH: That they may be
12 assisting the detainee to get counsel, and that's
13 part of their duties?

14 MR. LOEPPKY: Yes.

15 MS EDWARDH: They may also be
16 assisting a detainee in effecting his or her
17 return to Canada?

18 MR. LOEPPKY: Yes.

19 MS EDWARDH: They may be assisting
20 a detainee to gather evidence in Canada to show
21 that they should not be convicted of a crime for
22 which they stand accused in the foreign nation or
23 their penalty should be mitigated --

24 MR. LOEPPKY: Well, I am not sure
25 that they are assisting them in gathering

1 evidence, but --

2 MS EDWARDH: Are you familiar with
3 the Stan Faulder case, sir?

4 MR. LOEPPKY: No.

5 MS EDWARDH: Stan Faulder was a
6 Canadian who was charged and convicted of murder
7 in Texas, placed on death row, and many years
8 later the Government of Canada learned that he was
9 on death row in Texas and intervened on his behalf
10 in the U.S. Supreme Court. They took the position
11 that had they been properly notified, they would
12 have had an opportunity to assist counsel in
13 gathering relevant information about his
14 background in Canada.

15 So it is that kind of information
16 that I am talking about, that kind of assistance,
17 where --

18 MR. LOEPPKY: I understand that
19 kind of assistance. When you talked about
20 evidence, I thought you were physically talking
21 about going out and collecting evidence.

22 MS EDWARDH: Well, it may be
23 health reports, it may be birth reports, but
24 nonetheless, it is providing assistance to, I
25 suppose, counsel or to the detainee when they face

1 their trial in a foreign state. But they do that.
2 That's part of consular affairs as well.

3 So the provision of information to
4 assist the defence to ensure there is a fair trial
5 is one of the functions you understand properly
6 falls within consular affairs?

7 MS McISAAC: Mr. Commissioner, I
8 believe that Ms Edwardh is overstating the
9 situation.

10 The evidence, as I recall it, was
11 that Mr. Pardy, in his particular role as Director
12 of Consular Affairs, did undertake in a number of
13 limited cases that role and function. But I think
14 to say that it is part of the role, function and
15 obligation of consular services is perhaps taking
16 it a bit further.

17 We can take a look at the consular
18 manual, but I think my friend is overstating it
19 just a little bit.

20 MS EDWARDH: Let me see if I can
21 satisfy my friend's concern with phrasing it this
22 way.

23 If the Department of Foreign
24 Affairs, through the Consular Affairs Division,
25 decides in a particular case to undertake those

1 functions, i.e., providing information to the
2 defence to ensure there is a fair trial, you don't
3 take any objection that that falls outside the
4 duty that they have chosen to discharge that you
5 would from time to time be required to assist in?

6 MR. LOEPPKY: I am not sure I
7 understand the question.

8 MS EDWARDH: All right. Well, let
9 me give an example.

10 You said that you would share
11 information if the information-sharing protected
12 the provision of consular rights and services.

13 MR. LOEPPKY: I think I said we
14 would provide information that allows them to
15 carry out their consular duties. That was a
16 general statement.

17 MS EDWARDH: Absolutely. And I am
18 trying to kind of put some content into it.

19 MR. LOEPPKY: And you are trying
20 to articulate exactly what those duties are. I
21 understand that.

22 MS EDWARDH: Well then, I am
23 assuming that you and I can agree that the duties
24 in each case may not be the same but there have
25 been cases and there have been times when consular

1 officials have discharged their duties by taking
2 steps such as trying to assist in the provision of
3 evidence that is available in Canada so it can be
4 made available to the foreign tribunal.

5 MR. LOEPPKY: You have informed me
6 of that, yes.

7 MS EDWARDH: Okay. You accept
8 that.

9 So let's take the example of
10 Mr. Arar. There was a period of time in Syria
11 where the Syrian authorities informed various
12 Canadian individuals that he would stand trial for
13 the offence of being associated or connected with
14 the Muslim Brotherhood.

15 Do you recall that in the history
16 of this case?

17 MR. LOEPPKY: In the history, yes.

18 MS EDWARDH: And we have learned
19 from Mr. Pardy and others that being a member of
20 the Muslim Brotherhood is a very serious crime in
21 Syria and is, depending on how it is categorized,
22 punishable in some cases by death. Were you aware
23 of that?

24 MR. LOEPPKY: Well, I have become
25 aware of that statement.

1 MS EDWARDH: Since?

2 MR. LOEPPKY: Yes.

3 MS EDWARDH: All right. Not just
4 from me.

5 You knew -- or A-OCANADA had done
6 an extensive investigation of Mr. Arar and --

7 MR. LOEPPKY: I think I
8 categorized it yesterday that we commenced an
9 investigation based on advisory letters from CSIS
10 identifying certain key individuals, and Mr. Arar
11 came into the picture, and I would categorize him
12 as a subject of interest.

13 MS EDWARDH: All right. There was
14 an investigation undertaken in respect of
15 Mr. Arar.

16 MR. LOEPPKY: Yes.

17 MS EDWARDH: And if it
18 perchance -- let's get the hypotheticals, because
19 I don't have this information to put it to you
20 directly. I am kind of cross-examining with one
21 foot in the air.

22 If in fact it came to your
23 knowledge that the suggestion that Mr. Arar was a
24 member of the Muslim Brotherhood was clearly
25 erroneous and wrong and that your investigation

1 could show that from the time he entered Canada as
2 a 17-year-old until he was 31 or 32 there was no
3 reasonable basis to assume he was connected to the
4 Muslim Brotherhood.

5 My question is: If you heard from
6 DFAIT that the allegation he would stand trial on
7 was that he was a member of that organization,
8 would you be prepared to provide the evidentiary
9 record you had created to rebut the inference and
10 under what circumstances?

11 MR. LOEPPKY: We would be prepared
12 to share that information with Foreign Affairs to
13 allow them to do their job.

14 MS EDWARDH: That's exactly where
15 I am going. And by sharing the information, I
16 take it you would be prepared or should be
17 prepared in a case to make that information
18 available to the foreign tribunal, if it could be
19 made available with appropriate kind of caveats
20 and assurances --

21 MR. LOEPPKY: In discussions with
22 Foreign Affairs in terms of the general summary of
23 the information for their use.

24 MS EDWARDH: Do you know whether,
25 in respect of Mr. Arar's case, at any time Foreign

1 Affairs asked for and received from the RCMP any
2 information that it was forwarding to Syria to be
3 placed into the hands of defence counsel in Syria?

4 MR. LOEPPKY: No.

5 MS EDWARDH: You don't think there
6 was any such information provided --

7 MR. LOEPPKY: I don't know.

8 MS EDWARDH: If in fact
9 information had flowed from the RCMP to Foreign
10 Affairs for potential use in the Syrian court,
11 would you have expected to know?

12 MR. LOEPPKY: Yes.

13 MS EDWARDH: Give me a moment,
14 Mr. Commissioner; I am sorry.

15 THE COMMISSIONER: Take your time.

16 --- Pause

17 MS EDWARDH: Let me turn to the
18 question of sharing information with Syria. I am
19 going to make Mr. Fothergill earn his wages,
20 Mr. Commissioner.

21 Is it true, sir, that we can
22 assume that CSIS would have had access to the
23 information gathered in the A-OCANADA file?

24 MR. LOEPPKY: I believe it was
25 shared with them.

1 --- Pause

2 MR. LOEPPKY: Maybe I should
3 clarify. I know that they would have been aware
4 of the progress of file. I don't know if every
5 piece of information was provided in hard copy.

6 MS EDWARDH: Fair enough. They
7 would have had general access. They might have
8 had every piece of paper, they may not have. But
9 that would be through the CSIS liaison officer,
10 would it not?

11 MR. LOEPPKY: Yes.

12 MS EDWARDH: I know I am not going
13 to be able to ask the next question,
14 Mr. Commissioner, so I will just...

15 Let me turn then to Mr. Cabana's
16 offer that is made in the meeting with Mr. Gould:
17 that he is prepared to at least broach the issue
18 of sharing information with the Syrians in light
19 of the fact that information has been shared in
20 the past.

21 My question to you -- and you'll
22 want to answer slowly.

23 But my question to you, first of
24 all, is: Is there an information-sharing
25 agreement between the RCMP and the Syrians?

1 MR. LOEPPKY: No.

2 MS EDWARDH: Is there --

3 MR. LOEPPKY: You are asking about
4 a formal written agreement?

5 MS EDWARDH: Yes.

6 MR. LOEPPKY: No.

7 MS EDWARDH: Is the reference to
8 in light of Syria's sharing information in the
9 past, is that a reference only to information
10 shared by Syria, or does it refer to an exchange
11 of information by the RCMP with Syria and then
12 back?

13 MR. LOEPPKY: Could you repeat the
14 question just to make sure I am clear?

15 MS EDWARDH: I am sorry if it
16 sounds obtuse.

17 The reference in the note is,
18 Mr. Cabana offers to share information on Arar
19 with Syria in light of the Syrians' sharing of
20 information in the past.

21 MR. LOEPPKY: Yes, okay.

22 MS EDWARDH: I drew from that
23 reference, "sharing of information in the past",
24 that Syria had provided Canada, or the RCMP
25 specifically, with information.

1 MR. LOEPPKY: Well, I read into
2 that that throughout the years there have been
3 investigations that have included Syria that may
4 have been drug investigations or whatever, and
5 that we have exchanged information. We have
6 worked with them in the past in the pursuit of law
7 enforcement.

8 MS EDWARDH: Let me stand back.
9 Does the pursuit of law enforcement in dealing
10 with the Syrians include the pursuit of
11 information-sharing with Syrian Military
12 Intelligence?

13 MR. LOEPPKY: No, we would be
14 dealing with the law enforcement community.

15 MS EDWARDH: Are you aware, sir,
16 of whether Mr. Cabana's offer to share information
17 with Syrian Military Intelligence -- because we
18 know that's where Mr. Arar was; there is nothing
19 new there -- whether that offer and the statement
20 about the sharing in the past refers to any
21 occasion where other information was shared with
22 Syrian Military Intelligence?

23 MR. LOEPPKY: I am not sure what
24 he is referring to. That was my interpretation of
25 previous cooperation and sharing in a broader

1 context.

2 MS EDWARDH: In respect of a case
3 like Mr. Arar's, where we know that he is being
4 arbitrarily detained -- can we agree with that
5 phrase?

6 MR. LOEPPKY: He is being detained
7 in Syria.

8 MS EDWARDH: Yes, and is he not
9 facing any charges in Syria?

10 MR. LOEPPKY: That's my
11 understanding.

12 MS EDWARDH: And his detention
13 goes on for days and days --

14 MR. LOEPPKY: Yes.

15 MS EDWARDH: -- so he is
16 arbitrarily detained under the way we would use
17 that term in Canada.

18 MR. LOEPPKY: Yes.

19 MS EDWARDH: Who would be the
20 decision-maker? Where is the locus of decision
21 for the issue of sharing information? Who would
22 have the authority and wear the responsibility for
23 that?

24 MR. LOEPPKY: Well, if I can just
25 walk through the process, there would be

1 discussions between Foreign Affairs and the
2 investigative unit, as I commented, in terms of
3 the potential, the possibility. What are the
4 issues? What are the things that need to be
5 considered?

6 Following that, if it is deemed
7 that it might further the investigation, the human
8 rights issues had been initially considered, it
9 would involve CID from a headquarters perspective
10 given that it was international in scope. It
11 would have involved the liaison officer
12 responsible for that country providing his
13 thoughts and his input, his guidance, his advice
14 in terms of the things that needed to be
15 considered. And ultimately it would obviously
16 involve the ambassador, who would have a good
17 sense as to whether it was appropriate to ask
18 those questions, and we would follow that advice.

19 MS EDWARDH: So do I understand
20 you as saying that the ultimate decision is made
21 by the ambassador?

22 MR. LOEPPKY: If the ambassador
23 said "do not ask these questions", they would not
24 be asked.

25 MS EDWARDH: And in other

1 respects, leaving the ambassador out of it for a
2 moment, is it then correct to say, despite the
3 collection of advice that the officer would be
4 expected to -- you know, the advice he would be
5 expected to acquire, that ultimately it is the
6 investigator in the field who would make that
7 decision based upon the advice received?

8 MR. LOEPPKY: No. He makes a
9 recommendation. He does the research, then he
10 comes forward with a recommendation and it goes
11 through a formal process before it actually lands
12 on the desk of the ambassador.

13 MS EDWARDH: All right. But who
14 in the RCMP would make the final decision that
15 information would be shared? Would it be you, or
16 your counterpart today?

17 MR. LOEPPKY: Well, ultimately it
18 would be the investigative unit. When I talk
19 about the investigative unit, not the
20 investigator. It would go higher up within that
21 organization. There would be discussion with CID
22 in terms of the broad policy advice, and then they
23 would arrive at a decision as to whether to pursue
24 that form of investigation, in consultation with
25 the LO.

1 MS EDWARDH: What I am troubled
2 by, Mr. Loepky, is I am looking to fix someone
3 with the responsibility of the choice, and I hear
4 you saying it is something that people would
5 widely consult about it, but there is no one,
6 perhaps except the ambassador, who must at least
7 be at a certain level to make this decision.

8 MR. LOEPPKY: Ultimately, after
9 all of the consultation is done with all the
10 parties that I talked about, CID would look at it
11 and say, "Yes, we are going to forward these
12 questions to the ambassador."

13 MS EDWARDH: So Mr. Proulx would
14 have been the ultimate decision-maker in the RCMP?

15 MR. LOEPPKY: Well, in terms of
16 saying he is accountable, I think it is important
17 that you always do it in a consultative way so
18 that you have the benefit --

19 MS EDWARDH: Of course.

20 MR. LOEPPKY: -- of the
21 investigative unit.

22 MS EDWARDH: But that is what I
23 want to know. Who is accountable for that
24 decision? The head of CID?

25 MR. LOEPPKY: Accountable for

1 forwarding the request ultimately, in a national
2 security investigation, to the ambassador?

3 MS EDWARDH: Yes.

4 MR. LOEPPKY: I would say it is
5 CID.

6 MS EDWARDH: Thank you. That's
7 what I was trying to identify.

8 I want to just touch a few other
9 areas. I am going to try to finish, as I
10 promised, Mr. Commissioner. Sometimes you are
11 just never as quick as you think you are.

12 I want to talk about the wink and
13 the nod.

14 Sir, as a professional police
15 officer, the RCMP has an internal affairs
16 department?

17 MR. LOEPPKY: Yes.

18 MS EDWARDH: Metropolitan Toronto
19 Police Services has internal affairs --

20 MR. LOEPPKY: Pardon me?

21 MS EDWARDH: Metropolitan Toronto
22 Police Services has an internal affairs
23 department?

24 MR. LOEPPKY: Yes.

25 MS EDWARDH: Indeed, sometimes

1 when Metropolitan Toronto Police Services have a
2 big problem, they have called upon the RCMP to
3 assist them investigating members of the Force?

4 They have done so quite recently?

5 MR. LOEPPKY: Yes.

6 MS EDWARDH: And I want to talk
7 about the statements Cellucci and Powell made,
8 that there was a clear -- and I think they left
9 the clear impression that somebody in the RCMP
10 knew what was going on and that they -- I am going
11 to use broadly the concept of approval, right?

12 MR. LOEPPKY: Mm-hmm.

13 MS EDWARDH: And you don't
14 disagree with my characterization? You are
15 content with that?

16 MR. LOEPPKY: Yes.

17 MS EDWARDH: Sometimes it happens,
18 when you are looking at police misconduct, that
19 other officers who are aware of it just turn a
20 blind eye. You have seen that happen in your
21 years of service?

22 MR. LOEPPKY: Yes.

23 MS EDWARDH: What I am concerned
24 about, sir, is the very simple proposition, that
25 one or more police officers simply just agreed,

1 when they were talking to their American
2 colleagues, would just turn a blind eye, "We don't
3 hear no evil, we don't speak no evil," and in
4 effect gave the impression, "We are not going to
5 object."

6 Now, I want to put to you two
7 propositions about that.

8 Sometimes in the investigation,
9 internal or external of such a subtle kind of
10 remark, you would have to agree with me that it
11 would be very difficult to find out whether or not
12 that happened?

13 MR. LOEPPKY: Yes.

14 MS EDWARDH: And further, sir, you
15 will have to agree with me that in this case, in
16 respect of the dealings in relation to Mr. Arar,
17 it is no different. It is very difficult to
18 exclude that as a possibility, although you hope
19 to have excluded it?

20 MR. LOEPPKY: Yes. I undertook
21 four reviews --

22 MS EDWARDH: Yes.

23 MR. LOEPPKY: -- that I ordered to
24 determine our activities with respect to the
25 decision that had been taken in the United States,

1 and I did not uncover in any one of those any
2 bad-faith decisions or identify any bad-faith
3 intentions by any of our investigators.

4 MS EDWARDH: And I appreciate and
5 I am not criticizing the reviews you undertook,
6 sir. I am simply acknowledging the reality of the
7 policing culture and also the enormous pressure
8 the police were on and the fact -- let me just
9 finish the question -- the fact that your
10 investigations cannot exclude that as having
11 happened.

12 MR. LOEPPKY: I cannot exclude
13 that, but I reject your notion that the police
14 culture works on a wink and a nod approach. I
15 believe that we have professional policing in
16 Canada who adhere to high standards, and I reject
17 that.

18 MS EDWARDH: I do not want to
19 suggest for a moment that I take the view that the
20 vast majority of police officers are not
21 professional police officers. Please, that's not
22 what I am saying.

23 MR. LOEPPKY: Okay.

24 MS EDWARDH: What I am saying, as
25 with any major police force, there are persons in

1 that force for whom a wink and a nod have worked,
2 and no police force can entirely exclude that?

3 MR. LOEPPKY: Yes, I would agree
4 with that.

5 MS EDWARDH: Thank you.

6 One other quick area, and I am
7 just trying to clarify the issue of the liaison
8 officer travelling to Syria from Rome after
9 gathering information about Mr. Arar.

10 I take it, sir, from your review
11 of the record, it is clear that the RCMP liaison
12 officer did not travel to Syria to meet with
13 Syrian Military Intelligence with respect to
14 Mr. Arar?

15 MR. LOEPPKY: That's correct.

16 MS EDWARDH: Okay. There will be
17 a CSIS liaison officer in Rome as well?

18 MR. LOEPPKY: Yes.

19 MS EDWARDH: And I take it your
20 knowledge would not extend to whether or not that
21 person had travelled to Syria?

22 MR. LOEPPKY: That's correct.

23 MS EDWARDH: I would like to touch
24 upon the area of your decision to decline to sign
25 on to the letter proposed by Mr. Pardy which would

1 have had the signatures of both the Solicitor
2 General as well as the Minister of Foreign
3 Affairs.

4 We understand, sir, your position
5 from yesterday that you declined to accept -- no.
6 You declined to recommend to the Solicitor General
7 that he sign anything that said that there was no
8 evidence --

9 MR. LOEPPKY: Yes.

10 MS EDWARDH: -- because it was
11 misleading?

12 MR. LOEPPKY: Yes.

13 MS EDWARDH: We have agreed, sir,
14 that -- this may be a fine point, but certainly
15 you will agree with me that at no time were you
16 ever alive to the fact that there was evidence
17 upon which any legal process could issue in
18 Canada, i.e., you could never have gotten a search
19 warrant with respect to Mr. Arar's residence; you
20 could have never have gotten an authorization
21 under the Criminal Code, unless by way of a basket
22 clause; and you could never have arrested and
23 charged him for any criminal offence relating to
24 terrorism?

25 MR. LOEPPKY: Yes, that's correct.

1 MS EDWARDH: So no one thinks
2 Mr. Arar is special, you made it clear -- or I am
3 going to suggest to you if there had been any
4 direct evidence of his involvement in terrorist
5 activities, he would have been charged?

6 MR. LOEPPKY: As I tried to
7 explain yesterday, you know, when -- charges are
8 laid when you have sufficient evidence and you
9 gather evidence --

10 MS EDWARDH: Reasonable and
11 probable grounds is the legal foundation for
12 laying a charge.

13 MR. LOEPPKY: That's correct. But
14 before that, you gather pieces of information that
15 contribute to that.

16 MS EDWARDH: I understand that.
17 But if you had had direct evidence of someone
18 committing a terrorist act, or supporting a
19 terrorist organization, that person would be
20 charged, if that direct evidence existed?

21 MR. LOEPPKY: Yes.

22 MS EDWARDH: You made reference
23 yesterday to a concept, and I would like to
24 explore it because there was an objection made but
25 it was after the witness spoke.

1 You said yesterday, and I think in
2 a fairly careful selection of language, that there
3 was circumstantial pieces of evidence or
4 information that could be developed in an
5 investigation to form part of a chain in a
6 criminal case. That's what you said.

7 MR. LOEPPKY: I think so.

8 MS EDWARDH: I picked that apart
9 fairly carefully last night.

10 MR. LOEPPKY: Well ...

11 MS EDWARDH: You are content with
12 that as being what you at least either said, or is
13 correct today?

14 MR. LOEPPKY: Yes. Pieces of
15 information can become evidence, as it progresses.

16 MS EDWARDH: Of course. But I
17 want to analyze that a bit because pieces of
18 information that may become evidence may not be
19 evidence at all of anything, standing alone,
20 without a lot of further investigation?

21 MR. LOEPPKY: That's correct.

22 MS EDWARDH: And I think the
23 question that, in fairness, needs to be answered
24 by you without speculating on where an
25 investigation could go to make a piece of

1 information relevant -- I want to ask you this:
2 Standing alone, the information that you had about
3 Mr. Arar could not have justified any legal step
4 and did not amount to anything more, standing
5 alone without further investigation, to a
6 suspicion as characterized by your colleagues?

7 MR. LOEPPKY: That's correct.

8 MS EDWARDH: Thank you.

9 I want then to -- if I could just
10 have a moment?

11 --- Pause

12 MS EDWARDH: I want to ask this
13 question: Mr. Cabana testified under oath, and
14 indeed the documents themselves show that even
15 upon his return from Syria, there was an interest
16 that the RCMP had in interviewing Mr. Arar, and as
17 late as I believe October, the time of his return,
18 in 2003, it was a decision of the Force that he
19 should be interviewed as a witness.

20 Mr. Cabana said that over and
21 over.

22 Are you familiar with that? Did
23 you have a chance to inform yourself of his
24 testimony, sir?

25 MR. LOEPPKY: Yes, I am aware of

1 that.

2 MS EDWARDH: Okay. And he was the
3 senior investigating officer of A-OCANADA. I am
4 going to suggest to you, sir -- and this is what
5 troubles me about the refusal to write the letter
6 -- that from a policing perspective, the interest
7 in Mr. Arar was that he could be potentially an
8 important witness in an important criminal case.

9 Isn't that the effect of what
10 Mr. Cabana said and what you understood?

11 MR. LOEPPKY: My understanding
12 would be that he would be -- obviously
13 Superintendent Cabana gave evidence that he wanted
14 to interview him as a witness to perhaps explore
15 some issues that -- some information we were in
16 possession of. But certainly he was still a
17 subject of interest that we wanted to talk to.

18 MS EDWARDH: As a witness, is what
19 Mr. Cabana --

20 MR. LOEPPKY: Well, that's his
21 description of him.

22 MS EDWARDH: Well, surely, sir --
23 I mean, you and I have been at this game far too
24 long to not know that there is a huge difference
25 between a target, a suspect, and a prospective

1 witness who you are having difficulty
2 interviewing.

3 I mean, Mr. Cabana certainly gave
4 the impression in his testimony, if you accept him
5 as being truthful, that the purpose of
6 interviewing Mr. Arar was as a witness, and indeed
7 in October, when he comes home and the mounties
8 sit down to decide again -- they have a meeting
9 and they say that the purpose of an interview
10 would be to interview him as a witness.

11 MR. LOEPPKY: I accept
12 Superintendent Cabana's comment on that, and I
13 don't know what changed in the actual
14 investigation. I am not informed of the
15 particular details. But I would anticipate that
16 there would be something that transpired that
17 would have led him to that statement, but I am not
18 sure what that is.

19 MS EDWARDH: Well, I don't know
20 that anything changed because he is looking for
21 him as a witness when he is first talking to
22 Mr. Edelson, and at the very end the RCMP is
23 back -- and let me take you to Exhibit P-140, tab
24 11, page 35.

25 I am sorry, it is tab 31, sir. It

1 is getting late.

2 MR. LOEPPKY: Which tab?

3 MS EDWARDH: Tab 11, page 31.

4 THE COMMISSIONER: The P number
5 is...?

6 MS EDWARDH: And it is P-140,
7 Mr. Commissioner.

8 --- Pause

9 MS EDWARDH: Do you have that
10 reference, sir?

11 MR. LOEPPKY: Yes.

12 MS EDWARDH: The date then is
13 2003, October the 6th. It is just a few days
14 after Mr. Arar's return to Canada from Syria?

15 MR. LOEPPKY: Yes.

16 MS EDWARDH: And there is a team
17 meeting with respect to Mr. Arar.

18 MR. LOEPPKY: Yes.

19 MS EDWARDH: And the focus of the
20 meeting is to determine whether there is a need to
21 consider or getting an interview from Mr. Arar.

22 Do you agree with that, sir?

23 And then there is a discussion:

24 "Discussed the need to
25 interview ARAR at this time.

1 Would the interview (as a
2 witness) make it into the
3 public domain..."

4 Did you find that,
5 Mr. Commissioner? I am sorry.

6 THE COMMISSIONER: The tab?

7 MS EDWARDH: It is tab 11, page
8 31.

9 THE COMMISSIONER: All right. Go
10 ahead.

11 MS EDWARDH: And it is the very
12 first paragraph of this page beginning with the
13 language "A brief team meeting". Then there is a
14 discussion by the officers of whether there is a
15 need to interview Mr. Arar and they discussed the
16 interview (as a witness) and they are concerned
17 about whether it could slip into the public domain
18 via the media, which is of course a factor they
19 will want to consider.

20 I just want to close this by
21 suggesting to you that from the evidence
22 Mr. Cabana has given, that the language "a person
23 of interest" in respect of Mr. Arar, a person of
24 great interest, or whatever the language, a
25 peripheral to the investigation, never meant more

1 than he was wanted for the purpose of an interview
2 to see if he would be, or could be, made a witness
3 in an ongoing criminal investigation.

4 MR. LOEPPKY: Well, I certainly
5 agree with -- you know, I accept Superintendent
6 Cabana's testimony, and I spoke of what may have
7 changed. I don't know what may have even changed
8 within the investigation whereby they would now
9 want to interview him as a witness.

10 There may be material things that
11 they became aware of during the pursuit of their
12 investigation that could have influenced how they
13 categorized him.

14 MS EDWARDH: And I won't pursue it
15 with you, but indeed from the very first moment
16 they wanted to interview him, they said it was as
17 a witness. So there is nothing that has changed
18 as far as I can determine.

19 MR. LOEPPKY: I think between the
20 intervening steps, a number of things happened.

21 MS EDWARDH: Certainly a number of
22 things happened. He was arrested, detained, and
23 rendered by the Americans, and he was put inside a
24 prison and interrogated by the Syrians.

25 That leads me to my very last area

1 I want to touch on, Mr. Commissioner. Should I
2 proceed to do that now?

3 THE COMMISSIONER: If you are
4 content to take a few minutes, we are doing fine.

5 MS EDWARDH: All right. I may
6 want an extra five minutes.

7 THE COMMISSIONER: No, no,
8 absolutely. This is fine.

9 No. Why don't we take the break?

10 MS EDWARDH: Maybe I can shorten
11 this up.

12 THE COMMISSIONER: We will take
13 until 2:15.

14 MS EDWARDH: Thank you, sir.

15 THE REGISTRAR: Please stand.

16 --- Upon recessing at 1:02 a.m. /

17 Suspension à 13 h 02

18 --- Upon resuming at 2:15 p.m. /

19 Reprise à 14 h 15

20 THE REGISTRAR: Please be seated.

21 THE COMMISSIONER: Good afternoon.

22 MS EDWARDH: Thank you very much,
23 Mr. Commissioner.

24 Mr. Loepky, we had left off with,
25 really, two propositions: one being that things

1 had changed and the other being that things had
2 remained the same. It is clear that the record of
3 the RCMP discloses that at least from the
4 A-OCANADA perspective, and that promoted by
5 Mr. Cabana and thereafter on Mr. Arar's return, he
6 was wanted for the purposes of an interview with
7 respect to being a witness. So that brackets the
8 entire time frame of A-OCANADA's involvement or
9 interest in him, as we know it.

10 But you also said things changed,
11 and I want to explore the things changed, if I
12 could.

13 It is also clear from the record,
14 and perhaps you can agree with me, that members of
15 the Force were interested in pursuing and
16 obtaining information from the Syrian authorities
17 about Mr. Arar?

18 MR. LOEPPKY: That option I
19 believe was discussed, yes.

20 MS EDWARDH: Not so much an
21 option, but certainly they were willing recipients
22 of that information when Ambassador Pillarella
23 returned and produced a bout de papier which was
24 provided to him by military intelligence, and then
25 provided to both CSIS and the RCMP.

1 MR. LOEPPKY: There was a
2 discussion about whether questions would be
3 forwarded, I believe, yes.

4 MS EDWARDH: No, I am sorry, I am
5 not talking about questions. Maybe you are not
6 apprised of this, so let me just give you the
7 information and see whether this jogs your memory.

8 In November of 2002, a
9 three-paragraph document was provided by Syrian
10 Military Intelligence to Mr. Pillarella. It was a
11 document purporting to summarize the contents of
12 Mr. Arar's interrogation.

13 It was then taken by
14 Mr. Pillarella and returned to Canada where in a
15 meeting -- and it was translated by CSIS, and then
16 provided to the RCMP -- and in a meeting it was
17 discussed.

18 Does that trigger any
19 recollection? This would be November 2002.

20 MR. LOEPPKY: I have learned about
21 it since. I wasn't aware of it at the time.

22 MS EDWARDH: Okay. But learning
23 about it since allows me just to pursue this with
24 you a little further.

25 It is apparent from the

1 description of that meeting that the RCMP officers
2 found the document to be general and that they
3 wanted more detail in order to see if anything
4 could be confirmed.

5 You will agree with me that in an
6 ordinary investigation, wanting detail so it may
7 be confirmed is a good investigative avenue?

8 MR. LOEPPKY: Yes.

9 MS EDWARDH: However, in the
10 context of this case, when Mr. Arar is being
11 detained by Syrian Military Intelligence, would
12 you agree with me that wanting more detail and
13 encouraging the ambassador to get it runs a
14 serious risk about how that information could be
15 obtained by Syrian Military Intelligence?

16 MR. LOEPPKY: It runs a risk, and
17 that would be the reasons for discussions with
18 Foreign Affairs and ultimately with the
19 ambassador. It is an option.

20 MS EDWARDH: I understand that.
21 But certainly, as best you knew, with respect
22 to -- maybe you know something about the bout de
23 papier now, but certainly it would appear that the
24 risk that was run was not run in the face of any
25 imminent threat to national security?

1 MR. LOEPPKY: I am not familiar
2 with the document that you refer to, but --

3 MS EDWARDH: But you are familiar
4 enough with the investigations --

5 MR. LOEPPKY: But the discussions
6 obviously took place with respect to an option
7 that might be pursued.

8 MS EDWARDH: We will leave it to
9 the more detailed record because I think Mr.
10 Cabana and others can speak to it, because CSIS
11 did go off.

12 I want to talk about the approach
13 to the fruits of the interrogation.

14 There is information on the public
15 record that that document, and perhaps other
16 information, came back. I want to put to you this
17 proposition: that under the regime that the RCMP
18 had established for evaluating information, that
19 information would be presumptively incredible or
20 unreliable, presumptively unreliable, coming as it
21 does from military intelligence by way of an
22 alleged admission by Mr. Arar.

23 MR. LOEPPKY: I think it would
24 certainly be subject to questions. The people
25 that are looking at it would take into account any

1 past dealings that they may have had with military
2 intelligence, if they had had any. The input and
3 the environment of Foreign Affairs would have been
4 a valuable asset in terms of assessing the
5 reliability of it.

6 So there would have been a number
7 of factors that would have been considered.

8 MS EDWARDH: But as an officer,
9 let me just put this proposition to you: It was
10 known by everyone that Syrian Military
11 Intelligence had specifically a bad human rights
12 record, used torture, particularly in the initial
13 stage of detaining someone, and you would have no
14 real way of knowing how bad that situation was for
15 a detainee.

16 So when you receive the
17 information, I am going to suggest to you that if
18 you applied your mind to the categories of
19 information the Mounties received to file, you
20 would have had to view that as presumptively
21 unreliable.

22 Do you agree or disagree?

23 MR. LOEPPKY: I would disagree. I
24 think you have questions about it and you try and
25 do your due diligence. Obviously you wouldn't

1 attach the same reliability as you would if you
2 had a statement taken in a country like the U.K.,
3 but you would review it and apply some judgment
4 and knowledge and research.

5 MS EDWARDH: Knowing what you know
6 today, would you agree it is presumptively
7 unreliable?

8 MR. LOEPPKY: Well, you are asking
9 me a difficult question. I don't know what the
10 document says and I don't know all the
11 investigative details that they may have compared
12 it against or the analysis that they did.

13 But I would say that you would
14 obviously have questions about it.

15 MS EDWARDH: Right. Let me ask
16 you, sir -- I asked you a question, when you first
17 testified on July 6th, and at page 1374, line 4,
18 the question was this:

19 "Is it the case, then, that
20 any statement taken by
21 authorities in a jurisdiction
22 with a poor human rights
23 record would be viewed by the
24 RCMP, when it came to acting
25 on it or putting it on the

1 database, as presumptively
2 unreliable?"

3 And your answer, sir, was "yes".
4 So what's changed?

5 MR. LOEPPKY: I don't think
6 anything has changed. I think if I recall the
7 wording that you used, "acting on it", I think
8 those are things that if you were to act directly
9 on it without further inquiries, absolutely you
10 wouldn't do that. But I think you would do a due
11 diligence test.

12 MS EDWARDH: And putting it in the
13 database?

14 MR. LOEPPKY: That's right.

15 MS EDWARDH: You would do neither?

16 MR. LOEPPKY: Yes, I think you
17 would put it in the database because you have to
18 have some format to store it while you are doing
19 work on it and pertaining to it. It's --

20 MS EDWARDH: I am sorry?

21 MR. LOEPPKY: It's just a part of
22 file management.

23 MS EDWARDH: When you put it into
24 the database, there is also an assessment of it
25 that is undertaken, a record of how it is viewed?

1 MR. LOEPPKY: There would be a
2 notation as to how it was acquired, yes.

3 MS EDWARDH: Well, is there not
4 also a reference to what value is attached to it
5 by way of proven reliability, presumptive
6 unreliability? That is also included in the
7 database?

8 MR. LOEPPKY: I would expect that,
9 you know, the circumstances -- a brief description
10 of how it was obtained would be included.

11 MS EDWARDH: Let me be more
12 specific --

13 MR. LOEPPKY: I am trying to be --

14 MS EDWARDH: Is there not a
15 determination of reliable -- and I can go back
16 here to the discussion that we had around this.
17 But it was my understanding that there was an
18 evaluation undertaken of information and a
19 determination, when it was put on the database, of
20 how it was viewed.

21 MR. LOEPPKY: And if I recall my
22 response, I think I referred to the reliability
23 assessment being done when the information comes
24 from a source. Then it would be categorized in
25 terms of confirmed, believed reliable; there would

1 be a reliability assessment. If it was something
2 that came as very direct evidence from a search
3 warrant or another document or, for example, an
4 intercepted communication, it would be reliable.

5 This one, there would not be a
6 categorization, but it would clearly be defined,
7 the source that it came from. And I would expect
8 that there is a question about its reliability.
9 It has to be reviewed.

10 MS EDWARDH: Would you agree with
11 me that without confirmation it would be
12 worthless, given the source?

13 MR. LOEPPKY: I am not sure it
14 would be worthless. I think it would be of
15 questionable value.

16 MS EDWARDH: Of course if that
17 database was shared with anybody, they would get
18 that information?

19 MR. LOEPPKY: Yes.

20 MS EDWARDH: Certainly, if
21 circumstances were as we know them today, where
22 Mr. Arar was held without charge, without access
23 to counsel for days and days and then months and
24 months, you would agree with me that that
25 information would never see the light of day in

1 any courtroom if you were prosecuting someone?

2 MR. LOEPPKY: That's correct.

3 MS EDWARDH: So my question is
4 related to why there is an effort to seek more
5 information. Any information that comes from this
6 source is of no evidentiary value given the nature
7 of the source and the absence of the ability of
8 the RCMP or any prosecutor to put it forward in a
9 manner which would pass muster or scrutiny in
10 Canada.

11 Would you agree with that
12 proposition?

13 MR. LOEPPKY: Yes, that's correct.
14 And as I said, it would be of questionable value.
15 But you certainly might undertake some further
16 steps to confirm whether in fact the information
17 could be proven or disproven.

18 MS EDWARDH: But it itself could
19 never be used in a courtroom?

20 MR. LOEPPKY: No.

21 MS EDWARDH: I must admit when I
22 contemplated the RCMP wanting to go ask questions,
23 the image I drew in my mind had a humorous
24 element, Mr. Loepky.

25 I can imagine two officers

1 arriving at the Syrian Military Intelligence
2 headquarters, entering the room with General
3 Khalil and other of the senior officers with
4 Mr. Arar sitting in the middle, and you, sir, or
5 your colleagues saying to him, "We would like to
6 tell you that you have a right to communicate with
7 counsel", and then "you have a right", et cetera,
8 et cetera.

9 The thought of two RCMP officers
10 going over to ask questions has a ludicrous ring
11 to it when you know someone is arbitrarily
12 detained, has no access to counsel, because you
13 are not going to give him a cell phone and say we
14 have Mr. Edelson on the other end of the line.
15 It's just not going to happen?

16 MR. LOEPPKY: No.

17 MS EDWARDH: So those questions
18 could only ever serve some kind of intelligence
19 function because they would not be admissible as
20 evidence in any courtroom that you are aware of?

21 MR. LOEPPKY: Yes, I agree, but I
22 think it's appropriate to put it into perspective.
23 This was an option that was considered, and in an
24 investigation, you consider many options. Some
25 are followed up; some are not. In this case, it

1 wasn't.

2 MS EDWARDH: One of the things
3 that I find most troubling about the lack of
4 sensitivity to the utterances made by Mr. Arar
5 comes from a memorandum -- and I think there are a
6 couple of them -- I would like you to comment,
7 sir.

8 Could we look at Exhibit P-184.
9 --- Pause

10 MS EDWARDH: I would just like to
11 talk about how these are created, and the degree
12 of accuracy.

13 I will start with my biggest
14 problem. Under the phrase "Current Status" -- and
15 let's be clear. This is a memorandum --

16 MR. FOTHERGILL: P-184?

17 MS EDWARDH: Yes, P-184. Well, I
18 may have got this mixed up because this was
19 yesterday. It's the briefing note, styled a
20 "Briefing Note to the Commissioner".

21 THE COMMISSIONER: I think I have
22 the same as Ms Edwardh, just looking at the
23 blacking out.

24 MS EDWARDH: Mr. Commissioner, is
25 that what you have?

1 THE COMMISSIONER: That's the one
2 I have, it's 184.

3 MR. FOTHERGILL: We have the
4 document. That's fine.

5 MS EDWARDH: So then turning to my
6 concern, Mr. Loepky, under the Current Status--
7 first of all, did this document go to the
8 Commissioner? Can we tell from who signed off on
9 it?

10 MR. LOEPPKY: I don't believe it
11 did.

12 MS EDWARDH: You have signed it,
13 though, have you not?

14 MR. LOEPPKY: Yes.

15 MS EDWARDH: And when you sign it,
16 certainly that means you have read it?

17 MR. LOEPPKY: Yes.

18 MS EDWARDH: And how do we know
19 whether this document went to the Commissioner?

20 MR. LOEPPKY: Because if it went
21 to the Commissioner, he would initial it.

22 MS EDWARDH: And that was the
23 practice as you knew it, sir?

24 MR. LOEPPKY: Yes.

25 MS EDWARDH: All right. I am

1 sorry?

2 MR. LOEPPKY: And I would forward
3 ones that I felt were appropriate to go to his
4 level.

5 MS EDWARDH: This document, under
6 "Current Status," says the following:

7 "ARAR remains in Syrian
8 custody. He was interviewed
9 by the Syrians and
10 volunteered he had received
11 training at the [blank] camp
12 in Afghanistan."

13 Well, you and I both know that in
14 the language of the common law and criminal law,
15 that a statement which is volunteered is very,
16 very different from a statement which is obtained
17 through coercion, physical abuse, and torture.

18 Can you give us any idea who would
19 have made the decision that this information given
20 to the Syrians by Arar during his interrogation
21 had been "volunteered" by him?

22 Who would use that language? Who
23 wrote this document?

24 MR. LOEPPKY: It was written
25 within CID, and I presume it was as a result of

1 discussions that they had had with other partners.

2 MS EDWARDH: You will agree with
3 me that if the information came from Syrian
4 Military Intelligence that the language of
5 "volunteer" is misleading and would have misled
6 you and the Commissioner as to whether or not
7 Mr. Arar had ever made an admission in
8 circumstances that you could regard it as truly
9 reliable?

10 MR. LOEPPKY: Yes, but I think
11 it's important that -- I think, you know,
12 Inspector Reynolds, when he prepares the briefing
13 note, he relies on information that he has been
14 provided to prepare it.

15 I don't know the source of the
16 information.

17 MS EDWARDH: So this document
18 would have been prepared by Inspector Rick
19 Reynolds?

20 MR. LOEPPKY: Well, it's signed by
21 Inspector Rick Reynolds in the Financial
22 Intelligence Unit. So I assume that he was
23 certainly in the loop on this.

24 MS EDWARDH: And the other person
25 who approved the contents of this document was

1 Richard Proulx?

2 MR. LOEPPKY: Yes.

3 MS EDWARDH: Do I take it from the
4 language of "approved by" that he would have seen
5 and reviewed the content and decided that it
6 fairly reflected the record as he knew it?

7 MR. LOEPPKY: He would have
8 decided that that reflected the record in terms of
9 the information that they had received.

10 MS EDWARDH: Would you agree, sir,
11 that the language "volunteered" allows a police
12 officer to put a much greater degree of weight on
13 that admission than would be the case if he or she
14 knew it had been obtained in a coercive
15 investigation?

16 MR. LOEPPKY: Yes.

17 MS EDWARDH: Then there is another
18 issue, if I could just turn to this, and it's more
19 a question of putting forward only the negative
20 that bothers me.

21 In the second paragraph, under
22 "Background", in the third line there is a
23 reference to the investigation, then there is a
24 bunch of redactions and then it says:

25 "ARAR was approached by

1 members for an interview but
2 refused."

3 And I am going to ask you, sir:
4 Do you think it's a fair statement to put forward
5 to yourself and the Commissioner that he refused
6 when in fact his counsel, Ann Alder, carried on a
7 series of discussions about conditions that should
8 be imposed on the interview and were not able to
9 agree and the matter was left at that?

10 Is that a refusal, or is it
11 important to know --

12 MR. LOEPPKY: No, I think what you
13 have described is conditions --

14 MS EDWARDH: Yes.

15 MR. LOEPPKY: -- in terms of the
16 statement, and conditions which I understand
17 ultimately were found unacceptable by the
18 investigators.

19 MS EDWARDH: But that's quite
20 different than merely refusing, is it not?

21 MR. LOEPPKY: Yes.

22 MS EDWARDH: I am concerned, sir,
23 that in coming to decisions that you have to make
24 as the senior operational officer, that it is
25 important that the information you receive be

1 nuanced and carry with it the subtleties that
2 allow for true decisions to be made on a real
3 record.

4 I am going to ask you, sir,
5 whether, given those two examples in this
6 document, P-184, you will agree with me that those
7 two pieces of information are both significant and
8 are not adequately and fairly represented on this
9 piece of paper?

10 MR. LOEPPKY: You are talking
11 about the refusal part and volunteering part?

12 MS EDWARDH: Absolutely.

13 MR. LOEPPKY: On the refusal part,
14 I agree. I don't think that that is as accurate
15 as it could be, given the conditions.

16 MS EDWARDH: Yes.

17 MR. LOEPPKY: With respect to the
18 volunteered, I assume that the individuals who
19 prepared this, that is the information they were
20 provided, because to my knowledge we did not go to
21 Syria and we did not do an interview. Therefore,
22 I think they are acting on information they were
23 provided, and my assumption is that that's the
24 information they were given.

25 MS EDWARDH: And if that

1 information, the volunteering, came from Syrian
2 Military Intelligence, wouldn't you want to know
3 that as well as the Commissioner want to know it,
4 to make your own judgment about whether you would
5 give any weight to it?

6 MR. LOEPPKY: Well, I think that
7 the decision in terms of its weight would be given
8 by the investigators in conjunction with CID --

9 MS EDWARDH: Well, I --

10 MR. LOEPPKY: But I don't know
11 where the information came from.

12 I am just suggesting that I think
13 the individual who prepares the note would prepare
14 it with the understanding in terms of how he was
15 informed as to the information being obtained and
16 from where.

17 MS EDWARDH: And the information
18 could come from two sources. It might be that
19 somehow Syrian Military Intelligence conveyed
20 that, after some period of detention, Mr. Arar
21 volunteered it. And that would be an important
22 fact to know, would it not?

23 MR. LOEPPKY: If we were informed
24 of that, yes.

25 MS EDWARDH: And if it came from

1 that source?

2 MR. LOEPPKY: Yes.

3 MS EDWARDH: Wouldn't you want to
4 know that?

5 MR. LOEPPKY: Yes.

6 MS EDWARDH: Certainly I am going
7 to suggest to you that without that knowledge, you
8 might well consider it to have a value that it did
9 not have because of the nature of Syrian Military
10 Intelligence operations.

11 MR. LOEPPKY: You are talking
12 about the statement?

13 MS EDWARDH: Yes, the notion that
14 some statement was volunteered?

15 MR. LOEPPKY: Well, as I mentioned
16 earlier, I think you do your due diligence. You
17 take into consideration all the factors, you do
18 the research, you consult, and then you arrive at
19 a point of making a decision in terms of validity.

20 But I certainly would agree that
21 it's not as valid as if it was obtained under very
22 controlled conditions that we were present at.

23 MS EDWARDH: And indeed if it was
24 obtained by Syrian Military Intelligence without a
25 Canadian police officer standing by watching,

1 you'll have to agree you'll never know if it was
2 in fact volunteered?

3 MR. LOEPPKY: That's right.

4 MS EDWARDH: I want to turn to
5 consular visits, very briefly, if I could.

6 You were referred to a concern and
7 a complaint you made in September of 2003 about
8 feeling that you ought to have known about the
9 consular visits in the U.S., and there was a
10 meeting about that and you subsequently explained
11 that this was a miscommunication within the RCMP
12 and indeed some members did know about the visit.

13 But I have another set of
14 questions I would just like to quickly ask you
15 about this.

16 We have heard information and we
17 have received evidence on the public record that
18 Mr. Arar, very early on in his detention in New
19 York, was told by INS that he may be sent to
20 Syria. He reported that to DFAIT. In exploring
21 issues around where Mr. Arar was, DFAIT was told
22 that they should take his case to the highest
23 levels.

24 I want to ask you the following
25 questions, if I could, Mr. Loepky: Should you

1 have been told by DFAIT that very early on
2 Mr. Arar had been informed by INS he may have gone
3 to Syria, and should you have been told of the
4 information to take it to the highest levels so
5 that you could have satisfied yourself that he was
6 not going to be removed to Syria based on Canadian
7 information, because you, sir, are the one person
8 who could have picked up the phone and spoken to
9 your counterpart in the FBI and said, "Excuse me,
10 what's going on with this A-OCANADA information?
11 What are you going to do here?"

12 And you would have gotten an
13 answer, wouldn't you have?

14 MR. LOEPPKY: Okay. So your
15 question is...?

16 MS EDWARDH: My question is:
17 Should DFAIT have told you, sought your
18 assistance?

19 MR. LOEPPKY: I think DFAIT, when
20 they became aware of his concerns and the issues
21 that were taking place, they obviously carried out
22 or were in the process of carrying out their
23 mandate to get access and to ensure that he had
24 representation.

25 MS EDWARDH: That's it. They

1 shouldn't have picked up the phone and said to
2 you, "We have this information that he may be
3 rendered to Syria. He is a Canadian citizen and
4 we are concerned. Can you step into the fray here
5 and find out what's going on?"

6 MR. LOEPPKY: There were
7 discussions with Foreign Affairs here and our
8 liaison officer at Foreign Affairs was advised of
9 that possibility and notified the criminal
10 intelligence area of that, and unfortunately I was
11 not notified of that until later.

12 MS EDWARDH: Okay. I am sorry, I
13 may be missing a step here. So let's go back over
14 this. I may have to find a couple of documents
15 here.

16 It was my understanding, sir, that
17 this information was not transmitted to the RCMP,
18 this issue about Syria -- just a second.

19 --- Pause

20 MS EDWARDH: That there was a
21 visit to your offices on the morning of the 8th in
22 which that information was shared. But certainly
23 Roy knew sometime in advance -- and it's unclear
24 how soon in advance of that time -- because he
25 said he read it on a consular card, is my

1 understanding.

2 But nothing was formally conveyed
3 to you until the 8th, although he may have known
4 at an earlier time, and we will hear from him and
5 he will tell us when he knew.

6 Does that fairly state the
7 evidence?

8 MR. LOEPPKY: Yes.

9 MS EDWARDH: Thank you. Then let
10 me put this question: It is quite clear that
11 reviewing a consular card is not the same way as
12 having a direct overture for your assistance or to
13 bring something to your attention?

14 MR. LOEPPKY: That's correct.

15 MS EDWARDH: And if DFAIT chose
16 not to bring it to your attention, was it Roy's
17 obligation to bring it to some level of attention
18 in the RCMP in a more timely way? It's a fairly
19 urgent situation.

20 MR. LOEPPKY: I believe that he
21 did in fact notify headquarters, CID, of the
22 discussions and the status earlier than the 8th.
23 I think there was liaison and discussions on that
24 issue.

25 MS EDWARDH: Well, there is no

1 documentary record that I can assist you with to
2 be more precise. But it's your understanding then
3 that he knew, prior to the 8th, and so sometime on
4 the 6th or 7th he would have had that information
5 conveyed to CID?

6 MR. LOEPPKY: My understanding is
7 that in his role as liaison officer there, he
8 became aware of some information from Foreign
9 Affairs with respect to Mr. Arar, and at some
10 point he became informed that there was a
11 discussion or a piece of information that related
12 Mr. Arar to a possibility of deportation to Syria.
13 And at some point he relayed that to headquarters,
14 but I don't know exactly what the time frame is.

15 MS EDWARDH: I just want to be
16 very clear about whether you are saying you
17 believe that to be prior to Mr. Arar's removal to
18 Syria, or after Mr. Arar's removal to Syria. Or
19 are you able to say?

20 MR. LOEPPKY: I am not able to
21 say.

22 MS EDWARDH: Fair enough. That
23 doesn't quite answer, though, the one question
24 that I would have thought it seemed appropriate to
25 ask, which is that there is, it seems to me, good

1 reason, had DFAIT understood the message they got,
2 for them to have been inclined to pick up the
3 phone and seek the assistance of the RCMP to
4 penetrate law enforcement in the U.S., because in
5 fact the best and fastest way to do that is with
6 your assistance, is it not?

7 MR. LOEPPKY: Yes.

8 MS EDWARDH: And had they wanted
9 clarification, would you have assisted if they had
10 requested it?

11 MR. LOEPPKY: Yes, but I believe
12 that they were as surprised as we were with the
13 ultimate decision that was taken.

14 MS EDWARDH: And perhaps this
15 shines a beacon to future relationships,
16 Mr. Loepky. But in another circumstance,
17 assuming they were faced with a similar situation,
18 obviously it makes good sense to call upon your
19 offices or similar offices in the RCMP?

20 MR. LOEPPKY: I think it speaks to
21 the awareness that I mentioned earlier.

22 MS EDWARDH: Absolutely. Now, one
23 of the last two issues I want to briefly touch on
24 relates to your notes. Again, page 57.

25 You have described this page as

1 notes made in anticipation of Mr. Arar's speaking
2 publicly upon his return to Canada.

3 Is that correct?

4 MR. LOEPPKY: I think I said that
5 he was coming home that day. This issue had been
6 high profile for a good period of time, and these
7 were just some of the broad issues that I expected
8 we might see in a variety of forms.

9 MS EDWARDH: Fair enough. That's
10 all I was trying to suggest; that this was your
11 musings on issues that you believe may become
12 relevant?

13 MR. LOEPPKY: Yes.

14 MS EDWARDH: I found it
15 interesting that one of the issues that you
16 decided may become relevant on October 6th, before
17 Mr. Arar made any public statements, was the issue
18 of his torture.

19 It says, if you look at this
20 document, "Torture of Arar". Perhaps you could
21 read. "We..." I can't read your writing, sir.

22 MR. LOEPPKY: "Torture of Arar"?

23 MS EDWARDH: Yes.

24 MR. LOEPPKY: "We expect consular
25 affairs to do their job."

1 MS EDWARDH: Mr. Fothergill reads
2 your writing differently. He says, "We support
3 consular affairs to do their job."

4 Can you decipher between "expect"
5 and "support", or would you like to defer to your
6 counsel?

7 MR. LOEPPKY: I suspect that
8 Mr. Fothergill reads my writing better than I do.
9 I agree with him.

10 MS EDWARDH: He has probably
11 studied it more than you.

12 MR. LOEPPKY: It does say
13 "support".

14 MS EDWARDH: Fair enough. But
15 nonetheless, on October the 4th -- I am sorry,
16 October the 6th, prior to any public statement
17 made on behalf of Mr. Arar, you fully expected the
18 issue of torture to be engaged. That's why you
19 wrote it here?

20 MR. LOEPPKY: The reason I wrote
21 that, as I recall, was that there had been some
22 comments about potential torture and that we
23 supported consular affairs, that they would
24 undertake that issue at a political level, at a
25 Foreign Affairs level.

1 That's what I was referring to.

2 MS EDWARDH: And you would --
3 what? The RCMP then therefore would not. That
4 was their issue.

5 MR. LOEPPKY: That they would take
6 that issue up with a foreign government.

7 MS EDWARDH: I see.

8 MR. LOEPPKY: We would obviously
9 play a support role.

10 MS EDWARDH: And the information
11 that you had received about torture, can you
12 recall from whence it came?

13 MR. LOEPPKY: There was just media
14 coverage saying that there were allegations of
15 torture. There was I think a press conference by
16 Amnesty International that talked about torture,
17 so I felt that that might become an issue.

18 MS EDWARDH: Was that relating to
19 a report from the Syrian Human Rights Committee?
20 Does that jog your recollection of where it may
21 have come from?

22 MR. LOEPPKY: No. I think it was
23 a news conference earlier on.

24 MS EDWARDH: All right. Were you
25 aware that the head of consular affairs, Mr. Gar

1 Pardy, used as a working assumption the fact that
2 Mr. Arar had been tortured by Syrian Military
3 Intelligence?

4 MR. LOEPPKY: Not at the time, no.

5 MS EDWARDH: Let me then just go
6 to one quick last area. I want to talk about the
7 media leaks, if I could, and I would like you to
8 turn to page 90 of your notes.

9 This is a note you made on
10 November the 7th, 2003.

11 First, I would like to know, if I
12 could, to whom you were speaking.

13 "Ordered Andre to speak to
14 'A' Division."

15 Who is Andre?

16 MR. LOEPPKY: Andre was an
17 inspector who was in communication services at
18 headquarters.

19 MS EDWARDH: And his full name,
20 sir?

21 --- Pause

22 MS EDWARDH: Dion?

23 MR. LOEPPKY: No, no.

24 MS EDWARDH: Wrong one.

25 MR. LOEPPKY: I have an Andre in

1 my mind.

2 MS EDWARDH: Guertin?

3 MR. LOEPPKY: Yes, that's right.
4 Inspector Andre Guertin.

5 MS EDWARDH: And he worked in
6 headquarters?

7 MR. LOEPPKY: Yes, he was in
8 Communications Services.

9 MS EDWARDH: Would it normally
10 have been his job to transmit information between
11 your office and "A" Division?

12 MR. LOEPPKY: He would --
13 ultimately headquarters communications calls the
14 shots for communications in the organization.

15 MS EDWARDH: Now, you have this
16 discussion with him sometime on the 7th of
17 November.

18 Is that correct?

19 MR. LOEPPKY: Yes, I believe this
20 was at the morning briefing that we have every
21 morning at 8:30.

22 MS EDWARDH: And of course you
23 wouldn't be in a position to say, sir, whether or
24 not -- well, how would he be expected to transmit
25 that information?

1 MR. LOEPPKY: I believe that he
2 mentioned that there was a desire by "A" Division
3 to speak on this issue because there had been a
4 lot of criticism, a lot of coverage on the file,
5 and they wanted to speak out on the issue.

6 My position was that we would
7 speak from a headquarters perspective on this
8 given the interests and given the national issues
9 around this particular file and the scope of it.

10 MS EDWARDH: I will come back to
11 what you mean by to speak out on the issue.

12 But my question was: How would
13 Andre have distributed this order? Would he
14 generally write it up and then pass it on to "A"
15 Division to be handed down through the ranks?

16 MR. LOEPPKY: No. He would phone
17 the "A" Division communications and just ask them
18 to direct any inquiries or any calls to
19 headquarters, and they would be managed through
20 there.

21 MS EDWARDH: My concern is this
22 very day, or some day around that time, it would
23 appear that Miss O'Neill is getting information
24 because her article comes out November the 8th.

25 I am trying to establish when do

1 you suppose the direction would have reached
2 officers who may otherwise have provided
3 information to the media, if all that was going on
4 was Andre speaking to his communications
5 counterpart in "A" Division? How do you get the
6 order out to the officers?

7 MR. LOEPPKY: It would be
8 transmitted immediately after the meeting and "A"
9 Division would ensure that that message was
10 transmitted immediately.

11 MS EDWARDH: I mean, people are
12 busy. So I guess my question would be, certainly
13 that information may have gotten down to the line
14 people at "A" Division sometime, a day or two
15 after, but you are not suggesting that on November
16 the 8th -- or November the 7th, everyone would
17 have had that message, you know, within minutes of
18 you giving it.

19 MR. LOEPPKY: The mechanism that's
20 put in place is that we have communications
21 services. We don't have individual investigators
22 going out and speaking on particular files. We
23 try and manage that through an appropriate and
24 professional communications program.

25 So this directive, this

1 instruction, would have gone to "A" Division, and
2 they would have managed it so that any questions
3 that were directed to "A" Division communications
4 or in fact to the investigative office were
5 referred to headquarters.

6 MS EDWARDH: And that's just what
7 I am trying to get a sense of: how long a period
8 of time it would take to filter down to the actual
9 investigative office before they understood
10 clearly that they should refer all matters back to
11 headquarters?

12 MR. LOEPPKY: I think there was
13 a -- there is a general recognition that the
14 investigative officers would not be speaking to
15 the media on an ongoing file, and it would be
16 communications that would do that.

17 MS EDWARDH: I appreciate that
18 that might be a general principle. But you are
19 issuing an order here.

20 MR. LOEPPKY: That's correct.

21 MS EDWARDH: In fairly strong
22 terms, as you pointed out yesterday.

23 I am just trying to establish: Is
24 it reasonable to assume that your order would have
25 reached people, not immediately within the next

1 half hour, but it would have reached the rank and
2 file investigators within a day or so of it being
3 given?

4 MR. LOEPPKY: It would have
5 reached those who were authorized to speak to the
6 press that morning.

7 MS EDWARDH: Now, "A" Division,
8 you said -- when you say "A" Division, do you mean
9 A-OCANADA?

10 MR. LOEPPKY: No, the --

11 MS EDWARDH: The whole of "A"
12 Division?

13 MR. LOEPPKY: The whole of "A"
14 Division.

15 MS EDWARDH: But who are the
16 people who wanted to speak on the "issue"? That
17 was A-OCANADA, was it not?

18 MR. LOEPPKY: Yes.

19 MS EDWARDH: And they wanted to
20 speak on the issue, I take it, because they felt
21 they were being unfairly criticized in the press?

22 MR. LOEPPKY: I think that they
23 had gone through a difficult year in terms of the
24 number of reviews that had taken place, both
25 internally and from the CROPS officer, and they

1 simply felt that -- this is my perception -- they
2 felt that they had been unjustly treated in terms
3 of their professionalism.

4 MS EDWARDH: And unjustly treated,
5 unfairly criticized -- isn't that criticized both
6 internally and externally?

7 Is that fair?

8 MR. LOEPPKY: I would say
9 criticized externally.

10 MS EDWARDH: And unjustly treated
11 internally because of all the reviews you had
12 ordered?

13 MR. LOEPPKY: No, they had been --
14 I think there was a sense, if I can speak for
15 them, and I met with them near the end of
16 November, that they had been cast in a very
17 negative light and that their investigative
18 techniques were less-than-acceptable.

19 I mean, that's kind of the story
20 that was out there. These are professional police
21 officers and they were concerned, and it was for
22 that reason that I had a meeting with them near
23 the end of November and just said, "Stay the high
24 ground and move on."

25 MS EDWARDH: And might we take it

1 from that that that frustration, indeed anger or
2 upset over being unfairly or unjustifiably
3 criticized, obviously you think is at the root of
4 the decision to release negative information about
5 Mr. Arar?

6 MR. LOEPPKY: Not at all. I mean,
7 you are suggesting that that information came from
8 "A" Division, and I reject that. That is why
9 there is an investigation.

10 MS EDWARDH: You reject that?

11 MR. LOEPPKY: Yes.

12 MS EDWARDH: You will agree with
13 me that the nature of the information that was
14 released was very damaging to his reputation?

15 MR. LOEPPKY: Yes.

16 MS EDWARDH: And indeed one could
17 regard it as information designed to cut away the
18 support that had gathered around him? One
19 reasonable interpretation?

20 MR. LOEPPKY: That's one
21 interpretation.

22 MS EDWARDH: And there is no
23 doubt, given the nature of that information, that
24 another interpretation is that it would deflect
25 the focus from the RCMP on to Mr. Arar?

1 That's one interpretation? It's a
2 reasonable interpretation?

3 MR. LOEPPKY: There are any number
4 of interpretations that you can give to it.

5 MS EDWARDH: But that's one
6 reasonable --

7 MR. LOEPPKY: That's one.

8 MS EDWARDH: And certainly would
9 it also be fair to say that in addition to the
10 concern you had about the harm caused to the
11 institution of the RCMP by such a leak, you were
12 concerned about the possible harm to the
13 individual about whom information had been leaked?

14 MR. LOEPPKY: Yes.

15 MS EDWARDH: One last question,
16 sir.

17 My friend, Commission counsel,
18 spent quite a while with you yesterday talking
19 about the upset and concern around the articles
20 that had been written as a result of the comment
21 attributed to the Solicitor General that there
22 were rogue elements in the RCMP who may have
23 provided information.

24 Do you recall that discussion?

25 MR. LOEPPKY: Yes.

1 MS EDWARDH: It seems to me, after
2 listening to you discuss at length the flow of
3 information to U.S. entities, that it is a fair
4 observation to make that the Solicitor General
5 wasn't far off the mark: that officers acted in
6 violation of RCM policy, providing information to
7 the U.S. and not supervising whether or not it was
8 properly caveated and used according to policy?

9 MR. FOTHERGILL: Just to be fair
10 to the record, the Solicitor General rejected the
11 suggestion that he had said that and accused
12 Mr. Fife of taking liberties with his remarks.

13 MR. LOEPPKY: And I would just
14 respond that I reject the notion that members
15 acted as inappropriately, as you say, and I
16 suggest that there was no bad faith.

17 I have said on the public record
18 that there may have been some caveats that were
19 not respected, and that's an issue of trust
20 between law enforcement and ones that we have
21 addressed.

22 MS EDWARDH: We have your answer
23 to that, Mr. Loepky. Thank you.

24 Those are my questions.

25 MR. LOEPPKY: Thank you.

1 THE COMMISSIONER: Thank you,
2 Ms Edwardh.

3 Who is next?

4 Ms Jackman, were you going to
5 apply to ask questions?

6 MS JACKMAN: Yes. I would like to
7 ask questions. Does that mean I go next?

8 THE COMMISSIONER: You would if
9 the questions are appropriate.

10 Your standing is limited, very
11 limited, to the interests of your client as it may
12 have been affected by any evidence this witness
13 gave. So the broader issues that are raised by
14 the inquiry are not included within the grant of
15 standing.

16 MS JACKMAN: I understand that. I
17 think we may have maybe a divergence of opinion
18 over what is reputational.

19 Should I just try to ask them and
20 if there's a problem --

21 THE COMMISSIONER: Can you tell me
22 the nature of the questions you propose to ask?

23 MS JACKMAN: Well, I have several
24 questions. I don't really want to put Mr. Loepky
25 on notice about why I am asking them. But I

1 wanted to ask questions that sort of follow from
2 his evidence yesterday.

3 For example, he indicated that one
4 of the reasons for sharing with the CIA and the
5 FBI was their expertise in Sunni Muslim terrorism.
6 I would like to ask questions about that in terms
7 of Canada. Obviously, I think if they don't have
8 enough knowledge themselves, how can they judge
9 the strength of a case against my client in terms
10 of harming his reputation and destroying his
11 mental and physical integrity?

12 THE COMMISSIONER: The difficulty
13 with that is that this is not an inquiry into your
14 client.

15 MS JACKMAN: I know.

16 THE COMMISSIONER: It is only
17 insofar as anything that happened to your client
18 might be relevant to my mandate. And your
19 standing, therefore, is limited solely to his
20 reputational interests.

21 I must say I would have to be
22 persuaded that what you just said is evidence that
23 would affect your client's reputational interest.

24 MS JACKMAN: Well, as I understand
25 it, Mr. Commissioner -- I am speaking for Paul

1 Copeland as well because he is not here and so I
2 am acting on his behalf in respect of Mr. Almalki,
3 with Mr. Almalki's permission. So I am speaking
4 for both men.

5 As I understand it, Mr. Almalki
6 was the principal target of the investigation of
7 A-OCANADA. That's fairly serious allegations
8 against him. Mr. El Maati was a target of the
9 investigation of OCanada in Toronto; a fairly
10 serious allegation against him. The implication
11 being, if they were targets of the investigation,
12 where there's smoke, there's fire. So maybe they
13 were involved in terrorist activities. It
14 certainly reflects on their reputation.

15 If in fact they didn't have the
16 wherewithal or the knowledge or expertise within
17 the divisions doing the investigations to
18 understand what in fact a terrorist would be
19 within the context of that community, because they
20 didn't know the cultural, religious or other kind
21 of background, that is relevant in terms of trying
22 to rehabilitate their reputation in the eyes of
23 the public.

24 So I see it as a relevant
25 reputational question.

1 I also have other questions in
2 terms of the information-sharing and the use to
3 which it was put, both with respect to what
4 happened to both men overseas and, again, in terms
5 of the reliability, the kinds of questions
6 Ms Edwardh was asking about the credibility and
7 reliability of some of the evidence and whether --

8 THE COMMISSIONER: You are talking
9 about information-sharing overseas with respect to
10 Mr. El Maati and Mr. Almalki?

11 MS JACKMAN: Yes.

12 THE COMMISSIONER: I think you are
13 going to find, before you even get to that, that
14 the Government is going to claim national security
15 confidentiality on the fact, whether there was or
16 was not information-sharing.

17 MS JACKMAN: And that's fine.
18 They may claim that. But I think it's important
19 for the public to understand what questions are
20 not being asked in terms of my clients'
21 reputations.

22 So I think the question should be
23 on the record.

24 THE COMMISSIONER: Well, if there
25 is some value to that. First of all, I don't

1 accept that that affects your clients reputation.
2 But to satisfy you on that, the public -- am I
3 correct, Mr. Fothergill, you would claim national
4 security confidentiality on that?

5 MR. FOTHERGILL: Oh, most
6 certainly, yes.

7 THE COMMISSIONER: Yes. I mean,
8 we have been through this, so the public has now
9 been informed that you are not entitled to ask
10 those questions because of the Government's claim
11 of NSC. That is part of this process.

12 But I think the best way to deal
13 with this is if you want to indicate the general
14 areas, I will deal with them. If they are subject
15 to NSC claims, that of course would rule them out
16 on that basis.

17 MS JACKMAN: So what am I supposed
18 to do? Go through with you what my questions are
19 or I am supposed to --

20 THE COMMISSIONER: Well, just the
21 general areas. If you would like to do it in the
22 absence of the witness, I am prepared to hear you
23 in the absence of the witness; but, yes, if you
24 could indicate the general areas.

25 The reason I raise this is that as

1 I listen to Mr. Loepky's evidence -- and I am
2 certainly open to be persuaded -- I didn't hear
3 any evidence that came from him that I considered
4 reflected adversely on your clients' interests.

5 But, as I say, I was listening to
6 it for other purposes as well and I may well have
7 missed it.

8 MS JACKMAN: Well, then I would
9 rather that he not be here.

10 THE COMMISSIONER: Okay, then,
11 Mr. Loepky --

12 MS JACKMAN: And that he not watch
13 it on the TV outside.

14 THE COMMISSIONER: Yes, I think we
15 can do that. We can be respectful. If you don't
16 mind just ...

17 --- The Witness Withdrew

18 MS JACKMAN: I already covered
19 with you the expertise issue in terms of the unit.
20 I am not sure what you think about that.

21 With respect to the
22 information-sharing, it was my understanding of
23 his testimony that he had indicated it would be
24 essentially with foreign -- non-U.S. foreign
25 intelligence services; that it would essentially

1 be a case-by-case basis, that kind of information
2 sharing, there would be discussions with DFAIT.

3 I would like to ask some questions
4 about the strength of the kind of evidence that
5 would have to be there for them to be able to
6 decide to give information to another government
7 which may result in the torture of a person,
8 because in the case of both men, as well as
9 Mr. Nureddin, information was shared which did
10 lead to torture, very serious torture,
11 particularly in one of the cases -- actually in
12 more than one of the cases.

13 But I wanted to get at the
14 strength of that evidence essentially in terms
15 of --

16 THE COMMISSIONER: What
17 information was shared with respect to those three
18 individuals?

19 MS JACKMAN: Yes.

20 THE COMMISSIONER: I think, as I
21 have indicated -- Mr. Fothergill, I will let you
22 do it formally -- or let me ask you. The
23 Government would claim NSC over that?

24 MR. FOTHERGILL: Absolutely we
25 would.

1 MS JACKMAN: But am I not allowed
2 to ask in a hypothetical sense?

3 THE COMMISSIONER: Well, again,
4 quite frankly if Ms Edwardh asked the question, I
5 would say yes. But this is not an inquiry into
6 what happened to your clients, and your
7 standing -- I am repeating what I have said now a
8 couple of times. Your standing is limited to
9 asking this witness questions about evidence that
10 he gave that affected your clients' reputational
11 interest.

12 It seems to me that line of
13 questioning, even done in general terms, would not
14 fall within that criteria.

15 MS JACKMAN: Well, also another
16 thing that I was interested in investigating was
17 particularly with respect to Mr. El Maati, who did
18 have consular access. He was asked on a number of
19 occasions -- in fact, every time DFAIT came to
20 visit him in the jail -- whether or not he would
21 meet with an intelligence officer.

22 Again, I wanted to ask questions
23 about whether that intelligence officer would have
24 been CSIS or the RCMP? They can say -- I mean,
25 the officer was going to travel and meet, it would

1 appear to fall in line with their request for
2 travel arrangements from the RCMP -- which agency
3 it was.

4 I don't see any national security
5 concern.

6 And I wanted to ask it in the
7 context of if they felt that their case in Canada
8 against either or both men was insufficiently
9 strong that they felt they needed to use evidence
10 that was obtained under torture in another
11 country.

12 THE COMMISSIONER: This officer
13 has not given evidence about any of the matters
14 that you have just indicated. It would strike me
15 that you are opening new doors, if you will, with
16 respect to Mr. El Maati and Mr. Almalki if you ask
17 those questions.

18 The difficulty with that is -- I
19 am repeating now, I think, again -- that this is
20 not an inquiry into the cases of Mr. Almalki and
21 Mr. El Maati.

22 I can tell you, Ms Jackman, if we
23 were to embark on a inquiry as to the strength of
24 the case, or the investigation or the nature of
25 the investigation about those two gentlemen, first

1 of all, it would be, in my view, outside my
2 mandate, but it would be indeed two new inquiries
3 that would be under way that would take us longer
4 than we have already been at this one.

5 MS JACKMAN: One of the other -- I
6 mean, what should I do? I will just keep telling
7 you what I was going to cover.

8 THE COMMISSIONER: So then --

9 MS JACKMAN: And you can tell me I
10 can't ask any of the questions. That's fine. But
11 let me just at least tell you what they are.

12 THE COMMISSIONER: That's fine.

13 MS JACKMAN: The other point was
14 Mr. El Maati was detained November of 2000, was
15 tortured within 7-10 days, provided a false
16 confession obtained under torture. That
17 confession, we believe, was transmitted to Canada
18 and it would appear was likely used, and I wanted
19 to ask him questions about, again, the strength of
20 the evidence in terms of Mr. El Maati's reputation
21 for being a terrorist; whether or not that kind of
22 evidence would be used in terms of obtaining a
23 search warrant -- they had it at the time the
24 search warrant was obtained -- and whether or not
25 that kind of evidence would have been used in

1 passing on information in terms of Mr. Almalki's
2 case because he was not detained until May of
3 2002.

4 So, in other words, did they find
5 the information obtained under torture in Syria
6 concerning Mr. El Maati to be reliable and
7 credible enough to go search people's homes and to
8 pass on information before Mr. Almalki even
9 travelled to Syria to ensure his detention?

10 THE COMMISSIONER: Again, I will
11 leave it to the Government.

12 Would I be right, Mr. Fothergill,
13 that assuming there was evidence, the Government
14 would claim national security confidentiality over
15 whether or not the statement was received from
16 Syria made by Mr. El Maati when he was in --

17 MR. FOTHERGILL: Yes, we would. I
18 would also point out that the basis for the search
19 warrants that were obtained in January 2002 was
20 also the subject of a separate legal proceeding,
21 and we maintain a claim of national security
22 confidentiality with respect to anything that
23 hasn't actually been disclosed through that
24 proceeding.

25 So if it were the case that any

1 sort of information was obtained and whether it
2 was used to obtain search warrants, if it's not
3 previously disclosed, we would object to it being
4 disclosed in this forum.

5 MS JACKMAN: I guess the last area
6 I wanted to explore was the question of what you
7 would call opportunistic rendition if there was a
8 practice, as it appears to be the case of all
9 three other men involved of the Canadian either --
10 I don't know if it was the RCMP or CSIS -- of
11 their passing information on when they know a
12 person is likely to travel in the area in order to
13 cause that person to be detained in the hopes that
14 they may get stronger evidence because they have
15 an insufficient case against a person in Canada.

16 That is the facts in all three
17 cases. The information was received by the Syrian
18 government before the three men arrived in that
19 country. The information came from Canada. I
20 don't know if it came from Canada through the
21 U.S., through the RCMP, through CSIS. I would
22 love to ask where it came from. I know they are
23 going to use a national security claim in respect
24 of answering that.

25 But I would like to know if it's a

1 practice that they take weak cases, take advantage
2 of travelling where they have no case against a
3 person in order to try to puff it up through
4 torture to get confessions.

5 I think that goes to reputation as
6 well, because if the only case against these three
7 men, who were all seriously tortured, is
8 information obtained under torture, it speaks to
9 their reputation as well as the reputation of the
10 Government of Canada. And obviously if it's
11 opportunistic rendition, no wonder they are not
12 concerned about the Americans doing it.

13 THE COMMISSIONER: So your
14 question there is whether or not there is a
15 practice of what you call opportunistic rendition?

16 MS JACKMAN: Yes, to build up
17 cases that don't exist, essentially, through the
18 use of torture in another country.

19 THE COMMISSIONER: Mr. Fothergill?

20 MR. FOTHERGILL: Well, generally
21 we assert a claim of national security
22 confidentiality for exchanges of intelligence with
23 foreign countries in order to preserve that
24 relationship.

25 In specific cases directly

1 relating to Mr. Arar, we have tried to relax that
2 to the extent that we can, but I really don't see
3 us relaxing it in the context of people who are
4 not actually the subject of your inquiry.

5 THE COMMISSIONER: Thank you.

6 MS JACKMAN: And then the last
7 thing is just if he can confirm on the record that
8 no charges have ever been laid against either man;
9 they have not been subjected to the Criminal Code
10 provisions, section 83.01 and onward.

11 THE COMMISSIONER: I think we
12 can --

13 MS JACKMAN: You are going to
14 allow those questions?

15 THE COMMISSIONER: I think we can
16 do that by way of agreement. In fact, I am sure
17 there is other evidence. But if there is not,
18 correct me if I am wrong. But I can confirm that
19 there are no charges laid against either man.

20 MS JACKMAN: And the
21 anti-terrorism provisions haven't been used
22 against either man, not just the forced
23 interrogation, the conditions, the terms and
24 conditions, the preventative release issue.

25 THE COMMISSIONER: That apparently

1 is confirmed by Government counsel as well.

2 MS JACKMAN: So am I shut out on
3 everything?

4 THE COMMISSIONER: I would say so.
5 I would add this, though, Ms Jackman.

6 MS JACKMAN: At least I got to say
7 it on the record.

8 THE COMMISSIONER: You got the
9 concessions at the end.

10 I would say this, though. As you
11 are aware, I have made an order for a fact-finder,
12 and that fact-finding process is under way, which
13 involves both Mr. Almalki and Mr. El Maati.

14 I have said it before, but I
15 appreciate their cooperation with that.

16 In any event, I am hopeful that
17 that will proceed and be finished expeditiously.

18 Should we take the afternoon break
19 at this point, and then we can see where we go
20 from here with the others?

21 Maybe I should just run through
22 and get a feeling along the back row as I call it.

23 Mr. Bayne, can I start with you.
24 Do you have any questions at this point?

25 MR. BAYNE: Yes.

1 THE COMMISSIONER: You do? How
2 long do you expect to be?
3 MR. BAYNE: About a half an hour.
4 THE COMMISSIONER: Okay.
5 Mr. O'Brien?
6 MR. O'BRIEN: My questions have
7 been answered. Thank you, sir.
8 THE COMMISSIONER: All right.
9 And Mr. Wallace?
10 MR. WALLACE: None; thank you,
11 sir.
12 THE COMMISSIONER: Mr. Bell?
13 MR. BELL: None; thank you, sir.
14 THE COMMISSIONER: Mr. O'Grady, is
15 it, or ...
16 MR. WESTWICK: Mr. Westwick, sir.
17 THE COMMISSIONER: Mr. Westwick.
18 MR. WESTWICK: I will be between
19 five and 10 minutes.
20 THE COMMISSIONER: Okay. And ...
21 MS McINTOSH: I have no questions.
22 THE COMMISSIONER: Thank you,
23 Ms McIntosh.
24 Mr. Fothergill, do you know how
25 long you will be?

1 MR. FOTHERGILL: I think it's a
2 function of how the others ask their questions. I
3 think at the moment there is a good chance I will
4 have none.

5 THE COMMISSIONER: Okay. We will
6 take a break for 15 minutes and then resume.

7 THE REGISTRAR: Please stand.

8 --- Upon recessing at 3:18 p.m. /

9 Suspension à 15 h 18

10 --- Upon resuming at 3:35 p.m. /

11 Reprise à 15 h 35

12 THE REGISTRAR: Please be seated.

13 THE COMMISSIONER: Mr. Bayne?

14 EXAMINATION

15 MR. BAYNE: I have three areas,
16 Mr. Loeppky, to canvass with you.

17 The first, sir, is generally that
18 subject area that Ms Edwardh very cleverly, the
19 way we lawyers do, slid three propositions
20 together for you --

21 MS EDWARDH: Might I claim
22 national security confidentiality?

23 --- Laughter / Rires

24 MR. BAYNE: -- and suggested her
25 statement to you, with which you did not agree.

1 But her statement was that the record is clear
2 that Canadian information, or A-OCANADA
3 information, was used -- she used the word "used"
4 -- in the American decision, and she used it in
5 the singular, to arrest, interrogate and render
6 Mr. Arar.

7 Do you remember that question?

8 MR. LOEPPKY: Yes.

9 MR. BAYNE: And do you remember
10 you disagreed with that? You said you didn't
11 agree that you could come to that conclusion. We
12 don't know on what evidence -- or you said: "I
13 don't know on what Americans made their
14 decisions."

15 MR. LOEPPKY: That is correct.

16 MR. BAYNE: And Ms Edwardh pursued
17 the matter with reference to Mr. Arar's lease of
18 his premises here in Ottawa and his connection
19 with Mr. Almalki to invite you to prove a negative
20 and you agreed you couldn't. So you agreed with
21 her proposition that I can't say there was not at
22 least some reliance on Canadian information.

23 Do you remember saying that?

24 MR. LOEPPKY: Yes.

25 MR. BAYNE: I am not going to put

1 to you the relatively impossible task of proving a
2 negative, but I think there is another way to look
3 at this, and I would like to go through it with
4 you.

5 And like Inspector Cabana, when he
6 testified, there is certain evidence I am not
7 allowed to refer you so I will just refer in
8 detail to the evidence that I can mention.

9 Mr. Loepky, the decision, as
10 Ms Edwardh called it, to arrest, interrogate and
11 render is really four decisions -- and bear with
12 me. I will outline them first and then I am going
13 to ask you questions about them.

14 You know, number 1, there was a
15 decision made -- because the Americans phoned us
16 and told us even when we didn't know Mr. Arar was
17 coming into the U.S. -- that they knew he was
18 coming and they had already decided they were
19 going to refuse him entry.

20 Do you remember that?

21 MR. LOEPPKY: Yes.

22 MR. BAYNE: That is one decision.

23 MR. LOEPPKY: Yes.

24 MR. BAYNE: There was then a
25 decision they apparently took, a second decision,

1 to detain and interrogate him after he arrived?

2 MR. LOEPPKY: Yes.

3 MR. BAYNE: Okay? We know that
4 happened.

5 There was, number 3, then a
6 decision reached that he was conclusively a member
7 of al-Qaeda. You saw the reasons for the decision
8 of the INS officer?

9 MR. LOEPPKY: Yes.

10 MR. BAYNE: And No. 4, then there
11 was an American decision to render him to Syria?

12 MR. LOEPPKY: Yes.

13 MR. BAYNE: Okay. Let's take a
14 look at those.

15 Would you bear in mind with me --
16 and I think you will agree about the first two
17 decisions. The decision to refuse somebody entry
18 to the United States and, once he is there, to
19 interrogate people, that is for the Americans.
20 That is a sovereign American decision. You would
21 agree?

22 MR. LOEPPKY: Yes.

23 MS EDWARDH: May I rise and may my
24 friend indulge me for a moment, Mr. Commissioner.

25 You will remember that in the

1 not-too-distant past with respect to Inspector
2 Cabana, I endeavoured to produce documents that
3 showed that with respect to Mr. Arar's arrival in
4 Canada -- and we know that there is some linkage
5 to what goes on -- that as of a good deal of time
6 before this event of his arrest, I wanted to put
7 to the witness that it was clear that there was
8 already the label "terrorist" on it.

9 I don't want my friend to be in a
10 position to in effect mislead what the record is.
11 I mean, I was not allowed to explore how that got
12 on, whether it would be on both sets of computers
13 or anything else like that.

14 So whether it is purely a U.S.
15 decision -- I suppose some officer did stop him --
16 I don't want there to be any suggestion that
17 Mr. Bayne can explore on this record what the
18 evidentiary reasons were for that decision,
19 because I wasn't able to explore it.

20 MR. BAYNE: In fact, we know a
21 good deal more about the background of that. I am
22 not allowed to explore some of that.

23 But I don't want -- I mean, we
24 have this little public snippet. The unfortunate
25 process here is the public and media only know so

1 far about two RCMP layers here: Inspector Cabana,
2 who now represents the operational investigation,
3 and this witness.

4 And it has led, at the end of
5 Ms Edwardh's cross-examination, to an assertion by
6 her that these therefore were rogue elements
7 running amuck. And I think it's incumbent on me,
8 even in the limited way I can in the public
9 hearing, although you have more information and
10 will get more argument from me, Mr. Commissioner,
11 on this, when I am allowed to refer fully to the
12 evidence.

13 Yes, there is other evidence that
14 bears on this and, in my submission, much helps my
15 client.

16 But to the extent that I am able,
17 I would like to pursue this.

18 THE COMMISSIONER: Go ahead.

19 MR. BAYNE: So the first two
20 decisions are uniquely and appropriately American
21 decisions to make. We wouldn't criticize that
22 about their decisions: who they are going to allow
23 into their country, and when they have them there
24 who they want to interrogate.

25 MR. LOEPPKY: That is correct.

1 MR. BAYNE: Then there are two
2 other decisions that were made, though they are
3 more critical decisions: the decision that this
4 man has been proven to their satisfaction to be
5 conclusively a member of al-Qaeda and the decision
6 to render him to Syria.

7 I will come to those far more
8 critical decisions.

9 But I take it you would agree with
10 me, Mr. Loepky, that we wouldn't be here today if
11 only the first two decisions had been made and
12 Mr. Arar had then been returned to Zurich or
13 returned to Canada; right?

14 MR. LOEPPKY: That is correct.

15 MR. BAYNE: I mean, the Canadian
16 public, to the extent they are concerned about the
17 issues in this inquiry, would be concerned about
18 those decisions.

19 MR. LOEPPKY: Yes.

20 MR. BAYNE: Okay. On the decision
21 to refuse him entry, I take it you understand that
22 the evidence is that Mr. Arar had been out of this
23 country for some months prior to entering the
24 United States September 26th of 2002.

25 MR. LOEPPKY: That's my

1 understanding.

2 MR. BAYNE: And the evidence
3 indicates that nobody in the RCMP, and certainly
4 nobody in the A-OCANADA, even knew he was flying
5 into the United States or coming back to Canada on
6 September 26th?

7 MR. LOEPPKY: That's my
8 understanding.

9 MR. BAYNE: And so the decision --
10 can you tell us, sir --

11 MS EDWARDH: Excuse me,
12 Mr. Commissioner. I don't know that there's any
13 evidence -- we know that there is evidence of a
14 telephone call by the U.S. saying he is arriving
15 and we will in fact refuse him entry. I have no
16 basis for knowing or not knowing what A-OCANADA
17 knew, and I think it's speculative to conclude
18 they didn't know he was coming in.

19 MR. BAYNE: That's very unfair,
20 because my friend has tried to leave the
21 impression with the Canadian public that they did
22 know, or conspired in this, or were --

23 THE COMMISSIONER: I didn't get
24 that impression from Ms Edwardh's question, that
25 they knew that he was coming? That she was

1 putting forward that as a position?

2 MR. BAYNE: No. I think she is
3 putting forward the proposition that we don't know
4 that they didn't know.

5 THE COMMISSIONER: Well, I didn't
6 even understand -- well, the public record is
7 silent on that.

8 MR. BAYNE: Well, there's no
9 evidence that they knew. Surely we have to go on
10 what the evidence is.

11 THE COMMISSIONER: Well,
12 Mr. Fothergill, I would have thought that was
13 something, information that the RCMP had one way
14 or the other, subject to an NSC claim. I hear the
15 Government constantly saying we neither confirm
16 nor deny, but in any event...

17 MR. FOTHERGILL: I don't think it
18 is subject to an NSC claim, in the same way that
19 the fact that we did have about an hour's notice
20 of his return, we did not assert an NSC claim.

21 So insofar as this witness is able
22 to offer us his knowledge, if he has any, about
23 whether there was any additional prior knowledge,
24 I wouldn't object to him giving us that
25 information.

1 THE COMMISSIONER: Okay. Ask the
2 question.

3 MR. BAYNE: Dealing with this then
4 announced intention of the Americans to refuse
5 Mr. Arar entry, I understand this occurred
6 September 26th, 2002, at a time when the U.S.
7 NSEERS program was in effect?

8 Do you know what that NSEERS
9 program was?

10 MR. LOEPPKY: No I don't.

11 MR. BAYNE: You don't know. You
12 don't know there was a program in effect where
13 people of Syrian origin would come to the
14 attention of American customs or immigration
15 officials and automatically be checked?

16 MR. LOEPPKY: Yes, I was aware
17 there was a program. I didn't know that --

18 MR. BAYNE: That it was called
19 NSEERS?

20 MR. LOEPPKY: That's correct.

21 MR. BAYNE: So would you agree
22 with me that, already by the American programs
23 that were set up, Mr. Arar, by virtue of his
24 Syrian ancestry and citizenship, would have come
25 to the attention of American customs and

1 immigration officials?

2 MR. LOEPPKY: Yes.

3 MR. BAYNE: Do you know what
4 official -- do we know or do you know what
5 official in the U.S. made this decision that he
6 would be refused entry?

7 MR. FOTHERGILL: Sorry,
8 Commissioner. Here I think I do have to
9 intervene.

10 If he needs to refer to foreign
11 intelligence in order to answer that question,
12 then I object. If he can answer the question
13 without referring to foreign intelligence, then I
14 think he may do so.

15 THE COMMISSIONER: I think it's
16 important if Mr. Bayne is asking about an American
17 program and how it operated and would it
18 necessarily have resulted in certain actions be
19 taken. I mean, if you want to look at more
20 details about the program -- if you are
21 comfortable in answering the question that, yes,
22 that program would have operated this way, please
23 answer.

24 But it's a question that could
25 have many nuances to it, the answer.

1 MR. LOEPPKY: My knowledge is that
2 there was a program in place that would profile,
3 if you will, people with certain backgrounds.

4 MR. BAYNE: Sir, at the time this
5 decision to refuse entry was announced by the
6 Americans in the same phone call that advised us
7 he was coming, I have asked you, sir: Do you know
8 by whom the decision was taken; that is to say,
9 the authority or authorities in the U.S., the
10 particular person? Who made this decision?

11 MR. LOEPPKY: No, I do not.

12 MR. BAYNE: Or on what basis that
13 decision was made?

14 MR. LOEPPKY: No, I do not.

15 MR. BAYNE: And certainly this was
16 at a time before the reference to the lease being
17 sent down in questions for Mr. Arar had even
18 arisen; right?

19 MR. LOEPPKY: Yes.

20 MR. BAYNE: That occasioned after
21 the announcement, not before?

22 MR. LOEPPKY: That's my
23 understanding.

24 MR. BAYNE: So that's the first
25 decision.

1 The second decision to detain and
2 interrogate Mr. Arar, do you know who in the
3 United States made that decision to interrogate
4 him?

5 MR. LOEPPKY: No.

6 MR. BAYNE: And do you know what
7 U.S. interrogators were used to effect that
8 interrogation?

9 MR. FOTHERGILL: Again, I have to
10 caution the witness, if it's something he knows
11 through foreign intelligence channels, it's
12 subject to a claim of national security
13 confidentiality.

14 MR. BAYNE: If you don't know,
15 sir, you are entitled to say no.

16 MR. FOTHERGILL: If he simply
17 doesn't know, he can indicate that.

18 MR. BAYNE: The question is: What
19 U.S. interrogators were used to interrogate
20 Mr. Arar, if you know?

21 MR. LOEPPKY: I don't know.

22 MR. BAYNE: Pardon me?

23 MR. LOEPPKY: I don't know.

24 MR. BAYNE: And you therefore
25 don't know what independent information they

1 brought to that interrogation?

2 MR. LOEPPKY: That's correct.

3 MR. BAYNE: Or what prior
4 experience, if any, they had with Mr. Arar?

5 MR. LOEPPKY: That's correct.

6 MR. BAYNE: All right.

7 The third, and more critical
8 decision, the decision that he was conclusively a
9 member of al-Qaeda.

10 You are aware, sir, at the
11 relevant time, that throughout the Canadian
12 position of A-OCANADA was he was a person of
13 interest from whom they wished to take a witness
14 statement? You knew that?

15 MR. LOEPPKY: Yes.

16 MR. BAYNE: At the critical time
17 you are aware, and there's been reference in these
18 public proceedings to the fact that information
19 was requested of Canada while he was being
20 detained by the Americans, and that the Canadian
21 information that went back stated that the
22 evidence, information that Canadians had,
23 A-OCANADA had and our position, the A-OCANADA
24 position was, he could not be linked to al-Qaeda?

25 You were aware that that was the

1 A-OCANADA response?

2 MR. LOEPPKY: I have become aware
3 of that, yes.

4 MR. BAYNE: All right. So, sir,
5 not only is that information from Canada not
6 supportive of the American decision that he was
7 conclusively al-Qaeda, it's contrary to it. You
8 would agree?

9 MR. LOEPPKY: Yes.

10 MR. BAYNE: So it can scarcely be
11 realistically or reasonably argued that Canadian
12 evidence, or Canadian information, was the real or
13 effective cause of that American decision; right?

14 MR. LOEPPKY: Yes.

15 MR. BAYNE: The fourth decision,
16 the decision to render him to Syria, what
17 authority in the United States made that decision?
18 Do you know -- if you know?

19 MR. LOEPPKY: I don't know. I
20 understand --

21 MR. BAYNE: Okay.

22 MR. LOEPPKY: I understand there
23 was an INS document, but I don't know where the
24 decision was made.

25 MR. BAYNE: Okay. I take it you

1 would agree with me as a matter of common sense,
2 what we now know, you didn't know anything about
3 extraordinary rendition back in 2002; right?

4 MR. LOEPPKY: Yes, that's correct.

5 MR. BAYNE: Now, sir, what we now
6 know about it, though, we know to be that this
7 would not have been an event that would have
8 occurred unless Mr. Arar had been deemed by the
9 Americans to be some threat to their national
10 security; right?

11 They don't extraordinarily render
12 just somebody who comes in they are going to
13 refuse entry; right?

14 MR. LOEPPKY: Well, that would be
15 my understanding.

16 MR. BAYNE: So that the decision
17 to render him, a critical decision, like the prior
18 critical decision the Americans made that it was
19 proved to their satisfaction this man was
20 conclusively al-Qaeda, that could not possibly
21 have been reasonably or effectively based on
22 Canadian information because we told them we
23 couldn't link him to al-Qaeda; right?

24 MR. LOEPPKY: That's what we told
25 them, yes.

1 MR. BAYNE: So that there is no
2 evidence, I take it, of which you are aware, that
3 there was any real or realistic U.S. reliance on
4 A-OCANADA information for any of these decisions,
5 but particularly the two critical ones, the reason
6 for which we are here: the decision that they
7 made that he was conclusively al-Qaeda; and the
8 decision to render him to Syria; right?

9 MR. LOEPPKY: Yes.

10 MR. BAYNE: The second area, sir,
11 that I would like to deal with you, is Ms Edwardh
12 cross-examined you on the issue of Mr. Cabana
13 wanting to take a witness statement from Mr. Arar
14 and some difficulty you appeared to have with the
15 propositions that she was advancing so that he was
16 simply, and nothing more, than a witness.

17 I would just like to clarify.
18 From a criminal lawyer's point of view who has
19 been in this field for a long time, an experienced
20 investigator can take a witness statement from a
21 person or an accused statement; right?

22 MR. LOEPPKY: Yes.

23 MR. BAYNE: And as I understand
24 it, A-OCANADA was not in a position, they felt, to
25 take an accused statement from Mr. Arar?

1 MR. LOEPPKY: That would be my
2 understanding.

3 MR. BAYNE: But you can take a
4 witness statement from a person who is also a
5 person of interest. These are not mutually
6 exclusive water-tight compartments, are they?

7 MR. LOEPPKY: No, that's correct.

8 MR. BAYNE: In fact, there are
9 many, many unsavoury witnesses that the police are
10 compelled to use. I think, for example, of Karla
11 Homolka. There are many people who may be persons
12 of interest or more from whom the police take
13 witness statements; right?

14 MR. LOEPPKY: Yes.

15 MR. BAYNE: The third area, sir,
16 that I would like to canvass with you --

17 And I did not intend to do this
18 but I guess, Mr. Commissioner, the more I sat and
19 listened to the evidence...

20 And this was done, Mr. Loepky --
21 the questions I am about to ask you -- more
22 thoroughly in a different forum, but I will do it
23 in a brief way here. This has to do with your
24 evidence that started yesterday and then
25 reappeared a few times today, that RCMP policy

1 applied and there was no rule about or practice of
2 caveats being down, as far as you knew, but you
3 could understand, you said, how the men at the
4 operational level may have thought otherwise, due
5 to pressures and so on.

6 MR. LOEPPKY: Yes.

7 MR. BAYNE: All right. And I am
8 sure the men are grateful for that, but I have
9 some rather more pointed questions about this.

10 You will agree that these were,
11 post-9/11, out-of-the-ordinary, exceptional times;
12 right?

13 MR. LOEPPKY: Yes, I have
14 testified to that several times.

15 MR. BAYNE: Yes. And you have
16 testified that you weren't directly privy to an
17 agreement with international partners, domestic
18 and international partners, but Mr. Proulx was.

19 You mentioned in your evidence
20 yesterday that Proulx met with U.S.
21 representatives post-9/11, and you explained what
22 you understood was agreed to. He met domestic and
23 international partners, and you said we agreed --
24 and all the partners agreed -- but we agreed, the
25 RCMP, we would go out of our way to respond to

1 requests that they had. My understanding is
2 nothing was discussed about caveats, but of course
3 you weren't there; right?

4 MR. LOEPPKY: That's correct.

5 MR. BAYNE: And we would pull out
6 all the stops so there were no delays in
7 information-sharing.

8 That was your evidence?

9 MR. LOEPPKY: That was my
10 evidence, and that's what the -- you know, I have
11 commented on the environment and the circumstances
12 that we were living under at that point in terms
13 of the urgency and the importance of
14 information-sharing, and it was for that reason we
15 had that meeting and had those discussions.

16 MR. BAYNE: So that was an
17 out-of-the-ordinary, exceptional agreement,
18 operational agreement, in out-of-the-ordinary,
19 exceptional times; right?

20 MR. LOEPPKY: Yes.

21 MR. BAYNE: And it was Mr. Proulx,
22 not you, who directly engaged in all of that?

23 MR. LOEPPKY: He chaired the
24 meeting; he coordinated a meeting. As you say, I
25 wasn't at the meeting, but obviously there were

1 discussions about the message that I had and that
2 everybody else had about the importance of full
3 and open information-sharing in a timely manner.

4 MR. BAYNE: Well, that's what I am
5 about to come to.

6 What precise message, what precise
7 message, what words, what language was given to
8 the men, the men in the trenches who had to carry
9 out their orders from their superiors, about this
10 agreement and this exceptional
11 information-sharing?

12 What were they told exactly by
13 you, first of all, by you? Did you tell them
14 anything specifically?

15 MR. LOEPPKY: I can refer to
16 several specific incidents. I talked about the
17 criminal operations meeting. I talked about the
18 message that went out immediately post-9/11. And
19 I talked about the importance of timely, complete,
20 thorough information-sharing to address the
21 extraordinary situation, which was the events of
22 9/11 and the potential for further attacks, the
23 environment that we were living in, and the
24 expectations of the public and the various
25 communities that we served; the expectation that

1 there would be full cooperation to ensure their
2 safety and to carry out the mandates that they
3 expected of law enforcement.

4 MR. BAYNE: Okay. Well, that's
5 all pretty generalistic.

6 Do I understand, therefore, that
7 the message was generally as you gave it in your
8 evidence yesterday: that we would go out of our
9 way and pull out all the stops to respond to U.S.
10 requests and avoid delay in information-sharing?

11 MR. LOEPPKY: Yes.

12 MR. BAYNE: All right. Whose
13 responsibility is it to make clear to the men in
14 the trenches exactly what you meant by that kind
15 of generalistic message?

16 MR. LOEPPKY: I expect that that
17 kind of a message is carried out to the service
18 delivery, the front line, as you call it, the men
19 in the trenches. It's a message that's
20 communicated by the criminal operations officers,
21 and they then operationalize that kind of a
22 message, that there has to be full cooperation, no
23 delays, that type of thing.

24 MR. BAYNE: But it has to be
25 clearly and unmistakably conveyed to them, right,

1 these rules of engagement in this new post-9/11
2 environment? That's management's responsibility.
3 It's not the men -- it's not the employees, is it?

4 MR. LOEPPKY: No, that's correct.

5 MR. BAYNE: And who was the chief
6 operational officer, in effect, for the RCMP?

7 MR. LOEPPKY: Myself.

8 MR. BAYNE: And Mr. Proulx was
9 beneath you?

10 MR. LOEPPKY: Yes, he was in
11 charge of the national security program.

12 MR. BAYNE: And he was dealing
13 with these people, was he?

14 MR. LOEPPKY: As you have pointed
15 out, he organized a meeting, I think immediately
16 following 9/11, which was on the heels of my
17 general broadcast that has been referred to and
18 followed up by my comments to the criminal
19 operations officers.

20 MR. BAYNE: Well, how were the men
21 supposed to interpret "We will now go out of our
22 way to respond to U.S. requests for information to
23 avoid delays in information-sharing"?

24 From that sort of generalistic
25 message, what were they supposed to take from

1 that?

2 MR. LOEPPKY: Well, that they
3 would respond quickly, in a timely way; that
4 information would be shared as appropriate; that
5 there would not be -- I think I alluded to earlier
6 the traditional delays that might have existed
7 pre-9/11 in terms of responding. This was a new
8 environment, there was a new urgency and we had
9 additional resources deployed to address that
10 environment, and that they would do so in as
11 expedient a way as they could.

12 MR. BAYNE: But, you see, you
13 intended some restrictions on this. You said "go
14 out of your way" or authorized Proulx or somebody
15 else to give that message. He, after all, was the
16 one who struck this deal with other agencies.

17 But I take it there was never
18 written rules of engagement for the men, no
19 written protocol about this extraordinary
20 agreement?

21 MR. LOEPPKY: Not beyond the
22 policy that existed in writing.

23 The discussions, I accept, were
24 verbal communications by myself, in addition to a
25 multitude of other areas that I have spoken about,

1 and driven by the environment.

2 MR. BAYNE: But, you see, now some
3 years later, now that pressure is on and feet are
4 to the fire, management is, in my eyes, here
5 saying, "Well, we intended specifically, when we
6 gave these instructions to the men, there are to
7 be limits on this. You still have to formally
8 attach a caveat here, and you still have to adhere
9 to all RCMP policy, even if that causes delay."
10 Right?

11 You intended that, I take it from
12 your evidence?

13 MR. LOEPPKY: I would expect that
14 the information-sharing -- you know, we talked
15 about written caveats and we talked about implied
16 caveats. And clearly, if there's information
17 exchanged, there is an implied caveat.

18 MR. BAYNE: I understand that.

19 MR. LOEPPKY: Yes.

20 MR. BAYNE: I understand that.
21 We'll leave the caveats aside.

22 Let's assume information was being
23 shared pursuant to implied caveats and that's fine
24 with you, right?

25 MR. LOEPPKY: Yes.

1 MR. BAYNE: On the issue of policy
2 then, did you ever specifically issue rules of
3 engagement that said, "In effecting going out of
4 your way, or pulling out all the stops to get
5 information to the Americans as soon as possible
6 or to other domestic agencies, but -- but you have
7 to rigorously and religiously adhere to all RCMP
8 policies," did you ever send that in writing to
9 the men?

10 MR. LOEPPKY: No, I did not.

11 MR. BAYNE: Did you ever cause it
12 to be sent to the men?

13 MR. LOEPPKY: No, I did not.

14 MR. BAYNE: Did you ever make sure
15 that that's the way it was being interpreted?

16 MR. LOEPPKY: No, I did not.

17 MR. BAYNE: Did you ever occasion
18 Mr. Proulx to make sure that's the way it was
19 being interpreted?

20 MR. LOEPPKY: We never discussed
21 it.

22 MR. BAYNE: Mr. Cabana's evidence
23 was -- and he is the guy where the buck stops, you
24 know. He was handed this weighty investigation,
25 and he has given evidence that he was told RCMP

1 policy does not apply as it has in the past here
2 and caveats are down. Your mandate is (1) to
3 prevent things happening; (2) to gain
4 intelligence; and (3), if you can, to prosecute.

5 MR. LOEPPKY: Yes.

6 MR. BAYNE: Now, I take it you
7 would agree with me Inspector Cabana was chosen
8 for this task because he was an outstanding,
9 exceptional investigator. The RCMP reposed a
10 great deal of trust in him because he is such a
11 good investigator?

12 MR. LOEPPKY: Yes, he is.

13 MR. BAYNE: And so he wouldn't
14 just dream up, or manufacture, that people were
15 telling him caveats were down; right?

16 MR. LOEPPKY: No.

17 MR. BAYNE: I just don't
18 understand why, following an unprecedented
19 agreement such as Mr. Proulx arrived at with
20 domestic and international partners about
21 information-sharing, if the men were to be
22 criticized some years later for their
23 interpretation of instructions that were, "Go out
24 of your way to information-share and pull out all
25 the stops so there's no delay, so you protect

1 Canadians and prevent another terrorist event
2 here," how you could do that without a written
3 instruction to the men?

4 MR. LOEPPKY: Well, I believe that
5 the individuals were working on that file, that
6 they worked diligently; they worked in good faith.
7 They shared information according to the
8 interpretation that they obviously had.

9 I have characterized the
10 environment as one where there was a multitude of
11 messages from different communities about the
12 importance of sharing, both domestic and
13 international. In fact, the public would have
14 been disappointed if we had not shared
15 information.

16 The point that I guess we diverge
17 on is whether there was written instruction to
18 disregard policy.

19 MR. BAYNE: No. But there was no
20 written instruction on what the parameters of this
21 new information-sharing world were; right?

22 MR. LOEPPKY: It was to -- my
23 direction was to ensure that we shared quickly,
24 fully; the traditional type of things that might
25 have existed in terms of delays, that we address

1 those, that we respond quickly and fully --

2 MR. BAYNE: You said that. That's
3 not my question.

4 It was never written down, "You
5 can do this, you can do that, but you can't do
6 this." It was nothing more than this generalistic
7 message, as far as you know it -- because you
8 weren't even at this meeting. Mr. Proulx
9 apparently dealt with other people in the chain of
10 command.

11 But nothing more, you think, than
12 a generalistic message was given to pull out all
13 the stops and go out of your way; right?

14 MR. LOEPPKY: Yes.

15 MR. BAYNE: And I am asking you
16 why, in those exceptional circumstances, would it
17 not have been written down? These were
18 exceptional rules of engagement now for sharing
19 information in exceptional times, and an
20 exceptional international agreement.

21 MR. LOEPPKY: Well, if your
22 question was why would we not write down that
23 policy is being set aside, I guess -- is that the
24 question?

25 MR. BAYNE: No. "Don't interpret

1 this new world as entitling you to relax policy.
2 You will be held strictly to policy."

3 Don't you think you should have
4 made that clear if you intended that back in 2001?
5 If your men were going to be criticized for
6 misinterpreting, if in fact they did -- and I am
7 not convinced they did. But if that's one
8 interpretation of this, for misinterpreting what
9 you intended, it was your responsibility to make
10 it crystal clear; right?

11 MR. LOEPPKY: Yes.

12 MR. BAYNE: You see, if you go out
13 of your way, the normal way would be the normal
14 process, the normal formalities and so on. But
15 going out of your way is doing things differently;
16 right?

17 MR. LOEPPKY: Well --

18 MR. BAYNE: Isn't it a reasonable
19 interpretation --

20 MS EDWARDH: Please let the
21 witness answer.

22 MR. LOEPPKY: Going out of your
23 way is being more responsive, more sensitive to
24 the environment.

25 MR. BAYNE: Well, that's your

1 interpretation.

2 MR. LOEPPKY: Yes.

3 MR. BAYNE: But you agree that
4 somebody being told to go out of your way and pull
5 out all the stops to information-share, it's not a
6 very precise instruction, is it?

7 MR. LOEPPKY: It's a very broad
8 instruction to the senior officers.

9 MR. BAYNE: And then when it gets
10 down to the men in the trenches, I take it you
11 never followed up to make sure what they
12 understood of that, or never issued a written
13 edict?

14 MR. LOEPPKY: No, I didn't.

15 MR. BAYNE: Thank you, sir. Those
16 are my questions.

17 THE COMMISSIONER: Thank you,
18 Mr. Bayne.

19 Mr. Westwick?

20 EXAMINATION

21 MR. WESTWICK: Mr. Commissioner I
22 intend to be both short and non-controversial.

23 Mr. Loepky, my name is Vince
24 Westwick, and I am counsel for the Ottawa Police
25 Service. I just want to ask you some questions,

1 primarily about evidence that you have already
2 given.

3 You have spoken about integrated
4 policing and information-sharing both today,
5 yesterday and in your previous public and
6 in-camera appearances.

7 What I wanted to ask you about is
8 just a slightly different approach on that.

9 You have had broad police
10 experience over your career. You have had
11 extensive involvement with integrated operations.
12 You have been the senior operational person with
13 the RCMP for several years. And you have recently
14 retired.

15 And I just wonder, sir, what you
16 see as the future of integrated policing? I would
17 ask you that question, the future of integrated
18 policing on a national level, and more
19 specifically the future of integrated policing in
20 the National Capital Region.

21 MR. LOEPPKY: Certainly at the
22 national level, I think the vision of integrated
23 policing is to have a process where you have not
24 only law enforcement but other agencies that
25 contribute to a strong society, working together

1 with common objectives to address the root causes
2 of crime, to have common expectations, working
3 together in a very integrated way so that various
4 partners bring their expertise to the table and
5 play their role in addressing various community
6 issues as they arise.

7 When you examine how we have
8 operated in the past, law enforcement has had its
9 role. Other critical incident areas, provincial
10 agencies, health and welfare, social services,
11 things like Indian and Northern Affairs, they are
12 all working at their own level and in their own
13 stove pipes, if you will, to deal with public good
14 issues in various communities.

15 I think if we bring our collective
16 resources together and address those issues from a
17 much more holistic way, we can actually make a
18 difference, rather than trying to take those on on
19 our own.

20 And I think that within the law
21 enforcement community, we have made a tremendous
22 amount of progress over the last five years, and I
23 think I alluded to the fact that we now do have
24 things like a national threat assessment on
25 organized crime where all the partners have

1 contributed. It's a matter of bringing in other
2 organizations that can assist in dealing with the
3 root cause of crime.

4 So that's kind of the vision that
5 I see and I think where we need to go and where,
6 in fact, the Canadian Association of Chiefs of
7 Police is taking the agenda.

8 MR. WESTWICK: Focusing on
9 policing for a minute in the National Capital
10 Region, would it be your vision that it would
11 always include representation from the municipal,
12 provincial and federal levels?

13 MR. LOEPPKY: I think it certainly
14 has to. It has to in every community, but the
15 National Capital Region is certainly a very unique
16 environment. It is home to a number of
17 international embassies and VIPs, protectees, and
18 while the mandate for those falls to the RCMP, the
19 reality is they live in a community that is
20 policed by our police organizations.

21 So there is no option but to work
22 together in a very integrated way so that the
23 various areas that we can address and fill the
24 holes are done without overlap and duplication.

25 The environment within the

1 National Capital Region over the last three to
2 four years has changed significantly from what it
3 was ten years ago. There are discussions about
4 having a coordinated and a combined tactical
5 response team. Those are things that we wouldn't
6 have done five years ago and those discussions are
7 ongoing now, to ensure that there is value for
8 dollar for the taxpayers.

9 MR. WESTWICK: And would your
10 vision of integration in the National Capital
11 Region always apply to national security
12 investigations as well?

13 MR. LOEPPKY: I think, as you have
14 mentioned, I have commented on the record. I
15 think it has to in terms of the municipal and
16 provincial police that have touch-points and
17 contacts within the communities that we certainly
18 don't have here because we are not the front-line
19 police service.

20 That contact with the community
21 and that opportunity to develop closer
22 relationships obviously exists in a more fulsome
23 way at the uniform policing level, at the local
24 service delivery level, and therefore that kind of
25 a relationship is absolutely essential to ensuring

1 public safety.

2 MR. WESTWICK: And the same
3 question, sir, in the context of
4 information-sharing, and I am limiting the
5 question to domestic information-sharing and not
6 international information-sharing amongst police.

7 What would your vision of that be
8 in a national security investigation context, both
9 at a national level, and the second part of the
10 question, in the National Capital Region?

11 MR. LOEPPKY: Well, whether it's
12 at the national level or in the National Capital
13 Region area, I think that the various teams that
14 are put together -- for example, in the National
15 Capital Region, the INSET team includes
16 representatives from other police forces, and
17 there clearly has to be a seamless operation that
18 brings to the table not only the talent from the
19 various organizations but the knowledge that they
20 bring from their local communities and the access
21 that that provides to the local communities in
22 terms of their front-line officers.

23 So there has to be
24 information-sharing because the Chief in Ottawa,
25 Chief Bevan, needs to respond to his community and

1 to his counsel in terms of how do they need to
2 prepare and work together to prepare for any type
3 of eventual incident.

4 So that kind of collaboration is
5 essential.

6 MR. WESTWICK: Those are my
7 questions. Thank you very much, sir.

8 THE COMMISSIONER: Mr. Fothergill?

9 EXAMINATION

10 MR. FOTHERGILL: Mr. Loepky, I
11 just really want to discuss one subject area with
12 you. It is one that Mr. Bayne raised with you,
13 and that's to do with the need to communicate
14 instructions clearly.

15 I think you agreed with Mr. Bayne
16 that there is a need on the part of management,
17 when conveying instructions, to convey them
18 clearly.

19 MR. LOEPPKY: Yes.

20 MR. FOTHERGILL: You referred to
21 the exceptional circumstances post-9/11, and
22 Mr. Bayne referred to the exceptional response.

23 I am wondering if you could tell
24 us whether, in your mind, the response to
25 information-sharing, the approach, was it really a

1 significant change or indeed can you just comment
2 from your own perspective on what the response to
3 9/11 was in terms of information-sharing?

4 MR. LOEPPKY: I believe the
5 biggest gap that I saw was the timeliness and the
6 responsiveness, because prior to 9/11 there were
7 cases where information would -- either requests
8 would go out or requests would come in and they
9 would not be responded to in a timely way, and I
10 felt that that was an area that we needed to
11 address.

12 And we needed to address the
13 quality, to ensure that there was a good fulsome
14 exchange in terms of the detail of the
15 information. It couldn't be glossed over.

16 MR. FOTHERGILL: And you are aware
17 that in the days, or perhaps week or two after
18 9/11, Mr. Proulx met with representatives of other
19 agencies, both Canadian and American.

20 Isn't that right?

21 MR. LOEPPKY: I am aware of that,
22 yes.

23 MR. FOTHERGILL: And do you recall
24 him telling you what precisely was discussed in
25 the course of that meeting?

1 MR. LOEPPKY: Just generally that
2 he had met with domestic and international
3 representatives and talked about collaboration and
4 working together in an efficient and effective way
5 to really -- you know, the same messages that I
6 think that I was giving in terms of timeliness, in
7 terms of thoroughness, in terms of not letting
8 things fall between the cracks, to really go out
9 of their way to respond to issues in a timely way.

10 MR. FOTHERGILL: Mr. Bayne
11 described what came out of that meeting as some
12 form of unprecedented agreement. Was that the
13 impression that you got, that some sort of
14 unprecedented agreement between these partner
15 agencies had been reached at this meeting?

16 MR. LOEPPKY: No. My
17 understanding was that he had conveyed the
18 messages that obviously he had heard from myself,
19 from the broader community; I mean, the messages
20 about timeliness, information-sharing thoroughly.

21 But there was no indication of a
22 special agreement.

23 MR. FOTHERGILL: And did you ever
24 hear Mr. Proulx convey to anybody, either within
25 headquarters or in any division, that some sort of

1 unprecedented agreement had been reached with
2 partner agencies with respect to the sharing of
3 information?

4 MR. LOEPPKY: No, I did not.

5 MR. FOTHERGILL: I think it was
6 suggested to you by Mr. Bayne that somehow it was
7 incumbent upon Mr. Proulx to operationalize
8 whatever this agreement was.

9 Is it your view that somebody in
10 Mr. Proulx's position, head of CID, has the
11 responsibility to operationalize these sort of
12 high-level instructions?

13 MR. LOEPPKY: His responsibility
14 was -- I would focus more on the centralized
15 coordination of national security.

16 I think the operationalization --
17 and I commented on it -- was the criminal
18 operations officers who are out in the divisions.
19 They are accountable for operations that take
20 place across the organization and I provide broad
21 direction and then it is put into action at that
22 point.

23 That was one of the reasons that I
24 mentioned that during my video conference somewhat
25 after 9/11.

1 MR. FOTHERGILL: So if we look at
2 the role of Mr. Proulx as head of CID, for
3 example, and a divisional CROPS officer on the
4 other hand, between those two, who would be
5 responsible for putting into effect high-level
6 instructions from CID, or would it be a shared
7 responsibility?

8 MR. LOEPPKY: It would be the
9 criminal operations officer but recognizing that
10 CID has a very vital role to play in terms of the
11 international component of it, as I have outlined
12 in my evidence.

13 Therefore CID being the funnel, if
14 you will, for international inquiries, would
15 certainly have a role to play in terms of making
16 sure that information exchanges were done
17 expeditiously, did not languish in the pipe
18 anywhere, and were done quickly.

19 MR. FOTHERGILL: Can you comment
20 generally on the kinds of qualities that you would
21 expect to find in a CROPS officer in terms of
22 experience and understanding of how the RCMP
23 functions as an organization?

24 MR. LOEPPKY: Well, obviously they
25 are experienced police officers who bring with

1 them a significant amount of operational
2 background in terms of conducting police
3 operations. They bring with them an understanding
4 of a lot of the sensitive issues that we deal with
5 as an organization, whether those are sensitive
6 source matters and a variety of other things;
7 essentially a well-rounded background in terms of
8 operations, and an understanding of how we operate
9 within a policy framework.

10 And in today's environment,
11 obviously I expect them to understand as well the
12 corporate environment, the direction that the
13 organize's going, the vision it has in broad terms
14 and how that plays into their service delivery
15 responsibilities.

16 MR. FOTHERGILL: Would you expect
17 a CROPS officer to have an appreciation of the
18 existing policies of the RCMP and their role in
19 guiding police conduct?

20 MR. LOEPPKY: Yes.

21 MR. FOTHERGILL: And presumably if
22 a CROPS officer had some question about the
23 continued application or usefulness of a
24 particular policy, there would be nothing to
25 prevent that CROPS officer from seeking

1 clarification or direction from headquarters?

2 MR. LOEPPKY: That's the
3 expectation.

4 MR. FOTHERGILL: Are you aware of
5 anybody ever responding to messages coming out of
6 headquarters -- when I say "anybody", I mean
7 anybody within the division, a CROPS officer or
8 senior investigator -- inquiring whether this
9 high-level direction involved a departure from
10 policy?

11 MR. LOEPPKY: I am not aware of
12 anything.

13 MR. FOTHERGILL: And as a
14 practical matter, if a policy is to be suspended
15 or amended, what would ordinarily the process be
16 for doing that?

17 MR. LOEPPKY: The normal procedure
18 would be that if there's an issue identified in
19 policy that is a hindrance to investigations, or
20 that is inconsistent, whether it's involving case
21 law or investigative procedures, then there would
22 be a dialogue with the policy centre and input,
23 and ultimately if it required amendment, that
24 would take place by headquarters.

25 MR. FOTHERGILL: Is it fair to say

1 that an amendment or suspension of an RCMP policy
2 is a relatively formal process, or could it be
3 done informally?

4 MR. LOEPPKY: Yes. It involves
5 consultation. Even if it's a policy amendment
6 that's initiated by headquarters, there would be
7 consultation with experienced police officers,
8 senior police officers, across the organization to
9 make sure it meets the needs of the front-line
10 operations.

11 MR. FOTHERGILL: And just so we
12 are clear, these are policies of national
13 application, aren't they?

14 MR. LOEPPKY: Yes.

15 MR. FOTHERGILL: So they would
16 apply equally to all divisions?

17 MR. LOEPPKY: Yes.

18 MR. FOTHERGILL: So if you were to
19 amend the policy in response to a particular
20 investigation, it would apply in its new form
21 throughout the country?

22 MR. LOEPPKY: Yes.

23 MR. FOTHERGILL: Would you expect
24 a change or suspension of an existing RCMP policy
25 to be done in writing and communicated to the

1 divisions?

2 MR. LOEPPKY: Yes. If there was a
3 suspension of the policy, I would expect that
4 would be done in writing.

5 MR. FOTHERGILL: And would you
6 expect a CROPS officer to have a similar view?

7 MR. LOEPPKY: Yes.

8 MR. FOTHERGILL: Those are my
9 questions. Thank you.

10 THE COMMISSIONER: Thank you,
11 Mr. Fothergill.

12 Mr. David?

13 MR. BAYNE: Can I beg your
14 indulgence?

15 It's an unusual examination, and
16 there is a question that arises as a result of a
17 proposition that my friend put to this witness.

18 I didn't have an opportunity to
19 anticipate that question.

20 THE COMMISSIONER: Go ahead.

21 MR. BAYNE: I would like to deal
22 with it. I can do it from here.

23 THE COMMISSIONER: Certainly. Go
24 ahead.

25 MR. BAYNE: Thank you.

1 EXAMINATION

2 MR. BAYNE: Mr. Loepky,
3 Mr. Fothergill suggested to you, and you agreed,
4 as it were, with the proposition, that this wasn't
5 an unprecedented agreement.

6 Can you take Exhibit P-85, sir,
7 volume 1, tab 21, and see what Mr. Proulx
8 described this as?

9 MR. LOEPPKY: The reference again?

10 MR. BAYNE: Tab 21, sir. Let me
11 read it with you.

12 Just let the Commissioner catch
13 up. It's tab 21 of volume 1, Mr. Commissioner.

14 THE COMMISSIONER: I have got it.

15 MR. BAYNE: And it reads:

16 "Following the events of
17 9-11, a new era --"

18 A new era.

19 "... of openness and an
20 environment of sharing was
21 necessitated by the need to
22 prevent further terrorist
23 attacks from happening. In
24 particular --"

25 And you will see the "in

1 particular" refers to the new era.

2 "...the RCMP --"

3 And then the other agencies are
4 blacked out.

5 "... agreed that all
6 information --"

7 All information.

8 "... would be shared between
9 agencies as a matter of
10 course. Further, it was
11 agreed at Senior levels that
12 it would be the exception
13 rather than the rule to seek
14 permission prior to utilizing
15 or sharing the information
16 between the parties to the
17 agreement."

18 And then so-and-so:

19 "... met periodically and
20 shared information of
21 relevance to ongoing
22 investigations."

23 Sir, in my submission, there is
24 only one way to read that. Mr. Proulx, the
25 Assistant Commissioner CID, wrote that; right?

1 He agreed to that? It's over his
2 signature?

3 MR. LOEPPKY: Yes.

4 MR. BAYNE: He is the one who made
5 the agreement; right?

6 MR. LOEPPKY: I am not aware of
7 that.

8 MR. BAYNE: Well, you are, because
9 you told us it was Mr. Proulx who met with these
10 other agencies and made this information-sharing
11 agreement.

12 MR. LOEPPKY: He relayed -- I
13 wasn't at the meeting, but his message would have
14 been one that I had spoken about, was the
15 importance of full information-sharing in a timely
16 way --

17 MR. BAYNE: Mr. Loepky, that's
18 not my question, sir. Please listen to my
19 question.

20 MR. LOEPPKY: Yes.

21 MR. BAYNE: Mr. Proulx was the one
22 who went to the information-sharing agreement
23 meeting; right?

24 MR. LOEPPKY: That's my
25 understanding.

1 MR. BAYNE: He writes here over
2 his signature "a new era". It is a new era for
3 the RCMP of openness and an environment of
4 sharing, and he particularizes the new era as this
5 agreement. In his mind, this was unprecedented,
6 sir, right, if it's a new era?

7 MR. LOEPPKY: This briefing note
8 is written in 2004, and he is describing, I
9 believe, what he has learned. I don't know if he
10 is referring to his understanding of when he was
11 at that meeting or what he learned in 2004 and he
12 is now reporting upward.

13 That was my understanding.

14 MR. BAYNE: Whether he is writing
15 what he now believes or whether he is writing what
16 he then believed, he is writing that this was a
17 new era; right?

18 MR. LOEPPKY: Yes.

19 MR. BAYNE: Thank you.

20 THE COMMISSIONER: Mr. David?

21 MR. DAVID: I think I am going to
22 have to come into this issue, Mr. Commissioner.

23 I will have three areas of
24 examination for Mr. Loepky.

25 The first will be this information

1 exchange or information-sharing environment. The
2 second will be a series of eight questions that
3 have been submitted to Commission counsel from the
4 intervening parties that have standing before you,
5 Mr. Commissioner. And then I will end off with
6 two of my own questions.

7 EXAMINATION

8 MR. DAVID: Mr. Loepky, the theme
9 is information-sharing and the environment
10 following 9/11 and what that provoked.

11 I understand that in the hours
12 that followed 9/11, your messaging was that there
13 was to be thorough, complete, effective, efficient
14 and timely information-sharing.

15 Is that an accurate reflection of
16 your vision?

17 MR. LOEPPKY: That's the general
18 message that I put out.

19 MR. DAVID: And this message you
20 gave to Mr. Proulx. You gave that direction to
21 Mr. Proulx?

22 MR. LOEPPKY: It was given to all
23 of our business lines, but Mr. Proulx certainly
24 would have heard that message.

25 MR. DAVID: And do you think

1 Mr. Proulx understood the vision that you had, the
2 messaging that you had? Did there seem to be
3 miscommunication between yourself and Mr. Proulx
4 about that message, about that approach?

5 MR. LOEPPKY: I think that -- I
6 believe that he and I were of the same mind. I
7 mean, we knew and had observed, or he had
8 observed, that there were sometimes delays in
9 responding to information requests, information
10 exchanges, partly due to capacity, partly
11 sometimes due to simply having other tasks. And
12 the environment at that time was such that we felt
13 we needed to expedite information-sharing; we
14 needed to do that quickly and timely. And that
15 was the message that he was sending out and those
16 were my expectations.

17 MR. DAVID: And so in your
18 opinion, both Mr. Proulx and yourself were on the
19 same line of thought when it came to your vision
20 about how to respond to 9/11 in terms of
21 information-sharing?

22 MR. LOEPPKY: I don't think there
23 was any other option. I think that there was an
24 expectation by Canadians that --

25 MR. DAVID: But that's not quite

1 my question. My question is simply: Do you think
2 that Mr. Proulx understood your vision about
3 information-sharing in the post-9/11 environment?

4 Do you think he was clear about
5 your vision?

6 MR. LOEPPKY: I believe he was.

7 MR. DAVID: Okay. And your
8 vision, you shared it with Mr. Proulx. This
9 vision, through Mr. Proulx, was shared with
10 partner agencies, domestic and with U.S. agencies.
11 It was shared by you with your CROPS officers
12 across this country.

13 Is that a fair statement?

14 MR. LOEPPKY: Yes.

15 MR. DAVID: In one of the
16 responses you gave to Mr. Bayne about this subject
17 matter, you said that your message was to respond
18 -- and I quote you -- "to traditional type of
19 causes for delays in information-sharing".

20 Traditional type of causes for
21 delays in information-sharing. I would like you
22 to expand on that notion, on this idea, how your
23 messaging was responding to the traditional types
24 of causes of delays.

25 Is this a matter -- no, I will let

1 you respond to that.

2 MR. LOEPPKY: Perhaps I haven't
3 explained it as clearly as you would expect.

4 Pre-9/11, there would be ongoing
5 investigations where sometimes information would
6 not be exchanged in a timely way or responded to
7 in a timely way. Things would sit on the shelf.
8 They would take a lower priority, depending on who
9 was asking the question.

10 My expectations were that we would
11 respond to those. We had reassigned resources
12 across the organization to Project Shock; that we
13 would not only send out inquiries very quickly.
14 Rather than sitting on somebody's desk where
15 something came to somebody's attention that
16 required a follow-up, we would get it out there
17 very quickly to another organization, not wait for
18 the next shift or the next week. And at the same
19 time, if we had inquiries, we would respond very
20 quickly.

21 That was the general thrust of my
22 message.

23 MR. DAVID: And the traditional
24 types of causes for delays in information-sharing,
25 in our recent history we have had the benefit of

1 Justice Kaufman in writing a report on the Guy
2 Paul Morin affair, referring to the fact that part
3 of the Morin inquiry, part of the problem that was
4 identified by Justice Kaufman, was the fact that
5 sometimes police forces are jealous with the
6 information they do have and there was a culture
7 perhaps to keep that information for yourself, to
8 use it for your purposes, and maybe not so
9 willingly share it with others.

10 That same theme arose,
11 Mr. Loepky, in Justice Poitras' report too, when
12 it came to the Sûreté du Québec Commission of
13 Inquiry that occurred very recently.

14 Were you also addressing this
15 aspect of police culture in the messaging, in the
16 vision that you had?

17 MR. LOEPPKY: Very much so, and
18 I -- Mr. Cavalluzzo was here on previous
19 occasions, but I have alluded to some of those
20 cases: the Bernardo case where there wasn't
21 information shared appropriately, and the
22 importance of breaking down those silos that
23 sometimes exist in terms of turf and
24 protectionism, that we needed to move forward on
25 aggressively.

1 MR. DAVID: And so in light of
2 those comments by you, Mr. Loepky, in your
3 vision, in your mind, was the messaging that you
4 were giving to Mr. Proulx and to your CROPS
5 officers and to headquarters, constitute an
6 exceptional rule of engagement? Or was this the
7 normal course of business, as business should be,
8 in police information-sharing?

9 MR. LOEPPKY: It wasn't normal
10 course of business, and I certainly don't want to
11 portray it as such. I mean, we were living in
12 extraordinary times.

13 But my expectation was that we
14 would do our job. We would do it quickly, we
15 would respond quickly. We would do what was
16 expected in terms of the Canadian public; that
17 there wouldn't be delays and we wouldn't let
18 things languish.

19 I mean, I can't be more clear.
20 That we would be efficient and effective --

21 MR. DAVID: And so doing those
22 things those ways, as you have just described,
23 does that constitute an exceptional rule of
24 engagement?

25 MR. LOEPPKY: Well, I am not sure

1 what you mean by "rule of engagement".

2 MR. DAVID: Well, it's a term
3 that's been used.

4 MR. LOEPPKY: It may have been
5 used, and it's not a term that I would necessarily
6 use.

7 I just expected that these were
8 extraordinary times and we would respond in an
9 extraordinary way, in an efficient way, and do so
10 quickly.

11 MR. DAVID: Thank you.

12 The second area, Mr. Commissioner,
13 as I have alluded to, is with regard to questions
14 that have been supplied to us by the intervenor
15 groups.

16 By way of preliminary remark, I
17 just want to highlight to you that the relevancy
18 of these questions, though they may not pertain
19 directly to Mr. Arar -- they pertain more to
20 Mr. El Maati and Mr. Almalki -- the relevancy that
21 the groups have identified is that it's simply to
22 establish whether there were investigative
23 practices or approaches that were adopted previous
24 to Mr. Arar's fact line per se; in other words,
25 whether the experience of these two men led to the

1 experience of what Mr. Arar experienced in his
2 time line.

3 In other words, Mr. El Maati and
4 Mr. Almalki, they were cases that were dealt with
5 by the Canadian authorities, by American
6 authorities, by Syrian authorities previous to
7 Mr. Arar, and it's just to see if these fact
8 patterns set a pattern for what happened to
9 Mr. Arar.

10 THE COMMISSIONER: Well, ask the
11 questions and let's see.

12 How many questions are there?

13 MR. DAVID: There are eight
14 questions, Mr. Commissioner.

15 The first is: Were you aware,
16 Mr. Loepky, at the end of 2001 and at the
17 beginning of 2002, that Mr. El Maati had been
18 detained in Syria in November 2001 until the time
19 he was transferred to Egypt in late January 2002?

20 Were you aware of that fact?

21 MR. LOEPPKY: I don't believe so.
22 Not that I recall.

23 MR. DAVID: The second question
24 is: At what time, to your knowledge, did the RCMP
25 become aware of Mr. El Maati's detention in Syria

1 and in Egypt?

2 --- Pause

3 MR. LOEPPKY: I believe it would
4 have been sometime in maybe early 2002; but again,
5 I am not sure.

6 MR. DAVID: The third question is:
7 Were you aware that Mr. El Maati's family had no
8 indication of his whereabouts until several months
9 after he disappeared, and that he was held
10 incommunicado in Syria and then in Egypt until
11 several months later in the summer of 2002?

12 Was that to your knowledge?

13 MR. LOEPPKY: No.

14 MR. DAVID: The fourth question
15 is: Were you aware that a person -- and this is
16 more of a general question now -- that a person
17 held incommunicado in either Syria or Egypt was at
18 a very high risk of being tortured, especially
19 during interrogations?

20 MR. LOEPPKY: Not at that time.

21 MR. DAVID: And so --

22 MR. LOEPPKY: I have become aware
23 of that now as a result of the events that have
24 transpired.

25 MR. DAVID: The fifth question is:

1 Was this a consideration when you discussed the
2 investigative approach -- and I quote -- of having
3 questions sent to Egypt to be asked during an
4 interrogation?

5 MR. FOTHERGILL: This I think may
6 get us into an NSC issue, and I think we have also
7 discussed at length at this stage the process that
8 precedes the decision whether to send questions.

9 So I think this has already been
10 fully canvassed in the evidence.

11 THE COMMISSIONER: I think so.

12 And also, the witness had answered
13 "no" to the previous question and this question
14 presupposes a "yes" answer.

15 MR. DAVID: Okay. The next
16 question, Mr. Loepky, is: Did the RCMP ever
17 consider sending questions to be asked to Mr. El
18 Maati while he was in detention in Syria?

19 MR. FOTHERGILL: Again,
20 Commissioner, I object because, as I have said
21 previously, whether questions were considered for
22 particular detainees is subject to NSC.

23 MR. DAVID: The seventh question,
24 Mr. Loepky, is: Are you aware whether at any
25 time the RCMP or any other Canadian agency

1 considered sending questions to Syria either
2 directly or indirectly through another Canadian
3 official or agency to be asked to Mr. Almalki
4 while he was in Syrian custody?

5 MR. FOTHERGILL: Same objection,
6 Commissioner.

7 MR. DAVID: Okay. Then the final
8 question, Mr. Loepky, is: You have obviously
9 heard the term "war on terrorism" being used by
10 our U.S. partners -- by the United States, I
11 should say. Do you understand the concept of
12 extraordinary rendition to be one of the tools
13 that is resorted to by the United States in
14 obtaining information in the context of this war
15 on terrorism?

16 MR. LOEPPKY: It has certainly
17 come to my attention.

18 MR. DAVID: And in deciding how
19 you respond to requests for information, or how
20 you respond to exchanging information with the
21 United States, is this practice now accounted for
22 in sharing information?

23 MR. LOEPPKY: As I pointed out to
24 a question from Ms Edwardh, there is certainly a
25 higher level of awareness, in terms of what

1 transpired in the past, and it's a greater
2 consideration when information is shared. But
3 policy has not changed.

4 MR. DAVID: I have two of my own
5 questions from the evidence in general in
6 reference to caveats, Mr. Loepky.

7 I would ask you since the Arar
8 affair, since becoming attuned to the Arar fact
9 line, you described that there is now a more
10 sensitive approach to information-sharing with
11 other countries.

12 MR. LOEPPKY: Yes. One of the
13 things that has transpired is that advice has gone
14 out across the organization on the importance of
15 caveats and the importance of respecting those.

16 MR. DAVID: Would you agree with
17 me that the Arar affair, and what we have learned
18 since, has brought a closer monitoring of the use
19 of caveats within the RCMP?

20 MR. LOEPPKY: Yes, I think it has
21 had a number of effects. That is one of them.

22 MR. DAVID: And as a practice, to
23 your knowledge, does the RCMP still exchange
24 information, for instance, with a United States
25 partner, without resort to the use of an explicit

1 caveat?

2 MR. LOEPPKY: I think that there
3 are verbal -- well, I know there are verbal
4 exchanges where there's an implied caveat in all
5 cases, as I have mentioned. So not all
6 information exchanges will necessarily take the
7 form of a written piece of correspondence, and
8 that's very understandable given the multitude of
9 cross-border investigations that go on all the
10 time.

11 MR. DAVID: If it was an exchange
12 of information that was in a document form, is it
13 now the practice not to resort to an implied
14 caveat concept?

15 MR. LOEPPKY: Well, I would expect
16 that it would have caveats on it when it's
17 exchanged.

18 MR. DAVID: And this is a fair --
19 I don't want to say it's a recent practice, but
20 would you say that there is more rigour in the
21 resort to explicit caveats for written documents
22 since the Arar affair?

23 MR. LOEPPKY: Yes. I think I
24 commented that we had gone out with correspondence
25 across the organization on the importance of

1 caveats.

2 MR. DAVID: You have also
3 explained, Mr. Loepky, that in terms of when a
4 partner agency disabuses the information that is
5 exchanged, that there are not that many recourses
6 other than to raise the issue with the partner
7 agency in question and seek clarification and seek
8 explanation why there was a misuse of information
9 exchanged with explicit caveats or with implied
10 caveats.

11 Would you agree with me?

12 MR. LOEPPKY: That's correct.

13 MR. DAVID: And my question is:
14 Have you had or to your knowledge has an issue of
15 misuse been raised with a partner agency in the
16 United States regarding a national security
17 investigation since the Arar affair?

18 MR. LOEPPKY: Yes, those
19 discussions have taken place.

20 MR. DAVID: And more specifically
21 now, does the fact that you raised an issue of
22 misuse involve a situation where it concerned the
23 treatment of a Canadian detained overseas in the
24 context of a national security investigation?

25 MR. LOEPPKY: It was in relation

1 to a specific case, and it spoke to the importance
2 of caveats and respecting those.

3 MR. DAVID: This is in reference
4 to a situation that is other than Mr. Arar's?

5 MR. LOEPPKY: Well, certainly one
6 of the issues that I have raised with respect to
7 Mr. Arar.

8 MR. DAVID: With respect to
9 Mr. Arar. But my question is: Was there a
10 similar situation that you addressed or that to
11 your knowledge was addressed --

12 MR. LOEPPKY: Has been addressed,
13 yes.

14 MR. DAVID: -- that did concern
15 somebody else than Mr. Arar?

16 MR. LOEPPKY: No, it's -- what has
17 been raised and what has been discussed with
18 colleagues, international partners, is the
19 importance of respecting those and the fact that
20 it's a critical way of doing business.

21 MR. DAVID: That I understand. My
22 question is seeking your input as to whether you
23 have knowledge that you had to raise the issue of
24 the misuse of information that was shared with
25 another country where caveats were clearly

1 indicated in a specific case.

2 MR. LOEPPKY: Now I understand.

3 No, not that I am aware.

4 MR. DAVID: Okay. And my last
5 question, Mr. Loepky, concerns again resort to
6 implied caveats.

7 You explained that in terms of
8 your sister American agency, the FBI, you have
9 certain expectations because you share the same
10 police culture, the same way of doing business?

11 MR. LOEPPKY: Yes.

12 MR. DAVID: You have also
13 explained, and Ms Edwardh brought you there, with
14 regard to the INS, that perhaps your knowledge was
15 not as firm because you simply don't have an
16 experienced track record of dealing with an
17 organization such as INS so you are not exactly
18 sure how they would respond, what their practice
19 was, in terms of the concept of implied caveats?

20 MR. LOEPPKY: That's correct.

21 MR. DAVID: My question now
22 pertains to the CIA.

23 You referred in your evidence to
24 the fact that if it came to dealing with the CIA,
25 you would have the same expectations as you would

1 vis-à-vis the FBI in terms of a shared
2 understanding of the scope and the application of
3 an implied caveat?

4 MR. LOEPPKY: Yes, that is
5 correct.

6 MR. DAVID: And so my question now
7 is to you: In terms of practical experience, I
8 understand that the point agency in dealing with
9 the CIA for this country is CSIS, and that the
10 exception would be the RCMP?

11 MR. LOEPPKY: Yes.

12 MR. DAVID: And so my question is:
13 In the pre-9/11 environment, had you had previous
14 experience in terms of resorting to the use of
15 implied caveats in exchanging information with the
16 CIA?

17 MR. LOEPPKY: I believe it would
18 be limited.

19 MR. DAVID: Thank you. Those are
20 my questions.

21 THE COMMISSIONER: Just on that I
22 have a question, Mr. Loepky.

23 The use of implied caveats, I
24 don't know if I understood you to say, would they
25 be used when there was an oral or verbal exchange

1 as opposed to an exchange of documentation?

2 MR. LOEPPKY: That is correct,
3 Mr. Commissioner. Any time that there is an
4 information exchange between police officers,
5 whether those police officers are within the same
6 department or within other organizations, or in
7 fact internationally, it's just an accepted
8 principle that you do not use that information
9 beyond the purpose for which it was given to you.

10 In other words, you don't share it
11 with anybody else. You don't put it to a use for
12 which the provider of that information may not
13 have intended.

14 In other words, if the information
15 was given to you by another organization as
16 intelligence and you subsequently wanted to use
17 that in a document where it would become public,
18 such as obtaining a search warrant, you would be
19 expected to go back to that organization and say,
20 "I am going to do this. Will it compromise the
21 source if this is made public?"

22 So it's a principle. It's an
23 implied international rule --

24 THE COMMISSIONER: Within the law
25 enforcement community?

1 MR. LOEPPKY: Yes.

2 THE COMMISSIONER: But my question
3 is this: When you rely upon the implied
4 understanding, the implied caveat, is that limited
5 to circumstances where there is an oral or verbal
6 exchange? And was the practice then to rely on
7 written caveats in cases where there is a
8 documentary exchange?

9 MR. LOEPPKY: No. I believe that
10 even in a written piece of correspondence if the
11 caveat is not on the document and it's shared, I
12 think there's still an expectation that you go
13 back to the provider of that document before you
14 put it to a use for which it may not have been
15 intended.

16 THE COMMISSIONER: I have read the
17 RCMP policy, which says that you should attach a
18 written caveat to a document when you are
19 exchanging it.

20 MR. LOEPPKY: Yes.

21 THE COMMISSIONER: I think they
22 are just stamped on, aren't they?

23 MR. LOEPPKY: Yes, they are.

24 THE COMMISSIONER: It wouldn't
25 take a lot of time to stamp a written caveat?

1 MR. LOEPPKY: That's correct.

2 THE COMMISSIONER: Is there any
3 rationale or logic to why in some cases with
4 written documents, one would attach a written
5 caveat and in other cases it wouldn't? And let me
6 just finish.

7 The concern being that if the
8 practice is inconsistent, it may be sending a
9 different signal that sometimes when we attach a
10 written caveat, that's a real caveat. And in
11 cases where you don't, the person receiving the
12 message said well, they did the last time and they
13 are not this time, they are sending us a different
14 message.

15 MR. LOEPPKY: There may be cases
16 where there is written correspondence sent that in
17 fact is in furtherance of an investigation and it
18 would be understood that it was appropriate to use
19 that.

20 If two areas, two units, were
21 working closely together, two police departments,
22 and some information had been collected in the
23 support of a criminal investigation and it was
24 sent to the other department with the expectation
25 it would form part of the evidence, then the

1 caveat would probably not be on there.

2 But where that information --
3 where there's any suggestion that it's going to be
4 used for a purpose other than which it was sent --

5 THE COMMISSIONER: Where it could
6 be used as evidence. Is that what you are saying?

7 MR. LOEPPKY: Yes.

8 THE COMMISSIONER: I mean, if you
9 are sending a document that could be used as
10 evidence, then --

11 MR. LOEPPKY: You would expect
12 that it would have a caveat on it.

13 THE COMMISSIONER: All right.
14 Well, that I think completes it.

15 This is the third time that you
16 have testified. Let me express my appreciation,
17 the same way I did on the other two occasions.

18 I do very genuinely appreciate the
19 time and effort that you have put into giving
20 evidence and the contribution you have made to my
21 task. You have given your evidence in a very
22 straightforward and candid way, and it's helpful
23 to me and I very much do appreciate that.

24 MR. LOEPPKY: Thank you,
25 Mr. Commissioner.

1 THE COMMISSIONER: Thank you,
2 Mr. Loeppky.

3 That completes today's
4 proceedings.

5 We are going to start at nine
6 o'clock tomorrow. It's Friday and I am not sure
7 how long a day it's going to be. But in any
8 event, obviously the earlier we can finish on
9 Friday -- although I think it's expected that it
10 will be a fairly full day.

11 Is that right, Mr. David?

12 MR. DAVID: Yes.

13 THE COMMISSIONER: In any event,
14 we will start at nine o'clock.

15 THE REGISTRAR: Please stand.
16 --- Whereupon the hearing adjourned at 4:56 p.m.,
17 to resume on Friday, July 29, 2005,
18 at 9:00 a.m / L'audience est ajournée à
19 16 h 56, pour reprendre le vendredi
20 29 juillet 2005 à 09 h 00

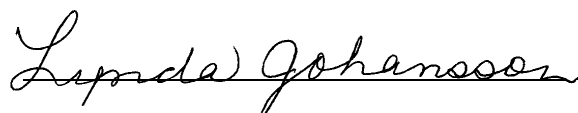
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