

**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:

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Salle Sussex
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Ottawa (Ontario)

le lundi 5 juillet 2004

Held at:

Government Conference Centre
Sussex Room
2 Rideau Street
Ottawa, Ontario

Monday, July 5, 2004

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Mr. Emelio Binavince	Minority Advocacy and Rights Council
Mr. Joe Arvay	The British Columbia Civil Liberties Association
Mr. Kevin Woodall	The International Commission for Jurists, The Redress Trust, The Association for the Prevention of Torture, World Organization Against Torture

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TABLE OF CONTENTS / TABLE DES MATIÈRES

	Page
DISCLOSURE MOTION ON BEHALF OF MAHER ARAR	
Submissions by Ms Edwardh	920
Submissions by Ms Mclsaac	1000
Reply Submissions by Ms Edwardh	1026
Submissions by Mr. Atkey	1033
SUBMISSIONS REGARDING RULES OF PROCEDURE CONCERNING THE ISSUE OF CONFIDENTIALITY	
Submissions by Ms Mclsaac	1041
Submissions by Ms Edwardh	1068
Submissions by Ms Mclsaac	1086

1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Monday, July 5, 2004

3 at 10:00 a.m. / L'audience débute le lundi

4 5 juillet 2004 à 10 h 00

5 THE COMMISSIONER: Mr. Cavalluzzo.

6 MR. CAVALLUZZO: Today we are
7 going to be hearing the motion of Mr. Arar's
8 counsel. I assume after that we will have
9 representations or comments in regard to the
10 questions you have posed in respect of the
11 procedure to be followed regarding national
12 security confidentiality.

13 Tomorrow we will continue with
14 Mr. Loepky's direct examination and hopefully we
15 will complete his evidence tomorrow afternoon.

16 Then, subsequent to that time, we
17 will be resuming on July 19, two weeks today, with
18 the evidence of Monia Mazigh.

19 Thank you.

20 THE COMMISSIONER: Okay.

21 MR. CAVALLUZZO: It is
22 Ms Edwardh's motion, so I assume she will
23 commence. Thank you.

24 THE COMMISSIONER: Ms Edwardh.

25 MS EDWARDH: Thank you very much.

1 We have changed sides, to add to the confusion,
2 Mr. Commissioner.

3 Before I begin formally with the
4 motion, I want to draw to your attention -- and
5 indeed I have some concerns about a letter written
6 by the American Ambassador to Canada published in
7 the Globe and Mail this weekend, or over the long
8 holiday weekend. It was actually published
9 July 1st.

10 Mr. Ambassador Cellucci makes the
11 statement that he would like to clarify the record
12 and essentially he says:

13 "To the contrary, I have
14 stated, on the record and on
15 more than one occasion, that
16 the decision to deport
17 Mr. Arar from New York was
18 made exclusively inside the
19 United States by U.S. law
20 enforcement officials."

21 We know from other reported
22 statements made by the Ambassador that there may
23 be several different versions of his comments, but
24 in light of his decision to communicate to the
25 media his view of the very matters that are before

1 you, I am going to ask, Mr. Commissioner, that
2 through your counsel you issue an invitation here
3 to him so that he can make these statements to
4 this inquiry.

5 THE COMMISSIONER: I will take
6 that under consideration.

7 I think, as you know, there has
8 been communication from the Commission to the
9 United States government requesting their
10 participation and we will consider whether or not
11 we will include a specific request to the
12 Ambassador to comment on that letter.

13 MS EDWARDH: Thank you very much,
14 Mr. Commissioner.

15 THE COMMISSIONER: Thank you.

16 MS EDWARDH: Let me then turn to
17 the motion that has been filed. I might indicate
18 that you should have before you, Mr. Commissioner,
19 a memorandum of argument filed on behalf of Maher
20 Arar; you should also have before you four volumes
21 of materials that have been appended. I'm sure
22 Ms McIssac won't object to me saying that you
23 should also have her memorandum in response.

24 THE COMMISSIONER: Right. Yes,
25 I do.

1 SUBMISSIONS / SOUMISSIONS

2 MS EDWARDH: With that, let me
3 commence.

4 Mr. Commissioner, this motion is
5 brought upon a single principled premise: That
6 premise is that information that is in the public
7 domain is in fact information that cannot be
8 reviewed or regarded as confidential information
9 and therefore cannot be subject to any claims of
10 privileged, let alone national security
11 confidentiality.

12 The focus of our motion today is
13 in respect of information, because indeed that is
14 what the Canada Evidence Act protects is
15 information, not the electronic version or the
16 documentary version of it, but it is the
17 information.

18 The second principle we ask you to
19 inform yourself with is that information cannot be
20 considered to be confidential when placed in the
21 public domain by governmental officials in
22 circumstances that show that this information was
23 in fact not sought to be protected.

24 Whether the disclosure is
25 authorized or not is irrelevant to our position.

1 It does not alter the fact as well that the
2 information is in the public domain, known to
3 the public.

4 As a result, it is our position
5 that information contained in documents held by
6 the Government of Canada relevant to the terms of
7 inquiry that reflects information that is already
8 in the public domain cannot be the subject of any
9 claim for privilege.

10 We ask, at page 1 of our
11 memorandum of argument for a number of remedies.
12 In paragraphs 4 and 5 we ask for also information
13 contained in government documents emanating from
14 the applicant, Maher Arar, or his counsel; or any
15 information emanating from foreign entities
16 provided by the applicant and his counsel.

17 That argument rests on not just
18 the prong of what has been disclosed publicly, but
19 ultimately on the fairness that, Mr. Commissioner,
20 we believe you owe and the Government of Canada
21 owes to Mr. Arar.

22 Let me just summarize that.
23 Information, that we believe is in the
24 government's hands relating to his interrogation
25 in Syria, United States and possibly Jordan, is

1 information, in my respectful submission, that
2 Mr. Arar, when he testifies -- and there is no
3 doubt he will -- is entitled to tell you,
4 Mr. Commissioner, "Yes, I made this statement.
5 This is the circumstance I made this statement.
6 This is the kind of torture I was subjected to
7 when I made this statement. This is the
8 information that the interrogators wanted me to
9 say."

10 Or to tell you whatever version of
11 the truth there is to the specifics of the
12 information. That ultimately, if this inquiry
13 means nothing Mr. Arar is entitled to tell you
14 that the information is right or wrong in respect
15 of the interrogation that he was submitted to that
16 is in the hands of the Government of Canada. That
17 is fairness coupled with the public principle.

18 In our motion I grant that we have
19 asked that information be provided directly by the
20 Government of Canada to us. Ms McIsaac, I think,
21 states in her memorandum of argument that this
22 information must properly flow only through you.
23 That is what the Inquiry Act contemplates and that
24 is what the terms of reference contemplate.

25 We, however, do not accept that

1 you have no authority to say to one participant
2 who has been granted standing that they must
3 provide information to another participant who is
4 granted standing if you find that it is
5 appropriate to do so, and we ask that you make
6 such an order.

7 THE COMMISSIONER: I have
8 certainly read Ms McIsaac's point. It struck me
9 that one way or the other what you are looking for
10 is production of the documents for the reasons
11 that you outline --

12 MS EDWARDH: Yes.

13 THE COMMISSIONER: -- and whether
14 they flow from the government to Commission
15 counsel to you or directly from the government to
16 you would make little difference to you, as long
17 as you got them.

18 MS EDWARDH: Correct.

19 THE COMMISSIONER: Yes. Okay.

20 MS EDWARDH: We also just wanted
21 to point out, though -- although we do take the
22 position you can make that order directly,
23 although it really is not of much moment to us --
24 that Rule 26 of the Rules of Procedure which
25 presuppose that you will hold, or Commission

1 counsel will hold, confidential to the Commission
2 documents until they are filed on the public
3 record in public hearings also states "except as
4 directed". We are of course asking that you so
5 direct.

6 THE COMMISSIONER: Right. Okay, I
7 understand your point. I will hear from
8 Ms McIsaac on it --

9 MS EDWARDH: Fine.

10 THE COMMISSIONER: -- so that you
11 don't have to concern yourself terribly with it.

12 MS EDWARDH: Before turning
13 specifically to the information that is public, I
14 want just to make brief reference to your terms of
15 reference and one other matter that we say is
16 included in paragraph (e) of your terms of
17 reference. I have set them out if you would just
18 turn to paragraph 6 of the memorandum.

19 You will see that that is the
20 catchall paragraph in the memorandum that states:

21 "...and any other
22 circumstance directly related
23 to Mr. Arar that Justice
24 O'Connor considers relevant
25 to fulfilling this mandate."

1 I am going to call it the basket
2 clause in the terms of reference.

3 We do take the view -- and my
4 submissions are directed in part to this point --
5 that you, Mr. Commissioner, should be concerned
6 about the fact that when Mr. Arar arrived in
7 Canada, and just before his arrival in Canada, and
8 during the discussions about whether there would
9 be a public inquiry, information was disclosed to
10 the media and to Members of Parliament, who sat
11 primarily in opposition, that could only be
12 regarded as information designed to discredit
13 Mr. Arar and to provide a disincentive to the
14 Government of Canada to call such an inquiry.

15 The fact of that occurrence, in
16 my respectful submission, sir, is relevant to, in
17 the same way after the fact conduct is relevant
18 to, the state of mind of those actors who were
19 involved in dealing with Mr. Arar's case. We
20 would ask that you, in approaching this motion,
21 acknowledge and accept that one of the other
22 circumstances directly related is indeed the
23 information disclosed, both before his release
24 and after his release, that was designed to
25 discredit him.

1 The other observation I would like
2 to make about paragraph 6 in our memorandum, in
3 approaching the task at hand it is self-evident
4 that you were called upon to conduct a public
5 inquiry into matters that necessarily involved our
6 relationship with our allies, particularly United
7 States; our relationships and international
8 communications with foreign entities such as Syria
9 and Jordan.

10 In that regard it is important to
11 observe that national security matters and foreign
12 or international relation matters are at the core
13 of your mandate. When the Government of Canada
14 created those terms of reference, in my respectful
15 submission, it is obvious that the exploration of
16 those relationships was on the table.

17 What we have done in our motion,
18 Mr. Commissioner, is to try to lay before you --
19 although it becomes increasingly difficult to be
20 exhaustive -- those matters that have been
21 referred to and described that are reasonably in
22 the public domain.

23 We, at page 5 of our memorandum,
24 identify the categories or classes of information
25 that we say are reasonably to be understood as

1 being in the public domain. Our materials are
2 designed to place before you the sources of that
3 information.

4 Some of them are very public, in
5 the sense that they belong to major media outlets
6 in this country and the articles that they have
7 written after interviewing government officials or
8 private persons; others represent things said in
9 the House of Commons at governmental committees;
10 others represent matters that counsel for Mr. Arar
11 has located or witnesses who have been interviewed
12 and whose will-say in this area has been put
13 forward in affidavit form in Volume IV of the
14 record.

15 I am not going to take you through
16 those, but the memorandum and the material is
17 organized to reflect these categories of
18 information that we say are clearly in the public
19 domain now.

20 I would like to, using these
21 categories, just take a couple of the facts or
22 pieces of information -- let me not call them
23 "facts" for a moment, the information to show
24 essentially how we are inviting you to reason.

25 Let me begin by asking you to turn

1 to page 6 of the memorandum. You will see there a
2 description of Mr. Arar's interrogation in the
3 United States. We state there that the
4 information publicly available now includes:

5 "The authorities had
6 information that (Mr. Arar)
7 knew Abdullah Al Malki. They
8 were aware that he had met
9 with Abdullah in October of
10 2001 and also that Abdullah
11 had witnessed the signing of
12 his lease in 1997. They
13 showed Mr. Arar surveillance
14 photos taken of Mr. Al Malki,
15 indicating that Mr. Al Malki
16 had been under surveillance
17 and a copy of the lease that
18 had been witnessed by
19 Mr. Al Malki."

20 was also shown.

21 U.S. authorities also expressed
22 concern about his relationship with Mr. El-Maati.

23 This information in the footnote
24 here relates to the Website of Mr. Arar which has
25 been notoriously in the public domain since 2003.

1 I thought, though, it might be
2 more appropriate, if anyone wished -- we
3 downloaded the Website and perhaps it should form
4 part of the record.

5 On the Website and again in a
6 media statement in November 2003 -- and Ms Davies
7 is handing both of those up, which everyone I
8 think has had for a long time.

9 You will see on the first page,
10 Mr. Commissioner, in the third paragraph, Mr. Arar
11 has described the questioning. This is the
12 questioning that was undertaken in the United
13 States. He was questioned in particular about
14 Abdullah Al-Malki. He gives a series of answers
15 about his relationship. Then in that same
16 Website -- and it is highlighted in dark ink --
17 the disclosure of the rental agreement to him
18 during the course of his interrogation in the U.S.
19 in 1997.

20 Also, if you just want to make a
21 note of this, if you turn to page 6, in a
22 description of his experience in Syria he has
23 publicly stated, both in the interview and again
24 on the Website, that while being interrogated in
25 Afghanistan he was asked if he had received

1 military training and, under torture, he indeed
2 admitted he had.

3 Over on the next page, under the
4 date early November 2002, he again states that he
5 was forced to say he had been to Afghanistan.

6 Lastly, just to make the point and
7 drive it home, at page 8, under the date of August
8 19, 2003, Mr. Arar said again that during
9 interrogation in Syria he was told to write, among
10 other things, that he went to a training camp in
11 Afghanistan and forced to do so by a threat to put
12 him "into the tire" and then to put his thumb
13 print.

14 This disclosure must be coupled,
15 in considering the public nature of this, by the
16 fact that there certainly was never any concern
17 expressed or discussion of the impropriety of
18 Mr. Arar putting this on his Website and
19 broadcasting it in his media statement, and it
20 certainly must be viewed as information which is
21 in the public domain.

22 It is also, in part, confirmed by
23 the order issued by the American government.

24 We have received this only as a
25 result of our own inquiries. You will see it in

1 Volume IV.

2 We obtained it from the Centre for
3 Constitutional Rights. It is that entity which is
4 conducting civil litigation on behalf of Mr. Arar.

5 THE COMMISSIONER: Excuse me. I
6 just have three volumes here. I thought I had
7 four.

8 All right; thank you.

9 Which tab is it?

10 MS EDWARDH: It is Tab 1,
11 Mr. Commissioner.

12 THE COMMISSIONER: Thank you; I
13 have it.

14 MS EDWARDH: I apologize for the
15 quality of the reproduction, but the fault does
16 not lie with our office.

17 This is a document that was
18 provided to Mr. Arar in the United States on the
19 occasion of his deportation or rendition to Syria.
20 It is one that was removed from his person when he
21 was in Syria and not returned.

22 It is interesting to observe, if
23 you turn to page 4 -- and you will bear with me
24 while we try to read along with respect to the
25 second paragraph:

1 "The FBI interviewed Arar on
2 September 27, 2002 at JFK
3 International Airport.
4 During the interview, Arar
5 admitted his association with
6 Abdullah Al-Malki and
7 Abdullah Al-Malki's brother,
8 Nazih Al-Malki. Arar advised
9 the FBI that he was friendly
10 with Nazih Al-Malki in Syria
11 while they were in school
12 together and that he [Arar]
13 worked with Nazih Al-Malki at
14 New Link Communications.
15 Arar also advised the FBI
16 that Al-Malki exports radios
17 and one of his customers was
18 the Palestinian military.
19 Arar also advised that he had
20 three business dealings with
21 Al-Malki. Arar also admitted
22 to FBI about meeting Abdullah
23 Al-Malki at the restaurant
24 where he and Al-Malki went
25 outside and talked in the

1 rain in October 2001."

2 This is a document,
3 Mr. Commissioner, that in an unredacted form was
4 shown to Mr. Arar, in a redacted form was provided
5 to CBS, and we have no other access to this
6 document.

7 THE COMMISSIONER: Is it clear
8 whether the redactions were done by the United
9 States government or were they done in Canada?

10 MS EDWARDH: I did not obtain this
11 document from any Canadian entity. I got it from
12 the Centre for Constitutional Rights. So it is
13 clear to me that it was redacted in the U.S. and I
14 assume redacted before provided to the CBS.

15 THE COMMISSIONER: All right.

16 MS EDWARDH: Certainly for our
17 purposes this information about Mr. Arar's
18 interrogation and the persons of interest, the
19 meeting at the restaurant, all of that is
20 disclosed in this document. It is information
21 that is clearly in the public domain.

22 Mr. Arar's own statements are in
23 the public domain. To the extent that this
24 information is in the public domain, we submit it
25 is not subject to any claim or possible claim for

1 confidentiality.

2 I wish to turn to another example,
3 because I want to correct one fact as well that is
4 in my memorandum.

5 In paragraph 15 we talk about
6 information provided to Michael Edelson, who was
7 then counsel to Mr. Arar.

8 Let me ask you, Mr. Commissioner,
9 to take a line through the second sentence. We
10 have corrected that, and we do not think that
11 Mr. Edelson's statement or will-say can support
12 that statement. So let me just withdraw it right
13 now.

14 THE COMMISSIONER: Just strike
15 that out?

16 MS EDWARDH: Just strick it out.

17 THE COMMISSIONER: Thank you.

18 MS EDWARDH: But we do put in our
19 affidavit -- and for your reference, if you turn
20 again to supplementary Volume IV, at Tab 7, you
21 will see Ms Davies' affidavit where she sets out
22 at length, commencing in paragraph 5 of the
23 affidavit, Mr. Edelson's meetings, what we
24 anticipate he will say that describe his meetings
25 with the Mounties, and the dates of those

1 meetings.

2 It is as a result of information
3 disclosed to counsel -- and let me tell you we
4 take a very strong view that if a member of the
5 police force comes and meets someone and says "we
6 want to tell you A, B, C or D", and those persons
7 are not bound by any oath of secrecy or bound by
8 an oath of office, they are of course free to
9 discuss that information with anyone they may need
10 to: free to discuss it with Mr. Arar; free to
11 discuss it with his wife. They are free to
12 discuss it with anyone they choose to discuss it
13 with.

14 We take the view that the
15 information provided to Mr. Edelson is also very
16 much in the public domain. You will see it
17 described at the bottom of page 7 and over to page
18 8.

19 Mr. Edelson was told that the
20 officers had access to Mr. Arar's palm pilot. It
21 is the only inference that can be drawn. It is
22 the bottom of page 7, over to the top of page 8.

23 THE COMMISSIONER: My Tab 7 is
24 only five pages. It is the affidavit of
25 Ms Davies, dated the 29th of June?

1 MS EDWARDH: Yes, it is five
2 pages. I am now turning to my memorandum,
3 Mr. Commissioner.

4 THE COMMISSIONER: I'm sorry. I
5 have that now.

6 MS EDWARDH: If you turn to the
7 bottom of page 7, paragraph 15 of the memorandum,
8 we have set out in some detail what information
9 was revealed to Mr. Edelson.

10 We draw from that that they were
11 prepared to disclose that they had information
12 from Mr. Arar's palm pilot reflecting a seizure at
13 the border; that he had been in the United States
14 on September 11th -- that information was
15 provided; that they found names of people of
16 concern in his palm pilot and others have Maher's
17 name in their phone books; that there were rumours
18 that he had been in Afghanistan; that when his
19 family travelled to Tunisia, the RCMP believed
20 that they were running away; and that indeed they
21 were concerned about his relationship with
22 Abdullah Al-Malki.

23 This information was also put into
24 the public domain by its transmission to counsel
25 and obviously with the intent that counsel was

1 free to discuss it with those they saw fit to.

2 THE COMMISSIONER: What you would
3 be requesting is for disclosure of any documents
4 which supported the assertions that the police
5 officer made to Mr. Edelson.

6 MS EDWARDH: Absolutely.

7 THE COMMISSIONER: Thank you.

8 MS EDWARDH: If I may, we get to
9 the perhaps more complex but from our perspective
10 not more complex disclosures that are described at
11 page 9 of the memorandum.

12 This of course is the infamous
13 Juliet O'Neill article.

14 In that article she makes numerous
15 statements which she attributes to the
16 observations made of the Maher Arar file held by
17 the RCMP and describes a number of the pieces of
18 information in that file.

19 From our perspective, one of the
20 most important is in part this fact that she had
21 access to his interrogation in Syria and
22 potentially the United States, because the
23 document that she quotes says that U.S.
24 interrogators had been told by Mr. Arar that he
25 had travelled to Pakistan.

1 I don't need to read you all of
2 those itemized assertions set out in the article,
3 but they constitute her access to RCMP information
4 which was disclosed.

5 We point out, and we include,
6 Mr. Commissioner, in our materials the
7 information, redacted in form, that formed the
8 basis of the search warrant -- that was given to
9 the issuing justice for him to determine whether
10 there were reasonable and probable grounds to
11 authorize the search.

12 You will find that information in
13 its redacted form at Tab 2 of Volume IV.

14 What is important about the
15 information is that despite its redaction, if one
16 reads a series of paragraphs together -- and I am
17 going to do that right now, starting with
18 paragraph 4.

19 The Corporal swearing the
20 information states in paragraph 4:

21 "On December 3rd, 2003, I
22 reviewed a [blank] document
23 dated December 13, 2002."

24 And there is an RCMP number
25 attached to the description of the document.

1 He then goes on to say in
2 paragraphs 8 and 9, that he has examined the
3 article published in the Ottawa Citizen, and this
4 article written by Juliet O'Neill mentioned:
5 "... 'that security officials
6 leaked allegations against
7 him (ARAR) leading to his
8 return to Canada'. She
9 further states that: 'one of
10 the leaked documents is about
11 what Mr. ARAR allegedly told
12 Syrian military intelligence
13 officials during the first
14 few weeks of his
15 incarceration.'"

16 In paragraph 9 the Constable
17 swears:

18 "On December 5th, 2003, I
19 examined and compared ..."
20 That is the crucial point.
21 "... the classified secret
22 document dated December 13th,
23 2002, as mentioned in
24 paragraph 4 of this affidavit
25 along with the article dated

1 November 8th, 2003 written by
2 Juliet O'NEILL of the Ottawa
3 Citizen mentioned in
4 paragraph 8 of this
5 affidavit. I verily believe
6 that the information from the
7 classified ... document was
8 the source document for
9 information which appeared in
10 Juliet O'NEILL's article."

11 What we have here is a story
12 placed into the public domain, transmitted
13 throughout the nation, not only by the Ottawa
14 Citizen but other major media outlets, that the
15 RCMP has confirmed is attributable to a source
16 document in the information sworn to obtain the
17 search warrant in respect of Ms O'Neill's home.

18 No question about its
19 authenticity, it would appear.

20 So all that information is now in
21 the public domain. To the extent particularly
22 that the proceeds or fruits of interrogation that
23 have been derived by torture sit in the hands of
24 the Government of Canada, not only has it been
25 made public, but elementary fairness dictates that

1 Mr. Arar must have that in his hands to answer to.

2 I just want to deal with a couple
3 more important facts. I'm not going to do
4 anything other than leave this with you,
5 Mr. Commissioner, knowing that you will have a
6 chance to read it and reflect upon it and see
7 whether there is an evidentiary basis which we
8 assert exists.

9 The other interesting observation
10 is set out again in Ms Davies' affidavit in
11 Volume IV. It pertains to Mr. James Lockyer, a
12 counsel I'm sure is well known to you.

13 Mr. Lockyer is described in Tab 7
14 of Ms Davies' affidavit as a person with whom the
15 Government of Canada proposed to enter into an
16 arrangement which would send him abroad to be an
17 observer at any trial of Mr. Arar in Syria.

18 It never came to pass that he
19 went, but during the course of -- and I should
20 add, after Mr. Lockyer and Mr. Arar developed a
21 solicitor-client relationship and Mr. Lockyer
22 acted for Mr. Arar for a period of time -- in the
23 course of his acting for Mr. Arar he met with and
24 had conversations with Government of Canada
25 officials.

1 It is very clear from the
2 affidavit that Mr. Frye of the Department of
3 Foreign Affairs told him that CSIS agents visited
4 Syria in late 2002.

5 A most interesting date if one
6 looks at the date of the document, December 13th,
7 as set out in the information to obtain, because
8 indeed that document, supposedly the summary of
9 the interrogation, leaves, in my respectful
10 submission, the obvious inference that when CSIS
11 attended in Syria the document fell into their
12 hands. There is other confirmation of that,
13 certainly that it is in their hands if it didn't
14 fall in at that time.

15 Let me jump, leaving you with a
16 number of these. I would ask you to turn to
17 page 15, paragraph 34.

18 In fairness to my friend's
19 position, Ms McIsaac has fairly said that
20 information provided by government officials when
21 they testified before various committees of the
22 House is not information over which she believes
23 there can be an assertion of privilege. I think
24 that generally -- or she is not intending to
25 assert privilege.

1 So this is a good example. We
2 have our Minister, Bill Graham, speaking on behalf
3 of the Department of Foreign Affairs and
4 International Trade, describing in the committee
5 that he has met with Colin Powell and been
6 advised:

7 "...that Canadian officials
8 were consulted on the
9 decision to deport Mr. Arar
10 to Syria."

11 We are asking, obviously, for
12 documents that reflect the information that Colin
13 Powell advised the Minister of Foreign Affairs
14 "that Canadian officials were consulted" and there
15 were discussions.

16 Certainly, it would seem at this
17 stage that that kind of information contained in
18 documents is no longer the subject of an
19 objection. I may be wrong, but that is my
20 understanding of my friend's position. She can
21 clarify it if I am mistaken.

22 Inviting you to turn to page 16,
23 the first bullet of page 16, at paragraph 35 there
24 is an article written by -- attributed to Robert
25 Fife and Juliet O'Neill. In it Gar Pardy is

1 quoted. Gar Pardy was the Head of Consular
2 Affairs for the Department of Foreign Affairs and
3 is undoubtedly a man who we will hear from.

4 He says in the article, and it
5 is quoted:

6 "Every time we talked to the
7 Americans, the Americans
8 would turn around and say
9 `your problem is back in
10 Ottawa. We only acted on
11 information that came from
12 there' he said. `Everytime
13 we said `look tell us why you
14 did this,' they said go talk
15 to the RCMP.' ... Mr. Pardy
16 said the RCMP always refused
17 to discuss the Arar file, and
18 Foreign Affairs was never
19 shown evidence that he
20 belonged to al-Qaeda. But he
21 said senior Syrian
22 intelligence officials told
23 Canadian officials that
24 Mr. Arar, 33, had once been
25 at training camp in

1 confidentiality has been given by the journalist
2 and literally it is a promise that may take them
3 to the door of the court or the jail.

4 But that it is not uncommon,
5 indeed is good journalistic practice and is
6 accepted, that sources may not be named
7 specifically.

8 We say that something like the
9 third bullet is sufficiently clear to constitute
10 the obvious fact that information has been put
11 into the public domain. Let me take you to it.

12 It states:

13 "Canadian agents trained
14 suspicious eyes on Maher Arar
15 and Abdullah Almalki as the
16 two men ate together in an
17 Ottawa restaurant - a meeting
18 that occurred two years ago,
19 just as an alleged associate
20 was arrested in Syria...
21 Days after Sept. 11, (that
22 is) [Ahmad Abou El-Maati] and
23 his brother, Amer, had been
24 placed on a global terrorist
25 watch list circulated by the

1 United States..."

2 Let me stop there. That
3 information certainly is not very different from
4 the information in the U.S. order or the
5 information that indeed Mr. Arar has described.

6 That article goes on:

7 "The names of Mr. Arar and
8 Mr. Almalki did not appear on
9 that list. But intelligence
10 agents suspected the two men
11 might be linked to Mr. Abou
12 El-Maati or Al-Qaeda...
13 [They] were spotted eating
14 together at Mango's, an
15 Ottawa fast-food restaurant."

16 Undoubtedly this person could have
17 written and talked in the rain, by anyway:

18 "Subsequent interrogations
19 involving Mr. Arar showed
20 that Canadian police or
21 intelligence agents duly
22 noted the encounter."

23 To the extent that this adds
24 anything to the earlier references, it is
25 important to observe that it is entirely

1 consistent, perhaps with the additional detail
2 that we now know what restaurant it is in, or it
3 is alleged to be in.

4 Again an unnamed source, but
5 equally, in our respectful submission, information
6 put into the public domain by government officials
7 or intelligence officials. You will see that at
8 page 20 where there is a description, starting
9 with the fourth line -- well, perhaps I better
10 start with the first line:

11 "Canadian and U.S.
12 intelligence officials are
13 `100-per-cent sure' that a
14 Syrian-born Canadian who was
15 imprisoned for a year in
16 Damascus trained at the same
17 al-Qaeda camp in Afghanistan
18 as a former Montrealer
19 convicted of planning a
20 terrorist attack. American
21 officials have long
22 maintained that Maher Arar
23 underwent training in
24 Afghanistan, but this is the
25 first time they have

1 identified the site...
2 Canadian officials had made
3 no claim about Mr. Arar's
4 alleged activities in
5 Afghanistan." "High-level
6 sources in Canada and the
7 U.S. who have access to an
8 extensive secret intelligence
9 file on Mr. Arar say the
10 33-year-old Ottawa software
11 engineer travelled to
12 Pakistan in the early 1990s
13 and then entered Afghanistan
14 to train at the Khaldun
15 camp."

16 We submit to you,
17 Mr. Commissioner, that is information that has
18 been disclosed, that it is sufficient, given the
19 practice of journalism in this democracy to quote
20 source as a high-level source in Canada who had
21 access to the file, and that it is clear that
22 information was placed into the public domain,
23 indeed the domain of, I think, the highest level
24 of publicity, into the hands of the media.

25 One is almost shocked at the

1 detail that comes pouring forth in this kind of
2 information, because if you turn the page to
3 page 21 you start to see -- and again it is
4 sourced to Mr. Fife -- at the first bullet, there
5 is a reference to:

6 "Maher Arar was deported to
7 Syria from the U.S. only
8 after the RCMP informed
9 American counterparts they
10 didn't have enough evidence
11 to detain or charge Mr. Arar
12 if he was returned to Canada,
13 CanWest News has learned."

14 Again, fully placed into the
15 public domain.

16 But should there be any doubt, if
17 you just turn over to page 23, in an article --
18 the second bullet -- in article written by Graham
19 Fraser it is stated, and the details of the
20 conversation are set out:

21 "When it was noted that Arar
22 was a Canadian, Canadian
23 security was contacted.
24 `They asked: Do you have
25 anything on him,' an official

1 closely involved in the case
2 said, on condition that he
3 not be quoted by name. `Yes,
4 indeed, they were told. He
5 is watched because he has
6 been to Afghanistan several
7 times.' On the basis of
8 that, the officials said,
9 Arar was arrested when the
10 plane landed in New York.
11 `Then they said to the
12 Canadians: If we transfer
13 that man to you, can you give
14 us the assurance that you
15 will lay charges against
16 him?' the official said.
17 `And the Canadian police told
18 them: No, we don't have
19 anything to lay charges
20 against him. We can't bring
21 any charges.' And the
22 Americans said `If you aren't
23 going to do anything, if you
24 are going to let him go
25 free...' According to the

1 official, Canadian officials
2 replied, 'Wait a minute, he
3 has already worked for two
4 years in Boston and you never
5 bothered to do anything about
6 him. And now he's back in
7 Canada ... all we can say is
8 that he has previously been
9 in Afghanistan. That's not
10 enough, given our Charter of
11 Rights.' The Americans said
12 'Obviously we can do nothing
13 with you,' and without any
14 notification to Canadian
15 consular officials, Arar was
16 transported to Jordan."

17 This is a remarkably detailed
18 disclosure of a conversation that has clearly been
19 placed by the government official into the media
20 on a condition stipulated by the government
21 official, and the stipulation is that he can't be
22 quoted by name. Given this accords with
23 journalistic practice, I suggest to you it is
24 enough to draw the inference that a public
25 official placed this in the public domain for

1 whatever purposes the government saw fit, but it
2 certainly was publicized.

3 Lastly, I want to draw to your
4 attention that in both proceedings before you,
5 Mr. Commissioner, on the applications for
6 standing -- and I am turning now to page 26, the
7 last bullet -- and as well in public information
8 provided to the Globe and Mail in April of this
9 year, Mr. El-Maati has provided information that
10 under torture in Syria that he both named Mr. Arar
11 and falsely confessed to a bomb plot.

12 I don't need to take you to it,
13 but I just want to alert you, Mr. Commissioner, to
14 the fact that in his affidavit before you asking
15 for standing he said no less. That is sworn
16 testimony.

17 My last point, which really has
18 less to do with Mr. Arar and his circumstances
19 than it has to do with government policy -- but we
20 do ask for information disclosed in documents --
21 relates to the practice of extraordinary
22 rendition.

23 At page 27, in the last bullet
24 carrying over to page 28, there is a discussion of
25 the practice of rendition.

1 Of course, it is well known
2 through the American media that it is attributed,
3 or it broke as a story in December 2002. The
4 following statement is attributed to an American
5 official.

6 "As one American official
7 told the Washington Post's
8 Diana Priest and Barton
9 Gellman, who broke the
10 'rendition' story in December
11 2002, 'We don't kick the shit
12 out of them. We send them to
13 other countries so they can
14 kick the shit out of them.'
15 The policy seems to have
16 begun in the 1990s.
17 According to George Tenet,
18 the CIA took part in over 70
19 renditions before September
20 11. No one knows how many
21 occurred since, as Congress
22 is not notified about
23 individual cases. But the
24 practice has probably
25 increased. According to the

1 Post, the Clinton
2 administration stopped
3 sending suspected terrorists
4 to Egypt after repeatedly
5 complaining about Cairo's
6 brutal interrogation methods.
7 'You can be sure,' said one
8 Bush administration official,
9 of such human rights
10 complaints, 'that we are not
11 spending a lot of time on
12 that now.' The United States
13 usually hands over
14 lower-level al-Qaeda
15 captives, keeping the key
16 aspects for itself. The most
17 common destinations are
18 Egypt, Jordan, and Morocco,
19 although suspects have been
20 sent to Syria, Pakistan,
21 Uzbekistan, and Saudi
22 Arabia."

23 We believe that this policy,
24 having been -- and we have given you one source.

25 This policy is not only public --

1 Mr. Tenet indeed testified to it at the 9/11
2 Commission hearings -- I might go so far as to say
3 is notorious.

4 To the extent that there are
5 documents disclosing information of the same kind
6 in the hands of the Canadian government, we ask
7 that those documents not be permitted to be made
8 the subject of any kind of claims. They should be
9 in the public domain as this information is in the
10 public domain. That is the kind of U.S.-Canada.

11 At page 29 we summarize a number
12 of the statements made by the Syrian government.

13 When one comes, Mr. Commissioner,
14 to the question of harm to international relations
15 and the confidence that one nation communicates to
16 another, it is our submission to you when the
17 foreign nation decides for its own interest that
18 it wants to put something on the public record,
19 then it cannot be the case that that foreign
20 nation then can turn to the Government of Canada
21 and say: Well, we can make it public, you can't.

22 It makes no sense and is
23 unprincipled as can be.

24 Certainly the Syrian government,
25 through its formal representatives in Canada and

1 the United States, has not hesitated to make a
2 number of comments about Mr. Arar. We set them
3 out at paragraph 42, between pages 29 and 30, and
4 I want to just draw your attention to a number of
5 them.

6 In the first bullet, halfway
7 through, the Ambassador to Canada says that Syria
8 has shared classified information with CSIS on
9 Maher Arar. That is the first point.

10 In the second bullet -- and part
11 of this we rely on quite heavily -- the same
12 ambassador, halfway through the bullet:

13 "He was released on Sunday.
14 Mr. Arnous said U.S.
15 authorities turned over an
16 extensive dossier on Mr. Arar
17 to Syria that the Americans
18 claimed showed involvement
19 with al-Qaeda terrorist
20 group. This included
21 information obtained during
22 interrogation of Mr. Arar
23 that took place while he was
24 detained in Jordan before
25 being turned over to the

1 Syrians. 'We tried to verify
2 all the information we had
3 from the Americans,' Mr.
4 Arnous said. 'And all his
5 files went to be verified in
6 Syria.' In the end, Syrian
7 authorities could not prove a
8 link, the envoy said."

9 In the last line the Ambassador
10 states:

11 "Syria also provided Canadian
12 officials with the
13 information in the Arar
14 dossier 'as a goodwill
15 gesture'..."

16 That information cannot be the
17 subject of any claim, when the official spokesman
18 of Syria has seen fit to disclose this
19 information.

20 At the end of the day,
21 Mr. Commissioner, we summarize for you a story. I
22 am not going to read it to you, but at paragraph
23 31, a fairly comprehensive story of all the
24 information that has been made public, and it is
25 indeed a great deal of information. All of the

1 information described there, that is reflected in
2 documents held, we submit cannot be the subject of
3 any claim. It is information and therefore
4 documents that ought to be provided through you or
5 directly to us from the Government of Canada.

6 Let me turn to some legal
7 observations if I could, Mr. Commissioner.

8 The legal argument starts at page
9 34, and starts perhaps with the obvious notation,
10 at page 34, paragraph 45, that the Government of
11 Canada itself could have investigated this matter
12 through internal reviews or departmental
13 investigations but instead chose to call a public
14 inquiry.

15 You must assume, in my respectful
16 submission, that section 2 of the Inquiries Act
17 has been met and answered because the matters you
18 are dealing with in fact relate to matters
19 connected with the good governance of this nation.
20 That is what section 2 gives to the executive
21 within their power to make an inquiry happen. It
22 is important business that we are about.

23 Equally so, assertions of
24 confidentiality must then of necessity not be
25 permitted to cover up incidents of bad government.

1 I want to make this distinction.

2 It may be the giving information
3 to a foreign entity is not per se unlawful, but I
4 think it is something that this inquiry will look
5 at as to whether or not it is good government.

6 So whether it is lawful or
7 unlawful, whether we have adverted to the problem
8 as a nation, or the government has, is not the
9 issue. Misconduct, we say, would occur if there
10 was a violation of our treaty obligations; maybe
11 others differ. But the question we need to ask as
12 a nation is: What constitutes the good governance
13 that we want to have when it comes to the sharing
14 of information?

15 In this context, Mr. Commissioner,
16 when you approach the questions we have posed to
17 you, I wanted to remind you that over-broad
18 assertions -- and this is really set out in
19 paragraph 47 of our written memorandum --
20 over-broad assertions of privilege from the
21 public's perspective constitute impunity.

22 The restoration of confidence in
23 institutions of policing and security requires, to
24 the greatest extent feasible, information be put
25 into the public domain.

1 I was minded of the very powerful
2 words of Justice Cory in the Phillips case -- and
3 they are set out in paragraph 47 -- when he talked
4 about the importance of a public inquiry and the
5 public nature.

6 I am going to take a moment to
7 read it. He says in paragraph 47:

8 "One of the primary functions
9 of public inquiries is
10 fact-finding. They are often
11 convened, in the wake of
12 public shock, horror,
13 disillusionment, or
14 scepticism, in order to
15 uncover 'the truth'.
16 Inquiries are, like the
17 judiciary, independent;
18 unlike the judiciary, they
19 are often endowed with
20 wide-ranging investigative
21 powers. In following their
22 mandates, commissions of
23 inquiries are, ideally, free
24 from partisan loyalties and
25 better able than Parliament

1 or the legislatures to take a
2 long-term view of the problem
3 presented."

4 Over at the next page Justice Cory
5 refers to the words of justice Sam Grange who
6 conducted the inquiry into the deaths of children
7 at Hospital for Sick Children. Justice Grange's
8 observations are interesting.

9 He states:

10 "I remember once thinking
11 egotistically that all the
12 evidence, all the antics, had
13 only one aim: to convince
14 the commissioner who, after
15 all, eventually wrote the
16 report. But I soon
17 discovered my error. They
18 are not just inquiries; they
19 are public inquiries ... I
20 realized that there was
21 another purpose to the
22 inquiry just as important as
23 one man's solution to the
24 mystery and that was to
25 inform the public. Merely

1 presenting the evidence in
2 public, evidence which had
3 hitherto been given only in
4 private, served that purpose.
5 The public has a special
6 interest, a right to know and
7 a right to form its opinion
8 as it goes along."

9 And I pause to note that the right
10 to know is certainly enshrined in section 2 of the
11 Charter.

12 We take the view that it was
13 indeed the shock and horror of having a Canadian
14 citizen sent to a nation whose human rights record
15 is intolerable that caused the shock, dismay, the
16 disillusionment and scepticism. And the need to
17 know whether there is blood on the hands of
18 government agencies is indeed a pressing one for
19 the Canadian nation.

20 One of the principles we asked you
21 to keep in mind was articulated in the important
22 case of Carey in Ontario. It is described at
23 paragraph 50 in our memorandum.

24 One of the principles brought to
25 bear in assessing whether there should be a

1 disclosure of cabinet documents, which usually are
2 one of the most protected kinds of documents or
3 information, the Supreme Court of Canada made this
4 observation.

5 We have set it out in its entirety
6 at paragraph 50, but I want to just read you the
7 last few lines set out in paragraph 50.

8 "The purpose of secrecy in
9 government is to promote its
10 proper functioning, not to
11 facilitate improper conduct
12 by the government. This has
13 been stated in relation to
14 criminal accusations in
15 Whitlam, and while the
16 present case is of a civil
17 nature, it is one where the
18 about behaviour of the
19 government is alleged to have
20 been tainted."

21 And certainly no less can be said
22 of the circumstances before you.

23 We have also cited the case of
24 Sankey and Whitlam, perhaps an historic case in
25 examining the issues of privilege.

1 This was a case, Mr. Commissioner,
2 that you may well remember. But for those who may
3 not have it at their fingertips, it was a case
4 involving an effort by a person to lay a private
5 information, as could be done in Australia at the
6 time, against the sitting Prime Minister -- no, he
7 was not sitting -- against the former Prime
8 Minister of Australia.

9 Although it is a case that might
10 be described as a procedural nightmare, the court
11 was called upon to make ma number of
12 determinations with respect to access to
13 documents.

14 In the course of that, three of
15 the judges, Justice Gibbs, Justice Stephen and
16 Justice Mason, dealt with issues that are
17 pertinent toward you, that you must deal with, and
18 had to deal with the issue of what was to be done
19 with documents over which a privilege was asserted
20 that had been put into the public domain.

21 In that case, the documents had
22 been put into the public domain by being filed in
23 Parliament, but the respondent had taken the
24 position that the parliamentary privilege
25 prevented anyone from referring to what was in the

1 public domain.

2 Fortunately, I can report the law
3 is not an ass and that the court dealt quite
4 appropriately with that submission.

5 I thought it would be important to
6 identify those portions of their judgment because
7 there is no pinpoint cites here, and they may
8 provide you with some assistance.

9 In Justice Gibbs' decision at page
10 19, paragraph 31 of the judgment, his lordship
11 concluded that the document so notoriously
12 published was a document that had to be produced.

13 The next --

14 THE COMMISSIONER: Did the court
15 there rely primarily on the principle of waiver?

16 MS EDWARDH: No. I think they did
17 what our court did in Babcock, and I will come to
18 Babcock. I am about to take you there.

19 In Babcock, Mr. Commissioner, the
20 Supreme Court of Canada was faced with the
21 situation where a number of Department of Justice
22 lawyers sued the Government of Canada, alleging a
23 breach of fiduciary relationship in respect of
24 their wages. They were not given the same wages
25 as Toronto Department of Justice lawyers.

1 In the course of discoveries a
2 number of documents were released to the
3 Department of Justice lawyers, as part of the
4 discovery process, and indeed they had another set
5 on their own. It doesn't quite say in the
6 judgment how they came to have them.

7 Justice McLachlin speaking for the
8 whole court very clearly says it poses the
9 question that it is not an issue of waiver that
10 they have the documents. What it is is they are
11 disclosed. They have them. They are in the
12 public domain.

13 So the issue of waiver was dealt
14 with by the Court of Appeal, and the Court of
15 Appeal used the doctrine of waiver. The Supreme
16 Court of Canada said no, that was not the right
17 way to think about it. The right way to think
18 about it was: Was it in the public domain? Had
19 it been disclosed?

20 THE COMMISSIONER: Is one of the
21 ways we would think about it here, would your
22 argument be -- the test here, as you are aware, in
23 my mandate is whether or not it would be injurious
24 to national security, and so on -- that if there
25 is any injury to be incurred that it is already

1 incurred as a result of the fact that it is now in
2 the public domain, so that there would be no
3 additional injury by the disclosure that you now
4 seek?

5 MS EDWARDH: That is certainly a
6 way that one could look at it, and indeed is a way
7 that it has been reviewed and looked at in the
8 context of the access jurisprudence.

9 THE COMMISSIONER: Right.

10 MS EDWARDH: For example, some of
11 the -- and let me just take you there. Let me
12 give you the cites that are relevant in --

13 THE COMMISSIONER: I don't want to
14 take you out of the flow of your argument.

15 MS EDWARDH: The cites in Sankey
16 relate to Gibbs, page 19, paragraph 31; Stephen,
17 pages 36 and 37.

18 You see as whole heading "Prior
19 Publication", and at the very end, in paragraph 42
20 of the decision he makes the observation:

21 "If the Executive Council
22 minutes have in fact received
23 wide publicity and if
24 involved in that process has
25 been the tabling of the

1 minutes in Parliament,
2 questions of proof and in
3 particular of whether the
4 proof of tabling involves an
5 infringement of parliamentary
6 privilege is said to arise.
7 This I deal with later.
8 Subject only to this, I would
9 regard such publicity as
10 going far towards destroying
11 any claim to Crown
12 privilege."

13 And he goes on.

14 While this case which goes to the
15 mid '70s -- I don't want to put it any higher,
16 Mr. Commissioner, than they say it is a very
17 important factor -- may be dispositive but not
18 necessarily dispositive in the public, we take the
19 view that if you look at our context, a public
20 inquiry called in respect of matters of national
21 security and in respect of matters of
22 international relations, where the government has
23 given much information out, that it is enough to
24 simply ask yourself has this been puts in the
25 public domain and then to say no privilege lies.

1 The last cite is Justice Mason,
2 page 59, paragraph 54.

3 He makes another interesting
4 observation in paragraph 54.

5 He starts by saying -- and this is
6 page 59 again, Mr. Commissioner:

7 "In the case of Mr. Stone's
8 minute paper there is an
9 additional complication."

10 That is one of the documents in
11 question.

12 "According to the evidence,
13 the contents of a document
14 purporting to a copy of
15 Mr. Stone's minute paper was
16 published in The Bulletin, a
17 weekly journal with
18 substantial circulation. If
19 it were established that a
20 document the subject of a
21 claim to Crown privilege had
22 been widely published in the
23 community it would be
24 difficult to sustain the
25 claim of privilege. The

1 damage, if any, consequent
2 upon disclosure would have
3 occurred .."

4 And that is your point,

5 Mr. Commissioner: would have occurred.

6 "... and additional use of
7 the document in court
8 proceedings would make
9 little, if any, difference.
10 However, to say this assumes
11 that the circumstances of the
12 publication are such that
13 they leave little or no doubt
14 as to the authenticity of
15 what is published. If, on
16 the other hand, there exists
17 real doubt as to the
18 authenticity of what is
19 published, production of the
20 document in court and its
21 comparison with the published
22 material may serve to set
23 doubt at rest and there by
24 confer the mantle of
25 authenticity on a publication

1 which was made unlawfully or
2 in breach of confidence."

3 So that is the consideration.

4 We take the view that with respect
5 to the information that we have laid before you,
6 there is no serious issue of authenticity, and
7 when put together one piece informs the other
8 piece and adds to the strength of the conclusion
9 that they are authentic utterances, either by
10 attribution or unnamed and that you can act on
11 them.

12 THE COMMISSIONER: The issue of
13 authenticity is something that I can examine,
14 because I will have an opportunity of looking at
15 the documents and making a judgment as to whether
16 or not the information that is in the public
17 domain corresponds and is authentic.

18 MS EDWARDH: Of course, subject to
19 only this caveat, Mr. Commissioner. We believe
20 that there was an effort to provide
21 disinformation. That kind of gets you into the
22 after the fact issue.

23 You have heard the discussion
24 about Mr. Harper and his comments.

25 We have filed with you a tape --

1 we don't need to play it today -- and a transcript
2 of an interview with Ms Ablonczy, a Member of
3 Parliament. We might put those into a kind of
4 separate category.

5 It is in Volume IV. We have
6 provided the tape to everyone, because we
7 ourselves did the transcription and should there
8 be any doubt of course the tape is available of
9 the actual television program -- I mean the radio
10 program.

11 The interview is one with CBC's
12 Evan Dyer. It is the very last, Tab 8.

13 So at some point disinformation
14 becomes important because it serves perhaps a
15 purpose that relates to good faith assertions of
16 confidentiality.

17 If you turn briefly to the
18 interview, you see discussions with Mrs. Ablonczy.

19 THE COMMISSIONER: Where do I find
20 that?

21 MS EDWARDH: You find it in the
22 supplemental volume, which is Volume IV, Tab 8.

23 THE COMMISSIONER: Yes. Go ahead.

24 MS EDWARDH: There are
25 particularly a series of statements.

1 I would start at page 2, in the
2 centre of the page, where Mr. Dyer says to her,
3 "Diane", and he then switches into his interview.

4 She says:

5 "Well, Mr. Arar became a
6 Canadian Citizen in 1991.
7 He's 45 years old now."

8 The reporter says:

9 "He's in his early thirties."

10 Diane says:

11 "I'm sorry?"

12 And then Diane:

13 "... correct. Um, my
14 information was different so
15 I'd have to check that out."

16 She goes on to say, if you just
17 flip over -- I am sorry, at the bottom page:

18 "Before yesterday the
19 Canadian government had not
20 disclosed that in fact Arar
21 is a citizen of Syria. So,
22 they were sending him home,
23 so to speak."

24 Then down further in the
25 italicized portion, there is a quote from

1 Mr. Graham, and then Diane said:

2 "He made a choice to retain
3 Syrian citizenship. He made
4 that choice when he was an
5 adult."

6 I can tell you, Mr.

7 Commissioner -- and we will get to this perhaps
8 tomorrow -- that the U.S. government itself, in an
9 immigration advisory to people, tells them not to
10 even try to abandon their Syrian citizenship
11 because it is hopelessly complicated and the
12 Syrians won't let people.

13 So you have Ablonczy saying this
14 about his choices, and then she says, if you turn
15 the page over to 4:

16 "I have information that he
17 visited Jordan. Um, he went
18 to Tunisia, on a holiday.
19 Um, he did not take his wife.
20 He did not contact his wife
21 while he was away, uh, and
22 then came back to the United
23 States. Uh, and information,
24 apparently, at that time came
25 into the U.S. hands which

1 information that is public actually fits with a
2 reading of your terms of reference. The relevant
3 portion we have set out in paragraph 57, page 40.

4 You are directed under paragraph
5 (k) again:

6 "... to take all steps
7 necessary to prevent
8 disclosure of information
9 that, if it were disclosed to
10 the public ..."

11 Reading it with my eyes,
12 Mr. Commissioner, for the moment, it makes no
13 sense for that part of (k), indeed the rest of
14 (k), to relate to matters which are already
15 disclosed, in our respectful submission.

16 You can either do it as you were
17 talking, by way of saying the incremental harm
18 certainly doesn't reach any standard of harm that
19 is worth noting; or you can say that I don't have
20 to prevent disclosure of information that has
21 already been disclosed to the public.

22 Both are available to you. But
23 you must, in our submission, first ask yourself as
24 you enter this task: Is this information in fact
25 confidential?

1 I want to take you if I could,
2 Mr. Commissioner, to the decision of Babcock and
3 Canada. It is described briefly in paragraph 58
4 of our memorandum of argument, and you will also
5 find it in our book of authorities at Tab 4.

6 Again I outline to you, and if you
7 just look at the headnote at page 2 one sees the
8 facts and the dispute between lawyers in the
9 Department of Justice, Vancouver, and the action
10 for breach of contract and breach of fiduciary
11 duty.

12 What happened, and I should make
13 this observation, is I understand that eventually
14 despite the release of the documents as part of
15 discovery, the Government of Canada produced a
16 certificate. It was a certificate which claimed
17 protection for 12 government documents that had
18 been listed as producible, some of which had
19 already been disclosed, and for five documents
20 that were in possession and control of the
21 respondents, and for other government documents
22 that had prior to the fact not been listed or been
23 listed as not producible.

24 In any event, the framework of the
25 discussion rests with the certificate and the

1 duties of the Clerk of the Privy Council in
2 respect to the certification of information.

3 Let me start, if I could, by
4 pointing to the decision of the Court of Appeal.
5 In paragraph 6 of the decision, Justice McLachlin
6 speaking for the court makes the observation:

7 "A majority of the Court of
8 Appeal reversed this
9 decision ..."

10 Which had upheld the certificate.

11 "... and ordered production
12 of the documents on the
13 ground that the government
14 had waived its right to claim
15 confidentiality by listing
16 some of the documents as
17 producible and by disclosing
18 selective information in the
19 McCoy affidavit."

20 She then sets out section 39. I
21 want to make this observation about section 39.
22 Section 39 is -- and so is section 38 -- in
23 respect of the disclosure of information.

24 If one turns over to page 10 of
25 the decision, paragraph 22, Chief Justice states:

1 "Section 39(1) permits the
2 Clerk to certify information
3 as confidential. It does not
4 restrain voluntary disclosure
5 of confidential information.
6 This is made clear from the
7 French enactment of s. 39(1)
8 which states that s. 39
9 protection arises only
10 `dans les cas où'..."

11 I apologize to anyone who is
12 fluent here.

13 "...the Clerk or minister
14 opposes disclosure of the
15 information. Therefore, the
16 Clerk must answer two
17 questions before certifying
18 information: first, is it a
19 Cabinet confidence within the
20 meaning of ss. 39(1) and
21 39(2); and second ... is it
22 information which the
23 government should protect
24 taking into account the
25 competing interests in

1 disclosure and retaining
2 confidentiality?"

3 Then down at the bottom of the
4 page, paragraph 25:

5 "A third requirement arises
6 from the general principle
7 applicable to all government
8 acts, namely, that the power
9 exercised must flow from the
10 statute and ... must be
11 issued for the bona fide
12 purpose of protecting Cabinet
13 confidences in the broader
14 public interest. The
15 function of the Clerk under
16 the Act is to protect Cabinet
17 confidences, and this alone.
18 It is not to thwart public
19 inquiry nor is it to gain
20 tactical advantage in
21 litigation. If it can be
22 shown from the evidence or
23 the circumstances that the
24 power of certification was
25 exercised for purposes

1 outside those contemplated by
2 s. 39, the certification may
3 be set aside as an
4 unauthorized exercise of
5 executive power..."

6 Then of course she quotes the
7 famous case of Roncarelli and Duplessis.

8 At paragraph 26:

9 "A fourth requirement for
10 valid certification flows
11 from the fact that s. 39
12 applies to disclosure of the
13 documents. Where a document
14 has already been disclosed,
15 s. 39 no longer applies.
16 There is no longer a need to
17 seek disclosure since
18 disclosure has already
19 occurred. Where s. 39 does
20 not apply, there may be other
21 bases upon which the
22 government may seek
23 protection against further
24 disclosure at common law..."

25 And she cites Duncan and Cammell,

1 Leeds and Alberta and Sankey and Whitlam.

2 "However, that issue does not
3 arise on this appeal.

4 Similarly, the issue of
5 inadvertent disclosure does
6 not arise here because the
7 Crown deliberately disclosed
8 certain documents during the
9 course of litigation.

10 27 On the basis of these
11 principles, I conclude that
12 certification is generally
13 valid if: (1) it is done by
14 the Clerk or minister; (2) it
15 relates to information within
16 s. 39(2); (3) it is done in a
17 bona fide exercise of
18 delegated power; (4) it is
19 done to prevent
20 disclosure..."

21 I underline this,

22 Mr. Commissioner:

23 "...it is done to prevent
24 disclosure of hitherto
25 confidential information."

1 We rely very strongly on the
2 decision in Babcock for the proposition that
3 resort cannot be had to prevent disclosure of
4 information that has not and cannot be reasonably
5 considered to be hitherto confidential
6 information.

7 In our written materials,
8 Mr. Commissioner, we then take you to a couple of
9 other cases and they present a relevant theme.

10 We refer to the case of K.F. Evans
11 Ltd. at paragraph 59 of the materials. That dealt
12 with a request to have access to redacted portions
13 of an affidavit filed in litigation by the
14 Government of Canada in respect of their answer to
15 a challenge to the Minister of Foreign Affairs
16 decision about issuing an export permit.

17 One of the things we thought was
18 interesting about this case, it is another
19 example -- although the government said you can't
20 have the redacted portions, they reflect
21 solicitor-client communication, the court made the
22 observation, much as you have done: Well, wait a
23 minute. This has already been disclosed.

24 In the portions set out in
25 paragraph -- page 42 -- the court states:

1 "On my view of the material,
2 I find that there can be no
3 harm from disclosure of some
4 of the Canada Evidence Act
5 deletions. For example, the
6 respondent concedes in the
7 case of deletions [No.] 15
8 and [No.] 16 on page 7, the
9 information is already
10 publicly known. In reviewing
11 the material, I find that
12 what is disclosed on page 25
13 covers essentially the same
14 subject matter as what is
15 kept confidential in
16 deletions 4 and 5..."

17 The court then asking itself the
18 question about harm declines then to give effect
19 to the request for redaction and orders the
20 material to be produced.

21 That of course was an application
22 for judicial review.

23 When we come to the principles
24 developed under the Access Act, again,
25 Mr. Commissioner, they don't adopt a Babcock

1 approach, but under access there are a series of
2 decisions that look to the issue of this proof of
3 harm and what do we say when information has
4 already been released into the public domain.

5 In paragraph 60 we address the
6 test that is involved in a number of the sections
7 of the Act about whether there is a reasonable
8 expectation of probable harm and point out to you
9 that when there is information that has been in
10 the public domain it is very difficult and the
11 courts have not been comfortable giving effect to
12 the claim. They have done it on the harm-based
13 approach.

14 Perhaps it is worth taking you to
15 at least the first of these Canada (Information
16 Commissioner) and Canada (Prime Minister). It is
17 in Tab 6 of our materials.

18 The records sought were records
19 that the government had produced in respect of
20 public opinion polls and focus groups on the issue
21 of national unity and constitutional change. The
22 government objected to the production of that.

23 If I could just take you first to
24 page 12 of the decision. It is a decision of
25 Justice Rothstein in the Federal Court, Trial

1 Division. He approaches this task by saying:

2 "In this case the exemption
3 is claimed..."

4 That is the exemption from
5 production:

6 "...is claimed pursuant to
7 section 14. The words 'could
8 reasonably be expected to' in
9 section 14 are also found in
10 other sections of the Act.
11 In considering the same
12 wording in
13 paragraph 20(1)(c), the
14 Federal Court of Appeal has
15 determined that the exception
16 to access must be based on a
17 'reasonable expectation of
18 probable harm'..."

19 They quote the important case of
20 Canada Packers in the Federal Court of Appeal.

21 "A careful reading of the
22 decision of MacGuigan J.A.
23 reveals that he was 'tempted'
24 to construe the word 'could
25 reasonably be expected to' by

1 analogy to an approach to
2 tort law but resisted that
3 temptation since it might
4 open the door to an exception
5 for possible rather than
6 probable harm."

7 Then Justice Rothstein goes on at
8 page 15 and he deals with the Government of Canada
9 suggestion that there should be a sliding scale.
10 He rejects it saying he is bound by Canada
11 Packers.

12 Then he points to the
13 jurisprudence, Mr. Commissioner. That is
14 summarized in paragraph 34 of this decision. He
15 states that relevant considerations for him on
16 this issue of probable harm -- and I want to draw
17 your attention to numbers 4 and 5:

18 "It is relevant to consider
19 if the information sought to
20 be kept confidential is
21 available from sources
22 otherwise available by the
23 public and whether it could
24 be obtained by observation or
25 independent study by a member

1 of the public acting on his
2 or her own..."

3 5. Press coverage of a
4 confidential record is
5 relevant to the issue of
6 expectation of probable harm
7 from its disclosure..."

8 He then cites Canada Packers as
9 well as another case.

10 THE COMMISSIONER: Would you
11 suggest, Ms Edwardh, that the test that I should
12 apply is that, a reasonable expectation of
13 probable harm? The language in the Order in
14 Council tracks the language in the Evidence Act,
15 in at least 38.01(6), which would cause, which --

16 MS EDWARDH: I would like to kind
17 of reserve on that for a moment because I am
18 deeply attracted to the language in Babcock where
19 Chief Justice McLachlin says you don't walk in the
20 door of 38 and 39, those sections, unless the
21 information is confidential.

22 I am not at this stage urging you,
23 Mr. Commissioner, that the only way you can go
24 with this is to do it in the context of harm or
25 proof of harm but, rather, you can say: To get me

1 into the door you have to show me this isn't
2 public information.

3 THE COMMISSIONER: So I
4 understand, in effect what you would be proposing
5 is a two-stage approach. First of all, you would
6 say under Babcock I must look to see whether or
7 not it has been disclosed. If so, then you would
8 say that is the end of the inquiry and, assuming
9 either I don't agree with that argument or I
10 thought some of it hadn't been disclosed, then
11 move to the second stage.

12 MS EDWARDH: Yes.

13 THE COMMISSIONER: My question
14 then to you is: At that stage -- and I will
15 surely get to that with some evidence, whether or
16 not --

17 MS EDWARDH: Yes.

18 THE COMMISSIONER: -- because some
19 information clearly will not have been
20 disclosed -- is just your submissions with respect
21 to the would be injurious test. If you want to
22 get back to me on that, but I would obliged to
23 hear from you on that.

24 MS EDWARDH: Off the top of my
25 head -- and I will check to make sure our

1 submissions are consistent with this -- I would
2 urge this: If you get to that stage and you are
3 looking at the issues around injury, then I think
4 you have to at least establish the basis, or Crown
5 counsel has to establish the basis of injury on
6 the basis of that test.

7 THE COMMISSIONER: Okay.

8 Thank you.

9 MS EDWARDH: One of the things we
10 say in our discussion of -- I am turning to
11 another point and I will be another 20 minutes.

12 THE COMMISSIONER: Did you want to
13 take a --

14 MS EDWARDH: Would it be
15 convenient to take a break?

16 THE COMMISSIONER: Sure. Why
17 don't we do that?

18 MS EDWARDH: Thank you.

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

21 --- Upon recessing at 11:26 a.m. /

22 Suspension à 11 h 26

23 --- Upon resuming at 11:44 a.m. /

24 Reprise à 11 h 44

25 THE COMMISSIONER: Ms Edwardh.

1 MS EDWARDH: Thank you,
2 Mr. Commissioner.

3 I would like, sir, to refer you
4 briefly to the decision of Air Atonabee. It is
5 referred to under paragraph 60 in our memorandum.
6 It is a helpful discussion of what is
7 confidential.

8 In Air Atonabee, third parties had
9 provided to the Government of Canada information
10 which they asserted was confidential. The
11 government was inclined to release that
12 information under the access act.

13 So at issue -- and the third
14 parties were actively involved in the proceedings.

15 At issue was whether or not
16 section 20(b) of the Act -- which characterizes
17 the type of information, whether it was financial,
18 technical or scientific. And then (b) also was a
19 requirement that it be confidential information of
20 that kind.

21 If you turn to page 15 --

22 THE COMMISSIONER: Which tab
23 is this?

24 MS EDWARDH: This is Tab 8,
25 Mr. Commissioner.

1 THE COMMISSIONER: Thank you.

2 MS EDWARDH: There is a useful and
3 thoughtful discussion of this requirement that the
4 information must be confidential.

5 The court states:

6 "The second requirement under
7 s. 20(1)(b), that the
8 information be confidential,
9 has been dealt with in a
10 number of decisions. These
11 establish that the
12 information must be
13 confidential in its nature by
14 some objective standard which
15 takes account of the content
16 of the information, its
17 purposes and the conditions
18 under which it was prepared
19 and communicated..."

20 I quote the Associate Chief
21 Justice Jerome in the case of Montana.

22 "It is not sufficient that
23 the third party state,
24 without further evidence,
25 that it is confidential....

1 Information has not been held
2 to be confidential, even if
3 the third party considered it
4 so, where it has been
5 available to the public from
6 some other source..."

7 Again quoting Canada Packers.

8 "...or where it has been
9 available at an earlier time
10 or in another form from
11 government.... Information
12 is not confidential where it
13 could be obtained by
14 observation albeit with more
15 effort by the requester..."

16 Then the next paragraph:

17 "It is not sufficient that
18 [the applicant] considered
19 the information to be
20 confidential ... It must
21 also have been kept
22 confidential by both parties
23 and ... must not have been
24 otherwise disclosed, or
25 available from sources to

1 which the public has access."

2 I wanted to commend that reasoning
3 to you. It is a decision of Justice MacKay in the
4 Federal Court, Trial Division.

5 I don't think I need it take you
6 to any other jurisprudence, but I would like to
7 just reflect on the contents of paragraph 61 in
8 our memorandum of argument.

9 It will be of no passing surprise
10 to you, Mr. Commissioner, that the law of
11 privilege -- not just privileges dealing with
12 public interest immunity, or national security
13 confidentiality -- is and historically has been
14 entirely sensitive to the issue of whether or not
15 the matter that is privileged is confidential or
16 is otherwise in the public domain.

17 We draw your attention first to
18 the case of Hunter in the Ontario courts, a
19 decision of Justice Cory, but it will be of no
20 surprise again to you that while we will go to
21 great lengths to protect the identity of a
22 confidential police informant, it stops when that
23 identity becomes publicly known or otherwise
24 widely disseminated.

25 Solicitor-client privilege is to

1 the same effect. While occupying a unique and
2 fundamental position in our legal fabric, it is
3 also the case that if a lawyer and client choose
4 to carry on their consultations and provide
5 information and communicate in public or in the
6 presence of a third party, that is sufficient to
7 destroy the protection.

8 We also note that spousal
9 privilege, another important privilege, does not
10 apply under section 4(3) of the Canada Evidence
11 Act if the communication occurs in front of a
12 third party or falls into the possession of a
13 third party.

14 Fourthly, we note that the famous
15 Wigmore four points adopted by the Supreme Court
16 of Canada in Slavutych and Baker contemplate a
17 circumstance where it is clear in the fourth
18 criteria that if the matter has been made public
19 then you couldn't possibly meet the injury test
20 set out to maintain the privilege.

21 So overall, if you look at a
22 consistent approach to the law of privilege,
23 whether we are dealing with the assertions of
24 governmental privilege or dealing with the
25 assertions of other kinds of privilege well known

1 to the common law or to the Canada Evidence Act,
2 once the information is in the public domain the
3 privilege to keep that information out of the
4 public domain really dies.

5 We submit -- and we do this in
6 paragraph 64 of our materials -- that the
7 government can't make disclosure for one purpose
8 and then assert the existence of national security
9 confidentiality for another purpose in respect of
10 the same information.

11 We also assert that the government
12 can't protect communication from foreign nations
13 when either the government has released it or the
14 foreign nations have released it themselves for
15 their own tactical or other reasons.

16 As a result, Mr. Commissioner,
17 when one stands back and looks at our motion to
18 you, we ask you to, in the first place, force the
19 Government of Canada to tell you, and based upon
20 the record we have filed, whether this information
21 is in any respect in the public domain, and then
22 tell them they cannot go forward with any claims.

23 If not, and in respect of other
24 information not in the public domain, we ask you,
25 when approaching the question of harm, to ask and

1 scrutinize any claim for harm, because we submit
2 that if it is already out there, then whatever
3 harm that will occur has occurred and there can be
4 no claim that a real injury would occur.

5 On that basis, Mr. Commissioner, I
6 want to thank you for your patience in hearing my
7 submission, but we would ask you to consider the
8 orders as rendered.

9 I want to ask you just one
10 question. I don't know how you wish to deal with
11 motions. Would it be appropriate that we request
12 that our motion material be filed? Otherwise,
13 will it --

14 THE COMMISSIONER: Do you have any
15 thought on that, Mr. Cavalluzzo?

16 MR. CAVALLUZZO: I would think it
17 could be filed, but it's not necessary to make
18 them exhibits.

19 THE COMMISSIONER: An exhibit, no,
20 if you were suggesting that. I think it is filed
21 and received and we will stamp as received all of
22 the material --

23 MS EDWARDH: Thank you.

24 THE COMMISSIONER: -- that has
25 been filed by you and Ms McIsaac in response.

1 MS EDWARDH: Thank you. Then
2 those are my submissions, Mr. Commissioner.

3 THE COMMISSIONER: Thank you very
4 much, Ms Edwardh. It is very helpful.

5 Ms McIsaac.

6 I notice the lectern is over on
7 the other side. You were moved, displaced.

8 You are welcome to speak from the
9 table if you wish, although if you would like to
10 rearrange.

11 We can think about in future
12 having more than one lectern for parties here so
13 that we don't have to go back and forth.

14 MS McISAAC: I would prefer to use
15 the lectern, sir.

16 THE COMMISSIONER: Okay, I
17 understand.

18 Do you want me to rise for five
19 minutes and let you reorganize? Does that make
20 sense?

21 MS McISAAC: That would be fine.
22 Thank you very much.

23 THE COMMISSIONER: We will rise
24 for five minutes.

25 --- Upon recessing at 11:53 a.m. /

1 Suspension à 11 h 53

2 --- Upon resuming at 11:58 a.m. /

3 Reprise à 11 h 58

4 THE COMMISSIONER: Yes,

5 Ms McIsaac.

6 SUBMISSIONS / SOUMISSIONS

7 MS McISAAC: Thank you, sir.

8 The Attorney General has filed a
9 response to the motion for disclosure. I will be
10 following, in a general way, the arguments that we
11 have put in writing with respect to our response.

12 The Attorney General has also
13 filed, and it is important because I do rely on
14 it, our submission as requested by the Commission
15 generally with respect to issues of national
16 security confidentiality. That submission was
17 filed in accordance with what was at the time, and
18 I believe still is, Rule 37(a) of the Rules of
19 Procedure adopted by the Commission.

20 THE COMMISSIONER: I have it here.

21 Thank you.

22 MS McISAAC: Thank you.

23 That submission obviously was of a
24 general nature and laid down for you the types of
25 information for which the Attorney General

1 believes national security confidentiality might
2 need to be claimed and provided to you the
3 jurisprudence which has dealt with issues of
4 national security confidentiality in the context
5 of the Canada Evidence Act, the Immigration Act,
6 and the Access to Information Act, where the
7 courts, particularly the Federal Court, have had
8 occasion to grapple with a number of the issues
9 that you will have to deal with during the course
10 of this inquiry.

11 But with respect to the motion
12 that is brought today, I have essentially four
13 points that I would like to make.

14 The first one is that the
15 motion -- and I realize my friend has had some
16 discussion with you on this -- but generally, in
17 my submission, the motion per se is ill-conceived.
18 I will expand on that, but it seeks relief, as you
19 discussed with Ms Edwardh, which is essentially
20 disclosure to the public and to Mr. Arar rather
21 than disclosure through you in accordance with the
22 rules in the terms of reference. I will come back
23 to that.

24 We also take the position that the
25 motion as such is premature, because it

1 necessarily is brought in the abstract because it
2 doesn't relate to specific documents; it relates
3 to specific general categories of information
4 only, which in fact may or may not be contained in
5 documents held by the government which are being
6 turned over to the Commission.

7 The motion also cites media
8 reports and speculation in those reports as proof
9 that facts are in the public domain. I caution
10 you that what is in the media reports may not
11 necessarily be an accurate reflection of the
12 actual facts.

13 Indeed, Ms Edwardh herself
14 referred to what she called disinformation.

15 Fourthly and finally, the motion
16 is based on a number of erroneous assumptions;
17 that is, assumptions that the Attorney General
18 intends to claim national security confidentiality
19 in respect of information where no such claim is
20 intended; or, in the other cases, that the
21 government holds information which in fact it does
22 not even hold.

23 Before I come to those four
24 points, I would like to take a moment to make some
25 observations with respect to the procedural

1 background of the inquiry and the inquiry's
2 mandate.

3 The most important thing for
4 everyone to keep in mind is that the inquiry is an
5 impartial fact-finding exercise. You are not here
6 to determine guilt or innocence. You are not here
7 to determine criminal or civil liability. You are
8 here to inquire into and report to the Government
9 of Canada with respect to the actions of Canadian
10 officials in respect of the matters relating to
11 Mr. Arar's arrest and detention in New York, his
12 deportation to Syria, the events that occurred
13 while in Syria and his eventual return to Canada.

14 You are not inquiring into the
15 actions of foreign government officials, rather,
16 Canadian officials, although I concede that
17 necessarily your inquiry into the actions of
18 Canadian officials may well lead you to ask
19 questions about the actions of foreign government
20 officials.

21 The process that is to be
22 followed -- and this is a process that you and
23 your counsel have established through the Rules of
24 Procedure -- is that you receive all information.
25 To facilitate that, this Commission has been added

1 to the schedule of the Canada Evidence Act so that
2 you may receive information which would normally
3 be the subject of a claim for national security
4 confidentiality, in that it would be described as
5 either sensitive information or potentially
6 injurious information under the Canada Evidence
7 Act.

8 Therefore, the Government of
9 Canada has set this inquiry up to ensure that you
10 receive all information. You are also added as a
11 Commission to the schedule to the Security of
12 Information Act.

13 Your terms of reference set up a
14 public inquiry but they also circumscribe what
15 aspects of this inquiry will be made public or can
16 be made public. In doing so, in my submission,
17 the government was attempting to steer a course
18 and balance the public interest in getting
19 information and having you inquire into and report
20 on the actions of Canadian officials; but the
21 understanding that this necessarily involved you
22 becoming familiar with and having access to
23 information, the release of which would be
24 injurious to international relations, national
25 security or national defence.

1 I will use the term "national
2 security confidentiality" to deal with all of
3 those matters.

4 Accordingly, in the terms of
5 reference you are directed to take all steps
6 necessary to prevent disclosure of information
7 that if it were disclosed to the public would, in
8 your opinion, be injurious to these national
9 security interests.

10 You are charged with the first
11 determination of whether national security
12 confidentiality ought to be applied to
13 information.

14 You are also directed to ensure
15 that the conduct of the inquiry does not
16 jeopardize any ongoing criminal investigation or
17 criminal proceeding. In my submission, the
18 requirement that the inquiry not jeopardize any
19 ongoing criminal investigation or proceeding
20 really also includes any prosecutions that might
21 result from a criminal investigation.

22 So you are to be mindful, in
23 determining what information is to be released or
24 what lines of inquiry you undertake, that you are
25 not to jeopardize these ongoing criminal

1 investigations or proceedings.

2 Within that context, it is
3 important to stress that while there may be
4 limitations on what information can be made
5 public, or what information can be provided to
6 Mr. Arar, no information will be withheld from you
7 and your counsel.

8 In order to deal with the
9 procedures and the restrictions that have been
10 placed on this inquiry by the Order in Council,
11 you have issued an order to the Attorney General
12 for the production of records from a number of
13 listed departments. That exercise is ongoing.

14 We have produced a large number of
15 documents. Some departmental productions are
16 complete, others are still ongoing. Indeed,
17 thousands of pages of documents have been produced
18 to your counsel and we are in the process of
19 dealing with additional documents.

20 In some cases those documents have
21 been produced with indications as to what
22 information is subject to a claim for national
23 security confidentiality by the Attorney General.
24 In those cases, what has happened is your counsel
25 has been provided with a version of the document

1 that can be read completely, as well as a version
2 of the document where information has been blacked
3 out in order to indicate what is the subject of a
4 national security claim.

5 While in some cases that is more
6 prevalent than in others, the net result is not
7 dissimilar to the affidavit which my friend has
8 produced at Tab 2 of Volume IV of her book of
9 documents where information is electronically
10 blacked out to indicate where the claim for
11 national security confidentiality has been made.

12 THE COMMISSIONER: Certainly the
13 SIRC report that was produced was very dissimilar
14 to that affidavit.

15 MS McISAAC: I understand that,
16 sir, and I think I have indicated that that was a
17 mistake.

18 THE COMMISSIONER: Just so that I
19 understand, because I am not sure I heard it on
20 the record, it was a mistake the extent to which
21 national security confidentiality was claimed?

22 MS McISAAC: That is correct, sir,
23 and that document is being reviewed.

24 THE COMMISSIONER: It will be
25 reviewed and will be resubmitted.

1 MS McISAAC: That is correct.

2 THE COMMISSIONER: Do I take it
3 from that that then there will be portions of that
4 document that won't be redacted?

5 MS McISAAC: That is correct, sir.

6 THE COMMISSIONER: And is the
7 process as you contemplate it then that that
8 document, redacted in the proper form, can then be
9 released, if Commission counsel decide to do so,
10 to the parties involved in the proceedings?

11 MS McISAAC: That is correct, sir.

12 THE COMMISSIONER: Do I understand
13 the process, as you see it, is that once the
14 government submits documents and has either not
15 claimed any national security confidentiality or
16 has claimed in part national security
17 confidentiality, the unredacted portions, or the
18 documents over which no claim is made, can then be
19 made available?

20 MS McISAAC: That is correct, sir,
21 subject to recognizing that not all documents have
22 been submitted to the Commission with claims of
23 national security confidentiality identified. In
24 a number of cases we have submitted the documents
25 without having gone through that exercise, on the

1 understanding with counsel that they will identify
2 the documents they wish to use, give those back to
3 us and at that point we will review them and
4 indicate if there are any claims for national
5 security confidentiality.

6 THE COMMISSIONER: Once you have
7 made an examination to determine if you are going
8 to make a claim, once that is done those documents
9 can be produced.

10 MS McISAAC: Right. In fairness,
11 sir, I have also asked your counsel for another
12 indulgence. This is not a scientific exercise.
13 It is a very difficult matter of exercise of
14 judgment, and I am quite certain that from time to
15 time information will be inadvertently not removed
16 from a document or, alternatively, a claim will be
17 made for something where we have decided that that
18 claim need not be made.

19 I have asked them that if they
20 notice those discrepancies to please come back to
21 us and we will sort them out. I can tell you,
22 with the volume of documents and the complexity of
23 the exercises you will see, those errors are bound
24 to be made and we will try to address them as
25 quickly as possible once they have been

1 identified.

2 THE COMMISSIONER: So I understand
3 the process clearly -- and I think this is
4 important: Is it the position of the government,
5 as it is said, that as much information and as
6 many documents as possible should find their way
7 into the public hearings?

8 MS McISAAC: I would say that is
9 correct, sir, yes.

10 THE COMMISSIONER: And can I take
11 from that that you will be asserting in the first
12 cut your claims after having made your very best
13 efforts to achieve that objective: that there be
14 as many documents as possible in the public
15 hearings?

16 MS McISAAC: That is correct, only
17 again I have to put a caveat on that, and that is
18 the speed with which we are trying to deal with
19 the redaction and identification of information
20 that needs to be subject to a claim for national
21 security confidentiality.

22 I have no doubt, as I said, that
23 because of the fact that we are trying to move
24 very quickly, there will be situations where we
25 have made a claim that we really shouldn't be

1 making. And if that is brought to our attention,
2 we will address it as quickly as possible.

3 THE COMMISSIONER: Okay.

4 I notice in your written material
5 in response to this motion -- and correct me if I
6 overstate it -- you agree generally with the
7 proposition that Ms Edwardh put forward: the fact
8 that information that is in the public domain,
9 while perhaps not determinative, is a very strong
10 factor in indicating that that information should
11 be available in the public hearings.

12 Is that a fair statement?

13 MS McISAAC: That is correct, sir,
14 because I cannot and would not attempt to dispute
15 the argument which is being made -- and I think it
16 is very helpful that you have had the benefit of
17 these arguments.

18 If information is in the public
19 domain -- and I will caveat that by saying
20 properly in the public domain, and is accurately
21 in the public domain -- it is very difficult in
22 most cases to argue that there would be any
23 additional injury to national security
24 confidentiality by virtue of the information being
25 released through this Commission.

1 However, that is not always the
2 case. That is why the bottom line for my
3 submissions is that you must review our claims for
4 national security confidentiality, and that in
5 fact is ongoing. Your amicus Mr. Atkey is
6 reviewing documents. He is identifying any where
7 he believes our claim for national security
8 confidentiality cannot be sustained, and no doubt
9 you will be calling on us then to justify that
10 claim.

11 THE COMMISSIONER: But before we
12 get to me settling the areas of dispute, what I am
13 interested in is in developing an efficient and
14 effective process so that hopefully we can
15 minimize what will eventually be the areas of
16 dispute. So the starting point in the process is
17 the claiming exercise by the government.

18 MS McISAAC: That is correct.

19 THE COMMISSIONER: Where I would
20 be very concerned is if I thought that the
21 government was approaching the claiming exercise
22 in an overly inclusive fashion sort of as a first
23 cut or as a starting position in a negotiation
24 that might be appropriate for a civil lawsuit and
25 not a public inquiry.

1 So what I would like to hear from
2 you is that, no, the government is approaching
3 this making every effort it can to achieve a
4 public hearing of the information.

5 MS McISAAC: That is the exercise
6 that we are attempting to go through; yes, sir.

7 THE COMMISSIONER: And have you at
8 this point in doing that exercise taken into
9 consideration information that is now in the
10 public domain?

11 MS McISAAC: Yes, we have.

12 THE COMMISSIONER: So the claims
13 you have been making to this point take into
14 consideration the types of arguments that
15 Ms Edwardh put forward.

16 MS McISAAC: Except that in a
17 number of cases we disagree with the proposition
18 that simply because some information through a
19 newspaper report is in the public domain means
20 that there will no longer be an injury to national
21 security by release of that information or that
22 particular document.

23 THE COMMISSIONER: I understand
24 that. I recognize I think it is inevitable that
25 there are going to be areas where obviously I am

1 going to have to rule upon.

2 I am repeating now, but what I am
3 looking for from the government is a commitment at
4 the outset to approach this in the spirit of
5 openness and not over-inclusion of confidentiality
6 claims.

7 Please carry on.

8 MS McISAAC: Thank you.

9 The first point that I made -- and
10 we have in fact discussed some of these issues --
11 is that the release to the public directly, which
12 is what I understood my friend to be asking for
13 initially, is contrary to the process which has
14 been established.

15 The one thing that in my view is
16 terribly important is that the information and
17 documents go to the Commission first; that any
18 claim for national security confidentiality is
19 evaluated by you, and that your counsel decides
20 what information is appropriate and necessary to
21 be put on the public record, either by giving it
22 to counsel for one of the parties or one of the
23 witnesses for the purposes of interviews and then
24 subsequently put on the public record.

25 In my submission, that is the

1 process that has been established and is also the
2 process which best allows you to keep track of
3 what documents are appropriately produced, what
4 documents need to be produced and how those
5 documents should be put on the public record
6 subject to the claims for national security
7 confidentiality.

8 It is important to remember here
9 that while this is set up as a public inquiry,
10 there is a clear recognition, as I indicated, in
11 the terms of reference that there are ongoing
12 issues which require that some information
13 inevitably cannot be put on the public record.

14 The government has said on a
15 number of occasions that Mr. Arar's name came to
16 the attention of the RCMP as a result of
17 investigations relating to possible activities of
18 al-Qaeda terrorist cells in Ottawa and that those
19 investigations are ongoing. The government must
20 be mindful, as you must be mindful, that the
21 process of review, consideration and ruling on
22 claims for national security confidentiality must
23 recognize that there are ongoing investigations
24 which need to be protected, cannot be compromised.

25 There are ongoing court

1 proceedings, and it is important to recognize that
2 there is in fact proceeding before the superior
3 court matters relating to the search warrant which
4 was executed both at home of Juliet O'Neill and at
5 the offices of the Ottawa Citizen.

6 Justice Ratushny of the Ontario
7 Superior Court is seized with that matter. There
8 are a number of issues before her, not the least
9 of which is whether any of the information filed
10 in support of the application to obtain the search
11 warrant ought to be disclosed or whether it ought
12 to remain subject to the sealing order which the
13 justice of the peace issued.

14 That sealing order, until set
15 aside, was issued pursuant to the provisions of
16 the Criminal Code for the purposes of protecting
17 the ongoing investigation.

18 So you have to again, in
19 evaluating matters for which national security
20 confidentiality is claimed in a general sense, any
21 injury or interference to those ongoing
22 investigations or ongoing criminal proceedings
23 which may or may not result from the public
24 disclosure of information.

25 The other issue that is important

1 to evaluate is that you can only make
2 determinations with respect to the government's
3 claims for national security confidentiality, and
4 indeed one of the things that has concerned me
5 somewhat with respect to our process of claiming
6 national security confidentiality or indicating
7 information for which the claim is made is that it
8 is very dangerous and difficult to make these
9 decisions without having the entire picture before
10 you.

11 You and your counsel have received
12 a large number of documents, but you have not
13 received all documents.

14 At the same vein, government has
15 reviewed a lot of those documents for issues of
16 national security confidentiality but we have not
17 reviewed all of them either.

18 One thing that I am concerned
19 about, and I urge you to consider, which speaks to
20 this motion, is that we not be precipitous. I
21 know there is an importance in moving this inquiry
22 along quickly. That is in everybody's interest.
23 But we have to be careful that we are not
24 precipitous in the release of information without
25 fully understanding the context in which that

1 information was collected and the consequences
2 that might result from that disclosure.

3 That requires, in my submission,
4 having a view to all of the documents and having a
5 view to the full picture in order to properly
6 assess what may or may not result from the public
7 disclosure of information, whether that
8 information in some way is, as my friend asserts,
9 in the public domain already.

10 In my submission, while
11 Ms Edwardh's submissions to you will be helpful to
12 you, extremely helpful to you, in evaluating
13 claims of national security confidentiality where
14 there is an issue about whether you ought to
15 accept that request by the government or not, it
16 would be premature in my submission to simply make
17 an order holus-bolus that information which is "in
18 the public domain" be immediately released to the
19 public and to Mr. Arar and his counsel.

20 I urge you not to forgo the
21 process which has been established by you and your
22 counsel for receiving that information and
23 evaluating, with the assistance of Mr. Atkey,
24 claims for national security confidentiality and
25 then receiving the detailed evidence that the

1 government would submit to you in support of those
2 claims.

3 There is also an issue with
4 respect to whether or not information is
5 legitimately in the public domain. I think it is
6 clear that information which found its way into
7 the articles written by Juliet O'Neill is
8 information which the Government of Canada takes
9 very seriously as having been disclosed in an
10 unauthorized manner.

11 Not only is the question of what
12 information was published in those articles a
13 matter which is before the superior court in the
14 proceedings before Justice Ratushny, but we also
15 have to consider very seriously whether in a
16 particular case the release of information in an
17 unauthorized fashion automatically means that
18 there will be no further injury if that same
19 information is subsequently released in an
20 authorized manner through the auspices of the
21 government in this inquiry.

22 It does not necessarily follow, in
23 my submission, that just because information is in
24 the public domain or some piece of information is
25 in the public domain, through what is considered

1 to be an unauthorized disclosure, that further
2 disclosure of that information, plus additional
3 information, would not cause some degree of
4 injury, either to national security
5 confidentiality in terms of relationships with
6 other states, but it also might be injurious to
7 the conduct of ongoing investigations.

8 Those are matters which you will
9 have to evaluate when reviewing the claims for
10 national security which have been made and which
11 obviously the government will have to justify
12 insofar as it has in fact claimed national
13 security confidentiality for some of that
14 information.

15 Third, there is the issue of what
16 is in the public domain.

17 Information which is released by
18 statements made by government representatives in
19 the House of Commons as to what facts the
20 government wishes to make part of the public
21 record is information that has been released, and
22 generally speaking I am not aware that the
23 government is claiming national security
24 confidentiality with respect to statements that
25 might have been made by ministers or other

1 representatives of the government either in
2 Parliament or before standing committees.

3 How much background to that
4 information should be released or is properly the
5 subject of a claim for national security
6 confidentiality is quite another matter.

7 There are also issues related to
8 media reports.

9 Many of the media reports that my
10 friend has pointed to are referred to unnamed
11 officials. In some cases, it wasn't clear to me
12 whether the official in question was an official
13 of the Canadian government or an official of some
14 other government, usually the American government.

15 They are often contradictory.
16 They are media reports suggesting that various
17 American officials have insisted that the Canadian
18 government or Canadian government officials were
19 complicit in the decision to send Mr. Arar to
20 Syria. More recently, Mr. Cellucci has written
21 his letter to the Globe and Mail in which he
22 denies there was any complicity on the part of the
23 Government of Canada.

24 So what is in the public domain
25 through media reports in a number of cases is

1 quite contradictory.

2 I also noted with interest my
3 friend's reference to the apparent disinformation
4 in the interviews given by Ms Ablonczy.

5 Ms Ablonczy is a member of the
6 opposition who was apparently giving an interview
7 to a reporter from the CBC.

8 I take it that my friend -- I have
9 difficulty figuring out how my friend would say
10 that statements by Ms Ablonczy which appear to
11 suggest that she didn't have all the facts could
12 be considered "disinformation", as if somehow
13 there was a concerted effort to put disinformation
14 on the file.

15 But that having been said, it
16 seems to me that there is an equally good argument
17 to be made with respect to some of the reports
18 that other governments, particularly the American
19 government, might have been putting some
20 "disinformation" out there, either purposely or
21 simply because a lot of people go about talking
22 about things about which they do not know.

23 I think if we review those media
24 reports it will be apparent, if compared to some
25 of the documentation, that a lot of these

1 statements that are being made by people are
2 statements based on conjecture, not fact.

3 So it is very dangerous to take
4 the position that simply because a media outlet,
5 whether it be a newspaper or a television or radio
6 station, reports something, that (a) the fact is
7 completely accurate or (b) that everything
8 surrounding that fact should properly be disclosed
9 and can no longer cause injury to national
10 security if disclosed.

11 Finally, with respect to some of
12 the claims that are made in the motion, they are
13 based on false assumptions.

14 The government is not claiming
15 national security confidentiality with respect to
16 some of the information that my friend seems to
17 think it is. In other cases, quite frankly, the
18 government doesn't have the information.

19 The deportation order, I have said
20 in my submission that the only copy of Mr. Arar's
21 deportation order that I am aware of being in the
22 hands of the Government of Canada is the very same
23 copy that Ms Edwardh has and we, too, got it from
24 CBS news. And that has been produced to your
25 counsel.

1 Statements by Mr. Edelson to
2 various investigators during his discussions with
3 them, we are not claiming national security
4 confidentiality with respect to what Mr. Edelson
5 said or what was told to Mr. Edelson during the
6 course of those discussions. There is a statement
7 which has been handed over.

8 The government has very little to
9 no information about any interrogation or
10 inquiries the Tunisian government may have made of
11 Ms Mazigh. We know only that she had to deal with
12 Tunisian officials in order to obtain appropriate
13 documentation to allow her to bring her children
14 out of Tunisia. We do not have statements that
15 Mr. Arar and his counsel believe ought to be
16 produced, let alone are we claiming national
17 security confidentiality for it.

18 Therefore, in my submission, the
19 proper way to deal with this issue is to follow
20 the process which you have established under your
21 rules. Documents will be produced to the
22 Commission. We will either claim national
23 security confidentiality as we turn them over or,
24 conversely, we will turn them over with a request
25 that counsel identify those they want to use and

1 we will then review them.

2 Those claims for national security
3 confidentiality will be reviewed in accordance
4 with the process set up under the rules, and if
5 you believe or your counsel believes that we have
6 been overly extensive in claims for national
7 security confidentiality, then obviously I will
8 have to provide detailed evidence to you in order
9 to attempt to convince you that those claims are
10 properly made.

11 That is a process which allows the
12 information to find its way into the public
13 domain, as appropriate, but allows you to keep
14 sufficient control over the process so that you
15 can ensure that you have fulfilled your mandate in
16 balancing that need for public disclosure of
17 information, but that the very important
18 requirement that ongoing criminal investigations
19 not be compromised and that Canada's interests
20 with respect to national security confidentiality
21 not be compromised.

22 It is important for the public to
23 realize that you will see everything. Your
24 determinations will be based on an evaluation of
25 all of the evidence and you have a fair scope to

1 summarize information that you have received and
2 to explain at the end of the day what your
3 findings are and how you have made those findings.

4 That does not necessitate that
5 information be put on the public record which
6 might injure national security confidentiality by
7 compromising ongoing investigations, by
8 compromising Canada's ability to deal with other
9 countries and receive important information from
10 those countries and, most importantly, not
11 compromise future prosecutions that might result
12 once these investigations are completed.

13 Thank you.

14 THE COMMISSIONER: Thank you,
15 Ms McIsaac.

16 Any reply, Ms Edwardh?

17 MS EDWARDH: Perhaps I could just
18 go over there.

19 THE COMMISSIONER: Okay.

20 REPLY SUBMISSIONS / SOUMISSIONS EN RÉPLIQUE

21 MS EDWARDH: I think I would like
22 to say that to the extent that I have understood
23 Ms McIsaac she has at least adopted the position
24 that when coming to assess any claim of the
25 government it is an important matter that the

1 information is in the public domain. We have
2 succeeded in large part in at least drawing that
3 point out in the course of this motion.

4 I think, to the extent that there
5 is that concession, it will be of great assistance
6 if you decide to go a route that isn't the Babcock
7 route, which is to simply say it is in the public
8 domain and I'm not going to go there.

9 I would like to make two comments,
10 if I could.

11 When there is a reference to
12 ongoing criminal investigations, there is a
13 tendency for everyone to throw up their hands and
14 I would ask you to be alive to the following
15 thing: There is such a thing as an ongoing active
16 criminal investigation and there is such a thing
17 as an investigation that just couldn't be closed.
18 Insofar as the investigation just couldn't be
19 closed by laying a charge or throwing up their
20 hands, I would like you to approach with great
21 suspicion claims that investigations are truly
22 ongoing, without very ample evidence that there is
23 a real investigation under way as opposed to one
24 that was undertaken and just didn't go anywhere
25 and is not in fact being pursued.

1 THE COMMISSIONER: Would you say
2 that there should be a specified offence --

3 MS EDWARDH: Absolutely.

4 THE COMMISSIONER: -- that the
5 investigation should be directed at?

6 MS EDWARDH: I understood my
7 friend to be talking about criminal
8 investigations, not national security
9 investigations that might be
10 intelligence-gathering by way of a preventive
11 jurisdiction for policing. That I think is quite
12 different.

13 So I am talking about active
14 investigations into allegations of criminal
15 wrongdoing.

16 THE COMMISSIONER: That is what
17 paragraph (o) of the Order in Council refers to,
18 criminal investigations.

19 MS EDWARDH: That's right.

20 The next thing, in respect of
21 being concerned about treading on Justice
22 Ratushny's territory, I want to make this
23 observation. In my friend's submissions, and I
24 believe she repeated this orally, she told you
25 that Justice Ratushny would determine what, if

1 anything, could be put into the public domain.

2 She has in part done that,
3 Mr. Commissioner. The document we have filed in
4 Volume IV is in fact a document that has been
5 placed into the public domain and it is part and
6 parcel of a motion that has been brought by the
7 applicants to quash the search warrant. To the
8 extent that it is there, it is available and in
9 the public domain and, in our view, sufficiently
10 informed to confirm the existence of and the
11 release of the statements, or summary of the
12 statements, made by Mr. Arar under interrogation.

13 I want to say this about
14 contradictory information -- and I'm not going to
15 blame the members of the media for the
16 contradictory information.

17 There is no doubt there is some
18 contradictory information. There is no doubt that
19 the Minister of Foreign Affairs, Mr. Graham, has
20 testified before a Commons Committee that there
21 were consultations. There is no doubt that
22 Mr. Cellucci would like to have you believe that
23 the Government of Canada was nowhere in sight, as
24 is current view. That doesn't mean that the
25 information the Minister put forward is

1 contradictory.

2 With the greatest of respect, I
3 will accept Minister Graham's word on that in the
4 context of the duties he had to discharge before
5 the Commons Committee.

6 I want to draw your attention to
7 one troubling feature. I don't mean to be whining
8 here, but there are two things my friend said that
9 I want to just address.

10 She said to you there were no
11 assertions of national security confidentiality
12 with respect to statements of Mr. Edelson. We are
13 asking for more than just what he said to Garvey,
14 who was investigating the complaint.

15 Mr. Edelson met with RCMP officers
16 who were investigating Mr. Arar way before the
17 interview with Mr. Garvey. We have asked for
18 notes of that interview, because that is where the
19 disclosure was made. We also wanted his statement
20 to Constable Garvey or whoever, Inspector Garvey,
21 because we thought it only fair that he have an
22 opportunity to refresh his memory. But we were
23 actually, and what is cited in the materials, is
24 information given to Mr. Edelson from the RCMP.
25 To that extent we said it was publicly disclosed.

1 Ms McIsaac also said with respect
2 to the order that they, too, had got it from CBS.
3 Well, it is obvious that CBS believes in
4 transparency more than the American government.

5 But I did note with grave concern,
6 at page 6 of her written materials, that, well, I
7 got the order from CBS -- or from Centre for
8 Constitutional Rights and therefore from CBS --
9 and the government got the same order.

10 I was very troubled by the
11 footnote on page 6 with respect to that order that
12 the Government of Canada received from CBS. The
13 statement made:

14 "The government has not made
15 any inquiries..."

16 Page 6, footnote 8.

17 THE COMMISSIONER: I have it.

18 MS EDWARDH: It says:

19 "The government has not made
20 any inquiries about this
21 order and cannot verify the
22 accuracy or legitimacy of the
23 document it has." (As read)

24 Well, it would be one thing if the
25 footnote read:

1 "The government has sought to
2 determine from its ally
3 whether the document is
4 accurate and legitimate."

5 (As read)

6 But, in my respectful submission,
7 to not have made any inquiries verges on being
8 quite shocking.

9 Other than that, I have made my
10 submissions to you. I do not intend to repeat
11 them. You have been most patient with us. Thank
12 you for the opportunity to make them in this forum
13 and we trust that they will be of some assistance
14 to you.

15 THE COMMISSIONER: I'm sure they
16 will. Thank you both for your submissions.

17 The process is, as was indicated
18 and set out in the Rules of Practice and Procedure
19 for the inquiry, where claims for national
20 security confidentiality are made and continued by
21 the government, then I will review, hear the
22 evidence and relating to those claims, I will look
23 at the information that underlies the claims and
24 will issue a ruling or rulings as we go forward.

25 When claims of national security

1 confidentiality are made, it is necessary for me
2 to hear the evidence or information in camera so
3 as not to defeat the claim before hearing the
4 merits of it.

5 Mr. Atkey, the amicus curiae, will
6 be involved in that process. He is here today.
7 I'm not sure if he wishes to add anything to what
8 I have heard already in this public hearing but,
9 Mr. Atkey, if there is anything that you would
10 like to add in this hearing I would be pleased to
11 hear from you.

12 MR. ATKEY: Thank you.

13 THE COMMISSIONER: Please, come
14 forward.

15 SUBMISSIONS / SOUMISSIONS

16 MR. ATKEY: Mr. Commissioner, I
17 will be very brief. I have listened with great
18 interest to the motion made today and have
19 carefully reviewed the materials that were filed
20 in support of it -- extensive materials. I may
21 say, I think the bringing of the motion has added
22 a great deal of substance to the task in front of
23 you and those involved in the process.

24 In response to the
25 government's position that this motion is

1 premature, I would argue that it is not premature.
2 In fact, it is helpful.

3 What might be premature at
4 this point is a decision, if you were to make a
5 decision consenting or granting the order
6 requested today. I think there is work to be
7 done yet in filing the information, reviewing it
8 in camera.

9 I think the fact that we have a
10 benchmark in terms of the motion today, the
11 information from the media, from the House of
12 Commons, from the parliamentary committees, from
13 all the sources that were indicated, will be
14 extremely helpful in certainly the submissions I
15 will be making as to whether this is information
16 that is properly within national security
17 confidentiality parameters.

18 I was more than a little
19 interested in the submission by counsel for the
20 government that it is in issue whether information
21 in the public domain is properly in the public
22 domain. In other words, was it authorized or was
23 it unauthorized.

24 That, sir, surely goes to the core
25 of what you are going to be asked to decide, that

1 is, the conduct of the officials of the Government
2 of Canada in relationship to Mr. Arar, and, if
3 there was an improper disclosure of information,
4 why was there an improper disclosure and for what
5 motive?

6 Similarly, suggestions that there
7 may have been incidents of disinformation I think
8 properly comes before you in assessing the conduct
9 of the activities of officials of the Government
10 of Canada. Because if there has been the use of
11 disinformation by officials of the Government of
12 Canada, and that has been done for a specific
13 purpose of harming or discrediting or besmirching
14 the reputation of an individual, that is something
15 that you would want to consider and it may be in
16 the context of the confidential information that
17 you will be considering in camera and you can make
18 an assessment as to what has appeared in the
19 public record and what appears before you in the
20 documents that are actually proved before you.

21 So those are my submissions as to
22 where we are at today. The motion is not
23 premature, but a decision today might be.

24 I should say by way of passing
25 that in addition to being guided by the provisions

1 of the Canada Evidence Act and the terms of
2 reference of this inquiry and the rules of
3 procedure established and the jurisprudence that
4 flows from the various court decisions, I will be
5 essentially putting forth and operating on two
6 principles that will guide my questions and my
7 submissions to you. I should state those for the
8 record.

9 The first, I think, flows from
10 section 2(b) of the Charter. This is a public
11 inquiry and that freedom of expression, that is at
12 the core of section 2(b) of the Charter of Rights
13 and Freedoms, I think applies to this public
14 inquiry; that is, the public's right to know to
15 the greatest extent possible.

16 There is jurisprudence that has
17 been placed before you today on that very point
18 and I will rely on that jurisprudence in asserting
19 Charter rights as they apply to these proceedings.

20 The second principle that will
21 guide me is the issue of fairness, fairness to Mr.
22 Arar who was the complainant who essentially
23 raised facts causing the Government of Canada to
24 constitute this public inquiry.

25 So I think in assessing the

1 documents and what should be made public in
2 accordance with the various principles that I have
3 alluded to, the issue of fairness to Mr. Arar and
4 knowing the case he has to meet, will guide me in
5 my submissions.

6 Those are my submissions for
7 today. Thank you.

8 THE COMMISSIONER: Thank you very
9 much, Mr. Atkey. I appreciate that.

10 I agree with that submission that
11 the decision with respect to claims of national
12 security confidentiality must necessarily await an
13 examination by me of the underlying evidence and
14 the information that gives rise to the claim.

15 Now, we have heard from
16 Ms McIsaac that certainly some of the documents
17 which are being produced are not accompanied by
18 a claim and some documents are being produced in
19 redacted form. So in those instances where
20 there is no claim, obviously the production of
21 documents to those involved need not await a
22 determination by me of the validity of a claim,
23 there being no claim.

24 So the decision on today's
25 motion -- which I also agree has been very helpful

1 to the process of the inquiry. I think it was
2 very useful to have a discussion of these issues
3 in a public hearing and will be of benefit to me
4 when I come to make decisions with respect to
5 claims for national security confidentiality.

6 We will leave the motion on that
7 basis. I agree with what Mr. Atkey submitted.
8 The motion was not premature; indeed, it was very
9 timely, in my view. These issues are ones that
10 were properly raised before I address the issues
11 of the government's claim.

12 So that completes this motion.

13 There are a couple of procedural
14 matters, Mr. Cavalluzzo. Are those ones that
15 should address after the lunch hour?

16 MR. CAVALLUZZO: Well, it is 10 to
17 one right now. It probably would be more
18 appropriate if we did.

19 THE COMMISSIONER: All right.

20 MR. CAVALLUZZO: The submissions
21 in regard to that I think may take an hour or so.

22 So it may be appropriate to do it
23 at that time.

24 THE COMMISSIONER: All right. We
25 will rise now and we will resume at 2 o'clock.

1 --- Upon recessing at 12:45 p.m. /

2 Suspension à 12 h 45

3 --- Upon resuming at 2:03 p.m. /

4 Reprise à 14 h 03

5 THE COMMISSIONER: Mr. Cavalluzzo.

6 MR. CAVALLUZZO: Mr. Commissioner,
7 during the course of determining our Rules of
8 Procedure and entertaining the submissions on the
9 applicable principles to be applied respecting
10 claims of national security confidentiality, two
11 important questions of process arose upon which we
12 are seeking input and representations from the
13 parties today.

14 One question relates to the
15 appropriate interpretation of your terms of
16 reference. The other question relates to the
17 appropriate procedure to follow in making
18 determinations concerning the disclosure of
19 information with respect to which national
20 security confidentiality claims have been made by
21 the Attorney General.

22 At the outset, just to give some
23 context to this, the first issue, as I said,
24 relates to the interpretation of your terms of
25 reference, in particular, section (k) of the terms

1 of reference.

2 In regard to this particular
3 question we will be considering the
4 interrelationship between the terms of reference
5 and the Canada Evidence Act as it relates to the
6 public disclosure of information which is relevant
7 to the inquiry but to which, once again, a claim
8 of national security confidentiality has been
9 made.

10 That is the first question; as I
11 say, an interpretation point.

12 The second question relates to the
13 most appropriate procedure to adopt in respect of
14 resolving claims of national security
15 confidentiality and in particular the question is:
16 Would it be best to hear all of the information in
17 one sequence in camera, rather than switching back
18 and forth between in camera and public hearings?

19 As such, if this procedure was
20 adopted, this one sequential in camera hearing
21 were adopted, then you as the Commissioner would
22 make a ruling or rulings after you have heard all
23 of the information to which national security
24 claims have been made.

25 This is not a motion, not a motion

1 per se, so that there is no set procedure to
2 follow. What I would recommend, as the Attorney
3 General has made extensive written submissions in
4 respect of these two questions, it may be most
5 efficient if the Attorney General was to start
6 first and any comments in reply can be made by
7 counsel for Mr. Arar.

8 By adopting that procedure, that
9 by no means means that an onus or burden is on the
10 Attorney General. It is just that we are seeking
11 their assistance, and so far their submissions
12 have been very helpful and we look further to
13 further submissions in this regard.

14 Thank you.

15 THE COMMISSIONER: Thank you,
16 Mr. Cavalluzzo.

17 Ms McIsaac.

18 SUBMISSIONS / SOUMISSIONS

19 MS McISAAC: Thank you, sir. What
20 I will do is address, if I may, your questions in
21 the order that they were posed to the parties.

22 The first question deals with a
23 decision under k(i) of your terms of reference.

24 So that everyone is clear, k(i)
25 indicates that:

1 "(i) on the request of the
2 Attorney General of Canada,
3 the Commissioner shall
4 receive information in camera
5 and in the absence of any
6 party and their counsel
7 if ..."

8 And the important words are:
9 "... in the opinion of the
10 Commissioner, the disclosure
11 of that information would be
12 injurious to international
13 relations, national defence
14 or national security."

15 So as I understand it, step one in
16 the process as we discussed this morning is that
17 the Attorney General makes a request that
18 information be received in camera on the basis of
19 national security confidentiality.

20 You must then form the opinion
21 that disclosure of that information would be
22 injurious to international relations, national
23 defence or national security.

24 Your first question is: What
25 happens if the Commissioner decides that

1 disclosure would not be injurious to national
2 security? So you don't accept my submissions in
3 that regard.

4 For those who are listening, you
5 have posed the question: If the Commissioner
6 decides that disclosure would not be injurious to
7 national security confidentiality, the
8 Commissioner may disclose the information after a
9 period of 10 days following receipt of the
10 Commissioner's decision by the Attorney General
11 unless the Attorney General has notified the
12 Commission within that period that he intends to
13 apply to the Federal Court for a determination
14 under section 38.04(1) of the Canada Evidence Act.

15 With respect, the Attorney
16 General, as I have indicated in the submissions
17 that we have filed, does not agree with that
18 position.

19 In our submission, the better way
20 to read the Canada Evidence Act would be to either
21 provide that a decision by you that disclosure of
22 information would not be injurious to national
23 security would be to provide in the rules a
24 deeming provision that such decision will be
25 deemed to be notice to the Attorney General

1 pursuant to section 38.01 of the Canada Evidence
2 Act --

3 THE COMMISSIONER: Is it really
4 the rules we are concerned about or the Order in
5 Council?

6 The Order in Council, as you know,
7 in subparagraph (3), when I deal with the public
8 interest, deems my decision to be notice under
9 38.01, but it does not do it in subparagraph (1).

10 MS McISAAC: It does not.

11 THE COMMISSIONER: So what strikes
12 me -- and this really isn't a position; this is a
13 question that was --

14 MS McISAAC: Understood.

15 THE COMMISSIONER: It strikes me
16 that the first task is to interpret the Order in
17 Council.

18 MS McISAAC: Right.

19 THE COMMISSIONER: And whether or
20 not subparagraph (1) itself deems it to be a 38.01
21 notice. It doesn't say it does.

22 MS McISAAC: It does not. But in
23 my submission, what it does not lead to is an
24 automatic disclosure of that information,
25 simply -- meaning no disrespect here -- just

1 simply because you have determined that in your
2 opinion disclosure would not be injurious.

3 In my submission, it still remains
4 that the information for which national security
5 confidentiality has been claimed falls under the
6 definition of potentially injurious information in
7 the Canada Evidence Act, section 38, which is
8 defined as information of a type that, if it were
9 disclosed to the public, could injure national
10 security relations or national defence or national
11 security.

12 It also falls under the definition
13 of sensitive information, which is information
14 relating to international relations or national
15 defence or national security that is in the
16 possession of the Government of Canada, whether
17 originating from inside or outside Canada, and is
18 of a type that the Government of Canada is taking
19 measures to safeguard.

20 THE COMMISSIONER: But the Order
21 in Council importantly makes no reference to me
22 considering whether information is sensitive or
23 not. It talks only about me forming an opinion as
24 to whether it is injurious.

25 MS McISAAC: That is correct.

1 THE COMMISSIONER: So it strikes
2 me that -- the difficulty I am having with what
3 you say is: Do you say I should now be
4 determining whether the information is both
5 injurious or sensitive?

6 MS McISAAC: No. What I am saying
7 is that once you have made your determination that
8 the release of the information would not be
9 injurious to national security confidentiality, we
10 have to apply the Canada Evidence Act to that
11 decision.

12 Your terms of reference do say in
13 paragraph (m):

14 "(m) nothing in this Order
15 shall be construed as
16 limiting the application of
17 the provisions of the Canada
18 Evidence Act."

19 THE COMMISSIONER: It seems to me,
20 as I read subparagraph (i), that certainly one
21 possible interpretation -- and let me read it:

22 "(i) on the request of the
23 Attorney General of Canada,
24 the Commissioner shall
25 receive information in camera

1 and in the absence of any
2 party and their counsel if,
3 in the opinion of the
4 Commissioner, the disclosure
5 ... would be injurious ..."

6 It seems to me implicit in that is
7 if I decide it is not injurious, then I am not
8 required to hear it in camera. It seems to me
9 that is what the author of that paragraph
10 contemplated.

11 MS McISAAC: That is correct. But
12 I think that doesn't mean automatically that the
13 Canada Evidence Act does not apply. I say the
14 information still falls under one of those two
15 definitions.

16 THE COMMISSIONER: But even on --
17 again I am just doing it to be the devil's
18 advocate. Even on the interpretation I propose,
19 the Canada Evidence Act would still apply.

20 MS McISAAC: Yes.

21 THE COMMISSIONER: What would
22 happen is if you disagreed with my decision, then
23 under the Canada Evidence Act, under the rules,
24 you would have 10 days to form your opinion and
25 then you could make your application to the

1 Federal Court. Everybody concedes that the
2 Federal Court's decision would trump any decision
3 that I made if they didn't agree with me.

4 MS McISAAC: Not exactly, sir. My
5 position would be that upon you making your
6 decision, one of two things should happen. Either
7 we can provide in the rules, as I have suggested
8 to counsel, that that would be deemed to be notice
9 under section 38.01; or alternatively, it would be
10 open for a participant to give notice at that
11 stage to the Attorney General of Canada, pursuant
12 to 38.01.

13 We can either have it done
14 specifically by a participant, and in my view the
15 appropriate participant would likely be an
16 official from the government department most
17 intimately involved in that particular
18 information. They would give notice to the
19 Attorney General of Canada that you are about to
20 release information publicly.

21 The Attorney General then -- and
22 that would be under probably 38.01(4).

23 "An official ... who believes
24 that sensitive information or
25 potentially injurious

1 information is about to be
2 disclosed in the course of a
3 proceeding may raise the
4 matter with the person
5 presiding at the proceeding.
6 If the official raises the
7 matter, he or she shall
8 notify the Attorney General
9 of Canada in writing of the
10 matter as soon as
11 possible ..."

12 Upon receipt of that notice, the
13 Attorney General of Canada then, under 38.03, has
14 ten days after the day on which he or she first
15 receives a notice to notify every person who
16 provided notice under 38.01 about that information
17 of his or her decision with respect to disclosure.

18 If the Attorney General says "yes,
19 go ahead and disclose it, Justice O'Connor", that
20 is the end of the matter.

21 THE COMMISSIONER: There is no
22 problem.

23 MS McISAAC: If the Attorney
24 General says, "No, I disagree with you, Justice
25 O'Connor. I do not permit you to release the

1 information", then it seems to me that we either
2 go under 38.04, which says the Attorney General of
3 Canada "may" apply to the Federal Court; or we go
4 to 38.04(2), in which it said:

5 "a person who is not required
6 to disclose information in
7 connection with a proceeding
8 but who wishes to disclose it
9 or to cause its disclosure
10 may apply to the Federal
11 Court..."

12 So the bottom line, in my
13 submission, is the proper interpretation of the
14 Canada Evidence Act is upon the making of a
15 decision by yourself that information is not
16 subject to national security confidentiality there
17 should either be a deemed notice -- will be an
18 actual notice to the Attorney General who will
19 make a decision as to whether he is going to
20 permit disclosure of the information.

21 If he decides he will not permit
22 disclosure of the information, it may then only be
23 released if either your counsel, on your behalf,
24 make an application to the Federal Court, or if
25 the Attorney General makes an application to the

1 Federal Court.

2 THE COMMISSIONER: The
3 difference in the two positions, it just comes
4 down then to who would make the application to the
5 Federal Court. In your scenario, either the
6 Attorney General or, if the Attorney General does
7 nothing, then I would make an application to the
8 Federal Court?

9 MS McISAAC: That is correct. But
10 absent an application --

11 THE COMMISSIONER: The other
12 position would be that if the Attorney General
13 disagrees, it wouldn't be disclosed but the
14 Attorney General would be the one who would be
15 required to carry the application to the
16 Federal Court.

17 MS McISAAC: Right. In my
18 submission, upon the Attorney General disagreeing
19 with you --

20 THE COMMISSIONER: What is the
21 practical significance of the difference? Are we
22 dancing on the head of a pin here?

23 MS McISAAC: I think only in the
24 sense that one of us has to decide to go to the
25 Federal Court or the information cannot be

1 released.

2 THE COMMISSIONER: But we are in a
3 situation where I have heard the evidence --

4 MS McISAAC: Right.

5 THE COMMISSIONER: -- and we are
6 positing the situation. Maybe it will never come
7 to be.

8 But I have decided it would not be
9 injurious to the public interest to release it, I
10 give the government my decision and the government
11 disagrees with the decision.

12 MS McISAAC: That's correct.

13 THE COMMISSIONER: Okay. Without
14 going through the intermediate steps, it then
15 comes down to the question: What happens then?

16 What I hear you saying is, well,
17 the Attorney General can either make an
18 application to the Federal Court in order to
19 prevent me from releasing it, or the Attorney
20 General can do nothing, although it disagrees, and
21 then I would have to make an application to the
22 Federal Court to get its approval.

23 MS McISAAC: That's correct.

24 THE COMMISSIONER: The alternative
25 situation is just the first happens. If the

1 Attorney General disagrees, then the Attorney
2 General has to make the application.

3 But in either event, when
4 there is a disagreement, assuming somebody
5 makes an application, the Federal Court will
6 determine release.

7 MS McISAAC: That's correct.

8 THE COMMISSIONER: So the
9 difference in the two positions -- and, as I say,
10 I don't have any fixed view on this for certain --

11 MS McISAAC: Right.

12 THE COMMISSIONER: The
13 difference in the two positions, it just seems to
14 me, is: Will the application necessarily have to
15 be made by the Attorney General or will there be
16 the option that if the Attorney General doesn't do
17 it the information could not be disclosed and then
18 I would have to bring an application to the
19 Federal Court.

20 MS McISAAC: Or a third option
21 is we decide, neither of us, to go to the
22 Federal Court.

23 THE COMMISSIONER: Well, would it
24 not be the case if I decide that it is in the
25 public interest that information be heard in this

1 public inquiry and that it would not be injurious
2 to national security -- I mean, I have a hard time
3 envisioning the situation where I would say we
4 can't go to Federal Court. I'm not going to
5 pursue it.

6 As I understand the mandate your
7 government has given me is to conduct a public
8 inquiry and to use every effort within my means to
9 bring out all of the information in public that
10 can be without injuring national security.

11 MS McISAAC: I'm not suggesting
12 you would. I was just pointing out that the
13 result, if neither party went to the Federal
14 Court, in my submission, reading the legislation,
15 would be that the information could not be
16 released.

17 THE COMMISSIONER: Ms McIsaac, if
18 the government disagrees with my decision that has
19 been made and the government wishes to have it
20 challenged and determined by the Federal Court,
21 why wouldn't the government then think that the
22 appropriate procedure to follow would be for the
23 government to bring that application?

24 MS McISAAC: I didn't say it
25 wouldn't, sir. I was simply interpreting the

1 legislation for you and I would take --

2 THE COMMISSIONER: No, we are
3 interpreting the Order in Council, in fairness.

4 MS McISAAC: Both.

5 THE COMMISSIONER: But the intent
6 of this inquiry, the government's intent as to how
7 this inquiry should be conducted, its intention is
8 set out in the Order in Council.

9 MS McISAAC: Yes, sir.

10 THE COMMISSIONER: So that it
11 seems to me, when I come back to my question, I
12 say: Why would the government want to create a
13 situation where there is a disagreement that would
14 require the Commission, not the government, to
15 bring the application?

16 I am just a bit at a loss to know
17 what lies behind that position.

18 MS McISAAC: I'm sorry, sir. I
19 didn't say the government wouldn't bring the
20 application. I was simply addressing for you my
21 understanding as to how the legislation fits with
22 the rules, fits with the Order in Council, so that
23 we are all clear on how the legislation applies.
24 There is no compulsion on the Attorney General to
25 go to the Federal Court. I did not say that the

1 Attorney General would not take the matter to the
2 Federal Court.

3 THE COMMISSIONER: But the
4 rules, as they are presently drafted after
5 hearing submissions, envision the second
6 situation, if you will.

7 MS McISAAC: Right. And I wrote a
8 letter to Mr. Cavalluzzo upon further review and
9 consideration of the Canada Evidence --

10 THE COMMISSIONER: Changing the
11 government's position on this.

12 MS McISAAC: Not changing the
13 government's position, clarifying what I
14 understood to be the application of the Canada
15 Evidence Act.

16 The Canada Evidence Act was not
17 drafted to deal with this particular situation,
18 rather what we are trying to do is we are trying
19 to sort of shoehorn the application of the Canada
20 Evidence Act into how things should proceed before
21 this Commission. The Order in Council provides
22 that the Canada Evidence Act is not derogated from
23 by the Order in Council.

24 What I was pointing out to
25 Mr. Cavalluzzo is that in the letter that is

1 attached to my submissions, in my submission the
2 proper reading of the legislation is that upon
3 you making a decision that information is not
4 subject to national security confidentiality
5 because you reached the opinion that its
6 disclosure would not be injurious, the proper
7 reading of the legislation is that if notice is
8 then given to the Attorney General of that
9 decision, either by way of a deeming provision or
10 by way of an actual notice, the net result is that
11 if the Attorney General disagrees with you one of
12 us has to go to court, but neither of us is
13 compelled to go to court.

14 THE COMMISSIONER: How do you
15 reconcile that with section 38.02(1.1)?

16 Again it's a question I'm not sure
17 exactly what this means, but let me read it for
18 those who don't have it.

19 MS McISAAC: Okay.

20 THE COMMISSIONER: It reads:

21 "When an entity listed in the
22 schedule..."

23 And that is this inquiry:

24 "...for any purpose listed
25 there in relation to that

1 entity, makes a decision or
2 order that would result in
3 the disclosure of sensitive
4 information or potentially
5 injurious information, the
6 entity shall not disclose the
7 information or cause it to be
8 disclosed until notice of
9 intention to disclose the
10 information has been given to
11 the Attorney General of
12 Canada and a period of
13 10 days has elapsed after
14 notice was given.

15 MS McISAAC: Right.

16 THE COMMISSIONER: What that would
17 seem to me to say is that if there was notice
18 given of the intent to disclose information over
19 which a claim of NSC is made, that the entity, the
20 inquiry, must wait 10 days, which would give the
21 Attorney General the opportunity to launch a court
22 proceeding, if he chose, and, failing that, then
23 it would be open to the entity to disclose the
24 information.

25 MS McISAAC: Two points on

1 that, sir.

2 The first one is that the section
3 is noticeably silent on what happens after an
4 notice is given under (1.1). It doesn't oblige
5 the Attorney General to respond in any way. So
6 I'm not sure that that flows.

7 But more importantly, in my
8 submission, your Commission, this Commission, is
9 listed in the schedule, but in my submission is
10 listed in the schedule so that you can receive
11 information without notice having to be given.

12 If I could refer you to 38.01(6),
13 it says:

14 "This section does not apply
15 when
16 i.e., nobody is required to give -- 38.01(6).

17 THE COMMISSIONER: I have it.

18 MS McISAAC: Okay. Nobody is
19 required to give notice, i.e., this section does
20 not apply, it is not engaged when:

21 "...the information is
22 disclosed to an entity and,
23 where applicable, for a
24 purpose listed in the
25 schedule.

1 In my submission, what was
2 intended by adding this Commission to the Canada
3 Evidence Act -- and let's look at what was said --
4 --- Pause

5 MS McISAAC: Sorry. Just
6 a moment.

7 The Order in Council says:

8 "Her Excellency the Governor
9 General in Council, on the
10 recommendation of the Prime
11 Minister, pursuant to
12 subsection 38.01(8) of the
13 Canada Evidence Act, hereby
14 makes the annexed Order
15 Amending the Schedule to the
16 Canada Evidence Act."

17 And (8) of course simply says that
18 the Governor in Council may by order may add or
19 delete.

20 And then you are added:

21 "The Commission of Inquiry
22 into the Actions of Canadian
23 Officials in Relation to
24 Maher Arar, for the purposes
25 of that inquiry, except where

1 the hearing is in public."

2 In my submission, all that was
3 intended was that this Commission, by being
4 scheduled to the Canada Evidence Act, the
5 provisions were not engaged during the process of
6 the government handing over information to you
7 which might fall under the category of sensitive
8 information, or potentially injurious information.

9 THE COMMISSIONER: Clearly
10 that is one of the intentions of being added
11 to the schedule.

12 MS McISAAC: In my submission it
13 does not engage 38.02(1.1), because you are not
14 listed for the purposes of the decision that
15 information is not subject to national security
16 confidentiality.

17 THE COMMISSIONER: It is not very
18 happily drafted all of this, is it?

19 MS McISAAC: I would have to agree
20 with you, sir, absolutely.

21 THE COMMISSIONER: I don't mean to
22 be beating on the argument. I must say, I think I
23 had the same problem you had. In reading the
24 Order in Council and this schedule it is by no
25 means clear what is intended.

1 MS McISAAC: When we did write
2 Mr. Cavalluzzo, again I apologized for not having
3 picked up that nuance earlier.

4 THE COMMISSIONER: Yes, because
5 when I was talking about the initial position of
6 the government, the initial submissions on the
7 rules led to drafting the rules --

8 MS McISAAC: Understood.

9 THE COMMISSIONER: -- anticipating
10 that there would be the 10-day period in which the
11 Attorney General could object and then if the
12 Attorney General didn't bring a court application,
13 the information would --

14 MS McISAAC: Understood, sir.

15 THE COMMISSIONER: -- be free to
16 go in the public domain.

17 What strikes me -- and let me say
18 it once again -- I haven't sort of decided. It
19 may be that nothing turns on the point as a
20 practical matter at the end of the day. It does
21 strike me, though, that the option that you
22 propose is, if nothing else, more complex than the
23 way the rules, as now drafted, contemplated the
24 process to be.

25 Now, I don't know -- that is not a

1 reason for not doing it --

2 MS McISAAC: Right.

3 THE COMMISSIONER: -- but it
4 strikes me that way.

5 MS McISAAC: As I say, the
6 alternative would be that an official would give
7 notice to the Attorney General and kick-start the
8 proceeding that way under 38.01(4).

9 THE COMMISSIONER: Yes, but then
10 at that point, even on your submission, the
11 Attorney General then could either choose to apply
12 to the court or not apply to the court. But on
13 your submission, if the Attorney General did not
14 and I continued to be of the view that the
15 information should be heard in public, then I
16 would be left -- and maybe there is not a problem
17 with it -- but with instituting a court proceeding
18 in order to achieve that.

19 MS McISAAC: Right. And I don't
20 wish anything of what I'm saying in terms of the
21 proper interpretation of the rules -- we all
22 understand it -- to be a foreboding that the
23 Attorney General would not make that application
24 himself rather than leaving it to you. I just
25 want it to be clear that the rules cannot be

1 drafted in such a way as to override the "may"
2 provision in the Canada Evidence Act, or should
3 not be drafted in such a way as to force
4 something.

5 THE COMMISSIONER: No question
6 about it. Both the Canada Evidence Act and the
7 Order in Council take precedence over the rules
8 of the inquiry.

9 MS McISAAC: Exactly.

10 THE COMMISSIONER: What do you
11 submit in terms of this issue as to how -- I
12 realize you didn't raise it, although I suppose
13 your recent submission and the amendment to the
14 rules indirectly raised it.

15 As you say, it may not be an issue
16 that ever really comes to have practical
17 significance. I'm just wondering whether it is
18 something -- I won't ask. I will wait until I
19 hear from Ms Edwardh as to what her submission on
20 the issue is.

21 MS McISAAC: Right. Okay.

22 THE COMMISSIONER: Do you have
23 anything else on that point?

24 MS McISAAC: Sir, only on your
25 second question which had to do with section (k).

1 THE COMMISSIONER: (k)(iii)?

2 MS McISAAC: Yes, (k)(iii).

3 THE COMMISSIONER: You agreed
4 with -- well, I guess it still was a question.

5 MS McISAAC: Yes. No, essentially
6 we agree.

7 I think that the one thing we were
8 concerned, that is not sort of contemplated as
9 well as it might be in the rules and I want
10 everyone to understand, is that if you decide to
11 release a summary, or if it is your view that --
12 whether it be a summary of information that you
13 have ruled is subject to national security
14 confidentiality but should be released any way in
15 the public interest, or whether we are dealing
16 with a summary of evidence that may have been
17 heard in camera, I want it to be clear, even
18 though it is not contemplated in the rules, that
19 we are very hopeful that there can be a discussion
20 between Commission counsel and the Attorney
21 General whereby, perhaps with a slight change in
22 wording or some other review of that summary, we
23 can end up with something that both are happy
24 with instead of heading off to the Federal Court
25 or coming to impasse immediately. I am hopeful

1 there will be some room for negotiation and
2 discussion there.

3 THE COMMISSIONER: Speaking I
4 think probably for myself but everybody else
5 involved in the process, if we or one of us has to
6 head to the Federal Court, I think that would be a
7 disappointment. It may be that it ends up being
8 the case, but public inquiries have suffered in
9 the past because parties have not been able to
10 conduct it in a way that avoided going to court.
11 That becomes enormously expensive and time
12 consuming.

13 MS McISAAC: And I agree with you,
14 sir.

15 THE COMMISSIONER: Right.
16 There was a second question. Do
17 you want too deal with it separately?

18 MS McISAAC: Sure. That is the
19 question of -- I am at a bit of a loss because at
20 first -- I will start by saying quite frankly it
21 hasn't been completely clear, in a practical
22 sense, how we would proceed to have a good
23 overview of the evidence by sort of having if I
24 can call them piecemeal reviews of information for
25 which national security confidentiality is

1 claimed, because it may be that that a particular
2 series of documents or documents from a particular
3 department may only tell part of the story and are
4 intertwined with information from other
5 departments.

6 So I have been concerned from the
7 beginning about trying to deal with some of these
8 issues on an abstract basis without having the
9 entire picture.

10 I think there is also going to be
11 a great deal of difficulty with some witnesses who
12 may be able to give most of their testimony --
13 must give most of their testimony in camera, but
14 there will be bits and pieces that could be
15 publicly given.

16 I am intrigued and find a great
17 deal of merit in the idea of having some kind of
18 process where we try to gather all of the
19 information for which national security
20 confidentiality is claimed and have one process
21 whereby the evidence is heard that may support
22 those claims, and may actually be some of the
23 evidence on those claims in that regard. And then
24 you, having a full picture, are in a position to
25 determine what information can be released.

1 I must say I am concerned for two
2 reasons.

3 I am concerned because an
4 incomplete picture is an unfair picture. It is an
5 unfair picture to Mr. Arar. It is an unfair
6 picture to the government officials who are the
7 subject matter of this inquiry.

8 I think it is a far better process
9 if we can structure it in such a way that we don't
10 have little disjointed pieces of information being
11 released without a more fulsome context within
12 which that information can actually be evaluated.

13 So without understanding exactly
14 how it is going to proceed, I must say that our
15 preference is certainly leaning to that as being a
16 better process.

17 THE COMMISSIONER: Thank you.

18 Ms Edwardh?

19 SUBMISSIONS / SOUMISSIONS

20 MS EDWARDH: Perhaps I might
21 address you from here, Mr. Commissioner, rather
22 than upset the apple cart again.

23 THE COMMISSIONER: Certainly.

24 MS EDWARDH: It is always a
25 terrible thing to ask lawyers questions, because

1 they begin to reconsider what they may have said
2 in the first place.

3 I would like to, first of all,
4 deal with your first question.

5 It is my submission that my
6 learned friend is wrong; that the answer proposed
7 should be nothing less than the following, and
8 then I will take you through my reasoning.

9 If you, sir, conclude that the
10 information in question, the disclosure of the
11 information would not be injurious, you must
12 obviously give notice, but that you have a right
13 to disclose that information if the Attorney
14 General does not take steps to stop you.

15 That is proposition one.

16 Second, in reading the statute
17 carefully, it was my conclusion that the reference
18 to 38 at this point, 38.04, the application to the
19 Federal Court is wrong; that when one looks at the
20 Act in its entirety -- and also I think it is
21 appropriate to the deference your decision should
22 take -- that the step the Attorney General can
23 take if you have made this factual determination
24 is to certify the information under 38.13.

25 Then the question would be whether

1 it was worth the candle to pursue a challenge to
2 the certificate, given how limited that challenge
3 can be.

4 I take quite the opposite view of
5 my friend. I start with the notion that section
6 38.01 exempts in its application or does not
7 apply -- and I now go to 38.01(6)(d).

8 "(6) This section does not
9 apply when
10 (d) the information is
11 disclosed to an entity and,
12 where applicable, for a
13 purpose listed in the
14 schedule."

15 So I went and got the schedule,
16 much as Ms McIsaac just did. And reading what the
17 schedule says carefully, it says:

18 "The Commission of Inquiry
19 into the Actions of Canadian
20 Officials in Relation to
21 Maher Arar, for the purposes
22 of that inquiry, except where
23 the hearing is in public."

24 And "for the purposes of that
25 inquiry", in my respectful submission, embrace

1 those activities that you would undertake in
2 camera.

3 One of the activities you would
4 take in camera was the determination, after
5 reviewing the evidence, of whether or not the
6 disclosure of certain information was injurious.
7 All that happens in camera. Mr. Arar, his counsel
8 and all the other persons in this room cannot be
9 privy to that process.

10 It was my submission that the
11 decision you are called upon to make is indeed one
12 that is protected under (d).

13 Then the next reference to you as
14 an entity, sir, is 38.02(1.1). It reads -- and
15 you just read it, but perhaps it is worth casting
16 our eyes on it again:

17 "When an entity listed in the
18 schedule, for any purpose
19 listed there ..."

20 And it is for the purpose of your
21 inquiry.

22 "... makes a decision or
23 order that would result in
24 the disclosure of sensitive
25 information or potentially

1 injurious information, the
2 entity shall not disclose the
3 information or cause it to be
4 disclosed until notice of
5 intention to disclose is
6 given and 10 days has
7 elapsed ..."

8 It makes perfect sense that you,
9 having gone through the exercise which will be
10 time consuming and expensive, and given who you
11 are, Mr. Commissioner, it makes perfect sense for
12 you, having reached this final decision -- and it
13 is within your mandate to do it in camera -- that
14 then having decided that, the government bears the
15 burden of deciding what to do.

16 Then question became: In looking
17 at these sections, because you were exempted and
18 removed from 38.01 by subsection (6)(d), then what
19 could the government do becomes the next question.
20 And that brings us to 38.13.

21 When I said certainly the
22 government is not without a remedy, because 38.01
23 is not engaged, what we are left with is the
24 Attorney General of Canada may choose to
25 personally issue a certificate that prohibits the

1 disclosure of the information.

2 It is my respectful submission to
3 you that this formulation of the relationship of
4 the decisions places the burden where it should be
5 and maximizes the flow of information to the
6 public and is entirely consistent with the
7 provisions of the Act.

8 That is my submission on question
9 one.

10 Question two: Again, I am sorry
11 but I don't agree.

12 I think I agree in general that
13 should you decide that there is information that
14 would be injurious to the interests of the state
15 in respect of national security but feel that for
16 reasons of the public interest some portion of it
17 should be released, one can arguably make the case
18 that you should go back into the resolution of it
19 under 38 because that indeed is what the terms of
20 reference say you ought to do. And I am content
21 with that.

22 What I am not content with is the
23 conclusion, as stated in the questions as sent to
24 us, that the Commissioner, or you, may not
25 disclose the information. I can agree with that.

1 The fact of the Commissioner's
2 decision under (k)(iii), the fact that an
3 application has been made to the Federal Court,
4 the fact that the agreement regarding disclosure
5 has been entered into unless the Attorney General
6 authorizes such disclosure in writing or by
7 agreement, or the Federal Court judge authorizes
8 the disclosure in a final order, in my respectful
9 submission is a publication ban.

10 It is a publication ban that is
11 framed as virtually an unlimited ban --

12 THE COMMISSIONER: But does that
13 track language in the Canada Evidence Act, though?

14 MS EDWARDH: Yes. Let me find the
15 section.

16 THE COMMISSIONER: Section
17 38.01(1) and (2)?

18 --- Pause

19 MS EDWARDH: Thank you,
20 Mr. Waldman.

21 Under 38.04(4) it says:

22 "An application under this
23 section is confidential.
24 Subject to section 38.12, the
25 ... administrator of the

1 [Federal Court] may take any
2 measure that he or she
3 considers appropriate to
4 protect the confidentiality
5 of the application and the
6 information to which it
7 relates."

8 In my respectful submission -- and
9 it may be Ms McIsaac has some view that would
10 assist you on this because we did have a
11 conversation about it.

12 It is my understanding that what
13 this purports to prohibit is any awareness by
14 participants, or myself particularly and
15 Mr. Waldman and my colleagues, and also the
16 public, that in fact this process has gone on in
17 the Federal Court.

18 I assume it means we would never
19 know if there was a decision.

20 In my respectful submission, that
21 cannot pass muster of constitutional scrutiny
22 under the recent decisions of the Supreme Courts
23 of Canada when you look at Dagenais, when you look
24 at Mentuk and then the recent decision with
25 respect to the Vancouver Sun. There is nothing

1 balanced. There is no way of looking at the
2 nature of the application. There is no way of
3 looking at the risk of injury.

4 It is just a bald class ban.

5 While we haven't had time to
6 formulate our views and produce any serious
7 written submissions to you on this, I do not agree
8 at all that that should be the law.

9 I do believe, Mr. Commissioner,
10 that you have authority to deal with this matter.
11 It is in your terms of reference. As a tribunal,
12 you can make a determination and, if necessary, I
13 would be prepared to undertake to bring a Charter
14 application to have this section struck out.

15 THE COMMISSIONER: You raise a
16 very important point, because we are getting to
17 the constitutionality of one of the new provisions
18 in the Canada Evidence Act that came in with Bill
19 C-36 that may or may not in the context of this
20 inquiry of become a real problem. I guess it
21 depends upon what happens down the road.

22 MS EDWARDH: The only difficulty
23 that counsel for Mr. Arar that I have --

24 THE COMMISSIONER: You wouldn't
25 know.

1 MS EDWARDH: I wouldn't know.

2 THE COMMISSIONER: But you should
3 know at least, and I think you are entitled to
4 know at least, now that you have raised it, as to
5 what view I am taking of that section.

6 MS EDWARDH: Yes.

7 THE COMMISSIONER: So you should
8 know in this instance in the abstract, so to
9 speak. If I were going to take the view that that
10 section is constitutional and that it applied,
11 then you would never know when we were proceeding,
12 if we were proceeding in that fashion.

13 I think you raise an important
14 point. I think we have raised a point here that
15 is going to require further submissions. I think
16 not one that, in fairness, we would want to deal
17 with without really having given it more thought
18 as to the best way to approach it.

19 The other side of it is we don't
20 want this inquiry to turn into unnecessarily just
21 me offering my opinions on sections of the Canada
22 Evidence Act if I don't need to. I am going to
23 have enough things to decide in this inquiry
24 without gratuitously going out of my way to pick
25 up others.

1 MS EDWARDH: But it is important.

2 THE COMMISSIONER: It is a
3 significant thing, yes.

4 Let me ask you a question, coming
5 back to Ms McIsaac's point -- and I will pose this
6 question to you as well Ms McIsaac.

7 Again, don't read into this
8 question that the answer should be determinative
9 of it, but the regime that Ms McIsaac posits would
10 have, in some instances, me, as the Tribunal,
11 reaching a conclusion. Contrary to the way things
12 normally work in administrative law, which is that
13 if somebody disagrees with that who is affected by
14 it, they may challenge it, they may seek judicial
15 review and so on, but she would posit a regime
16 whereas if I wanted to implement my decision it
17 may become necessary for me, the Tribunal, having
18 made a decision, to apply to a court to have the
19 court in effect approve the decision.

20 I mean, I suppose there is nothing
21 wrong with it, but my question is: Is there any
22 sort of other example or precedent whereby we have
23 administrative tribunals -- and I'm not strictly
24 speaking -- I suppose I am a type of an
25 administrative tribunal -- who then have to go to

1 apply to court to seek to enforce the decisions
2 they have already made?

3 It seems to me that on the
4 contrary, normally, in a lot of cases, we say that
5 the Tribunal that made the decision shouldn't even
6 appear as a party in the proceeding where judicial
7 review is sought for the decision. Here the
8 government would be suggesting that in one
9 scenario the Tribunal itself should be making the
10 application to court.

11 Again, it doesn't determine the
12 issue, but if there is ambiguity in the Order in
13 Council and in the schedule to the Evidence Act
14 one should maybe assist it in looking at what
15 normal regimes in administrative law are.

16 I simply ask that question: Do
17 you have anything to respond to that?

18 MS EDWARDH: I can answer you,
19 Mr. Commissioner, that I am unaware of any such
20 exercise. In fact, in reading Ms McIsaac's
21 submissions the first notation I made, when I
22 think I fully understood them, is: Why on earth
23 would you spend the time and energy devoted to
24 this issue when, if she objects then and doesn't
25 like your answer, then she trumps anyway? It all

1 has to go to Federal Court. Either you go to
2 Federal Court or the Attorney General goes to
3 Federal Court.

4 So if they are seriously going to
5 object, is it is worth you as a Commissioner's
6 time to spend a month or two months trying to sort
7 this out, only to have Ms McIsaac say, "Well, we
8 said no the first time and the Attorney General
9 takes that position."

10 It seems to render -- and I don't
11 mean to be sarcastic in saying that it seems to
12 render the activity that you have to undertake,
13 that is onerous, almost irrelevant or redundant
14 because we are going to get there anyway so it
15 seems. Which is why I was driven to rethink the
16 relationship of the sections.

17 THE COMMISSIONER: yes, I
18 understood that. And why you would say their
19 remedy is 38.13?

20 MS EDWARDH: That is correct.

21 If I could, I would also like
22 to -- that is clearly why entities are carved out.
23 I think you have just pointed that out.

24 I would like to deal with the
25 third question, could I --

1 THE COMMISSIONER: Yes.

2 Please do.

3 MS EDWARDH: -- before you turn
4 back to Ms McIsaac.

5 THE COMMISSIONER: Yes.

6 MS EDWARDH: This is one we have
7 given a lot of painful consideration to because we
8 understand, Mr. Commissioner, that it is more
9 efficient for you, and indeed would give you a
10 full context, to do what is proposed by holding,
11 you know, one kind of series of sequential
12 hearings or one large hearing.

13 This is why the constitutionality
14 of the provision came up, because it became
15 apparent that since we are not part of those
16 hearings two things would happen. We would not
17 directly know to what the government objected
18 unless you assured that in each ruling that
19 objection was taken. But if we are present in the
20 hearing room when the government objects, I can
21 protect, if I wish, Mr. Arar's rights. I can go
22 to the Federal Court.

23 The holding of this large hearing
24 cuts counsel for Mr. Arar out. We can't have
25 access to that court to vindicate any right.

1 While I appreciate, and indeed defer to the public
2 interest that is in your hands, we still have a
3 client that we represent and are interested in
4 vindicating his interests as much as possible in
5 this process. But the proposal takes us out.

6 We also got to constitutionality
7 because we imagined you then reconvening a hearing
8 and maybe calling some of the evidence, and in the
9 course of asking a question there could be an
10 objection. At the same time, you wouldn't be able
11 to tell me, "Well, we have already been to the
12 Federal Court on that and I'm sorry, Ms Edward, I
13 did my best and the Federal Court said no because
14 it is secret." So am I to go off to the Federal
15 Court? This is where we got wound up in kind of
16 circles of problems.

17 The other comment I wish to
18 make -- and I don't have an answer to how to
19 protect my client's rights in the context of being
20 cut out of so much, including knowing whether the
21 Federal Court has been involved -- is what will
22 the public know?

23 If we have hearings where the
24 government objects and you must make the decision
25 to dispose of the objection in camera and invoke

1 all the procedures that are part of your terms of
2 reference, everyone here will know the government
3 objects. It is important that the public know
4 that the government objects.

5 They must also be able to do what
6 they can to assess the validity, rationality and
7 purpose of that objection.

8 If we get into this large hearing,
9 none of us will know. You will know,
10 Mr. Commissioner, Commission counsel will know and
11 the government will know.

12 THE COMMISSIONER: But there
13 is the one safeguard. I don't say it is
14 completely equal to sort of the information as you
15 would have it.

16 In the Rules it is proposed that
17 Commission counsel will do a summary, to the
18 extent possible, of the evidence that is going to
19 be heard in camera, so that parties will know what
20 evidence it is proposed will be called in the
21 in camera hearings. I'm not sure how that is
22 going to work out.

23 But we are at this point talking
24 at a point in the proceedings, I suppose, where it
25 has already been determined that the evidence will

1 be heard in camera.

2 I take your point. I take your
3 point that if we go through the public hearings
4 and there is an objection that should be heard
5 in camera it will become more manifest as to what
6 is going in camera.

7 On the other hand, as you fairly
8 point out, the practicality of switching back and
9 forth will make, first of all for me,
10 understanding the evidence more difficult and,
11 secondly, will greatly intrude upon the
12 efficiency, if I can put it that way, of this
13 inquiry. It will become potentially a torturous
14 process.

15 MS EDWARDH: Those are my
16 submissions, Mr. Commissioner.

17 I couldn't find an answer. I
18 wondered whether there might be -- if in your
19 rulings you would consider identifying the precise
20 nature: What was the question asked or area that
21 was objected to? Perhaps if there was a Federal
22 Court proceeding that there was an agreement
23 reached here that Mr. Arar or his counsel would be
24 given notice of that and could be at least in a
25 position to make submissions.

1 Because of course the Federal
2 Court has a right to notify anyone and even if we
3 weren't included in all of it, we might be able to
4 be included in some of it.

5 I don't know that there is an
6 adequate halfway house, but that is one.

7 THE COMMISSIONER: I think what I
8 can say to you in advance, that whatever process
9 we adopt -- and I think as you appreciate and
10 Ms McIsaac appreciates and those that follow the
11 inquiry do -- this is a very different type of
12 proceeding than the one that we lawyers and judges
13 are usually involved in and presents some very
14 unique problems. The solutions to those
15 problems -- I am confident that we can conduct
16 this inquiry in a way that will be efficient and I
17 think that I will be able to fulfil my mandate. I
18 am confident of that.

19 The solutions to the problems
20 are going to be found in the procedures that we
21 adopt. To some extent we are going to learn as we
22 go. I think that we all have a commitment to
23 doing as much of this in public as we can.
24 Certainly I have a commitment to do it in a way
25 that is as fair as possible to Mr. Arar, that we

1 will be looking for ways to address the concerns
2 that you raise.

3 I think that counsel should feel
4 free as we proceed to make submissions about the
5 process as things occur so that the rules, as I
6 have said, are not fixed in stone. We will do our
7 best to proceed in a fair way, but nonetheless in
8 as efficient a way as possible.

9 Okay? Thank you.

10 Ms McIsaac, reply?

11 --- Pause

12 SUBMISSIONS / SOUMISSIONS

13 MS McISAAC: Sir, my first
14 submission would be that Ms McIsaac did not write
15 the Canada Evidence Act, so I won't take
16 responsibility for it. We are all in the position
17 of having to try to apply it.

18 I don't want to repeat what I have
19 already said, but in response to your question
20 about the position that this would put you in if
21 you were forced to apply to the Federal Court,
22 having been the one who made the initial
23 determination and whether there is a sort of
24 precedent for that kind of approach, what I would
25 say is it strikes me that it may not be dissimilar

1 to the situation that you would be in if, as an
2 inquiry -- now, we must remember that while there
3 are certain judicial aspects to what you are
4 undertaking it is an inquiry and, for instance,
5 there could be a situation where you were to issue
6 a subpoena or take some other steps that are not
7 complied with, in which case you would be the body
8 that has to take the steps, whether it be go to
9 court or some other process, to enforce your
10 order.

11 So it would be similar to that
12 circumstance I would think. But it would be
13 unique and it would not be the sort of situation
14 that one frequently sees.

15 THE COMMISSIONER: The enforcing
16 the subpoena type of thing is more of enforcing an
17 order. This would be asking the court to agree
18 with my decision.

19 MS McISAAC: Yes. Another
20 situation might be -- and I know this came up in
21 some of the previous inquiries, the Blood Inquiry
22 and the Somali Inquiry -- the issuance of
23 section 13 notices, where the inquiry itself, as
24 the only body capable of doing so, is called upon
25 to defend its decision. It happens with Human

1 Rights Commissions who are conducting inquiries
2 before a referral to a Human Rights Tribunal, they
3 are often called upon, even though they are the
4 decision maker in a sense, to defend their
5 decision. So it would be similar to that sort of
6 situation.

7 I don't agree with my friend, for
8 the reasons I said earlier, that we automatically
9 go, in a case where you have made a decision that
10 information is not subject to national security
11 confidentiality, to requiring the Attorney General
12 to file a Certificate under 38.13 because I don't
13 think we go that quickly to that point.

14 It is appropriate -- because then
15 there is very little review by the Federal Court.
16 That would be much better, in my submission
17 actually, my interpretation, which then allows the
18 Federal Court, both the Trial Division and the
19 Court of Appeal, to opine on the matter as well.

20 It may be a little difficult for
21 all involved to have them reviewing your decision,
22 but at least it is a full review of the decision
23 as opposed to a Certificate by the Attorney
24 General.

25 With respect to the last question,

1 quite frankly I would find it helpful if -- this
2 is the question about how we should proceed.

3 I would find it helpful if
4 Commission counsel could assist on explaining to
5 us how they envisage the process proceeding,
6 because as I understood the rules there would be
7 almost a concurrent process envisaged whereby
8 information is reviewed and if there are issues
9 with respect to claims for national security
10 confidentiality the Attorney General would be
11 called upon to justify those claims during an
12 in camera hearing, but those would be ongoing
13 during the process.

14 My biggest concern, as I said
15 earlier, is that leads to perhaps a piecemeal
16 approach where you are reviewing information
17 contained in documents that may have been produced
18 by the RCMP but we have not yet had an opportunity
19 to make submissions with respect to information in
20 documents perhaps produced by a Foreign Affairs
21 which contain the same kind of information; or
22 indeed the information came from Foreign Affairs
23 to the RCMP or vice versa. So that there is a
24 disconnect in terms of the totality of the
25 information.

1 In my submission, it would be much
2 better to have a process whereby the information
3 is -- all of those net claims for national
4 security confidentiality could be dealt with
5 together.

6 But I am not absolutely certain
7 how either process would actually work out in
8 practice, so it is a little difficult to be more
9 precise in my comments than that.

10 THE COMMISSIONER: Okay. Thank
11 you, Ms McIsaac.

12 Well that completes the
13 submissions, and those are helpful, with respect
14 to the questions that were raised by Commission
15 counsel.

16 What I will do is, within the next
17 short while, issue a ruling dealing with some of
18 the matters that were raised today and indicate in
19 that ruling those that will be deferred, as to how
20 they will be dealt with.

21 So counsel and the public will be
22 aware as to how we are proceeding as a result of
23 the submissions I heard today.

24 That completes the work for the
25 day, does it, Mr. Cavalluzzo?

1 Let me thank both counsel,
2 Ms McIsaac and Ms Edwardh, for your submissions
3 today. They are very helpful and I am obliged for
4 the work that you put into it and under
5 considerable time pressure that this inquiry is
6 creating. It has been a good deal of assistance
7 to me. So thank you, both.

8 Yes, Mr. Cavalluzzo.

9 MR. CAVALLUZZO: Mr. Commissioner,
10 this would complete today's process.

11 Once again, tomorrow, we will
12 reconvene at 10 o'clock for Deputy Commissioner
13 Garry Loepky for the RCMP.

14 There is the possibility -- I am
15 not sure of this -- that he may go into Wednesday.
16 I hope not, but if necessary. I hope to be just
17 an hour and a half or two hours with him in my
18 direct examination, and then we will hear from
19 counsel for Mr. Arar and counsel for the Attorney
20 General.

21 If we finish him tomorrow, then we
22 would reconvene on July 19th, as I said earlier
23 this morning.

24 THE COMMISSIONER: All right.

25 We will rise and resume at

1 10 o'clock tomorrow.

2 --- Whereupon the hearing adjourned at 3:01 p.m.,
3 to resume on Tuesday, July 6, 2004
4 at 10:00 a.m. / L'audience est ajournée à
5 15 h 01, pour reprendre le mardi 6 juillet
6 2004 à 10 h 00

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Lynda Johansson,
C.S.R., R.P.R.

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