

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



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

Audience publique

Public Hearing

Commissaire

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

Commissioner

Tenue à:

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

le mardi 3 mai 2005

Held at:

Algonquin Room
Old City Hall
111 Sussex Drive
Ottawa, Ontario

Tuesday, May 3, 2005

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Ms Marie Henein Mr. Hussein Amery	National Council on Canada-Arab Relations
Mr. Steven Shrybman	Canadian Labour Congress/Council of Canadians and the Polaris Institute
Mr. Emelio Binavince	Minority Advocacy and Rights Council
Mr. Joe Arvay	The British Columbia Civil Liberties Association
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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1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Tuesday, May 3, 2005

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

4 3 mai 2005 à 10 h 00

5 THE COMMISSIONER: Mr. Cavalluzzo.

6 MR. CAVALLUZZO: At the outset of
7 this morning, I would like to give some background
8 to the procedural issues which we will be
9 addressing today. At the same time, I would like
10 to inform the public as to what we have
11 accomplished in the last several months and what
12 we hope to achieve in the upcoming few months.

13 As you know, this public inquiry
14 was established in February of 2004 to inquire
15 into the actions of Canadian officials in relation
16 to Mr. Arar relating to a number of independent
17 points.

18 First is his detention in the
19 United States in December of 2002; second, his
20 deportation to Syria, via Jordan; third, his
21 imprisonment and treatment in Syria; fourth, his
22 return to Canada; and then any other circumstance
23 that you find relevant to fulfilling your mandate.

24 Of course, this is the mandate of
25 the Commission in Part 1.

1 In Part 2, the Commission has been
2 mandated to resolve a very important issue, and
3 that is the issue of whether there should be an
4 independent arm's length review mechanism for the
5 national security activities of the RCMP.

6 The Part 2 process is continuing
7 on at the same time that we are conducting the
8 Part 1 hearings, and a great deal has been
9 accomplished in that regard as well.

10 Now because of the nature of the
11 issues within its mandate, this public inquiry is
12 unique in that it is the first time that a totally
13 independent tribunal has reviewed the national
14 security operations of several government
15 agencies, with the backdrop of the Canadian
16 Charter of Rights and Freedoms. This requires a
17 procedural model which reasonably balances the
18 rights of the parties along with the interests of
19 the public generally.

20 In light of the matters it is
21 looking into, the public inquiry will, of
22 necessity, hear evidence which cannot be disclosed
23 to the public or Mr. Arar because of its national
24 security nature. However, we can advise the
25 public that even though some of the evidence of

1 government must be heard in camera, without the
2 presence of Mr. Arar or the public or indeed
3 Mr. Arar's counsel, it has been vigorously tested
4 through the cross-examination of Commission
5 counsel to ensure its reliability and credibility.

6 The role that Commission counsel
7 played in these in camera hearings was novel
8 because of the uniqueness of the issues we had to
9 deal with and the procedural model which we
10 adopted to accommodate the various interests.

11 Although government assertions of
12 national security are not novel in our legal
13 system, their application to this inquiry is
14 unique for two reasons:

15 First, these national security
16 confidentiality claims are being made in the
17 context of a public inquiry, with a statutory
18 mandate to meaningfully inform the public.

19 Second, some of the information
20 over which the government claims national security
21 confidentiality may already be in the public
22 domain, whether it be through the statements of
23 Ministers in the press or, as we have seen, the
24 leaks of information concerning Mr. Arar that we
25 have reviewed.

1 The procedural challenges faced by
2 this public inquiry have been immense. Today we
3 will be discussing some of the procedural issues
4 which have arisen as a result of the procedural
5 model which has evolved. However, before I refer
6 to these issues, I would like to review the state
7 of this public inquiry to this point in time.

8 We started our in camera hearings
9 last September and, as you may recall, prior to
10 that, in June of 2004 we heard from a number of
11 contextual witnesses relating to the RCMP, CSIS,
12 and the Department of Foreign Affairs. Since
13 September, we have completed 63 long days of
14 evidence, heard from numerous government
15 witnesses; have received and reviewed thousands of
16 exhibits, with tens of thousands of pages. We
17 heard from CSIS witnesses, from front line
18 employees to senior management, including Mr. Jack
19 Hooper, who was one of our contextual witnesses.

20 We heard weeks of evidence from
21 the RCMP, including witnesses from Project
22 A-OCANADA, from the "A" Division, and from
23 headquarters, the directorate over which has
24 responsibilities relating to national security
25 investigations. We heard from senior RCMP

1 officials, up to Deputy Commissioner Loeppky, who
2 you may recall was also a public contextual
3 witness.

4 We heard evidence from the
5 Canadian Border Services Agency, and we heard
6 many, many witnesses, and will hear further
7 witnesses, from the Department of Foreign Affairs,
8 including senior officials, security and
9 intelligence personnel, consular officials, and
10 ambassadors.

11 We also heard from other senior
12 officials in other government departments,
13 including senior officials in the Privy Council
14 Office.

15 Throughout this whole process we
16 have periodically released redacted documents so
17 that the public could be aware at least of some of
18 the information which we were reviewing in camera.

19 As lead Commission counsel, I can
20 confidently say that we have accomplished a great
21 deal, and I am satisfied with the progress of this
22 inquiry to date. We are getting to the bottom of
23 this story.

24 As an aside, I also want to put on
25 the public record that in my over 30 years of

1 practising law -- I am frightened to admit that --
2 but in over 30 years of practising law, I have
3 never seen a group of lawyers on our legal staff
4 work harder, more diligently, and under such
5 extreme conditions, and I will be forever grateful
6 to these people for their huge contributions.

7 All of this of course was done in
8 camera, without any public acclamation, without
9 any public recognition, but I can assure the
10 public that this legal staff has worked beyond the
11 call.

12 Where do we go from here?

13 In the next few months, we will
14 have public hearings, in which we will hear from
15 the Minister who was responsible for the RCMP and
16 CSIS at the material time. We will hear from the
17 Minister who was responsible for the Department of
18 Foreign Affairs at the material time. We will
19 also hear from senior officials, front line
20 employees, senior officers and so on, of the
21 government agencies who were involved in this
22 particular case.

23 Upon the completion of the public
24 evidence, there will be a week or two of further
25 in camera evidence to deal with outstanding

1 matters which were not resolved in the original in
2 camera hearings. This will not be comprehensive
3 evidence but will just deal with the gaps which
4 are still left outstanding at this point in time.

5 We then hope to have submissions
6 in the fall and then hopefully your interim report
7 will be submitted to the Government of Canada in
8 due course, and hopefully by the end of the year.

9 Finally, let me turn to the
10 hearing today.

11 Although this is a public inquiry,
12 the terms of reference imposed a duty to take all
13 steps necessary to prevent the disclosure of
14 information to the public of information which
15 would, in your opinion, be injurious to
16 international relations, national defence, or
17 national security. The Order in Council called
18 upon you to hear evidence in camera upon the
19 request of the Attorney General if, in your
20 opinion, the disclosure of such information might
21 endanger national security.

22 However, in order to ensure public
23 disclosure, the Order in Council contemplated that
24 the Commission would release a summary of some of
25 the information we heard in camera and provide the

1 summary to the Attorney General for his comment
2 prior to the public release of the summary.

3 The purpose of the summary was
4 twofold: First, the summary was intended to keep
5 the public informed of the evidence we had heard
6 in camera. Second, the summary was intended to
7 provide the parties with as much information as
8 possible about the in camera evidence in order to
9 be prepared for the public hearings.

10 Unfortunately, the experience with
11 the summary procedure led the Commission to
12 conclude that it was unworkable. In particular,
13 at the completion of the CSIS in camera evidence,
14 a summary was prepared of a relatively small
15 portion of the evidence which the inquiry believed
16 could be disclosed to the public. What ensued was
17 a very protracted, complex, and time-consuming
18 process. After a few months of attempting to
19 accommodate the government's concerns, we failed
20 to reach an agreement with the government as to
21 what might be disclosed to the public.

22 The summary which we wished to
23 disclose became the subject of a Federal Court
24 challenge, and in light of this experience the
25 Commission was faced with being tied up with the

1 government in endless disputes, or coming up with
2 a procedure which would be fair and thorough but
3 also expeditious.

4 In your ruling on the summary you
5 do set out certain aspects of the experience, and
6 I will not review that with you today other than
7 stating that as a result of this experience new
8 considerations came to the fore, and as a result
9 we have suggested a new procedure which does not
10 contemplate the issuing of summaries, although
11 that power to issue summaries still exists with
12 the Commission.

13 In the course of adopting the new
14 procedure, four issues have arisen, which we will
15 deal with today on an issue-by-issue basis.

16 The first two relate to the
17 fairness of having certain witnesses testify in
18 light of the unusual aspects of our procedure.

19 The third issue relates to how the
20 public hearings will be conducted in order to
21 ensure that national security concerns are
22 accommodated, and the final issue relates to the
23 role of amicus curiae, or the friend of the
24 inquiry.

25 In terms of the procedure, I would

1 like to recommend the following in respect of each
2 issue.

3 Issue number 1 in the Notice of
4 Hearing relates to Mr. Arar's testimony. The
5 issue there in a nutshell is that all government
6 witnesses to date have had access to the in camera
7 documents and evidence before they testified.
8 Because of national security concerns, Mr. Arar
9 will not have access to many of these documents
10 and much of the in camera evidence.

11 In light of this, the Commission
12 is seeking submissions on how to address this
13 situation and, in particular, how to minimize the
14 potential unfairness to Mr. Arar.

15 In respect of this motion, the
16 order of proceeding would be as follows:
17 Mr. Arar's counsel would lead, followed by the
18 three intervenors who I understand wish to make
19 submissions on this issue, followed by the
20 government, followed by RCMP individual officer
21 counsel, and then final comments from Mr. Arar's
22 counsel.

23 The second issue relates to the
24 testimony of the Royal Canadian Mounted Police.

25 On the other side of the coin, we

1 have an issue raised by the RCMP and individual
2 officers. Although they have had access to all of
3 the in camera evidence, it is argued that there is
4 a potential unfairness to RCMP and individual
5 officers who may testify because, in answering
6 questions which may be posed to them in the public
7 hearings, they may be precluded from relying upon
8 or referring to information or evidence which we
9 have heard in camera because of the national
10 security confidentiality claims of the government.

11 That will be the second issue
12 which we will deal with today, and the order of
13 proceeding will be as follows:

14 Mr. Bayne, who represents
15 individual RCMP officers, will lead; government
16 counsel will be next; Mr. Arar's counsel will be
17 next; the intervenors, if they wish to deal with
18 this issue, will be next; and finally Mr. Bayne
19 will have the opportunity to have the final
20 comment.

21 The third issue deals with the
22 conduct of the public hearings. And that is we
23 are going to be discussing a process which should
24 be followed to ensure government claims of
25 national security confidentiality are

1 appropriately addressed and to ensure that there
2 is no disclosure of information over which the
3 government claims national security
4 confidentiality except in accordance with your
5 terms of reference.

6 In terms of the order of
7 proceeding on this, this is really not the motion
8 of anybody, but I suggest the following order, and
9 I have spoken to counsel about this: the
10 government would lead off; Mr. Bayne would follow;
11 Mr. Arar's counsel would follow that; intervenors
12 would follow that. And as to any reply or
13 comments, I would leave that open. Obviously the
14 government may want to respond, and Mr. Arar's
15 counsel may as well.

16 The final issue that we will be
17 dealing with today deals with the very important
18 issue as to the role of the amicus curiae.

19 Under our rules we have an amicus
20 curiae who will be of great assistance to the
21 Commission in matters relating to issues of
22 national security, and his assistance to this
23 point in time has been significant and no doubt in
24 the future will be even more significant.

25 As far as this issue is concerned,

1 I believe that we should start off with the
2 amicus, followed by the government, followed by
3 Mr. Bayne, followed by Mr. Arar, followed by the
4 intervenors, and with the final comment left to
5 the amicus.

6 Mr. Commissioner, I just wanted to
7 put on the record, as I said at the outset, we are
8 back, and we hope to accomplish a great deal in
9 the next few months of public hearings.

10 Thank you.

11 THE COMMISSIONER: Back in public,
12 Mr. Cavalluzzo.

13 Thank you very much,
14 Mr. Cavalluzzo. Let me join in your comments
15 about the work that the Commission staff has gone
16 through. I, like Mr. Cavalluzzo, have been in
17 this business for a long time, and I have not seen
18 before such a dedicated, hard-working, talented
19 group of lawyers, and also the administrative
20 staff of the Commission who have devoted endless
21 hours to preparing for the inquiry. So I join
22 with you and express my gratitude to that group of
23 people.

24 Let me also, before we begin, make
25 special mention of the amicus curiae, Mr. Ronald

1 Atkey, who is with Mr. Gordon Cameron who works
2 with him in that role. I also join in your
3 comments about the valuable contribution they have
4 made to the inquiry.

5 With that, then let's turn to the
6 first issue, the one relating to Mr. Arar's
7 testimony.

8 Ms Edwardh, you are going to lead
9 off on that?

10 MS EDWARDH: I am; thank you,
11 Mr. Commissioner.

12 THE COMMISSIONER: Counsel are
13 free, when making submissions, certainly to use
14 the lectern, as Mr. Cavalluzzo did, and probably
15 that's the preferred method. But I am also
16 content if people do wish to speak from the table
17 where they have their papers and where others are
18 situate. So feel free, as you choose, to speak
19 from either position.

20 Ms Edwardh.

21 MS EDWARDH: Thank you,
22 Mr. Commissioner. Next time I will probably sit
23 down.

24 Let me make one observation.
25 Certainly from Mr. Arar's

1 perspective, we feel that amicus might be called
2 on with respect to the conduct of the public
3 hearings as well, because certainly it is our
4 submission that in respect of the conduct of the
5 public hearings, they have a specific role to
6 play, and I think it warrants hearing whether they
7 agree or disagree.

8 THE COMMISSIONER: That would be
9 the third issue today. Yes, I think that is a
10 good idea, and certainly, Mr. Atkey, if you have
11 anything that you or Mr. Cameron want to say on
12 that, I would welcome your submissions.

13 MS EDWARDH: Thank you.

14 SUBMISSIONS / SOUMISSIONS

15 MS EDWARDH: Let me turn to the
16 issue of Mr. Arar.

17 I want to begin by observing that
18 all of the witnesses you have heard,
19 Mr. Commissioner, have had access to the relevant
20 record documents and testimony that they would
21 need to give full and fair testimony before you,
22 and that is because it is a matter of fundamental
23 fairness to any witness who is called upon to
24 contribute to this process.

25 Mr. Arar stands in a unique and

1 different position. He has not had access to any
2 of the confidential testimony or any of the
3 confidential documents. He has had access to
4 highly redacted documents, with little
5 information, although with great study, I have to
6 add, some titbits come up. But the whole of this
7 process that has gone on so far, without intending
8 any criticism to you, sir, or my colleagues or to
9 Commission counsel, has not occurred, it's fair to
10 say, in the public domain. It has occurred
11 outside of that bright white light of public
12 scrutiny that you, sir, so often work in.

13 I was astounded at the position of
14 the Attorney General of Canada, in their
15 memorandum dealing with today's issues, where
16 Ms McIsaac, on behalf of the Attorney General of
17 Canada, says:

18 "With respect to Mr. Arar and
19 with respect to the issue of
20 fairness --"

21 She does this at page 2.

22 "... it is simply dispensed
23 with by saying that it is
24 submitted that Mr. Arar does
25 not have a 'case to meet.'"

1 Well, with respect,
2 Mr. Commissioner, that is utterly ill conceived.
3 Mr. Arar is entitled to as much fairness as every
4 other witness who has appeared before you. He
5 has, in every respect, a profound reputational
6 interest in the conclusions you reach. He is no
7 different than anyone else.

8 Your inquiry will not make
9 findings of civil or criminal liability, but the
10 findings may indeed have serious and profound and
11 negative effects on reputational interests.

12 This inquiry was called, in part
13 at least, because there were leaks in the
14 government suggesting things like Mr. Arar had
15 trained in Afghanistan, that he was a member or
16 associated with al-Qaeda, that he had knowledge of
17 sleeper cells in Ottawa. And with the greatest of
18 respect, we demand an opportunity to answer those
19 allegations.

20 His reputational interests may be
21 more damaged than any other person if he is not
22 given an opportunity to answer.

23 The question really is how to
24 answer, and let me begin with this.

25 From the very beginning, Mr. Arar

1 has wanted to testify, to tell his story, and to
2 assist you to fulfil your mandate. He had wanted
3 to discuss all the circumstances he was aware of,
4 from the investigation in Canada, his detention in
5 the United States, his deportation, and I am going
6 to say deportation to Jordan and then Syria, and
7 his arbitrary detention in Syria.

8 Mr. Arar and his family have
9 endured the spotlight because they want the truth
10 to come out.

11 There is one context fact that I
12 think is important here. When this inquiry was
13 originally convened, Mr. Commissioner, Mr. Arar
14 was scheduled to testify at the beginning.
15 Subsequently, a determination was made that he
16 ought not testify until the in camera hearings
17 were conducted so that he could obtain the fullest
18 disclosure possible prior to giving sworn
19 evidence. That has been your practice for all
20 other witnesses.

21 Now you have not as yet,
22 Mr. Commissioner, nor has your counsel, been able
23 to accord Mr. Arar with the same fundamental
24 rights as other witnesses have. So the question
25 then becomes, not so much why this has happened,

1 because it's obvious why has happened. It's
2 happened because the Government of Canada has
3 ensured that all of the hearings that have
4 occurred have occurred in secret. I don't even
5 know the address of where you held the hearings,
6 let alone the substance or content of what has
7 gone on.

8 We had hoped, as our only vehicle
9 to get adequate information, to receive from the
10 Commission the summaries. If we couldn't see the
11 actual evidence, we had every expectation that
12 you, Mr. Commissioner, would be able to provide
13 adequate summaries that would allow Mr. Arar to be
14 informed as much as possible about what had
15 transpired and what were the issues that he needed
16 to address.

17 Mr. Commissioner, again, the
18 Government of Canada has prevented you from
19 issuing timely summaries. My estimation, had you
20 proceeded in Federal Court, would be that we would
21 not be convening this hearing until sometime in
22 2006.

23 So it is, in our respectful
24 submission, patently clear that the position of
25 the government has made it impossible for Mr. Arar

1 to testify now. We simply have no more
2 information about the allegations against him than
3 we knew, really, at the very beginning of this
4 inquiry.

5 So the principle must be that you,
6 Mr. Commissioner, and the government, must be able
7 to make some meaningful information available to
8 Mr. Arar before he testifies.

9 This raises a big issue in our
10 minds. The first is obviously your report will be
11 notice of some kind to him. How much and in what
12 detail remains to be seen.

13 But we also take the view,
14 Mr. Commissioner, that while testifying to all
15 matters at this time may not be an option, there
16 are matters before you that are essential to be
17 heard and decided by you as part of your interim
18 report.

19 In order to look at those matters,
20 I draw your attention to page 3 of our submission
21 where your terms of reference direct you to
22 inquire into, granted the actions of Canadian
23 officials, but in respect of Mr. Arar's detention
24 in the U.S., in respect of his deportation to
25 Syria via Jordan, and in respect of the

1 imprisonment and treatment of Mr. Arar in Syria,
2 and in Jordan, I might add, and his return.

3 It is critically important for
4 you, Mr. Commissioner, to be in a position to make
5 factual findings about Mr. Arar's treatment in
6 Jordan and Syria as a backdrop to your conclusions
7 in respect to the conduct of Canadian officials.

8 How are you, sir, to decide the
9 reasonableness or the outrageousness of Canadian
10 officials relying on utterances made by Mr. Arar
11 in Syria if you are not able to evaluate or have
12 information about the reliability of such
13 statements? And the reliability of such
14 statements will rest upon the circumstances in
15 which they were obtained.

16 It is simply our position that if
17 you proceed without reference to arbitrary
18 detention, physical abuse, and torture, that you
19 will take the heart and soul out of this inquiry.

20 So the question is: How do you,
21 sir, obtain this information?

22 We say, very simply, that Mr. Arar
23 cannot be called on to testify now until it's
24 fair. He's not here to suffer any more abuse,
25 obviously, at the hands of anyone. He's entitled

1 to the rights and privileges of all the witnesses
2 who attend before you.

3 But we are also concerned about
4 delaying this question of his testifying until
5 after your interim report in respect of these
6 important issues around his treatment and
7 detention in Jordan and Syria.

8 So we ask, sir, that you consider
9 a creative option, a creative option that will not
10 have Mr. Arar testify to all matters generally,
11 but on those matters that are essential to the
12 fair and adequate discharge of your mandate for an
13 interim report, and that we put forward, starting
14 at paragraph 17 of our submission at page 5. We
15 ask you to adopt the creative solution of an
16 independent fact-finder.

17 That independent fact-finder could
18 undertake a limited and narrow examination in
19 order to report to you on the conditions of
20 confinement of Mr. Arar in Jordan and Syria,
21 perhaps the United States, and also to decide
22 whether or not there are other persons who could
23 contribute to the understanding of those
24 conditions, and that is set out in the materials.

25 While it is an unusual solution,

1 in the world of human rights, Mr. Commissioner,
2 this is not an unusual proposal.

3 We set out for you at paragraphs
4 18 and 19 the methods often used by the United
5 Nations Human Rights Commission in their system of
6 creating rapporteurs and other persons who are the
7 fact-finders for the human rights commission.
8 There are thematic rapporteurs, for example there
9 is a worldwide rapporteur on torture, on freedom
10 of expression, on extra judicial executions.
11 These rapporteurs are experts, they are highly
12 respected fact-finders. They can come from the
13 bar, they can come from NGOs, they can work
14 singularly or they can work in combination with
15 others, and they can undertake research.

16 With this in mind, we also point
17 out that a fact-finder is not alien to the
18 ordinary administration of justice. We have
19 provided you with examples where such an expert
20 can be appointed under the Federal Court Rules.
21 There is a procedure in the Ontario Rules of Civil
22 Procedure for the appointment of experts. And
23 while they vary, in essence it is a form of
24 delegation of a limited inquiry to a person who
25 can respond to you, can respond to the mandate you

1 create, and we ask you to consider it. It has
2 many, many advantages.

3 You are familiar with such
4 persons, Mr. Commissioner, because when you
5 undertook your task as the Commissioner in the
6 Walkerton Inquiry, you, for example, retained
7 Dr. Robert Gillam who we understand interpreted
8 and presented important findings to the inquiry.

9 The Honourable Justice Krever in
10 his interim report on blood safety retained
11 experts to audit Red Cross blood centres and
12 simply presented the conclusion to the inquiry.

13 So we urge you to consider this as
14 an option, and we have set out in paragraph 25 the
15 kinds of issues that the assessor or fact-finder
16 could entertain.

17 Certainly, he should have access
18 to the documents and testimony that bear on
19 Mr. Arar's treatment, if there are any in the in
20 camera process. He should be permitted to conduct
21 an in-depth interview with Mr. Arar. He should be
22 able to conduct the kinds of interviews that would
23 involve discussions with Mr. Arar's family
24 members, his physicians, any mental health
25 professionals. He should be permitted to discuss

1 issues with others who have undergone the same
2 experience in the same prison, with the same men.
3 He may find the confirmation important.

4 I ask, Mr. Commissioner, because I
5 think it is only fair to: Does this creative
6 solution to the problem that has been created
7 constitute an unfairness to anyone else? I think
8 it of utmost importance to observe two things.

9 I was here last year when
10 Mr. Cavalluzzo reported his efforts to obtain the
11 assistance and involvement of the Government of
12 Syria, the Government of Jordan, and the
13 Government of the United States. It's fair to say
14 that their deliberate choice to be absent from
15 these proceedings is important because, with
16 respect, only they have a direct interest in the
17 conditions of confinement of Mr. Arar in Jordan
18 and Syria.

19 We take a very strong position
20 that there is no other party before you, they
21 having chosen not to participate, that has a
22 direct interest in those conditions of confinement
23 except Mr. Arar.

24 So with that, in my respectful
25 submission, this innovative process would do the

1 following:

2 It would put Mr. Arar in a
3 circumstance where he was able to provide, on a
4 limited basis, information that we submit is
5 necessary to discharge your mandate and to have in
6 your possession before the writing of the interim
7 report. It is a model that we have adopted which
8 does not cause prejudice or injury to any other,
9 and it would allow Mr. Arar to be protected from a
10 process that he is not able to participate in now,
11 because he doesn't have the knowledge and
12 information on the broader issues. And it is
13 particularly appropriate as a model when the
14 inquiry is: Describe the conditions of
15 confinement, torture and abuse.

16 And I want to say one last thing:
17 If we were trying to call all this evidence before
18 you, Mr. Commissioner, some of it is so intensely
19 personal and private that it is very hard to put
20 into the context of a public inquiry. It's very
21 hard to spend time on people's sleeping habits,
22 their nightmares, their ability to have intimate
23 relations with spouses, how that has changed. But
24 those are the kinds of questions that get asked,
25 that need to be answered in the question: What is

1 the effect of what happened and what happened
2 exactly?

3 So with that, Mr. Commissioner, we
4 commend to you this model as one that is creative
5 and fair, and urge you to accept it.

6 If I could answer any questions, I
7 would be pleased to.

8 THE COMMISSIONER: Please, if you
9 would, and thank you for that, Ms Edwardh.

10 I haven't had any direct
11 experience with a model like this. I am obviously
12 familiar with the Ontario Rules, and I read the
13 material about the United Nations human rights
14 experience.

15 But I do have a couple of
16 questions about it.

17 The appointment, first of all, if
18 one were to be appointed, would be an appointment
19 by the Commission?

20 MS EDWARDH: Absolutely.

21 THE COMMISSIONER: And if a report
22 were prepared, then it would be, in the first
23 instance, delivered to the Commission. Would you
24 anticipate or is it in these types of situations
25 anticipated that at that stage, before it was

1 entered formally into the record of the
2 Commission, there would be an opportunity for
3 those who have standing at the Commission to see
4 it and to make submissions?

5 What I am thinking of -- I don't
6 suggest this would happen -- for example, if the
7 report included something that was totally
8 irrelevant or unrelated, it might need to be
9 vetted before it became part of the record of the
10 Commission.

11 MS EDWARDH: I think it is prudent
12 to, at a minimum, adopt a process, if one were
13 inclined, to permit submissions to be made; that
14 there may be something on the record that is
15 irrelevant, there may be something that even -- I
16 don't know what it would be -- that would violate
17 national security confidentiality, obviously that
18 kind of vetting must occur before it would be
19 filed.

20 But I do think we can do that with
21 written submissions to you. It isn't necessary
22 for the expert fact-finder to come and testify.
23 But that's another option.

24 THE COMMISSIONER: Right. That
25 was one of my other questions. When the

1 fact-finders of this sort are appointed and have
2 been appointed in other proceedings, is it common
3 that they would be presented to the tribunal with
4 an opportunity for people who wanted to inquire
5 about the process perhaps, or even indeed some of
6 the substance, to be given an opportunity to do
7 so?

8 MS EDWARDH: I think it's within
9 your discretion, Mr. Commissioner. I think it
10 goes both ways.

11 THE COMMISSIONER: Right.

12 MS EDWARDH: It might well be
13 something you might want to receive further
14 submissions on, but it isn't necessary that they
15 need to be presented for that kind of examination.
16 In your order directing their mandate, you could
17 ask that they report in accordance with certain
18 steps, and one of those steps could be to
19 articulate clearly the process undertaken.

20 THE COMMISSIONER: Given that this
21 is a factual inquiry which, to this point, other
22 than perhaps this procedure, will base the
23 findings on evidence that's given directly under
24 oath and subject to cross-examination, what role
25 would a report of a fact-finder, as you suggest,

1 play in the evidentiary hierarchy, if you will?

2 Would that report be capable of
3 being used by me if I were to make any finding, in
4 support of any finding that could be said to be
5 adverse to either an agency or an individual?

6 MS EDWARDH: In my submission, the
7 short answer, Mr. Commissioner, is should you make
8 the decision to set up a fact-finder, and you
9 decide to accept the report because it accords
10 with the direction you have provided in setting
11 out the mandate, that your acceptance of that
12 report makes it no different than any other
13 factual matter that is before you.

14 For example, in another context,
15 if it was important for you to understand the
16 capacity to do audio intercepts in a room, and
17 given the fact that you may not have the technical
18 skill, you retain someone who said simply to you
19 "absolutely, there's a clear capacity to do this
20 in this room", then I would say to you that you
21 are entitled to accept that expert report and act
22 on it, without going through any more elaborate
23 process.

24 THE COMMISSIONER: What I am
25 concerned about is section 13 of the Inquiries

1 Act, which as you are aware requires notice to be
2 given -- and I don't have the exact wording
3 here -- and individuals or institutions an
4 opportunity to respond to any allegations of
5 misconduct, if a report of this sort were relied
6 upon to make a finding that fell within section
7 13, could it be said to be unfair in that there
8 wouldn't be the opportunity to cross-examine and
9 indeed it wouldn't be something that was directly
10 given under oath?

11 MS EDWARDH: Well, your
12 fact-finder could choose to administer an oath
13 too, on your direction.

14 But let me deal more substantively
15 with the issue.

16 The reason, Mr. Commissioner, we
17 said that there was no one who had a direct
18 interest in Mr. Arar's treatment, other than the
19 Syrians and the U.S. and perhaps Jordan, was
20 because there is no one at risk of a finding of
21 misconduct that they were directly causing
22 Mr. Arar's abuse in jail in Syria, to my
23 knowledge. But I haven't been in your hearings.

24 THE COMMISSIONER: Right.

25 MS EDWARDH: It's my understanding

1 perhaps the closest that comes to it is the
2 suggestion that Ambassador Pillarella's
3 enthusiastic support of the Syrians in their
4 interrogation of Mr. Arar could have intentionally
5 or otherwise encouraged the interrogation process.
6 But he still is not alleged to be in the basement.
7 He doesn't purport to have knowledge of the
8 process of interrogation from the documents I have
9 seen.

10 So I even take the position he is
11 not directly interested.

12 THE COMMISSIONER: I understand,
13 and I understood that point in your submission
14 when you said that the only person who is directly
15 interested in the evidence or information that
16 Mr. Arar was tortured when he was in Syria would
17 be Mr. Arar.

18 It seems to me that if one were to
19 go ahead with the proposal that you make, that one
20 of the conditions that might be attached to it
21 would be that while the information would become
22 part of the record of this inquiry, it could not
23 be used as the basis for any finding of misconduct
24 against another individual or institution.

25 As I hear your suggestion, what

1 you are saying is, and that's probably the case,
2 it wouldn't be necessary to be used for that
3 purpose because it's not directly alleged that
4 anybody who is a Canadian official was involved in
5 the torture.

6 MS EDWARDH: I don't want to
7 resile though, Mr. Commissioner, from hierarchies.
8 I do not believe, nor do I accept, that you are
9 anything but the master of your own house in the
10 procedure of this Commission of Inquiry. And if
11 the Government of Canada, because of the decision
12 to proceed entirely in camera, has created a
13 situation where you now feel you can't call upon
14 another witness to testify fully, the question I
15 ask is: There is nothing in your terms of
16 reference that would prevent you from adopting the
17 conclusions of a fact-finder after a review, with
18 the assistance of your counsel, of the evidence he
19 gathered and the conclusions he reached.

20 It is not the case, in my
21 respectful submission, that your terms of
22 reference require you to find facts only on the
23 basis of sworn testimony before you. This is an
24 inquiry; this is not a trial.

25 In that respect, should you have

1 confidence in the process and in the scope of the
2 inquiry and in the credibility of the fact-finder,
3 you are at liberty, sir, to adopt it as your own.

4 If it found a section 13 notice,
5 and a finding of misconduct in my respectful
6 submission, that is appropriate as well.

7 All this is is a compromise
8 necessitated because Mr. Arar has been cut out
9 from Day 1 in this process.

10 But you need to know whether the
11 utterances he gave in Syria are hogwash, or
12 whether they are matters which are reliable enough
13 for the Canadian intelligence establishment to
14 give some credence to.

15 We know that if you will use a
16 mechanism that is reputable and acceptable,
17 there's only going to be one conclusion. But you
18 need to have a process for that.

19 It would be a very serious flaw in
20 this inquiry if you didn't arm yourself with that
21 information before your interim report.

22 While we know Mr. Arar may have to
23 wait until the end of the day to give a full
24 account of what transpired, I must tell you,
25 Mr. Commissioner, in light of the history of the

1 summaries, Mr. Arar and his counsel have doubts
2 and grave concerns as to whether the interim
3 report will even see the light of day. We have no
4 doubt that you will have to fight to make it see
5 the light of day.

6 THE COMMISSIONER: If I could, I
7 have more questions about it, because as I said
8 the proposal is unique to me.

9 You did, in the course of your
10 submission, mention that the fact-finder should be
11 given access to any documents, even those that
12 were received in camera, with respect to the
13 events that the fact-finder would be reporting on.
14 Would you be proposing then that the fact-finder
15 see documents over which the government claims
16 national security confidentiality, or would these
17 be public documents?

18 Any of these questions, by the
19 way, that I am asking, are just things that have
20 occurred to me as I read your material. Feel free
21 if you wish to get back to me on them.

22 MS EDWARDH: I think the answer
23 is, if possible, they ought to see matters. So
24 obviously a fact-finder must be a person who is
25 capable of getting security clearance and who will

1 work within the confines of the rules of this
2 inquiry.

3 But I am sure if you,
4 Mr. Commissioner, or your counsel were to pick up
5 the phone and ask our former Justice Arbour if
6 there was someone she recommended to conduct such
7 a finding, that you get some names. And I am sure
8 that ultimately if the Government of Canada, who
9 is often privy to using rapporteurs, is satisfied
10 with the credentials of such a person, then indeed
11 they will get security clearance.

12 So I don't resile at all from the
13 suggestion that as much information should be
14 given to you to permit you with comfort to accept
15 the findings.

16 THE COMMISSIONER: Would you
17 envision that the interview with Mr. Arar would be
18 audiotaped or videotaped, or how would the report
19 be presented?

20 Would it be a written report, or
21 is that something that would be up for discussion?

22 MS EDWARDH: I think that would be
23 up for discussion. Obviously a written report to
24 you. Any interview with Mr. Arar or his spouse or
25 his children or his mother or his treating

1 physicians would be a matter to think about, how
2 it would form appendixes, whether they could be
3 reviewed by you and then sealed because of the
4 confidentiality associated with them.

5 There are many avenues to protect
6 the integrity of the fact-finding process, and
7 also to preserve both privacy interests and just
8 what the limited scope of the inquiry is.

9 I would be glad to think about and
10 address any of them that you require of me.

11 THE COMMISSIONER: Do you have any
12 idea from other experiences as to how much time
13 this type of process would take?

14 Let me say that if it's otherwise
15 a good idea and one that should proceed, the
16 question of time isn't one that should militate
17 against it. I am just interested.

18 Do you have any comment on that?

19 MS EDWARDH: I have one personal
20 example, if you will bear with me.

21 I represent someone who laid a
22 complaint for one of the U.N. rapporteurs who
23 travelled to Iran, and the process, I believe,
24 between the making of the complaint, the
25 rapporteur's entrance into the country, which

1 obviously had to be negotiated, and delivering a
2 report, wasn't much more than three months, once
3 they got in.

4 So I would think that a dedicated
5 rapporteur, who doesn't have to travel to Syria --
6 which we wouldn't advise in any event -- or
7 doesn't have to travel to other countries, could
8 do this in a 6-to-8-week period.

9 THE COMMISSIONER: Thank you very
10 much, Ms Edwardh. Most helpful.

11 MS EDWARDH: Thank you.

12 THE COMMISSIONER: We will turn to
13 the intervenors, and we have three of them.

14 Mr. Neve, are you speaking on
15 behalf of the group?

16 SUBMISSIONS / SOUMISSIONS

17 MR. NEVE: Good morning,
18 Mr. Commissioner. It's a pleasure to be here, my
19 first opportunity to be in front of you since the
20 day when I asked on behalf of Amnesty
21 International for status at the inquiry.

22 I speak today on behalf of Amnesty
23 International but also on behalf of the 17 other
24 organizations that have been granted intervenor
25 status before this inquiry, and two other

1 colleagues from other organizations are going to
2 make brief presentations to you as well.

3 This phase of the inquiry offers a
4 critical opportunity to ensure that issues of
5 significant concern to the Canadian and indeed
6 international public are fully explored and
7 addressed in a manner, of course, consistent with
8 your mandate.

9 Clearly one element of central
10 interest to the public is being able to hear from
11 Maher Arar about his experience. Intervenors are
12 deeply disappointed that the positions taken by
13 the government with respect to what have become a
14 staggeringly wide sweep of national security
15 claims have meant that there has been virtually no
16 meaningful disclosure to Mr. Arar of evidence
17 relevant to this case to this point in time,
18 making it virtually impossible for him to take the
19 stand at this time in any way that would be
20 consistent with procedural fairness.

21 We are therefore very supportive
22 of the submission Ms Edwardh has made, urging that
23 an independent fact-finder be appointed with power
24 to, at the very least, enquire into Mr. Arar's
25 treatment in Jordan and Syria, an issue which of

1 course is of utmost importance to all of the
2 issues at stake in this inquiry.

3 We have similarly recommended this
4 option in our written submission to you,
5 describing such an expert, in our words, as a
6 special rapporteur, a role and function which
7 Ms Edwardh has very rightly highlighted has long
8 standing, extensive, and I would say successful
9 precedence within the international human rights
10 system, be it at the United Nations or other
11 international human rights bodies such as the
12 Organization of American States.

13 We believe that the appointment of
14 such a fact-finder could and should be used to
15 address another pressing concern that intervenors
16 have regarding the inquiry and which we believe is
17 central to your mandate. We have highlighted
18 since the outset of the inquiry that it was vital
19 that there be careful examination of the
20 possibility that what happened to Maher Arar was
21 not an isolated, exceptional instance, but rather
22 might have been part of a wider pattern, and that
23 the pattern might even have been tantamount to a
24 Canadian variation of the notorious U.S. practice
25 of extraordinary rendition, whereby individuals

1 are transferred by one government into the hands
2 of police and jailors in another country outside
3 of the usual framework of legal and human rights
4 safeguards.

5 We were supportive, for that
6 reason, of the applications for standing that were
7 made by or on behalf of Muayyed Nureddin, Abdullah
8 Almalki, and Ahmed Abou El-Maati.

9 When they were not granted
10 standing, we instead urged that they be called as
11 witnesses.

12 We do understand and appreciate
13 the procedural concerns and sensitivities that may
14 make it difficult for the Commission to call them
15 as witnesses and to testify in a conventional
16 manner, many of the same concerns and
17 sensitivities that of course arise in Mr. Arar's
18 case. An independent fact-finder could resolve
19 these difficulties.

20 Commissioner, I cannot stress
21 enough how vitally important intervenors consider
22 this point to be. All three of these men,
23 Canadian citizens, have, like Mr. Arar, been
24 arrested and detained in Syria. They have all,
25 like Mr. Arar, made allegations of being

1 interrogated under torture, and critically,
2 information that arises in all of these cases
3 raises questions about the scope and nature of the
4 relationship between Canadian law enforcement and
5 security agencies and their Syrian counterparts.

6 Did their arrests come about as a
7 result of information that was provided by
8 Canadian agencies? Did their arrests come about
9 as a result of some sort of request made by
10 Canadian agencies? Did information from Canada
11 form the basis of the interrogations they
12 experienced in jail in Syria? Did Canadian
13 interest in the results of the interrogation
14 sessions interfere in any way with diplomatic
15 efforts to protect the fundamental rights of these
16 men while they were in detention? And finally,
17 what use was made of the confessions and
18 information obtained during the various
19 interrogation sessions, and in particular, did
20 information from any one interrogation flow into
21 any of the other cases, including Mr. Arar's?

22 All four of these men were held
23 for at least a portion of their imprisonment in
24 the same detention in Damascus, the Palestine
25 branch of the Syrian military intelligence. These

1 four men were detained in Syria over a time that
2 spanned almost two and a half years, beginning
3 with the arrest of Mr. El Maati in November of
4 2001 and continuing through to the release of
5 Mr. Almalki in March 2004. Each of them, and/or
6 their families, have alleged that Canadian law
7 enforcement and security agencies may have been
8 closely involved in what happened to them.

9 Commissioner, we are cognizant of
10 the fact that your mandate is to inquire into the
11 role of Canadian officials with respect to Maher
12 Arar, but we very strongly are of the view that
13 the role cannot be properly understood and
14 assessed without considering the fundamental
15 question of whether his experience was an isolated
16 one, and may have therefore been an error or
17 oversight, or, rather, was part of a pattern and
18 may have therefore been something more systemic
19 and even intentional.

20 This distinction is a fundamental
21 one. It would most certainly shape the nature of
22 your findings and recommendations. It is also
23 central to the policy phase of the inquiry.
24 Unless we understand whether there is a pattern
25 behind Mr. Arar's experience, it is difficult to

1 know what should be recommended as to the most
2 effective approach to oversight of RCMP national
3 security activities. Unless we understand whether
4 there is a pattern behind Mr. Arar's experience,
5 Mr. Commissioner, the Canadian public will
6 inevitably feel that this inquiry into what
7 happened to him is incomplete.

8 We very much urge, therefore, that
9 you take up the recommendation made by Mr. Arar's
10 counsel to appoint an independent fact-finder and
11 that his or her mandate expressly include
12 inquiring into the experiences of these three
13 other Canadian citizens who were detained and
14 allegedly tortured in Syria and considering what
15 role Canadian agencies may have played in what
16 happened to them.

17 Thank you.

18 THE COMMISSIONER: Thank you very
19 much, Mr. Neve.

20 As I understand your submission,
21 there are two things that you are saying in
22 respect of the other individuals that the
23 fact-finder would look at. One would be the
24 treatment in Syria, and the second, a much broader
25 issue, would be, my word, the complicity of the

1 Canadian government in their being detained and
2 treated that way in Syria?

3 MR. NEVE: That's correct.

4 THE COMMISSIONER: That captures
5 the two areas you are suggesting the fact-finder
6 should address with respect to those three?

7 MR. NEVE: Yes, we consider both
8 of those issues to be of critical importance and
9 central to your mandate.

10 THE COMMISSIONER: Thank you very
11 much.

12 Who's next? Mr. Saloojee?

13 SUBMISSIONS / SOUMISSIONS

14 MR. SALOOJEE: Thank you very
15 much, Mr. Commissioner, for giving me the
16 opportunity before you today.

17 I will begin, of course, by noting
18 that Mr. Arar's case is of great importance to all
19 Canadians but, in particular, to Canadian Muslims
20 and Arabs. We feel very strongly about this case
21 and we have from the beginning, not only because
22 Mr. Arar is one of our own, one of us, but also
23 because his case seems to encapsulate many, if not
24 all, of our collective concerns after September
25 the 11th.

1 Some examples that I am sure you
2 are quite aware of, the visitations by the RCMP
3 and CSIS and the tactics typically used in those
4 visitations against Canadians of Arab and Muslim
5 origins; the issue of racial profiling; the issue
6 of detention and interrogation while travelling
7 through the United States; the fear of being
8 stigmatized as a terrorist in our own country, and
9 all of the attendant tragedies that that entails;
10 the issue of dirty information about individuals
11 being circulated and exchanged with others, and
12 the consequence of those exchanges; the issue of
13 public information published about us by anonymous
14 sources; and so forth and so on.

15 It certainly is not an
16 exaggeration to say that many Canadian Muslims and
17 Arabs do live in the shadow of Mr. Arar. We are
18 fearful that what happened to him might very well
19 happen to us.

20 Certainly I think I would amplify
21 Mr. Arar's counsel's statement that Mr. Arar does
22 have a very profound reputational interest, and
23 that interest I think is shared by many Canadian
24 Arabs and Muslims who have had their lives ruined
25 post 9/11 for a variety of reasons, being smeared

1 as terrorists or terrorist sympathizers. There's
2 a litany of those cases, and in all of those
3 cases, reputations have been ruined, families
4 destroyed, livelihoods compromised.

5 Therefore I think it's safe to say
6 that Canadian Arabs and Muslims have placed a
7 great deal of hope in this Commission. We have
8 asked for it, we have fought for it, we have
9 advocated for it. We don't have any presumption
10 about the outcome, but our primary expectation is
11 that the Commission would leave no stone unturned
12 in examining what happened to Mr. Arar.

13 We therefore believe that there
14 can't be a full, complete, and meaningful
15 exploration of his situation without also
16 listening to the testimony of the individuals
17 mentioned earlier by my colleague, Mr. Neve,
18 Abdullah Almalki, Muayyed Nureddin, and Ahmed Abou
19 El Maati. In fact, we believe that such
20 information is essential to a full and complete
21 review of Mr. Arar's experiences.

22 Mr. Cavalluzzo mentioned earlier,
23 of course, that in the initial stages of the
24 public hearings there were various witnesses who
25 were called, some of which he termed "contextual

1 witnesses," and of course we are going to be
2 looking forward to a number of other witnesses as
3 well, officials, functionaries, front line
4 workers, as he called them. These witnesses, we
5 believe, these three men, are no less relevant and
6 no less important to be heard from than the other
7 witnesses that we have heard from previously or we
8 will hear from.

9 As with Arar, there are troubling
10 unanswered questions about the role of our
11 security agencies in these men's detention and
12 alleged torture, and I think and I hope that you
13 will agree with me that the similarities between
14 these cases are uncanny and alarming and must
15 warrant serious exploration.

16 You have heard some of the facts
17 from my colleague, Mr. Neve, and really I think
18 it's our position that certainly you are mandated
19 within the broad powers that you have to consider
20 any other circumstances relevant for Mr. Arar's
21 situation. So within that framework, I certainly
22 think that you have the power to listen to these
23 men.

24 Beyond that, I think that it's our
25 position that what these men have to say is

1 squarely within your mandate in looking at
2 Mr. Arar's situation directly and in a focused
3 manner, because their testimony might shed some
4 light on some of the following issues: whether
5 what happened to Mr. Arar was, in fact, isolated
6 or whether it was a Canadian-style rendition
7 policy; whether what happened to Mr. Arar was in
8 whole or in part due to the fact that he was a
9 Canadian Arab or Muslim. Their testimony might
10 yield valuable evidence as to Canada's
11 relationship with Syrian intelligence. And
12 certainly I think their testimony would be very
13 important in your recommendations about an
14 appropriate oversight mechanism for the RCMP.

15 One notes already among the
16 Arab-Muslim community that there is significant
17 disappointment about the fact that so much time
18 has been devoted to in camera hearings and there
19 has not been a summary produced of those hearings.

20 Our recommendation to listen to
21 these men is not to delay the Commission or to
22 hamper its work. We are not calling for a
23 full-blown inquiry into these men. Our intent is
24 simply to listen to them, to illuminate, in the
25 fullest and most meaningful way possible, what

1 happened to Mr. Arar.

2 Justice must not only be done but
3 must be seen to be done, and their testimony is no
4 less relevant and no less important to those that
5 you have heard before and those that you will hear
6 soon.

7 Thank you so much.

8 THE COMMISSIONER: Thank you very
9 much, Mr. Saloojee.

10 Next is Mr. Allmand.

11 SUBMISSIONS / SOUMISSIONS

12 MR. ALLMAND: Mr. Commissioner,
13 because I want to refer to certain documents, I
14 will make my statement from my seat, if that's
15 acceptable?

16 THE COMMISSIONER: That's
17 acceptable.

18 MR. ALLMAND: Mr. Commissioner,
19 one of the questions you are asking today is how
20 the Commission should provide fairness to Mr. Arar
21 who feels unable to testify because he has not had
22 access to much of the testimony given in camera
23 and consequently cannot fully or adequately
24 comment on it.

25 In the joint submission of the

1 intervenor organizations of April 28th, there is a
2 proposal to appoint a special rapporteur, which
3 Mr. Neve has already referred to, which attempts
4 to respond to the issue of Mr. Arar's testimony.
5 And this morning, of course, his attorney put
6 forward a similar proposal, which she called a
7 creative option, for an independent fact-finder.

8 So on behalf of the International
9 Civil Liberties Monitoring Group I would like to
10 explain why we are supporting such a proposal or a
11 variation of it and what it should cover.

12 As I mentioned before, the
13 International Civil Liberties Monitoring Group is
14 a coalition of 34 civil society organizations,
15 human rights groups, refugee support groups, trade
16 unions, faith groups, and so on, which was set up
17 after September 11th, 2001, with a mission to
18 monitor and to protest any attack on, or
19 violations of, or infringement of human rights, as
20 set out in our constitution, in our federal and
21 provincial laws, and in the international treaties
22 ratified by Canada.

23 While we are here dealing with the
24 case of Mr. Arar, the International Civil
25 Liberties Monitoring Group is also concerned with

1 any practice or policies which would constitute an
2 attack on the Canadian human rights system or
3 undermine the integrity of that human rights
4 system.

5 In giving notice of the
6 Commission's mandate last year, you said you
7 wanted evidence with respect to the deportation of
8 Mr. Arar to Syria via Jordan, also the
9 imprisonment and treatment of Mr. Arar in Syria,
10 and then any other circumstance directly related
11 to Mr. Arar that the Commissioner considers
12 relevant to fulfilling his mandate.

13 Commenting on your mandate, you
14 stated in your ruling of May 10th, 2004, and I
15 quote from your ruling.

16 "I am committed to ensuring
17 that the inquiry is both fair
18 and thorough, and that in the
19 course of the inquiry, I
20 obtain and consider all
21 relevant information relating
22 to the issues identified in
23 the terms of reference. I
24 agree with the submissions of
25 those applicants who urge

1 that the inquiry look into
2 not only what happened but
3 also the causes. I intend to
4 examine the why it happened
5 from an individual,
6 organizational and systemic
7 perspective. I also agree
8 with the submissions that the
9 scope of my mandate should be
10 interpreted broadly and that
11 the actions in question must
12 be viewed in context."

13 Mr. Commissioner, if we are to
14 achieve your goals for the inquiry as stated in
15 the ruling that I just referred to, that it be
16 thorough, that it be broad, that it be in context,
17 whether it is the result of a systemic policy or
18 not, then I would submit that you must find a fair
19 means to hear Mr. Arar and to understand the
20 context in which he was detained, interrogated,
21 and tortured.

22 We believe that you must deal with
23 the following questions:

24 First, was Arar's detention and
25 torture in Syria the result of a mistake by

1 Canadian officials or a result of a policy?

2 Second, did Canada have any
3 arrangements with Syria and the United States
4 regarding confinement, interrogation and torture?

5 And third, did Canada have its own
6 policy of rendition?

7 And I would submit that in order
8 to get answers to these questions, you must
9 examine the other cases of Canadians tortured in
10 Syria, to see if it adds up to a pattern or to a
11 policy. Otherwise, Mr. Commissioner, you will be
12 eliminating without any inquiry one entire
13 possibility relating to Mr. Arar's treatment.

14 The evidence that we have been
15 able to examine, scant as it may be, suggests to
16 us that there is a strong possibility that there
17 is a pattern, that Mr. Arar's case is not an
18 isolated one which was the result of mistakes and
19 inexperience.

20 My colleagues have already
21 referred to the cases of El Maati, Almalki and
22 Nureddin, who were all detained in Syria, in the
23 same prison, with the same interrogator, with the
24 same allegations of torture, and they said the
25 questions they were asked in Syria were similar or

1 the same questions that they had been asked in
2 Canada by Canadian security officials before they
3 left to go overseas.

4 So in conclusion,
5 Mr. Commissioner, we would like to suggest the
6 following: We submit, and are convinced, that you
7 cannot find out what happened to Mr. Arar unless
8 you check the possibility of a pattern, a system,
9 or a policy -- in other words, perhaps a Canadian
10 version of rendition -- and this means getting
11 information about other cases, examining what
12 happened to them as compared to Mr. Arar, in
13 particular those tortured in Syria.

14 A final word. We believe that if
15 this is not done, then what is the value of the
16 Part 2 policy review? How can we, or you,
17 recommend a policy to correct a problem if we
18 don't know the full parameters of that problem, if
19 we don't know the full causes which led to the
20 arrest, to the confinement, to the interrogation
21 and torture of Mr. Arar in Syria?

22 Thank you very much,
23 Mr. Commissioner.

24 THE COMMISSIONER: Thank you,
25 Mr. Allmand.

1 Ms McIsaac, for the Government,
2 you are next?

3 SUBMISSIONS / SOUMISSIONS

4 MS McISAAC: Thank you, sir.

5 If you may, I would like to start
6 my submissions this morning by reminding everyone,
7 as I am sure I don't need to remind you, sir, that
8 this is a public inquiry, not a trial, and you are
9 an independent fact-finder. And it's against that
10 background, in my submission, that you have to
11 determine the issue of whether and when Mr. Arar
12 should testify before you and how that should be
13 done.

14 First of all, as we have said in
15 our submissions, the Attorney General does not
16 know precisely what allegations Mr. Arar wishes to
17 make against Canadian officials or the totality of
18 what he will say if he testifies. We assume that
19 Commission counsel have interviewed him and that
20 Commission counsel do have views as to what his
21 evidence would be, and that Commission counsel is
22 in the best position to advise you as to whether
23 he would be able to provide evidence that would
24 assist you in your evaluation of the conduct of
25 Canadian officials, and whether this evidence is

1 unique to Mr. Arar or whether it's available from
2 other witnesses.

3 Quite frankly, if Mr. Arar has
4 such evidence that would assist you in the
5 evaluation of the conduct of Canadian officials,
6 it is clearly the view of the Attorney General
7 that you would need to hear from him in order to
8 evaluate that evidence.

9 With respect to the issue of
10 fairness, there seems to be a rather profound
11 misunderstanding, in my view anyway, as to what
12 the purpose of this inquiry is. The purpose of
13 this inquiry is to evaluate the conduct of
14 Canadian officials in accordance with the
15 provisions of your terms of reference, and in
16 particular, I would have thought their involvement
17 with respect to Mr. Arar's detention in New York,
18 his subsequent deportation to Syria via Jordan,
19 their involvement or role, if any, in his
20 incarceration in Syria, and subsequently his
21 return to Canada, and other matters that you might
22 find directly related to Mr. Arar which are
23 relevant to that inquiry.

24 The Government of Canada takes the
25 position that Mr. Arar does not have a case to

1 meet.

2 Like any other inquiry, this
3 inquiry certainly involves the reputations of
4 various individuals, whether they be witnesses at
5 the inquiry, and sometimes whether they simply be
6 bystanders to the inquiry. But it is important to
7 go back continually to this first principle: that
8 the purpose of the inquiry is to examine the role
9 and the conduct of Canadian officials.

10 Accordingly, the government takes
11 issue with the premises at paragraphs 7 and 13 of
12 the submissions that have been filed by Mr. Arar's
13 counsel, and those comments are to be found --
14 paragraph 7, which is at page 3, where the
15 statement is made:

16 "Mr. Arar simply has no more
17 information about the
18 allegations against him than
19 he knew at the commencement
20 of the inquiry."

21 The purpose of this inquiry is not
22 to look into the allegations against Mr. Arar.

23 And similarly, paragraph 13 at
24 page 4:

25 "It would be grossly unfair

1 for Mr. Arar to testify at
2 the inquiry when he will be
3 unable to respond to
4 questions related to the
5 documents and testimony
6 emanating from the in camera
7 hearings from which he has
8 been excluded."

9 Mr. Commissioner, if Mr. Arar were
10 to testify, he would not be cross-examined with
11 respect to the evidence that you have heard in
12 camera. He would be cross-examined, if at all,
13 with respect to the material that is in the public
14 domain and which, in accordance with your rules,
15 has been provided to him ahead of time.

16 He cannot and will not be asked
17 questions about documents and testimony from the
18 in camera hearings. He doesn't have to respond to
19 allegations in order for you to judge the actions
20 of Canadian officials. Your job is to review
21 their actions and determine if they were
22 reasonable in the circumstances and whether they
23 contributed in any way to what happened to
24 Mr. Arar.

25 THE COMMISSIONER: Let me

1 understand, though. Is it the government's
2 position that Mr. Arar is or is not entitled to
3 procedural fairness as a witness in this inquiry?

4 MS McISAAC: He certainly is, sir.
5 But we have to put the concept of procedural
6 fairness in context, and I am not here today to
7 urge that Mr. Arar must testify.

8 I am simply here to say if it is
9 the evaluation of your counsel who decide which
10 witnesses will assist you in fulfilling your
11 mandate, if it is their view that Mr. Arar has
12 information which would be of value to you in
13 assessing the conduct of Canadian officials, then,
14 yes, he should testify.

15 And as we have said in our
16 submission --

17 THE COMMISSIONER: But there is
18 also a concern, though, that if he were to
19 testify, as Ms Edwardh points out, that there
20 would be a concern that he would inevitably be
21 testifying about events and information about
22 which there's a good deal of evidence in camera,
23 of which he would have no knowledge.

24 MS McISAAC: I don't make the
25 connection, sir. Mr. Arar, I presume, would

1 testify as to the circumstances: what happened
2 when he was stopped in New York, what the
3 officials in New York said to him, what happened
4 when he was incarcerated.

5 THE COMMISSIONER: You are saying
6 then that all of the evidence I've heard of what
7 happened in New York then can be made available to
8 Mr. Arar?

9 MS McISAAC: No, sir, because I
10 don't think there's a connection. That's not what
11 I am saying, sir.

12 THE COMMISSIONER: And throughout
13 the in camera process, the government has been
14 adamant, witness after witness after witness be
15 provided with all of the information that the
16 Commission has with respect to matters about which
17 that witness was testifying. Repeatedly I have
18 heard the plea from the Government, it's only fair
19 in complaints, if there's even a little slip-up,
20 that a prospective witness has not been shown a
21 document or has not been told every question that
22 the witness may be asked. That's been the
23 approach of the government.

24 And it seems to me rather
25 disingenuous for the government to come along now

1 and say that Mr. Arar would testify, if we called
2 him, and yet would not have access to the type of
3 information that witnesses -- and not just in this
4 proceeding but generally in proceedings -- have
5 access to. That's the concern I hear from
6 Ms Edwardh.

7 MS McISAAC: Well, that's correct,
8 sir. But my submission is that it's based on a
9 false premise, which is, as I say, if Mr. Arar has
10 information that he wishes to provide to the
11 Commission, that the Commission judges will be of
12 assistance to the Commission, that evidence, in my
13 submission, needs to be given by him. I don't
14 know how else you are going to receive it.

15 I have difficulty with the idea of
16 the special rapporteur because, after all, you are
17 an independent fact-finder. That's what your role
18 is. That's what you are. Why do we need to
19 involve yet another person?

20 It may be that some of this
21 evidence will be very difficult and it may be that
22 appropriate accommodations should be made in order
23 to allow Mr. Arar to give that under a
24 non-publication ban or even in private. We would
25 have no objection to that because we appreciate

1 that some of this evidence, for him to relate what
2 may have occurred to him in Syria, is going to be
3 extremely difficult for him.

4 But the point is that, in our
5 view, if he has information, particularly if he
6 has allegations against Canadian officials, it's
7 very difficult for us to appreciate how that
8 evidence could be provided to you without the
9 Canadian officials having the opportunity to know
10 what that evidence is.

11 THE COMMISSIONER: It seems to me,
12 and as you may have gleaned from one of the
13 questions I asked Ms Edwardh, that one might make
14 a difference between information that is an
15 allegation against a Canadian official, i.e.,
16 information that relates to the interests raised
17 by section 13 of the Inquiries Act, and other
18 information about which he may give evidence or
19 provide to a fact-finder.

20 MS McISAAC: And that may well be
21 the case, sir. I am not sure that we need an
22 independent, somebody else to hear that evidence.
23 But it may be that there is evidence that could be
24 given without the necessity of cross-examination.

25 There is a point that I think is

1 very important to make here. The government
2 accepts that Mr. Arar is the victim in this case.
3 He is the individual who was deported to Syria.
4 He is the individual who spent close to a year in
5 a Syrian prison. He doesn't have, in our
6 submission, anything to answer to.

7 And quite frankly, I took umbrage
8 to some extent to the suggestion that he would be
9 subjected to abuse. That is not the case.

10 But I come back to the point that
11 I was making, which is that if Mr. Arar has
12 evidence which would be useful to you in
13 evaluating the actions of Canadian officials, that
14 evidence needs to be heard by you. And in terms
15 of timing, in my submission, that evidence needs
16 to be heard by you prior to an interim report. It
17 seems to me to be less than expeditious to have
18 some kind of interim report that may then hear
19 Mr. Arar's evidence, that may then require the
20 recalling of more witnesses.

21 However, all of that is premised
22 on my opening remarks, which is that we are not in
23 a position to evaluate the nature or the necessity
24 of the evidence that Mr. Arar would give to you,
25 and it may well be totally appropriate at the end

1 of the day for your counsel and you to decide that
2 it is not necessary for you to hear from him under
3 oath for the purposes of cross-examination. It
4 depends what the evidence is going to be.

5 THE COMMISSIONER: What Ms Edwardh
6 suggests, as I listen to it -- and I hope I am
7 summarizing it fairly -- is essentially he gives
8 his recount of what happened to him in Syria.

9 MS McISAAC: Yes.

10 THE COMMISSIONER: And as you
11 indicate, as you acknowledge, I think fairly so,
12 that could be a very difficult exercise --

13 MS McISAAC: There's no question
14 about that. We accept that.

15 THE COMMISSIONER: Everybody
16 understands that and is very sympathetic to it.

17 That being the case, that's the
18 body of information that is proposed, Ms Edwardh
19 goes on to make the point -- she says that the
20 nature of the mandate here is such that to not
21 hear that story, to not hear that information in
22 the context of this inquiry would be to take the
23 heart out of the inquiry.

24 So whether one puts the word
25 "essential" on it or not, her submission is that

1 surely in this inquiry into what happened to Maher
2 Arar, you are going to want to have the
3 information from him as to what happened.

4 I hear you not disagreeing with
5 that.

6 MS McISAAC: Absolutely not.

7 THE COMMISSIONER: And I hear you
8 saying that you think that I can receive that
9 information in manners other than him sitting in
10 the witness box in front of cameras being
11 cross-examined.

12 MS McISAAC: Absolutely. The only
13 point I wish to make is to the extent that
14 Mr. Arar has specific allegations that would
15 inform your determination or evaluation of the
16 conduct of Canadian officials, it seems to me, in
17 the abstract at least, which is what I am working
18 in, that it would be appropriate, and indeed
19 essential, that if those allegations were to
20 inform your findings, that the officials in
21 question have some opportunity to question
22 Mr. Arar as to those particular allegations.

23 If there aren't particular
24 allegations, then maybe that doesn't become
25 necessary.

1 Unless I can assist further, those
2 are my submissions.

3 THE COMMISSIONER: I just
4 wondered. I hear your general comments with
5 respect to the fact-finder, rapporteur concept. I
6 am just wondering whether you have any other
7 comments with respect to that approach, number
8 one; and, second, your comments with respect to
9 the submissions from Mr. Neve and the other
10 intervenors with respect to the fact-finder
11 interviewing, if that's the word, or reporting on
12 I suppose is better, concerning the three other
13 individuals.

14 MS McISAAC: The government has
15 always had a difficulty with the issue of the
16 circumstances of these other individuals. Again,
17 I would turn to Commission counsel, who are in the
18 best position after conducting an interview of
19 these individuals, to make a recommendation as to
20 whether their evidence would be of assistance to
21 you.

22 What would concern me about the
23 involvement of a special rapporteur would be that
24 that rapporteur would not be in a position to
25 evaluate the circumstances of these individuals as

1 to how they ended up incarcerated in Syria or the
2 actions of Canadian officials, if any, in relation
3 to that.

4 The person who needs to do that,
5 assuming it's within your mandate -- and I suggest
6 it's not, unless you find some direct correlation.
7 The person to do that is you, by hearing the
8 evidence, reviewing the documents, and looking
9 into the circumstances as to how each of these
10 individuals ended up being in Syria.

11 If the purpose of this is simply
12 to interview them to determine the extent to
13 which, or the circumstances under which, they were
14 held in Syria, then without wishing to in any way
15 seem callous -- and I certainly don't mean to do
16 that at all -- it's not immediately apparent how
17 that informs you in fulfilling your mandate with
18 respect to the actions of Canadian officials as
19 they relate to Mr. Arar's circumstance.

20 THE COMMISSIONER: The argument as
21 I heard it on that point was they were there in
22 and around the same time as Mr. Arar, and if
23 Mr. Arar said that he was treated by his jailers
24 in such a way, their evidence might show a pattern
25 and might lend support to it; that that's the way

1 people who were being detained on national
2 security concerns in Syria were treated at that
3 time.

4 MS McISAAC: I can't dispute that,
5 sir, having not spoken to the individuals in
6 question.

7 THE COMMISSIONER: That's what I
8 understood the submission on that part of what
9 their information, the use that would be made of
10 that.

11 MS McISAAC: And Mr. Cavalluzzo
12 and his team would certainly be able to advise you
13 as to that if they have conducted interviews of
14 these individuals and know what evidence or what
15 assistance they would be able to give you.

16 THE COMMISSIONER: But the
17 suggestion is that if I were to take evidence from
18 them -- and I understand Mr. Neve's point that
19 there were two parts of evidence he was
20 suggesting. There was the treatment in Syria and
21 then there was, my word, the complicity of
22 Canadians in treating them.

23 But if I were to take it on one or
24 other for those purposes to glean that
25 information, the suggestion again is that be done

1 by way of the fact-finder process.

2 MS McISAAC: If you deem it
3 appropriate to inquire into the circumstances of
4 the arrest of any one or all three of these
5 individuals in Syria and their questioning in
6 Syria, with respect, why would we do that or why
7 would you do that through an independent
8 fact-finder? Why wouldn't you do it yourself
9 using the offices of your counsel, your ability to
10 determine what documents are relevant, what
11 witnesses need to be called, and what questions
12 need to be asked in order to inquire into those
13 circumstances? Why would you do that through an
14 independent rapporteur?

15 THE COMMISSIONER: I take your
16 point. I think probably one of the same issues
17 that would arise would be the concern that we hear
18 with respect to Mr. Arar. If they are talking or
19 testifying -- and I don't know the details. But
20 assuming that they were tortured and mistreated
21 while they were in detention in Syria --

22 MS McISAAC: But it seems to me,
23 sir, that before you take that step, you have to
24 determine whether there is some relationship
25 between their circumstances and the circumstances

1 of Mr. Arar; and upon having determined that
2 through your own fact-finding process, we would
3 then reach the question of whether it is
4 appropriate within your terms of reference,
5 necessary, relevant -- whatever you determine --
6 to go down that road of further investigation and
7 inquiries of the individuals themselves.

8 If there is no connection, you
9 cannot make any connection based on your
10 fact-finding, then it seems to me that it's not
11 appropriate for you to be making further inquiries
12 in that regard.

13 THE COMMISSIONER: Well, the
14 connection that's alleged, I am repeating, is that
15 it is suggested that there be a similarity in
16 treatment that would lend support to Mr. Arar's
17 description.

18 MS McISAAC: That is the
19 connection that is alleged. But before you head
20 down that road and worry about the rapporteur
21 situation, in my submission, you would have to
22 make a determination based on your own inquiries
23 that there is some basis to those allegations.

24 THE COMMISSIONER: Okay. Is that
25 it then?

1 MS McISAAC: Thank you.

2 THE COMMISSIONER: Thank you.

3 Mr. Bayne, do you have anything to
4 say on this issue?

5 SUBMISSIONS / SOUMISSIONS

6 MR. BAYNE: Surprisingly I do,
7 Mr. Commissioner.

8 Maybe what I will do,
9 Mr. Commissioner, is bring or offer perhaps a
10 somewhat different perspective to the arguments
11 that you have heard.

12 THE COMMISSIONER: Just for those
13 here who don't know you, Mr. Bayne represents an
14 RCMP officer.

15 MR. BAYNE: Investigators in
16 A-OCANADA.

17 Let me begin by echoing many of
18 the comments made by Ms Marlys Edwardh on behalf
19 of Mr. Arar. I take a somewhat different position
20 than the AG of Canada that Mr. Arar can be simply
21 dismissed as having no case to answer. I think it
22 is right to say he has, like the RCMP officers, a
23 profound reputational interest, and in the way
24 that Ms Edwardh characterized it; that is, there
25 is the potential for negative public reputational

1 impact. That's the reality of this. Ms Edwardh
2 gave examples of that, with which I agree. There
3 are allegations of training in Afghanistan,
4 membership or association with members of
5 al-Qaeda, connections to sleeper cells or their
6 members or terrorism. And all of that, in my
7 submission, all of us would rightly expect that
8 Mr. Arar would demand to answer and have a full
9 opportunity to do that.

10 With those comments,
11 Mr. Commissioner, I come to the same conclusion
12 that Ms Edwardh, on behalf of Mr. Arar and the
13 intervenors do, on this issue about Mr. Arar
14 testifying, that on the issue of fairness, it is
15 impossible for Mr. Arar to testify, but,
16 Mr. Commissioner, for quite a different reason.

17 Among her submissions, my learned
18 friend Ms Edwardh said Mr. Arar wants the truth to
19 come out, and we all want the whole truth to come
20 out, not part-truths or half-truths.

21 In my submission, sir, this issue,
22 the issue of the Arar testimony, like the second
23 issue of RCMP testimony, is inextricably tied to
24 the issue of fairness and, put simply, I agree
25 with those who have argued that in Mr. Arar's

1 testimony the full story cannot and will not come
2 out publicly so as to do what public inquiries are
3 supposed to do: educate and inform the public.

4 In chief, in other words, the full
5 story can't and won't emerge from the central
6 person, for the obvious reason, he doesn't know it
7 all, he can't be permitted to know it all, he
8 doesn't have the national security clearance to
9 know much of this national or international
10 evidence. In chief, therefore, he will be
11 restricted and the public won't hear the full
12 story.

13 But even assume, Mr. Commissioner,
14 some forum in which he can assert some facts, some
15 of the facts he alleges, in some setting, but
16 let's, for the sake of this argument about public
17 testimony, assume it is in the public forum.

18 My point, sir, with respect, is
19 the cross-examination of that central testimony
20 would be so censored, so edited, so manipulated,
21 in the same way the actual testimony of key RCMP
22 investigators would be in public, that it won't be
23 the tool of cross-examination that it is supposed
24 to encompass in our system, a full and thorough
25 challenging of the testimony and propositions of

1 the evidence of the witness, simply because we
2 won't be entitled in cross-examination even to
3 mention certain significant pieces of evidence.

4 Experienced litigators know,
5 sir -- and your background is such that you are
6 one of them -- that you make your case in our
7 system not only through your own client, or
8 witnesses you call on behalf of your client, or
9 documents you adduce in-chief, but equally or even
10 more importantly, you make your case, certainly in
11 the field in which I practice, through full and
12 effective and thorough cross-examination of the
13 other side's case. That is usually the cauldron
14 in which the truth most clearly emerges.

15 And that will be impossible here,
16 were Mr. Arar to testify. Manifestly unfair,
17 first of all, to the RCMP investigators, who want
18 the full story told. Relevant evidence in the
19 form of documents and testimony under oath from
20 other witnesses that has national security
21 significance or international relations or
22 international security ramifications cannot even
23 be publicly mentioned by the cross-examiner in
24 order to test Mr. Arar's evidence.

25 So you end up with a process that

1 is a sham cross-examination, a pale imitation of
2 the adversary process, a pantomime, hardly what
3 the Canadian public has a right to expect.

4 It isn't only, however, unfair to
5 the RCMP's investigators, that their counsel can't
6 properly cross-examine, it is also unfair to
7 Mr. Arar, because assume cross-examination is cut
8 off because of subject matters that we can't get
9 into. That leads to unfair conjecture and
10 speculation, and I say this recognizing that
11 cross-examination is also a critical forum in
12 which the witness who is challenged can shine. A
13 witness who withstands challenging
14 cross-examination makes a terrific impact on a
15 fact-finder, and that too is an opportunity.

16 Ms Edwardh talked about Mr. Arar's
17 desire to answer allegations. He won't have that
18 opportunity, and very unfairly and unfortunately
19 and maybe even overstating the evidence that could
20 be brought to challenge him, the public will be
21 left to speculate, to imagine what might be
22 lurking out there.

23 The third unfairness, sir, in my
24 submission, to the Canadian public and to the
25 integrity and credibility of the public inquiry

1 process if this type of constrained examination
2 in-chief and then sham cross-examination process
3 were to take place, is that the fundamental role
4 of education and informing and apprising the
5 Canadian public will go wanting.

6 Therefore, sir, because of this
7 distortion of examination and cross-examination,
8 it would be unfair, in my submission, to require
9 Mr. Arar to testify in public. It simply won't
10 advance the search for truth that the Supreme
11 Court of Canada has told us these inquiries are
12 all about. In fact, if anything, it would
13 undermine the credibility of the public inquiry
14 process.

15 THE COMMISSIONER: I don't think
16 you do it intentionally, the question isn't
17 whether or not he should be required. I think
18 Ms Edwardh's point is that at this point in time,
19 for the reasons that she mentions and which you
20 agree with, he would not choose to testify,
21 except, she makes the point, with respect to his
22 treatment in Syria there is a need for this
23 Commission to hear his story concerning that.

24 My question to you is -- I hear
25 what you say about the difficulties of him

1 testifying, if I can put it generally, on the full
2 scope of it. But with respect to that one
3 discrete aspect of what he might testify about, I
4 hear Ms Edwardh saying that she doesn't envision
5 the problems that you are pointing to, if he were
6 just to testify about his treatment in Syria.

7 In fact, I think, to use her
8 words, she would say that your clients, the
9 members of A-OCANADA, do not have an interest in
10 that. It would be Mr. Arar that has the interest
11 in telling that story and the Commission indeed in
12 hearing information about that.

13 How would you respond to that,
14 Mr. Bayne?

15 MR. BAYNE: I think reading your
16 question, Mr. Commissioner, you do have an
17 interest in that, if I may be so bold as say that.
18 And I am not going to stand here and tell you that
19 you ought not to have an interest in that.

20 I say only this -- and it was very
21 late last night when I first looked at some of
22 these materials, not all of which I finished
23 reading. I have some alarm bells going off that I
24 can't quite properly enunciate.

25 I am sure you will tread very

1 carefully in constructing any procedure, as has
2 been suggested to you.

3 My initial response is that -- and
4 it may not be a satisfactory answer, quite
5 frankly, because I do not want to suggest that you
6 take the heart out of the inquiry. But no witness
7 should be able to dictate the subject matters on
8 which they will and won't testify and limit it to
9 that, without the full breadth of testimony coming
10 out.

11 That's just an initial reaction.
12 It may not be a satisfactory one, and I would like
13 a little more time to think about that. It
14 obviously will not be subject to
15 cross-examination. But then, on the other hand,
16 you have rightly made the point that it also would
17 not be the subject of any criticism of any
18 individuals.

19 THE COMMISSIONER: I put that
20 forward as a question to individuals.

21 MR. BAYNE: I would certainly have
22 different views if it were otherwise.

23 THE COMMISSIONER: Yes. I had
24 assumed that.

25 MR. BAYNE: And I don't want to

1 overstep my very narrow mandate here representing
2 individuals, but it just occurred to me, listening
3 to some of the further submissions of other
4 counsel on the proposed procedure -- and this will
5 already have occurred to you -- that some of this
6 sounded like delegation of your entire job, if you
7 will permit me to make that comment.

8 It's one thing to talk about the
9 treatment in Syria, then the complicity of the
10 Canadian government. I thought that's what you
11 were looking into and conducting a very thorough
12 inquiry about. And to expand it beyond that into
13 a number of other individuals, we have to remember
14 that both sides would have to be fully heard on
15 that as well, and that may get us two more years
16 of this inquiry.

17 Those are my submissions.

18 THE COMMISSIONER: Thank you,
19 Mr. Bayne.

20 It's a quarter to twelve. What we
21 have left is reply. Would you like to take a
22 break, Ms Edwardh?

23 MS EDWARDH: I am in your hands.

24 THE COMMISSIONER: We might as
25 well do it and finish this issue.

1 SUBMISSIONS / SOUMISSIONS

2 MS EDWARDH: I am not sure I have
3 distilled entirely the areas of agreement and
4 disagreement, but I certainly see in both the
5 questions you have asked, the answers given by
6 Ms McIsaac, and the answers given by Mr. Bayne,
7 some consensus that if Mr. Arar were to testify,
8 he would not be given the same procedural rights.
9 Whether there's an argument about whether he has a
10 case to answer, he would be treated differently.

11 With respect, Mr. Commissioner,
12 that's enough, in my submission, to raise big red
13 flags. He has been treated differently enough
14 already.

15 Mr. Bayne makes an interesting
16 point. He said the alarm bells went off in his
17 mind because of the sense that perhaps Mr. Arar
18 was dictating the subject matters in which he
19 would propose to give information to the
20 Commission.

21 I just want to remind you,
22 Mr. Commissioner, that he is not dictating. You
23 posed a question to us. And the question which
24 was posed was: Were there matters that were
25 essential to be dealt with in your mandate prior

1 to an interim report?

2 It was to that that we directed
3 our minds. We are not trying to dictate the
4 subject matter of providing information to the
5 Commission.

6 I draw some comfort from the
7 answers as well by Ms McIsaac that there's no
8 question that the government accepts that Mr. Arar
9 is the victim, and I take it that means an
10 acknowledgment that he is the one that was
11 deported and remained in conditions of confinement
12 that were, at best, horrific. And I don't see
13 Mr. Bayne disputing that.

14 So one of the difficulties that
15 faces you is to determine what are the benefits of
16 a special rapporteur, given the questions that are
17 before you. I don't see any of the positions
18 taken by my colleagues that undermine your right
19 to define an issue, and to give to the rapporteur
20 a mandate, and to give to the rapporteur a set of
21 questions that you need answering.

22 Obviously there are huge
23 advantages in doing so, and no one has stood
24 before you clamouring and saying, "We have a
25 direct interest. We intend to challenge

1 Mr. Arar's description of the cell he was in in
2 the Palestine branch of the military intelligence
3 in Syria, whether it was 3 by 6 or not or whether
4 he was beaten with a cable."

5 That's not in issue, it appears.

6 So what you need is some materials
7 and information before you that will allow you to
8 assess the products of that interrogation.

9 And if there is no contest,
10 really, about it, it's a question of getting it
11 before you in a way that is consistent with
12 fairness to Mr. Arar and at the same time I don't
13 hear others saying, "We have a right to
14 cross-examine on this issue." That is not what
15 has been said.

16 I would like to say one other
17 thing.

18 Ms McIsaac said that the
19 submissions of Mr. Arar in some respects were
20 premised on what she described as a false premise.
21 With the greatest of respect, I draw some comfort
22 in Mr. Bayne's view of reputational interests.

23 Ms McIsaac said that this is only
24 about the conduct of officials, its
25 reasonableness, et cetera. There can be no doubt

1 that there are statements of fact that are
2 profoundly negative about Mr. Arar, that have been
3 promulgated by the government. And while he
4 wishes to answer those, he wishes to answer the
5 leaks, he can't do it until the process is
6 rendered fair.

7 So we need to give you the tools,
8 and the tools that we say are necessary to go to
9 the next stage of the interim report is this
10 limited factual area. I don't see anybody here
11 who has created any kind of compelling argument
12 that would indicate it should not be pursued.

13 THE COMMISSIONER: In response to
14 questions, Ms McIsaac seemed to suggest that --
15 and I don't want to be unfair to what she said --
16 accepting if I conclude that, yes, I want to have
17 Mr. Arar's evidence of what happened to him in
18 Syria, that I think that that's important for the
19 inquiry; that absent Mr. Arar making any
20 allegation against Canadian officials, her view
21 was that I could receive that -- I should receive
22 it, in any event -- directly rather than through a
23 fact-finder, and that there wouldn't be any
24 cross-examination, there wouldn't need to be, and
25 indeed it wouldn't necessarily, depending on

1 sensitivity and privacy concerns, need to be some
2 or all of it in public. One could adjust -- and
3 then I take it we are customizing the process.
4 But one could customize the process to meet the
5 circumstances of doing that.

6 Let me just add to that.

7 As you are probably aware, it is
8 anticipated that there will be evidence during the
9 week of June 6th dealing with torture and the
10 problem with expert evidence with respect to the
11 product of torture, if you will.

12 I just wondered if you could
13 respond to whether or not an option of that sort
14 is something that should or should not be
15 considered?

16 MS EDWARDH: With respect,
17 Mr. Commissioner, I see the benefits of the
18 fact-finder as much more significant because of
19 the scope of the fact-finder's inquiry.

20 In other words, if Mr. Arar sits
21 for a morning -- and I will come to whether I am
22 going to suggest that's even a partial
23 solution --to describe what happened in Syria, you
24 get a very small fraction of the important kind of
25 evidence that could be called or be explored with

1 a fact-finder: interviews with a spouse,
2 interviews with other members of the family,
3 interviews with physicians, interviews with mental
4 health persons who had been involved.

5 That kind of fact-finding process
6 that may be critical to the assessment of whether
7 someone has been tortured and what the sequelae of
8 his experience is, are not the kinds of things,
9 with the greatest of respect, that are best done
10 in two or three hours of testimony.

11 And that is why the international
12 community has opted for the rapporteur model.
13 People don't readily discuss these events with
14 openness and candour and their fears and what they
15 did in the middle of the night at four o'clock in
16 the morning when they were losing their mind in a
17 public forum.

18 If Mr. Arar can't give all of his
19 testimony on this crucial part, we have learned a
20 lesson in international human rights work that the
21 best way to access this information is not under
22 the glare of publicity, it's in a careful, focused
23 evaluation from a number of sources that could
24 give rise to a result that would satisfy you.

25 And I would ask that you accept

1 that model.

2 THE COMMISSIONER: Thank you,
3 Ms Edwardh.

4 We will rise and take the morning
5 break for 15 minutes.

6 --- Upon recessing at 11:45 a.m. /

7 Suspension à 11 h 45

8 --- Upon resuming at 12:16 p.m. /

9 Reprise à 12 h 16

10 THE REGISTRAR: Veuillez-vous
11 lever.

12 THE COMMISSIONER: The second
13 issue then is the one relating to RCMP witnesses.

14 Mr. Bayne, you lead off.

15 SUBMISSIONS / SOUMISSIONS

16 MR. BAYNE: If I may be permitted,
17 Mr. Commissioner, I would like to pick up on just
18 a couple of comments of Mr. Cavalluzzo in opening
19 that I can confirm that vigour is, at the very
20 least, a descriptive adjective for the
21 thoroughness with which Commission counsel has
22 approached their duties in camera, and it should
23 give all parties, and Mr. Arar's counsel, some
24 comfort that, sitting in my chair, I have been
25 made quite squeamish by how vigorous

1 Mr. Cavalluzzo has been. So there should be no
2 doubt about that issue.

3 I also agree with him in his
4 characterization of the mandate of this inquiry to
5 meaningfully inform the public that there are
6 immense procedural challenges to this particular
7 unique inquiry and to his summary of the roughly
8 nine months of evidence heard as being thousands
9 of pages of documentary evidence and documents and
10 tens of thousands of pages of evidence.

11 With that background in mind,
12 Mr. Commissioner -- and there's no need to make
13 these, as it were, exhibits to my submissions --
14 there was originally a Notice of Hearing, and it's
15 now an Amended Notice of Hearing, and of course
16 there's been reference made to the ruling on
17 summaries.

18 I will make brief reference to
19 those three documents and then to the blood
20 inquiry case in making my submissions.

21 I have given the Registrar ten
22 copies of the blood inquiry case for ease of
23 reference while I am making those submissions and
24 I will come to the case in just a moment.

25 This is a unique inquiry,

1 Mr. Commissioner. I think implicit in
2 Mr. Cavalluzzo's opening was that fact: nine
3 months to date in camera, and many national
4 security and international relations and
5 international security issues abounding, and the
6 involvement of other nations. It is not an
7 inquiry about a domestic water supply, as in
8 Walkerton, or even the Canadian blood supply, as
9 in the blood inquiry case.

10 As you observed, or Commission
11 counsel observed in the notices, the notice of
12 this hearing in its original form and then again
13 in its amended form, there are references under
14 items 2 and 3 to the fact that some, or much, of
15 the evidence that has been canvassed in camera may
16 not be disclosed publicly.

17 I say that because this is not a
18 matter where there is an isolated one or two
19 relatively insignificant little pieces that might
20 not come out in the public testimony of the men
21 who were in the front line as investigators in the
22 A-OCANADA task force. This is a matter in which,
23 at the very best, were they to testify, the public
24 would be treated to part-truths, half-truths, a
25 partial picture at best.

1 I refer only to your decision on
2 the summaries because of your conclusion that the
3 process was unworkable, and I would make this
4 comment.

5 Even if this process of having key
6 RCMP investigators testify were workable -- and I
7 say "workable" in the sense that the summaries
8 were not workable, that there could be some
9 consensus on what were public facts and the public
10 record. I am not even convinced that Ms Edwardh
11 necessarily would agree that there is a discrete
12 public record.

13 But even if there were, through
14 your firm control, some sense of workability in
15 the process so that it didn't dissolve into what
16 others have called a train wreck or a potential
17 train wreck, it won't and can't be fair.

18 With that, may I turn to the
19 decision of the Supreme Court of Canada in the
20 blood inquiry case, a unanimous decision of the
21 Supreme Court in 1997. And, Mr. Commissioner,
22 although a lengthy case, it won't take long to
23 refer to the key aspects of the decision.

24 The full court sat in judgment on
25 this case, and if you have a copy and can turn it

1 up, I will deal, first of all, Mr. Commissioner,
2 with the headnote under the words "Held the appeal
3 should be dismissed," where the Court deals in a
4 paragraph -- or the headnote deals with the basic
5 principles applicable to inquiries.

6 I won't read all of it. It's
7 there with principles with which we are all
8 familiar.

9 The concluding line of that
10 paragraph, however:

11 "Finally, a commissioner must
12 ensure that there is
13 procedural fairness in the
14 conduct of the inquiry. Not
15 only in the rulings or the
16 final outcome but in conduct
17 is process and process is
18 adduction of all relevant
19 evidence, including the
20 cross-examination and
21 examination process."

22 So it is in the hearing process
23 that procedural fairness must be ensured, and that
24 is to say not take a stab at it or do the best
25 that can be done but it must be ensured.

1 The judgment of Mr. Justice Cory
2 on behalf of the entire court may be turned to.
3 The court fleshes out in its language at paragraph
4 30 the basic principles of commissions of inquiry.

5 If we can turn up paragraph 30,
6 the court says:

7 "It may be of assistance to
8 set out what was said
9 regarding the history and
10 role of commissions of
11 inquiry in Phillips."

12 And then some paragraphs are set
13 out about the general occasion for commissions,
14 their utility, but it is the third part of
15 paragraph 30, the third paragraph under paragraph
16 numbered 30, that I would like to begin reading.

17 "One of the primary functions
18 of public inquiries is
19 fact-finding. They are often
20 convened in the wake of
21 public shock, horror,
22 disillusionment or scepticism
23 in order to uncover 'the
24 truth.'"

25 And the court puts that in

1 quotation marks. That is to say the whole truth.

2 I will read on, skipping a couple
3 of sentences:

4 "Yet these inquiries can and
5 do fulfil an important
6 function in Canadian society.
7 In times of public
8 questioning, stress, and
9 concern, they provide the
10 means for Canadians to be
11 apprised of the conditions
12 pertaining to a worrisome
13 community problem, and to be
14 part of the recommendations
15 that are aimed at resolving
16 the problem. Both the status
17 and high public regard for
18 the Commissioner and the open
19 and public nature of the
20 hearing help to restore
21 public confidence not only in
22 the institution or situation
23 investigated but also in the
24 process of government as a
25 whole. They are an excellent

1 means of informing and
2 educating concerned members
3 of the public."

4 If that is so then, if these are
5 processes to uncover the truth and apprise or
6 educate and inform Canadians, they must not be
7 misinformation vehicles based on half or
8 part-truths that are the result of editing,
9 heavily censoring, and highly manipulating the
10 evidence. They must not be vehicles that spur and
11 encourage speculation and imagination to fill in
12 blanks.

13 Where evidence has fallen, at
14 random almost in this case, or by coincidence, or
15 by deliberate occasion, into the public domain,
16 there is an unfortunate tendency that isolated
17 non-contextualized pieces of evidence become
18 highlighted, inadvertently but unavoidably, and
19 they are not within the meaningful context of a
20 complete fabric of evidence or a complete story.

21 If I can read on in paragraph 31:
22 "The inquiry's roles of
23 investigation and education
24 of the public are of great
25 importance. Yet those roles

1 should not be fulfilled at
2 the expense of the denial of
3 the rights of those being
4 investigated. The need for
5 the careful balancing was
6 recognized by DeCarre J.A.
7 when he stated at paragraph
8 32: 'The search for truth
9 does not excuse the violation
10 of the rights of the
11 individuals being
12 investigated.' This means
13 that no matter how important
14 the work of an inquiry may
15 be, it cannot be achieved at
16 the expense of the
17 fundamental right of each
18 citizen to be treated
19 fairly."

20 So once again the court is
21 unanimously endorsing the proposition that the
22 role of the inquiry in investigating and educating
23 the public becomes a search for truth, not a
24 search for part-truths or half-truths or distorted
25 stories.

1 And in the occasion of seeking to
2 put the full truth before the public, no matter
3 how important the work of the inquiry, which is to
4 say, no matter the public profile of an inquiry,
5 no matter the public appetite for some
6 information, no matter the media appetite for
7 getting something out into the public, something,
8 anything, that cannot be done if it is at the
9 expense of the fundamental right of each citizen,
10 including principal participants in the inquiry
11 whose reputation is at stake in a public hearing,
12 to be treated fairly.

13 The main media line, if one can
14 characterize it that way, or a main dominant media
15 line from the start of this case -- and it's been
16 echoed in the submissions of some of the
17 intervenors here today -- is that government
18 agencies are or may well be to blame for what
19 happened at the hands of U.S. and Syrian officials
20 to Mr. Arar, either by having connived or
21 conspired with them or even, it was suggested
22 today, having a form or variant of Canadian
23 extraordinary rendition.

24 The profound reputational
25 interest, to quote an earlier counsel here this

1 morning, that these investigators have, can't be
2 discounted.

3 Mr. Commissioner, I will finish
4 the references to the case by asking you to turn
5 up paragraphs 55 and 57, because the court, in
6 paragraph 55, deals directly with the need for
7 procedural fairness under that heading and says:

8 "The findings of fact and the
9 conclusions of the
10 commissioner may well have an
11 adverse effect upon a witness
12 or party to the inquiry, yet
13 they must be made in order to
14 find the nature of, and
15 responsibility for, the
16 tragedy under investigation
17 and to make the helpful
18 suggestions needed to rectify
19 the problem. It is true that
20 the findings of a
21 commissioner cannot result in
22 either penal or civil
23 consequences for a witness.
24 Further, every witness enjoys
25 the protection of the Canada

1 Evidence Act and the Charter
2 which ensures the evidence
3 cannot be used in other
4 proceedings against the
5 witness. Nonetheless..."

6 And this is the key sentence:

7 "... procedural fairness is
8 essential..."

9 Not merely desirable and not to be
10 meted out as a best we can do.

11 "... is essential for the
12 findings of commissions may
13 damage the reputation of a
14 witness. For most a good
15 reputation is their most
16 highly prized attribute. It
17 follows that it is essential
18 that procedural fairness be
19 demonstrated in the hearings
20 of the commission, not simply
21 in the findings, not simply
22 in the end product, in the
23 hearings, in the hearing
24 process. The public
25 procedure, of course, is part

1 of that hearing process."

2 It is my respectful submission,
3 Mr. Commissioner, that what will inevitably unfold
4 if key investigators are put into the position
5 already under the glare of much media, already
6 with insinuations hanging over their heads of, in
7 words such as "rogue elements" of the RCMP and so
8 on, anxious to defend their conduct and explain
9 their process of thinking, reasoning, on what they
10 relied, and so on, are put into a position of
11 being examined and cross-examined in this public
12 forum, what will result is, as I say, a process or
13 a picture of half-truths, not the whole truth, not
14 a search for the truth. These officers will be
15 unable to refer to significant pieces of relevant
16 evidence such that their evidence will be
17 censored, edited, and manipulated so that they
18 will be unable to explain fully to the Canadian
19 public their thoughts, their reasoning, their
20 actions, the investigative steps they took.

21 They will be unable fully to
22 explain and answer for their conduct.

23 Where I do part company with my
24 learned friend Ms Edwardh is that the mandate of
25 this inquiry puts them directly on the front line.

1 It is their conduct, in the language of your
2 mandate, that is being inquired into. I conceded
3 that Mr. Arar has likewise a profound reputational
4 interest, but theirs is no less, and they are
5 entitled to the guarantee, the assurance that a
6 fair procedure will be the hallmark of this
7 inquiry.

8 There will also be missing in
9 their evidence the full and what I would say is
10 critical context for their conduct. You have to
11 have a coherent picture. It is very unfair to
12 assume that you can isolate a piece of evidence
13 and treat it discretely without requiring a
14 broader explanation that gives meaning and context
15 to conduct or to belief.

16 Not only will these officers be
17 unable to give that evidence themselves but they
18 will be unable to tender evidence or documents
19 from other witnesses relevant to their conduct.
20 We have had many, many witnesses testify in this
21 in camera proceeding and thousands of documents
22 and key pieces of evidence, so that it's far from
23 just a restriction on what they themselves can
24 testify about. Evidence from other diverse
25 sources that could be called to justify their

1 conduct, their beliefs, their reasoning, their
2 actions, why they did what they did and believed
3 what they did, what they were being told and
4 encouraged to do, will be missing.

5 I have already said that isolating
6 pieces of evidence, pieces that have randomly
7 fallen into the public domain inadvertently
8 highlights or emphasizes that evidence. It's also
9 clear to you, now having heard a complex and
10 coherent story, that it will be out of context.
11 There will be no proper context for the evidence
12 of these officers.

13 So in my respectful submission,
14 what we will end up with is not the form of search
15 for truth that the public inquiry vehicle is
16 supposed to create but a distorted half-truth of
17 misleading false pictures that invite speculation
18 and conjecture to fill in the blanks.

19 It's what all Canadian juries are
20 warned against: not making up their minds or
21 developing impressions until the full story is
22 heard. And it never will be in the public
23 testimony of these officers.

24 These key officers represent, I
25 take it it is the Commission's hope, a

1 representation of the RCMP's investigative effort
2 in this and related cases. But telling half, or
3 less than half, because it is not, and I
4 reiterate, not a matter of one or two pieces of
5 evidence that would fall out of the public purview
6 here. We are talking about swaths of critical
7 evidence, critical documents, that were and are
8 important to the officers' conduct and belief
9 system that will simply not be able to be
10 discussed, mentioned, or explained to the Canadian
11 public.

12 It's not the fault of the officers
13 that they can't tell their whole story or the
14 basis on which their conduct and thinking evolved
15 and was based. It is, what is in my submission, a
16 legitimate concern that the Attorney General for
17 Canada has about Canada's international relations,
18 national security concerns, ongoing
19 investigations, ongoing relations with security
20 agencies, and so forth.

21 It isn't that the officers don't
22 want this evidence to come out; it is very much
23 the opposite. They are not putting up a block on
24 telling the whole story. It will be done for
25 them. They will be told they cannot explain this.

1 They cannot fully explain the evidence on which
2 they base their decisions.

3 In a public inquiry, in my
4 respectful submission, the public makes up its
5 mind. They're educated, they're informed, they
6 join issue. That's the intent of it, and in the
7 best cases, that's how it works. This will not be
8 a case where the public will be able to make an
9 educated or informed public opinion and judgment.
10 This will not be a case, in the evidence of these
11 officers, that serves the search for truth.

12 So it's unfair to the
13 investigators who will be hobbled, censored,
14 manipulated witnesses, with their own reputations
15 at stake, able to tell only a little bit or part
16 of the story. And I pause to emphasize it may
17 even be nothing more, in a given case, than one
18 critical piece of evidence that may be important
19 for the Canadian public. The Canadian public may
20 find their truth in even one piece of evidence,
21 that I and the officers cannot begin to mention or
22 discuss with them in their evidence.

23 But there is much more than one
24 piece of evidence. There are critically important
25 documents that go on for many, many, many pages

1 and many witnesses who have given evidence that
2 will be excluded from the story of these officers.

3 In my respectful submission, you
4 simply can't do that to them. You can't hobble
5 them, put them up for public display in a setting
6 in which they are already, by insinuation, accused
7 of wrong-doing in the sense that there have been
8 media stories about their complicity with
9 Americans or conniving with Syrians. In my
10 respectful submission, they too must be entitled
11 to full, fair opportunity to answer, and that
12 won't be made to them in a public setting, unlike
13 the setting in which they have given their
14 evidence to you.

15 It's also, in my respectful
16 submission, a process that's ultimately unfair to
17 Mr. Arar.

18 I say that because some of the
19 suggested procedure involves somebody, anybody,
20 making an objection that the officer can't tread
21 into this or that or can't go there, can't discuss
22 this or that evidence. That invites the kind of
23 worst level of speculation and innuendo against
24 Mr. Arar. It may be that the piece of evidence,
25 or pieces of evidence, or accumulation of

1 evidence, or the testimony of another witness, or
2 a number of witnesses would not be of significance
3 in terms of what my learned friend Ms Edwardh
4 called Mr. Arar's name being cleared in these
5 proceedings. It might not be that significant,
6 and yet the innuendo and imagination and gap in
7 the evidence will remain.

8 But most unfair, too, it's unfair
9 to the Canadian public, because as I said at the
10 outset of these submissions, misleading and
11 distorted half-stories or half-truths don't serve
12 the search for truth and the formation of informed
13 public opinion.

14 If I can turn, Mr. Commissioner,
15 briefly to some comments about -- they are rather
16 preliminary, and I trust you will forgive me for
17 that. Through my own fault, I saw my learned
18 friend's argument on behalf of Mr. Arar late last
19 night and finished it this morning.

20 If I can direct you to
21 paragraphs -- I think it starts at 32, the
22 argument of counsel for Mr. Arar.

23 The proposition is put that while
24 the police are experienced, skilled witnesses, and
25 know when they are treading into a minefield of

1 inadmissibility -- that's one of the propositions
2 advanced.

3 And in my respectful submission,
4 Mr. Commissioner, the argument that begins at
5 paragraph 32 of counsel for Mr. Arar's submissions
6 is comparing apples and oranges, missing the
7 point, and it's an inappropriate analogy.

8 "The legitimate, justifiable,
9 constitutional restriction on
10 either (a) the police leading
11 inadmissible or irrelevant or
12 unduly prejudicial evidence
13 against an accused person in
14 a criminal trial where the
15 liberty of the accused is at
16 stake -- "

17 Essentially that is what all these
18 cases refer to, criminal trials where it is the
19 accused who is seeking the disclosure and the
20 police are relying on some privilege to refuse to
21 produce that information. So restrictions on the
22 police leading certain types of testimony against
23 an accused, or (b) asserting a privilege for their
24 own benefit, and the privileges set out here are
25 solicitor-client privilege in paragraph 32,

1 informer privilege in paragraph 33, investigative
2 techniques in paragraph 34, with some examples
3 following in paragraphs 35 and 36, they're all
4 very different cases.

5 Paragraph 32, just for example.
6 That was a solicitor-client communication that the
7 police declined to disclose. At trial, the
8 accused brought an application for a stay and
9 sought access to the legal advice provided to the
10 RCMP by the Department of Justice. The RCMP
11 claimed solicitor-client privilege over this
12 opinion.

13 It is not the RCMP or the
14 investigators in this case who are seeking to hide
15 behind some shield of national security or
16 international relations or ambassadorial relations
17 and Canada's conduct among the League of Nations.
18 They want the full story told. They simply are
19 not going to be allowed to do it beyond their
20 control.

21 Likewise paragraph 33,
22 confidential informants. The informer privilege
23 is something that the police and Crown regularly
24 assert to protect the identity of informants. The
25 accused seeks that, but it is the police who

1 regularly assert the privilege. That's a far cry
2 from what's happening here, where the police want
3 to be able to tell their full story but are not
4 permitted to do so. And the same thing with the
5 investigative techniques.

6 So a criminal trial and the
7 analogy to either privileges being occasionally
8 asserted by the police or the Crown on their
9 behalf for their own benefit or for the benefit of
10 the safety of an informant is a very different
11 case from the one we have before us where the
12 police are in, the investigators are in the front
13 line now. They are the ones in the public inquiry
14 whose reputations are at stake. There is not an
15 accused here in the sense of a criminal trial
16 against whom they are bringing evidence. This is
17 an inquiry into their conduct, and they,
18 Mr. Commissioner, will be the ones to bear witness
19 to their own conduct, their own actions, their own
20 thinking and the bases for which they took action.

21 It's that that's going to be
22 restricted. They won't be allowed to tell that
23 story. So the examples are not apt.

24 If the issue then is not one of
25 being aware of when you're about to tread on to a

1 prohibited piece of proscribed evidence -- and my
2 submission is it's clearly not. It's not that the
3 officer doesn't -- "no, I'm not allowed to talk
4 about this." The issue is really that these
5 officers in the front line are confident that if
6 the Canadian public knew the full story, their
7 full story, they would leave with their
8 reputations highly intact.

9 It is in the public where
10 reputations are damaged, sir, and you can't, in my
11 submission, close the barn door after the horse of
12 reputation has already bolted in a public hearing
13 in a subsequent report; that is to say, powerful
14 impressions will be created and reported in the
15 media in any public hearing in which an officer
16 doesn't appear to have a proper or full answer for
17 something or there's some gap left hanging.

18 It's simply unfair to everybody in
19 the process.

20 My learned friend, in paragraph
21 38, talks about the officers and their counsel
22 clearly stating their objection on the record to
23 answering certain questions, and that again misses
24 the point.

25 It's not that they or I don't want

1 the full story told -- we very much do -- it is
2 that they are in a position they cannot do it, and
3 that's what makes the procedure unfair.

4 In my respectful submission, sir,
5 at the end of the day, you have heard a
6 contextualized full story. You will be issuing a
7 report, and the public trusts you, having heard
8 all of the story -- much in the way that the
9 process is advocated here for Mr. Arar to give
10 some sort of private or in camera testimony to a
11 rapporteur who will report to you and you will, in
12 turn, report to the Canadian public.

13 In my respectful submission, you
14 can't put these officers in the position of
15 exposing their reputations and yet hobbling their
16 ability to tell their full story. So it would be
17 procedurally unfair to have them testify in public
18 under those circumstances, and there's simply
19 no -- of the attempts to cobble some sort of
20 making an objection from time to time or making it
21 clear that there's something more hanging here
22 does more to exacerbate the problem than it does
23 to cure it.

24 THE COMMISSIONER: There is, in
25 the public domain now, a considerable amount of

1 information about the RCMP investigation. We have
2 the Garvey report, redacted form, but there are
3 substantial disclosures in that. There are the
4 documents, the RCMP documents, that were entered
5 as exhibits in the in camera hearings in redacted
6 form that have been made public. There is the
7 SIRC report and statements by Ministers and so on.
8 So there is now in the public domain a good deal
9 of information about the RCMP investigation. I
10 readily point out by no means all of the story.

11 Can you, Mr. Bayne, point to
12 specific examples. If, for example, one were to
13 lead the evidence so that it would be part of this
14 Commission's public record, evidence of the
15 information now in the public domain about the
16 RCMP investigation, can you point to specific
17 examples where the type of problem that you are
18 asserting -- and I say this with respect, I am not
19 being critical -- but in the abstract would, in
20 fact, arise.

21 What I'm getting at is it strikes
22 me, as I look to that, there's a good number of
23 areas -- I hear what your concern is, that in some
24 cases, in order to properly answer questions, an
25 RCMP witness would have to refer to national

1 security confidentiality information. But it
2 strikes me, in having heard all of the in camera
3 evidence, that there's evidence in the public
4 domain where that's not the case. And one could,
5 if people with goodwill and in good faith sat
6 down, could work out a means whereby information
7 could be put in the public record here that would
8 help foster the public nature of this inquiry
9 without encountering any unfairness concerns to
10 individual RCMP officers.

11 What I am really asking you is, I
12 hear your argument in the abstract. Be specific.

13 MR. BAYNE: Well, to be specific,
14 I would have to get into references to pieces of
15 evidence that would necessarily have to be
16 referred to to make full answer to or fully
17 explain certain pieces that are out in the public
18 record, and I think that's inevitable in this. I
19 don't agree with the premise of the question,
20 Mr. Commissioner, that there are discrete little
21 parcels of evidence that stand by themselves.

22 For example, you say that
23 Mr. Garvey has issued a report, redacted, and it's
24 not necessary for an officer to comment on that
25 report. The report speaks for itself, and you say

1 it's in the public record. But the minute you put
2 an officer up there to answer for some of the
3 inclusions or omissions in that report, he will be
4 getting into evidence that has been redacted for
5 presumably good reason, or at least arguable
6 reason, and to give you specific examples of it,
7 I'm going to have to start discussing pieces of
8 evidence with concrete examples.

9 THE COMMISSIONER: What I'm asking
10 you for is a concrete example -- just refer to
11 what's in the public domain now. Obviously you
12 can't refer to the evidence that you would like to
13 rely upon, your witnesses might like to rely upon
14 in answering a question, but what I would suggest
15 you could do is point to, in what's a rather
16 extensive public record, about what went on in
17 this investigation and point out to me specific
18 examples where this problem arises.

19 What I'm reluctant to do -- I feel
20 an obligation, I think as you're aware, that to
21 the extent I can, the government has asked me to
22 maximize public disclosure during the hearing
23 process. That's what the government wanted when
24 they appointed this inquiry. We have had to forgo
25 the summary process because it's not workable. We

1 now hear in argument that we're going to forgo
2 perhaps not calling any RCMP witnesses but RCMP
3 witnesses who are involved in the investigation.
4 Your argument would say that none of those should
5 be called.

6 That's a significant restriction
7 in the public nature of this inquiry that one
8 should only adopt, it would seem to me, if it's
9 absolutely necessary in order to protect the
10 fairness to individuals. No question. I think
11 nobody in this room will argue against the point
12 that this inquiry should afford procedural
13 fairness to the witnesses. I include all
14 witnesses, including Mr. Arar, if they are to
15 testify before the inquiry.

16 But I think that those that would
17 argue that I should restrict the evidence to be
18 called carry with them an onus to satisfy me that
19 this isn't a theoretical type of prejudice or
20 procedural unfairness that arises; that there are
21 actual problems and seeing whether we can tailor
22 the procedure in order to avoid the unfairness and
23 at the same time have not all but some public
24 disclosure to foster the public nature of this
25 inquiry.

1 MR. BAYNE: Well, sir, I was under
2 the impression that this issue of particular
3 examples was of necessity going to be dealt with
4 in camera. I maybe erroneously got that
5 impression.

6 I don't know how I can really
7 answer the question. You say there's a
8 significant body about the RCMP investigation in
9 the public. There's also a very significant body
10 of evidence relevant to that. It may not be the
11 actual investigation. It may be the investigation
12 of other agencies, information from other
13 agencies, Canadian or otherwise, that bears on
14 that that is not in the public domain and to which
15 these officers would necessarily make reference in
16 explaining their conduct.

17 Remember, they're not just going
18 to be blandly reading the Garvey report. The
19 purpose of their coming forward would be
20 presumably to explain, if the Garvey report refers
21 to something, some conduct, why you did this or
22 what did you base it on? And it's my respectful
23 submission that you can't say, well, in that,
24 there's a tidy little answer that doesn't get into
25 national security and confidential information

1 that came from other security agencies or other
2 investigative agencies or other pieces of evidence
3 that are not in the public domain. You simply
4 have to do that to fully tell your story.

5 THE COMMISSIONER: Is what you are
6 saying, then, that it's necessary to hear your
7 submissions about specifics in camera?

8 MR. BAYNE: That's what I would
9 say, Mr. Commissioner. I can give you concrete
10 examples of trying to answer about an issue and
11 being hobbled by being unable to refer to other
12 relevant pieces of evidence.

13 THE COMMISSIONER: Let me just
14 change the subject slightly.

15 Is it your submission that no
16 witnesses from the RCMP can be called to testify
17 about any of the involvement in the RCMP in the
18 events relating to Mr. Arar?

19 MR. BAYNE: Nobody in the position
20 of the front line investigators that I represent.

21 THE COMMISSIONER: Accepting for
22 the moment my point that there is now information
23 in the public domain relating to the front line
24 investigation -- again I make the point not all of
25 it but there is some -- what do you have to say

1 about the prospect of calling another, or other,
2 RCMP officers, not front line investigators, who
3 would be informed about the A-OCANADA
4 investigation, who would be in positions of
5 authority, who would be able to describe, albeit a
6 good deal of it may be secondhand, the matters
7 relating to the A-OCANADA investigation that are
8 now in the public domain?

9 MR. BAYNE: I really think that's
10 a matter for counsel for the RCMP,
11 Mr. Commissioner.

12 THE COMMISSIONER: But I want your
13 submission on it. You're on your feet. I agree
14 that it certainly is a matter for the government,
15 counsel for the RCMP, and I will be asking them
16 the same question.

17 MR. BAYNE: It seems to me if it
18 puts those people in a position of not being able
19 to tell the story to the Canadian public, the
20 fundamental problem of not properly educating,
21 actually misinforming, leaving out critical parts
22 of the story, it has the capacity to do more
23 danger than good.

24 Maybe you contemplate some process
25 whereby these are not the people responsible for

1 the action and it won't redound upon the people
2 who actually took actions or what they did, but I
3 do find it difficult to conceive of how you can
4 tell part of the story in an inquiry such as this.

5 I have real concerns about the
6 nature and suitability of the public inquiry
7 vehicle for a case such as this. Nine months and
8 more of experience here of trying to torture some
9 process that will accommodate the desire to get
10 things out into the public, it's always, given the
11 mandate of the Supreme Court of Canada, that you
12 have to ensure fairness to these men, reputational
13 fairness --

14 THE COMMISSIONER: That's a given.

15 MR. BAYNE: And my respectful
16 submission is, speaking on behalf of the officers
17 who I represent, who are key front line
18 investigators, who would be seen as the people
19 responsible for the front line investigative work
20 done by the RCMP in this case, that that can't be
21 done telling part of the story.

22 And I may disagree with you as to
23 the relative volume of what's in the public domain
24 and what isn't and the significance of what isn't.

25 THE COMMISSIONER: It seems to me

1 that the government, having called a public
2 inquiry and bringing with it the involvement of
3 others, people have an interest in it who have
4 been granted standing, in particular Mr. Arar --
5 let me put it in the form of a question: Is there
6 not an interest in the public inquiry to providing
7 a party, such as Mr. Arar, an opportunity, to the
8 extent that it's possible, to hear in public and
9 to question evidence that relates to the mandate
10 and particularly when that evidence or
11 information -- it's not evidence in the inquiry --
12 but that information is already in the public
13 domain as a result of decisions made by the
14 Government who called the inquiry?

15 MR. BAYNE: Some parts of it,
16 Mr. Commissioner, are in the public domain, but
17 it's the officers who will have to answer and they
18 won't be able to answer fully.

19 If you conceive of a process where
20 these officers are going to be put up for
21 cross-examination and not be able to fully explain
22 their conduct and their beliefs and the pieces on
23 evidence on which they relied, then, no --

24 THE COMMISSIONER: But isn't that
25 the point? There may be instances where that's

1 the case and there may be instances of evidence
2 where it's not the case. And are we being
3 premature and trying to judge it in the abstract,
4 that this simply doesn't work and therefore we
5 abandon the whole notion of calling RCMP witnesses
6 in this inquiry? Or does it behoove us to make an
7 effort?

8 MR. BAYNE: In my respectful
9 submission, it's reasonably foreseeable -- indeed,
10 given the nature of the evidence that we've heard
11 and the types of things that will not get into the
12 public record here that were extremely important
13 to the investigative team and the officers who
14 comprised it -- no, I don't think it's a matter of
15 putting your head down and doing the best you can
16 do in a difficult inquiry.

17 In my respectful submission,
18 that's not procedural fairness to these officers,
19 hobbling them and having them tell part of the
20 story with key parts missing. If there's
21 something that is so innocuous, then why have them
22 testify? If it's so innocuous, it isn't a
23 critical part of this proceeding.

24 But if it's at the heart of the
25 inquiry and theirs are critical pieces of evidence

1 they'd like to point to and can't, then, no, it's
2 not a matter of, don't we have a duty to do this?
3 Not if we can reasonably foresee it's simply not
4 going to be fair to these officers.

5 They can't be put in the position
6 where they can't make full answer to the questions
7 that are put to them.

8 THE COMMISSIONER: Okay. Is that
9 it?

10 MR. BAYNE: Thank you.

11 THE COMMISSIONER: Thank you,
12 Mr. Bayne. It's 1:00. Should we rise until 2:00
13 or 2:15? 2:15.

14 THE REGISTRAR: Please stand.
15 Veillez vous lever.

16 --- Upon recessing at 1:00 p.m. /

17 Suspension à 13 h 00

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

19 Reprise à 14 h 18

20 THE REGISTRAR: Please be seated.
21 Veillez vous asseoir.

22 THE COMMISSIONER: Ms McIsaac?

23 MS McISAAC: Thank you, sir.

24 If I might, I'd like to start by
25 going to your terms of reference, and particularly

1 reminding everyone of paragraph "O" of your terms
2 of reference, and the operative part of paragraph
3 "O" that I wish to draw attention to is as
4 follows:

5 "The commissioner be directed
6 to perform his duties without
7 expressing any conclusion or
8 recommendation regarding the
9 civil or criminal liability
10 of any person or organization
11 and --"

12 And this I would underline.

13 "-- to ensure that the
14 conduct of the inquiry does
15 not jeopardize any ongoing
16 criminal investigation or
17 criminal proceedings;"

18 For valid and practical reasons,
19 sir, you recognized early on that it would be more
20 expeditious to receive all of the relevant RCMP
21 evidence in camera first because there is a
22 recognition of the high potential for injury to
23 ongoing criminal investigations.

24 And I think as you now appreciate,
25 having heard that evidence, there is also a

1 potential for injury to international relations,
2 particularly the relationship that our police
3 force has with other police forces, and there are
4 also privacy interests of other individuals who
5 are involved and who are not parties to these
6 proceedings.

7 As we know, information came to
8 the RCMP's attention during the course of a
9 criminal investigation that related to Mr. Arar --
10 or the information, not the investigation, the
11 information related to Mr. Arar.

12 And it is information relating to
13 that investigation which the Attorney General has
14 identified for you as being information which
15 ought not to be disclosed publicly.

16 The purpose of protecting that
17 information is to protect the ongoing
18 investigations, the integrity of those
19 investigations, and to avoid jeopardizing any
20 future prosecutions.

21 This raises, therefore, a very
22 difficult problem. Any witness who is called on
23 behalf of the RCMP will, in our submission, be
24 unable to answer many questions arising from the
25 isolated facts concerning the investigation that

1 are publicly known. I don't intend to repeat what
2 Mr. Bayne has said in this regard.

3 The front line investigators
4 cannot answer the questions, neither can more
5 senior members of the force answer many of these
6 questions without revealing information which, it
7 is the view of the Attorney General, would, if
8 disclosed, jeopardize those investigations and any
9 possible future prosecutions.

10 As a result, there is the
11 substantial risk that there will be incomplete
12 answers leading to speculation about what cannot
13 be fully discussed or stated, that unwarranted and
14 unfair conclusions may be drawn, not only as to
15 the conduct of the individual RCMP officers and
16 other Canadian officials whose conduct is the
17 subject of this inquiry, but possibly about the
18 RCMP itself as an organization, possibly about
19 Mr. Arar, and possibly about other individuals.

20 In our view, it would not be
21 sufficient for you to simply prohibit only those
22 questions which would lead to answers which would
23 necessarily disclose this kind of information.

24 If I could use an example provided
25 by Mr. Arar's counsel team at paragraph 39 of

1 their submission -- this, in my view, is exactly
2 what one needs to be concerned about in these
3 circumstances.

4 The example is given in paragraph
5 39, which is to be found at page 12, of an RCMP
6 witness being asked to explain something he or she
7 did during the Project A-OCANADA or Project
8 OCanada investigations, and the suggestion is made
9 there may be three explanations, but only two can
10 be made public.

11 Well, what if the third
12 explanation is actually the most important
13 explanation? What if the third explanation is the
14 underpinning that really gives the context and the
15 basis for the actions having been taken?

16 The public would be left with the
17 two probably, possibly, less persuasive
18 explanations; the public would not hear the most
19 coherent, the most cogent, and indeed the most
20 persuasive explanation.

21 The front line investigators, as
22 Mr. Bayne said, are the very individuals whose
23 conduct is the subject of this review, and I think
24 it would be disingenuous of us not to recognize
25 that in many ways it is the focus of the RCMP and

1 their actions which this Commission is looking at.

2 To provide someone who is not one
3 of the front line investigators to provide this
4 information would, in my submission, only compound
5 the problem.

6 That individual, a more senior
7 person, would also not be able to answer all of
8 the questions. They would be subject to the same
9 constraints as the front line officer, but in
10 addition, the information they would be providing
11 would necessarily be secondhand information if
12 they weren't directly involved in the various
13 investigative activities or other actions which
14 were the subjects of the question.

15 So that, in my submission, doesn't
16 provide a much more commendable approach to this.

17 You are required by your terms of
18 reference to conduct your proceedings in a manner
19 that does not reveal this information. It is,
20 admittedly, an extraordinarily difficult line that
21 you must tread between conducting a fulsome
22 inquiry, maximizing disclosure to the public,
23 being fair to those who are involved, particularly
24 those whose conduct is particularly the subject of
25 your investigation. These are various interests

1 which need to be carefully balanced.

2 In my submission, the approach
3 that you have taken to date with respect to
4 hearing this evidence in camera is the only way of
5 really fulfilling that mandate, because it is the
6 only way that you have obviously received all of
7 the information.

8 I reiterate again, the witnesses
9 who have testified have been vigorously
10 cross-examined with respect to that information;
11 it has enabled you to protect that information
12 which requires protection pursuant to your terms
13 of reference, and yet you have been able to
14 release a certain amount of information to provide
15 certain disclosure to the public.

16 At the end of the day, it will be
17 your public report, based on your findings after
18 hearing all of the evidence, that will provide the
19 maximum amount of public disclosure and be the
20 ultimate fulfilment of your mandate.

21 So, in closing, I agree with
22 Mr. Bayne's submissions that it is not fair to the
23 individual front line officers to require them to
24 come before the public, to be in a position where
25 they can only give partial answers, and that it is

1 really not a solution to invite a more senior but
2 removed member of the RCMP to try to explain
3 various actions solely for the purpose of -- it's
4 going to sound funny when I say that -- solely for
5 the purpose of public disclosure, but there are
6 situations, and this, in my submission, is one of
7 them, where public disclosure, simply by virtue of
8 your terms of reference and the nature of the
9 matter that you're inquiring into, must be
10 limited, and we're going to have to accept that.

11 It doesn't mean that you won't get
12 to the bottom of it, it doesn't mean that you
13 won't know everything, and it doesn't mean that
14 you won't be able to make solid, viable findings
15 and recommendations.

16 It just means that to some extent
17 there will be limitations on public disclosure.

18 THE COMMISSIONER: It strikes me,
19 Ms McIsaac, that the RCMP's role in the events
20 that give rise to the mandate are obviously
21 central. I mean, you'd agree with me --

22 MS McISAAC: I would agree with
23 that, sir.

24 THE COMMISSIONER: One can hardly
25 even begin to consider the mandate -- one couldn't

1 consider the mandate without considering a good
2 deal about what the RCMP's involvement in those
3 events.

4 It strikes me that, this being a
5 public inquiry, there's some force to the
6 suggestion that people make that we should do our
7 best not simply to report on those events in my
8 report but also to conduct hearings during the
9 course of which maximizes the public disclosure.
10 I mean, do you agree with that?

11 MS McISAAC: I don't disagree with
12 that as a proposition, sir. I do say, though,
13 that in totality, and you've heard the evidence
14 now from the RCMP, if you cannot do that in a
15 manner that is fair -- fair to the RCMP officers,
16 fair to the RCMP as an institution, fair to
17 Mr. Arar, fair to the public, who are entitled to
18 the full story -- possibly -- I mean, it just
19 can't be done. It may be that you will have to
20 accept that.

21 THE COMMISSIONER: Are we giving
22 up too easily at this point?

23 MS McISAAC: I don't think so,
24 sir.

25 THE COMMISSIONER: At this point

1 that's what I would question. I would think that
2 the Government of Canada, having called a public
3 inquiry into this and given the central role that
4 the RCMP played, to come here and to simply make
5 general submissions, you can't call any RCMP
6 witnesses whatsoever -- that's your submission --
7 in the public.

8 To me, I'm concerned that that
9 looks like we're giving up too easily. I think to
10 use Ms Edwardh's expression, should we not work
11 cooperatively to see what can be done in order to
12 call evidence from the RCMP about the events --
13 there's already a good deal of evidence in the
14 public domain respecting the RCMP -- in a way that
15 doesn't operate unfairly to officers but simply
16 not just give up. Let's be creative.

17 MS McISAAC: Well, believe me,
18 sir, I've tried. I'm not sure there is a way to
19 do that, to avoid the very issue we've been
20 talking about.

21 Let me give you an example. You
22 asked Mr. Bayne for an example this morning.

23 THE COMMISSIONER: I didn't
24 receive any. Yes?

25 MS McISAAC: Let's take the

1 genesis of this issue, if you will, which is the
2 investigation that was being conducted which
3 caused Mr. Arar's name to come to the attention of
4 the RCMP.

5 Now, what is more important and
6 fundamental to an understanding of what happened
7 than to know what was that investigation, who was
8 involved, why were they investigating it? But
9 those are matters that cannot be publicly
10 disclosed. Therefore, from the very beginning,
11 we're faced with only a partial story.

12 THE COMMISSIONER: There's no
13 question, if the RCMP -- if one or more witnesses
14 from the RCMP give evidence, that the entire RCMP
15 story will not be told. I mean, that is a given.

16 The question is: Can those parts
17 of the story that can be told be told in a way
18 that doesn't unfairly prejudice the individuals?
19 That seems to me the question.

20 So to stand up and say, "You're
21 not going to get the whole story, therefore we get
22 none of the story," I don't think is the purpose,
23 nor is it what I think was intended in my terms of
24 reference. The terms of reference accept that
25 there won't be full disclosure, but they say

1 maximize public disclosure. So we're going to get
2 some parts and some parts only; and what we have
3 to avoid, I agree with you, is prejudice and
4 misleading.

5 But to come along and in the
6 abstract simply say, "Well, we give up. We can't
7 do it because we can't get the full story and it's
8 going to be half-truths and everything else," I
9 say with the greatest of respect to you and to
10 Mr. Bayne, I wonder, is that good enough?

11 Isn't the government's obligation,
12 particularly the government, perhaps not so much
13 Mr. Bayne, having called a public inquiry, isn't
14 it obliged to do everything humanly possible it
15 can to assist, to assist this Commission, in
16 calling what evidence we can in the public forum?

17 MS McISAAC: And in my submission
18 we have done that, sir, within the confines of the
19 legitimate public concern and issue with respect
20 to the protection of international relations,
21 national security generally, investigations, and
22 possible prosecutions.

23 Many, many documents have been
24 released and we've already seen that to some
25 extent that perhaps is, in itself, an example of

1 how documents are released telling part of the
2 story, leading to speculation, which is quite
3 possibly erroneous.

4 And that's not going to be helped
5 by additional testimony, in my submission; it's
6 going to be compounded.

7 THE COMMISSIONER: With great
8 respect, I think the submissions underestimate the
9 public's ability to understand or the capacity to
10 understand what's going on here.

11 I think, first of all, if it's
12 made clear that if the evidence is that you're
13 getting part of the RCMP story, not all of it,
14 most people could understand that and understand
15 the constraints we are operating under. And if
16 certain questions can be asked but can't be
17 answered because the concerns you've raised, I
18 would have thought most people can understand that
19 as well.

20 So I am concerned that in an
21 atmosphere or a working environment that's not
22 cooperative, trying to call RCMP evidence could
23 indeed be a struggle.

24 I am anxious, though, to invite
25 the government -- indeed I'll make a ruling at the

1 end of this -- to work cooperatively with the
2 Commission, and anybody else that is involved, to
3 see if we cannot devise a means whereby some of
4 the RCMP story and evidence can be told as part of
5 the public record of this Commission in a way
6 that's not misleading or unfairly prejudicial.

7 MS McISAAC: Then I will address
8 that when I address my submissions to how the
9 public hearings could be conducted, because that
10 of course will be one of the major issues in which
11 we are suggesting a cooperative approach to make
12 those work.

13 THE COMMISSIONER: Okay. Thank
14 you, Ms McIsaac.

15 Ms Edwardh?

16 SUBMISSIONS / SOUMISSIONS

17 MS EDWARDH: Thank you very much,
18 Mr. Commissioner.

19 I come to these submissions with a
20 singular disadvantage. Each of my colleagues,
21 Ms McIsaac and Mr. Bayne, have stood before you
22 and asserted that the entanglement of confidential
23 and public information is literally impossible to
24 separate. Had I been there, I could offer you,
25 Mr. Commissioner, some concrete suggestions about

1 how to disentangle that knot. But I, with the
2 greatest respect to their submissions, find it
3 inconceivable that there is not a way for you to
4 discharge your mandate in such a fashion that the
5 public will understand.

6 My friend says much has been done
7 to assist in the public hearing process. Well,
8 we've not been here for the last year. There has
9 been no public component to this in any meaningful
10 sense. So I want to just make a few comments
11 about the submissions and turn to ours.

12 No process, a criminal trial, a
13 civil trial, or an inquiry, gets, as Mr. Bayne
14 characterizes it, the whole truth. We have
15 evolved a framework for the adjudication of facts
16 in all those forums where certain kinds of
17 information are not available. And they might
18 have been available.

19 I have been active in a number of
20 commissions of inquiry where it would have been
21 really useful to look at the cabinet confidences.
22 Despite my best efforts, I have been told it's not
23 the business of the inquiry to have access to that
24 kind of material.

25 I don't want to suggest that the

1 challenges before you are not immense, but at the
2 same time, there are all sorts of protected areas
3 of information, and generally we do pretty well in
4 terms of the adjudication of facts.

5 The troubling part I have to deal
6 with is the notion of procedural fairness, of
7 which I am a very strong believer, and the alleged
8 unfairness to the officers.

9 In every case that one does, there
10 is the potential for objections to be made and
11 information to be carved out of the adjudication
12 process. It is simply not available to the
13 fact-finders or the trier of fact, as we often use
14 the term.

15 Mr. Bayne says but this problem
16 you face today is different because the RCMP want
17 to tell -- they want to tell everything about the
18 investigation. Well, with the greatest of
19 respect, their duties have not shifted.

20 When I conduct a Charter challenge
21 in a serious criminal case, I am making
22 accusations against police officers. They are
23 being accused of committing violations of the
24 Charter. They are accused of doing illegal
25 searches and seizures. And they may want to tell

1 the whole truth. They may want to speak
2 everything. But if they have a duty to say, "I
3 cannot answer that question as it would tend to
4 disclose the identity of an informant", they must
5 say that.

6 Every one of us who practise in
7 this forum understands that there is a range of
8 matters that the RCMP, whether they want to or
9 not, are duty bound to protect. And that is why I
10 categorically reject the suggestion of Mr. Bayne
11 that this situation is different from a situation
12 where a police officer, in an open public and
13 serious criminal trial, must say, "I'm sorry, I
14 cannot answer that question."

15 And there may be a wide range of
16 matters, and that was the purpose of setting out
17 in our written submissions to you the kind of wide
18 range of issues that officers -- it's not of
19 discretion. They are not, in some circumstances,
20 entitled to disclose solicitor-client
21 communications if a team gets legal advice from
22 the Department of Justice and they are not
23 entitled to do that. The whole team is protected
24 by that legal advice, and an individual officer
25 can't waive it.

1 Further, if they desperately want
2 to tell what a confidential informant said or
3 wanted to say something that might identify it in
4 order to protect their reputations, to give a full
5 and complete answer to the question, they simply
6 can't do it. And our Supreme Court of Canada has
7 made it very clear it doesn't matter what their
8 personal interest is. They are obliged, as a
9 matter of duty, to uphold these legal principles.

10 They are obliged here, as a matter
11 of duty, to uphold the privileges of the state
12 with respect to national security confidentiality.
13 We all know that. So whether they want to or not,
14 they will discharge their duties as officers of
15 the law.

16 We think, and I submit to you in
17 the strongest terms, that with your guidance and
18 your hand giving shape to these proceedings, we
19 can make sure that the information is protected at
20 the same time as you discharge your duty, which
21 was to hold a public inquiry. And that is what
22 the terms of reference call for.

23 If we adopt the position of
24 Mr. Bayne, and one concurred with respect to the
25 whole of the RCMP, then how is it that you could

1 permit Minister Easter to be called? How is it
2 that Minister Graham is going to be singled out so
3 that the intelligence he would receive throughout
4 the intelligence apparatus or whatever, how are we
5 going to call him?

6 If you accede to this without
7 trying, with the greatest of respect, you might as
8 well thank us for all attending here today and let
9 the public part of this go forever, because in
10 logic and in principle, you cannot back away from
11 saying, well, if it applies to "A," then it
12 applies to the management, then it applies to the
13 Solicitor General, then it applies to the Minister
14 of Foreign Affairs and International Trade.

15 With the greatest of respect,
16 that's not good enough, because we haven't tried.

17 We set out in our submissions to
18 you that there is no substantive unfairness if it
19 is clear to the public that the officer can't
20 answer the question. If the officer has to say,
21 "I have three reasons" -- and I totally disagree
22 with Ms McIsaac on the point -- "and I can only
23 tell you two, which are the lesser reasons" -- and
24 surely the officer can explain himself -- "and
25 they are as follows, and on the third matter, I

1 object to answering that on the basis of national
2 security confidentiality", it's move-on time.

3 I mean, we are not standing before
4 you as junior counsel unable to work within the
5 framework that you set. It would be a travesty to
6 take the work that has gone on so far and to take
7 no last step to move this into the public forum.

8 Certainly on behalf of Mr. Arar,
9 his wife and children, any meaningful
10 understanding is worth a shot at.

11 We suggest that you can start the
12 public hearings by offering an explanation to the
13 public that sometimes this proceeding may appear a
14 little strange or that matters that they would
15 like answers to cannot, in fact, go forward as
16 answers, and that you will make sure that two
17 goals are served: that information that must be
18 protected will be protected until you rule and the
19 public will get as much information as they can.

20 And with the greatest of respect,
21 I believe you can tell people to stay their
22 judgment.

23 But I don't think this is
24 procedurally unfair to the officers. As long as
25 people know that they have a duty to make an

1 objection, or their counsel to make an objection,
2 it simply can't be unfair.

3 What would be unfair would be to
4 deprive them of the right to make the objection,
5 and they have ample opportunity to do so, with the
6 benefit of counsel who have sat through the entire
7 in camera process and are very familiar with the
8 factual record.

9 So I ask you to reject the
10 submission that we aren't good enough to do this,
11 and the public is so stupid they won't get it. I
12 think there are many cases where we have far too
13 little confidence in the public. In my respectful
14 submission, we cannot back away from trying, we
15 cannot back away, as persons of goodwill, of
16 finding a way. But it takes wanting to find a
17 way. I quite agree with that.

18 On behalf of Mr. Arar, I want to
19 make it very clear to everyone here that we want
20 to find that way, and as much as possible find
21 some answers within the confines of what the law
22 of Canada will permit us to find.

23 Those are my submissions. Thank
24 you.

25 THE COMMISSIONER: Thank you,

1 Ms Edwardh.

2 The intervenors? Mr. Neve, or are
3 all three going to speak to this?

4 Okay. Thank you.

5 SUBMISSIONS / SOUMISSIONS

6 MR. NEVE: Commissioner,
7 intervening organizations, indeed the Canadian
8 public, have waited eight long months for the
9 resumption of the public phase of what is, of
10 course, meant to be a public inquiry. In our view
11 it is now vitally important that the evidence that
12 is presented and explored over the coming weeks
13 provide the maximum possible amount of public
14 disclosure.

15 To exclude RCMP witnesses, the
16 essential and mandated public dimension of this
17 process will be lost. It will be exceedingly
18 difficult for intervening organizations, who bring
19 into the hearing process a range of perspectives,
20 representative of various aspects of the public
21 interest, to participate in and engage with the
22 inquiry in any meaningful way, including by making
23 effective submissions and proposing concrete
24 recommendations.

25 Evidence from RCMP witnesses is

1 obviously a key element to this inquiry, and
2 intervenors believe that as much as that evidence
3 as possible must be made available to the public
4 during this phase of the hearings.

5 We do appreciate that RCMP
6 witnesses may not be able to respond to all
7 questions, due to national security concerns. We
8 urge, of course, that national security claims be
9 strictly limited to information that truly would,
10 if disclosed, be injurious to national security.
11 We are confident that testimony can be provided in
12 a manner that takes this into account and involves
13 moments of further proceedings in camera when
14 strictly necessary.

15 With proper context and prefacing,
16 it will be possible to explain why it may not be
17 possible for RCMP witnesses to respond to some
18 questions in a manner that the public will
19 understand, and I too would underscore the point
20 that we should not sell short the ability of the
21 public to draw those lines and develop that
22 understanding.

23 It is critical to recall as well,
24 Commissioner, that there were a number of
25 high-profile, widely reported leaks of information

1 about Mr. Arar to the media during the latter part
2 of 2003. Those leaks, originating with what were
3 generally termed unnamed government sources,
4 certainly did not afford basic procedural fairness
5 to Mr. Arar. They have also resulted in a range
6 of information being put on the public record,
7 from which witnesses should not now be allowed to
8 retreat.

9 Finally, let me state the obvious:
10 The fact that summaries of in camera evidence are
11 not going to be made publicly available makes it
12 all the more important -- in fact vital -- that
13 there be a maximum amount of RCMP evidence brought
14 forward during this public phase. Any other
15 process would be of great detriment to the public
16 nature of this inquiry.

17 The public should not be asked to
18 wait for the end of the process to begin to
19 broaden their understanding, shape questions, and
20 try to make meaningful input. That is what public
21 interest is all about. And there has always been
22 considerable public interest in this case.

23 I just note the words of
24 Mr. Justice Cory in the blood inquiry decision
25 which has been referred to earlier by Mr. Bayne,

1 at paragraph 31, where he highlights that the
2 public interest is about:

3 "... being a part of the
4 recommendations that are
5 aimed at resolving the
6 problem, not simply waiting
7 to hear about the
8 recommendations at the end of
9 the process."

10 Ultimately, of course,
11 Commissioner, you will have heard all of the
12 evidence, and you will be able to ensure that the
13 final public record is both fair and accurate, and
14 "fair" means to all concerned.

15 We therefore endorse the
16 recommendations made by Mr. Arar's counsel as to
17 how testimony of RCMP witnesses should be handled.
18 We believe that it is a process that seeks to
19 maintain maximum public disclosure, respects
20 strictly necessary national security claims, and
21 protects the fairness rights of witnesses.

22 Thank you.

23 THE COMMISSIONER: Thank you,
24 Mr. Neve.

25 Mr. Bayne?

1 SUBMISSIONS / SOUMISSIONS

2 MR. BAYNE: They say -- and I
3 think you said this in a different way when you
4 asked me about examples this morning -- that the
5 devil's in the details.

6 The whole debate here has been
7 couched in, I suppose, fairly hypothetical terms
8 that don't put flesh on the skeletal outline of
9 the problems, and there's a real danger in that.

10 Mr. Commissioner, when you asked
11 me about examples in the public domain of what we
12 couldn't get into, I invite you, sir, to go to the
13 transcript of proceedings, page 15136, starting at
14 line 6, and going, just that page, over to the
15 next page, 15137, to line 2.

16 Certainly it's fair, I think you
17 will see having read that, that my expectation was
18 and is that we will deal with specific examples of
19 specific prejudice to this type of proposed
20 procedure in camera.

21 You asked the question of
22 Ms McIsaac that -- it's a given, you said, that
23 the entire RCMP story won't be told. But they,
24 presumably whoever is nominated to be a witness to
25 tell this partial story of the RCMP investigation,

1 can tell a part of the story so that it does not
2 prejudice individuals.

3 And I ask, how do you do that?
4 How do you do that in a concrete example? And I
5 can't really have that discussion with you in the
6 public domain because to answer a concrete example
7 of something that you or your counsel would like
8 to tender or offer for a part of this public
9 record can only be answered by submissions in
10 camera of why the details of that won't work.

11 I am not trying to be obtuse and I
12 am not trying to exclude other counsel. It is
13 simply something that you contemplated back on
14 April 20th. I certainly contemplated that you
15 would want to hear from me further about specific
16 examples, but we both contemplated we would have
17 to do that in camera.

18 I am still anxious to do that.
19 I've barely yet seen the public record, as it is
20 being called, in terms of a document that's been
21 prepared, but ultimately the devil is in the
22 details. It's fine and dandy to say, "Oh, we can
23 come up with something that will be fair or give
24 enough fairness", but when you get into the
25 details of how this will actually work, in my

1 submission, it starts to tell the tale on itself
2 that it's fraught with very grave unfairness.

3 THE COMMISSIONER: When I asked
4 you the question, Mr. Bayne, I wasn't asking you,
5 obviously, for the answer.

6 MR. BAYNE: Oh.

7 THE COMMISSIONER: I was asking
8 you, having regard to the public record, to give
9 me an example of an area where there would be
10 questions of matters in the public record for
11 which the type of problem you submit existed.

12 I agree with your point that we
13 are going to have to follow this hearing with an
14 in camera hearing -- and we'll do that shortly; I
15 will talk about the scheduling of that -- to hear
16 the specifics, because I'm going to address this
17 issue, not in the abstract, but I'm going to look
18 at the specifics.

19 In any event, my question wasn't
20 seeking to have you refer to answers. It was
21 simply to point to a subject matter that is in the
22 public domain that would necessitate reference to
23 NSC material in its answer.

24 MR. BAYNE: I misunderstood then.
25 And part of my reticence, sir, is I don't want to

1 transgress into something that isn't actually in
2 the public record and start pulling things out of
3 the in camera.

4 But may I say this: At the end of
5 the day, I think what the Canadian public is
6 really concerned to know about, and what I've
7 heard almost every counsel address directly or
8 indirectly, is: Did what the RCMP did or didn't
9 do cause or contribute to Mr. Arar's fate?

10 We are all here not because of an
11 RCMP investigation per se but because Mr. Arar
12 ended up being detained in the U.S., deported by
13 U.S. authorities to Jordan and Syria and detained
14 there for a year, and the real issue is: Did RCMP
15 conduct cause or contribute to that?

16 At the end of the day, that's
17 always the question that's going to be asked here,
18 and there's a wealth of evidence on that that
19 underlies the answer to everything that the RCMP
20 did here or didn't do.

21 It may be, looking down the
22 accurate prism of hindsight, that some individual
23 action or actions can now, years later, be said to
24 be criticized. But if they had little or nothing
25 to do with Mr. Arar's fate, that's what would

1 really concern the Canadian public.

2 That's why, sir, giving concrete
3 examples does necessitate going in camera and, in
4 my submission, really provides the answer to the
5 problem at the heart of all this.

6 THE COMMISSIONER: Just before you
7 sit down, the in camera hearing -- and we are
8 thinking of scheduling that for tomorrow or the
9 next day. I expect that the arguments on the
10 matters that are before me today may spill over
11 until tomorrow morning. So I am going to suggest
12 that the in camera hearing -- Mr. Cavalluzzo, you
13 may wish to speak to this -- take place either
14 tomorrow afternoon or Thursday morning.

15 As part of that, let me point out
16 that that will be the third time that I will have
17 heard from you on this issue, and I'm asking you:
18 How long do you expect your submissions will be in
19 that in camera hearing?

20 MR. BAYNE: When I first made
21 submissions to you on this, of course I didn't
22 have the advantage of knowing what were the
23 alleged public facts. I haven't read all of those
24 as yet. I certainly wouldn't be prepared to or
25 able to make helpful submissions by tomorrow

1 afternoon. I would be able to do it by the next
2 morning.

3 And in terms of the time that it
4 takes, I can give you examples that would take the
5 whole morning or I can give you one example and
6 you may say that's enough. When we discussed this
7 before, you opined that there might be one, there
8 might be 85 examples.

9 THE COMMISSIONER: Well, I can't
10 imagine it would take the whole morning. I mean,
11 you can give me credit for knowing the evidence.

12 MR. BAYNE: Right. I find it
13 difficult, with great respect, sir, and I mean no
14 disrespect to you. I find it difficult at times
15 to keep accurate track of what is and isn't so far
16 out there in the public domain after nine months
17 of evidence. We take for granted what we know.

18 So this 20- or 30-page summary
19 that sort of, bare bones, picks little pieces of
20 what's in the public record, I'll have to go
21 through that and then I'll go through some of
22 those issues and why, dealing with those in
23 isolation, that way would be manifestly unfair and
24 you just can't make answer to it.

25 THE COMMISSIONER: Okay. Well,

1 unless I hear any suggestion to the contrary, we
2 will schedule the in camera hearing for Thursday
3 morning.

4 MR. CAVALLUZZO: Yes, at nine
5 o'clock.

6 THE COMMISSIONER: Nine o'clock.
7 We will have to finish it by the lunch hour. So
8 people may arrange to make their submissions in
9 such a fashion that everyone is given an
10 opportunity to speak to it and it's completed by
11 the lunch hour on Thursday.

12 MR. CAVALLUZZO: Just a couple of
13 qualifications. First of all, we will have to
14 ensure that the place is available.

15 SPEAKER: It is.

16 MR. CAVALLUZZO: It is. Thank you.
17 The second question is whether or
18 not amicus may wish to participate.

19 THE COMMISSIONER: If either
20 Mr. Atkey or Mr. Cameron is available, yes.

21 MR. CAVALLUZZO: Okay, thank you.

22 MR. BAYNE: Where is that,
23 Mr. Commissioner?

24 THE COMMISSIONER: You can talk to
25 Mr. Cavalluzzo after.

1 MR. BAYNE: I'm sorry. See, that's
2 what I mean.

3 --- Laughter / Rires

4 THE COMMISSIONER: That completes
5 that issue.

6 Let's move to number 3. I think
7 the suggestion here is that the Government lead
8 off, Ms McIsaac, followed by Mr. Bayne, and then
9 across the room. Thank you.

10 SUBMISSIONS / SOUMISSIONS

11 MS McISAAC: Thank you, sir.

12 I was very gratified to hear the
13 submissions of Mr. Arar's counsel and counsel for
14 the intervenors about a cooperative approach to
15 the public hearings.

16 You have heard a great deal of
17 evidence in camera. You have a good sense and
18 understanding of the areas over which the
19 government claims national security
20 confidentiality.

21 You have not expressed a view yet
22 with respect to those claims as they pertain to
23 the RCMP or much of the evidence that's about to
24 be heard from the primary set of witnesses which
25 will be testifying in public, being the witnesses

1 who represent the Department of Foreign Affairs.

2 In our submission, the best way
3 for this to proceed in order to maximize the
4 amount of evidence that can be placed on the
5 public record and to make sure that it proceeds in
6 an orderly and coherent way, would be as set out
7 in my submission at page 4. You'll see a series
8 of bullet points there, sir.

9 THE COMMISSIONER: Yes, I have it.

10 MS McISAAC: Let me use an
11 example. Before a witness, for instance, from the
12 Department of Foreign Affairs testifies, counsel
13 for the Attorney General would identify those
14 areas of the expected evidence that are subject to
15 a claim for national security confidentiality.

16 For instance, by way of an
17 example, when it comes to an official from the
18 Department of Foreign Affairs, the Attorney
19 General has claimed national security
20 confidentiality with respect to discussions of a
21 confidential nature that may have taken place in
22 the case of Ambassador Pillarella or the consular
23 officer, Mr. Martel, both of whom I understand
24 will be testifying, confidential discussions that
25 they undertook with Syrian officials.

1 You are aware that the underlying
2 basis of that claim relates both to the general
3 concept that discussions of this nature are
4 conducted in confidence, that the confidence is
5 necessary and it's necessary to be kept in order
6 that the Canadian officials who are on the ground
7 in Syria now can maximize their ability to deal
8 with these same officials in order to assist
9 individuals who may be incarcerated there now, may
10 be incarcerated in the future, or to assist the
11 families of Syrian Canadians who may still be in
12 that country.

13 The same thing goes for
14 discussions with other countries.

15 But that's an example of an area
16 of evidence over which the Attorney General has
17 claimed a national security confidentiality.

18 In order to allow things to
19 proceed in a sensible and coherent manner, we're
20 suggesting that that be identified by the Attorney
21 General prior to the witness testifying, that you
22 would give instructions to counsel that questions
23 with respect to these identified areas are not to
24 be explored during the witnesses' public
25 testimony.

1 Now, with respect to the witnesses
2 coming up, most questions, I would have thought,
3 either have already been explored, if the witness
4 has already testified in camera, and you and your
5 counsel would be able to indicate, "Yes, we have
6 fully explored that particular area with this
7 witness."

8 On the other hand, if the witness
9 has not yet testified and is scheduled to come
10 back to testify in camera, then as we did with the
11 first round of public hearings, the questions that
12 counsel would want to ask of these witnesses would
13 be identified and held for inquiry during the in
14 camera portion of their testimony which would
15 follow.

16 As I say, I thought this process
17 worked fairly well during the initial round of
18 public hearings.

19 The Commission counsel will have
20 the opportunity to ask questions of those
21 witnesses who have not already testified in
22 camera, and it prevents us kind of jumping up and
23 down every few minutes if we have carved off those
24 areas of testimony that are, for the moment at
25 least, out of bounds.

1 You will then, of course, have to
2 make a ruling at some point with respect to the
3 national security claims that have been made with
4 respect to the witnesses' testimony.

5 In my submission, those claims
6 ought to be dealt with in an omnibus manner. That
7 is why I am not suggesting and would vigorously
8 reject from the Government's point of view, a
9 piecemeal ruling, that as a question is asked and
10 an objection is made to the answering of that
11 question, that we would immediately adjourn and
12 have some kind of immediate ruling on the matter.
13 It's not an orderly flow.

14 It also raises a fundamental issue
15 that I think we have to address, is that there are
16 two aspects -- actually, there are three aspects
17 to any claim for national security.

18 The first aspect is the
19 proposition, and let me use an example that's
20 probably easy to understand. I believe we all
21 adopt and respect the proposition that a name of a
22 confidential police informer should not be
23 disclosed.

24 First of all, the proposition has
25 to be adopted with respect to the nature of the

1 information being protected.

2 But then the next question that
3 often arises and it frequently arises with
4 informers: Would this particular answer or this
5 particular piece of information, if disclosed,
6 actually identify the police informer?

7 So there are two parts to it that
8 need to be, in my submission, addressed in a more
9 omnibus manner.

10 The third issue that you will have
11 to address at some point, and in my submission,
12 can only best be addressed when all of the
13 evidence has been heard by you, is the question of
14 public interest.

15 You may accept that the
16 proposition, for instance -- again, just using an
17 example -- that the names of police informers
18 should be protected. You may accept the
19 proposition that revealing this particular piece
20 of information would disclose the name of a police
21 informer, but you may, nevertheless, at the end of
22 the day, having heard all of the evidence, having
23 decided what factual findings you are going to
24 make, you may decide that notwithstanding all of
25 that, the public interest in disclosure of this

1 particular piece of information far outweighs the
2 public interest to be protected.

3 In my submission, all of that --
4 certainly the final aspect of that -- can only be
5 accomplished at the end.

6 So what we are suggesting is the
7 following, as set out at page 4 of my submissions:
8 An identification at the beginning of a witness's
9 testimony of those areas where the witness cannot
10 answer questions because of the national security
11 confidentiality claims.

12 We would work together with your
13 counsel. In many cases these areas will be
14 informed by the claims that have already been made
15 with respect to the information in the documents
16 to which the witness will be testifying.

17 We will work cooperatively among
18 counsel, with your direction, to ensure that those
19 areas are ones where counsel recognize that they
20 are not to go around asking questions.

21 Ultimately, at the end of the day,
22 a list of the outstanding issues and questions
23 that need to be explored in camera with that
24 witness will be compiled and then Mr. Cavalluzzo
25 and his team will be able to do so in a subsequent

1 in camera hearing or, conversely, we'll be able to
2 say, "We've already heard this witness extensively
3 in the in camera proceedings, and I can assure you
4 that those questions have been asked and answers
5 received."

6 At the end of that process, then
7 you will develop a process for the issuance of, if
8 you believe it necessary, your interim report and
9 your findings with respect to the Government's
10 various claims of national security
11 confidentiality and your recommendations with
12 respect to the release of any information if you
13 believe it should either be released because you
14 reject the claim or because you believe the public
15 interest in disclosure outweighs the national
16 security concern.

17 Thank you.

18 THE COMMISSIONER: Thank you,
19 Ms McIsaac.

20 Mr. Bayne, do you have anything to
21 add to this?

22 SUBMISSIONS / SOUMISSIONS

23 MR. BAYNE: Two comments very
24 briefly, Mr. Commissioner.

25 One, the investigators I

1 represent, I just want this known, have already
2 testified and have been thoroughly cross-examined,
3 so I wouldn't think bullet point number 3 would
4 necessarily apply to them.

5 Secondly, sir, I can imagine the
6 need for a fourth bullet, maybe at the top, of a
7 clear indication of what -- and I mean specifics,
8 not generalities -- of what a witness is expected
9 to testify about.

10 THE COMMISSIONER: Thank you,
11 Mr. Bayne.

12 Ms Edwardh?

13 SUBMISSIONS / SOUMISSIONS

14 MS EDWARDH: I seem to be arguing
15 for all of the conventional procedures that we use
16 in ordinary courts, Mr. Commissioner.

17 The gist of my submission is that
18 it would be -- since you haven't made any
19 rulings -- that it would be wrong for you to rule
20 out areas unless there is an objection, that the
21 burden of objection should be on the witness
22 and/or their counsel and/or the Government.

23 I submit that if you say, "We're
24 going to take out an area," we will inevitably
25 fall into this error -- I have two documents --

1 --- Off microphone / Sans microphone

2 MS McISAAC: Mr. Commissioner, I
3 assume we have two documents that have been
4 differently redacted.

5 I've invited my friend not to play
6 gotcha, but if there are discrepancies in this
7 terribly difficult process, to bring them to my
8 attention so we can deal with them.

9 MS EDWARDH: I wasn't going to
10 deal with this until I heard what Ms McIsaac was
11 essentially saying.

12 The government has provided to the
13 Commission a document -- and that's the document
14 at the top, Mr. Commissioner, that's the first
15 document.

16 THE COMMISSIONER: First page?

17 MS EDWARDH: So paragraph 7 on
18 this document, which relates to the consular visit
19 of October 23, reads as follows:

20 "When asked if he wished the
21 embassy to provide him with
22 anything he might need, he
23 answered that his needs were
24 all taken care of by his
25 Syrian hosts." (As read)

1 Redaction.

2 "He also..." (As read)

3 Et cetera.

4 But the documents we obtained
5 through Access to Information leaves the complete
6 opposite impression. It's at the second page.

7 "When asked if he wished the
8 embassy to provide him with
9 anything he might need, he
10 answered his needs were all
11 taken care of by his Syrian
12 hosts (his answers were
13 dictated to him in Arabic by
14 the Syrians.)" (As read)

15 Now, if you carve out the areas,
16 you're going to say "International affairs" means
17 that matters of conversations or discussions of
18 the role of the Syrians we should stay away from,
19 I couldn't discuss or ask questions about what the
20 Syrians did, their demeanours, what they said
21 publicly, if you carve out this space too broadly.

22 I admit that there may be
23 conversations of such a nature that there is a
24 valid objection on the basis of international
25 relations and essential aspects of comity between

1 nations.

2 But if you are doing an area one,
3 you will by necessity protect information that
4 could fall into the public domain.

5 In my submissions -- or
6 Mr. Waldman and my submissions to you, we suggest
7 a very traditional procedure, that there is a
8 question, and if there is an objection, that there
9 is a record made of that question and objection,
10 kept for the benefit of all of us.

11 That at that time, if you have not
12 heard the answer to the question, it is just
13 perhaps a new question may pop up, you may wish to
14 go in camera to hear the answer to get a full view
15 of the claim and the answer, but that we and
16 amicus should be entitled to either make some
17 submission to you there briefly, make it at the
18 end of the witness's testimony, or make it in the
19 final submission before the report that's going to
20 come out, the interim report.

21 You can park your decision to rule
22 on it because it may not be timely or appropriate,
23 but I want to take the position very simply that
24 if I ask a question and there's an objection, I
25 say, "No, Mr. Commissioner, I got this through

1 Access to Information".

2 I might be able to do it in two
3 seconds. Ms McIsaac might sit down. The issue of
4 whether the answer can be given might be resolved.

5 Or I might be able to say, "This
6 was the subject of three articles in The Globe and
7 Mail, The New York Times, and The Miami Herald",
8 and that may cause people to sit down.

9 So we think, in the strongest of
10 terms, that you can have confidence in counsel and
11 the witness making an appropriate objection, but
12 we suggest to you in the strongest terms not to
13 carve out areas that will inevitably be overbroad.

14 It's not that you'll be protecting
15 information that you should protect but, rather,
16 you will be cutting away from the public part of
17 this process information that belongs in the
18 public domain.

19 Those are my submissions.

20 THE COMMISSIONER: Thank you,
21 Ms Edwardh.

22 Mr. Neve?

23 SUBMISSIONS / SOUMISSIONS

24 MR. NEVE: Thank you.

25 Commissioner, intervenors

1 certainly do agree with the proposition that a
2 cooperative solution to the challenge of dealing
3 with the blend of public and in camera evidence
4 that will be constantly in front of you over the
5 coming weeks needs to be found.

6 We do not agree, however, with the
7 proposal to identify in advance certain topics or
8 subject matter as being out of bounds for the
9 purposes of questioning in public because related
10 questions and answers might involve matters that
11 are subject to national security confidentiality
12 claims.

13 In our view, such an approach
14 would unduly restrict public disclosure and risks
15 significantly further impairing the public's
16 ability to follow, participate in, and engage with
17 this public inquiry.

18 We are particularly concerned
19 about this because these are national security
20 claims that lie behind the proposal, and they have
21 not yet been resolved through national security
22 confidentiality rulings by you.

23 Ultimately, any number of the
24 claims may be found by you to be either unfounded
25 or legitimate, but outweighed by a public interest

1 favouring disclosure.

2 We do already know from your
3 attempt to release the summary of CSIS evidence in
4 December that your views do differ from the
5 Government's on any number of these national
6 security claims.

7 As such, ruling topics out of
8 bounds at this time risks limiting your ability to
9 hear the fullest possible back and forth through
10 questioning by all parties of the relevant
11 evidence with respect to topics that you may
12 ultimately rule should be wholly or partially
13 disclosed.

14 Instead, we urge that you not
15 prepare a list of prohibited topics, that all
16 matters be open for questioning, and that national
17 security claims be dealt with as they arise,
18 including by going in camera, either immediately
19 or at the end of a witness's testimony, when
20 strictly necessary, to hear any answers that you
21 have not already heard in earlier in camera
22 sessions.

23 Thank you.

24 THE COMMISSIONER: Thank you, Mr.
25 Neve.

1 Mr. Atkey, were you going to make
2 submissions on this point?

3 MR. ATKEY: I will make
4 submissions on point 4.

5 THE COMMISSIONER: Thank you.
6 Then, Ms McIsaac, I think we're
7 back to you.

8 SUBMISSIONS / SOUMISSIONS

9 MS McISAAC: I'd like to make two
10 points, sir.

11 The first is with respect to this
12 idea of a cooperative attitude that all counsel
13 must approach with.

14 The document that Ms Edwardh
15 showed you is clearly an example of where a
16 cooperative approach would work very well.

17 We have disclosed thousands of
18 documents to you. We have made every effort to
19 identify in those documents the information for
20 which we believe release would not be in the
21 national interest, and in fact would be contrary
22 to the national security of the country.

23 At the same time, there have been
24 hundreds of Access to Information Act requests,
25 and it is inevitable that people will differ on

1 exactly which pieces of information in a
2 particular document need to be identified in order
3 to protect specific national security concerns.

4 I would hope that before we start
5 this process, with the assistance of Commission
6 counsel, all documents would be identified. If
7 there are differences in documents, those
8 differences would be identified in order that we
9 can have an orderly approach to the production of
10 documents for witnesses.

11 We would also have a witness
12 statement or a will-say or something of that
13 nature and an identification of the documents that
14 the witness is about to testify to.

15 That is what I see as a
16 cooperative approach which would help us to deal
17 with the public evidence in a coherent manner.

18 The second point I want to make is
19 to point out that while the process of protecting
20 national security is commenced by the government
21 institutions who are best situated to deal so,
22 identifying for you that information over which a
23 national security claim is made, it is the duty of
24 all of us -- counsel for the Government of Canada,
25 your counsel, and indeed yourself -- pursuant to

1 the terms of reference, to ensure that this
2 proceeding is such that the information for which
3 a national security interest resides does not get
4 disclosed, and that the orderly process, if you
5 should determine that you're in disagreement with
6 the submission that national security applies to a
7 particular piece of information, we follow a
8 process whereby that is articulated, that your
9 ruling is made, that your ruling is considered, or
10 if we're talking about a public interest, that
11 that's done, as I say, at the end, at the
12 appropriate time.

13 I am concerned that if we don't
14 put some rules and parameters around the public
15 evidence of some of these witnesses, we will be
16 constantly objecting, that the evidence will be
17 essentially incoherent, and that you will not be
18 able to run in to some kind of secure room at the
19 end of the day and have sufficient information
20 before you in order to properly and coherently
21 adjudicate on the issue of whether this particular
22 piece of information ought to be released.

23 As we know, you have to look at
24 this as a totality. One little piece of
25 information here, one little piece of information

1 there, that's not the appropriate way to approach
2 the issue of national security.

3 It's a little bit like pulling on
4 the thread of a sweater: you pull on the thread
5 of the sweater, and the next thing you know, the
6 whole sweater unravels.

7 That approach is inconsistent with
8 the joint obligation that we all have to protect
9 information, the disclosure of which would be
10 injurious to national security or would jeopardize
11 ongoing investigations.

12 In my submission, the approach
13 that the Attorney General has suggested is the one
14 which maximizes your ability to have an orderly
15 proceeding, maximizes the ability to receive
16 evidence in camera -- pardon me, in public -- and
17 then allows you the maximum opportunity to
18 consider and properly rule on issues of national
19 security.

20 Thank you.

21 THE COMMISSIONER: Thank you,
22 Ms McIsaac.

23 Mr. Cavalluzzo, should we go to
24 the next issue?

25 MR. CAVALLUZZO: We have one

1 remaining issue and it looks like it will take
2 another hour. I don't know if you want to take a
3 break now?

4 THE COMMISSIONER: Okay. Let's
5 take a break before we start that.

6 MR. CAVALLUZZO: I think we can
7 finish today.

8 THE COMMISSIONER: We might finish
9 today, contrary to what I had said earlier.
10 Things are going more quickly.

11 MR. CAVALLUZZO: And there's going
12 to be -- Ms Edwardh wants to raise another issue
13 in terms of -- an issue that she's brought forward
14 in terms of writing. We can do that at the
15 completion of the amicus issue.

16 THE COMMISSIONER: Okay. We'll
17 rise for 15 minutes.

18 THE REGISTRAR: Please stand.

19 Veuillez vous lever.

20 --- Upon recessing at 3:25 p.m. /

21 Suspension à 3 h 25

22 --- Upon resuming at 3:43 p.m. /

23 Reprise à 15 h 43

24 THE REGISTRAR: Please stand.

25 Veuillez-vous lever.

1 Please be seated. Veuillez-vous
2 asseoir.

3 THE COMMISSIONER: Good afternoon,
4 Mr. Atkey.

5 SUBMISSIONS / SOUMISSIONS

6 MR. ATKEY: Good afternoon,
7 Mr. Commissioner.

8 In response to the Amended Notice
9 of Hearing for today, as indicated previously, I'm
10 going to confine myself to issue No. 4, the role
11 of amicus curiae. Nevertheless, depending on the
12 views of others and questions you may have, I'm
13 quite prepared to address your questions regarding
14 the other three issues, and particularly issue No.
15 3, which may be related.

16 Let me, for the record, set forth
17 some of the background as to what the role of
18 amicus curiae has been, what amicus curiae has
19 done in these proceedings, and particularly
20 important, what amicus curiae has not done.

21 I was appointed by you last June
22 to act as counsel independent from the government
23 to test government requests on the grounds of
24 national security confidentiality. I immediately
25 reviewed carefully the terms of reference,

1 particularly paragraph (k), directing you in
2 conducting the inquiry to take all steps necessary
3 to prevent disclosure of information that if it
4 were disclosed to the public could, in your
5 opinion, be injurious to national relations,
6 national defence or national security.

7 Of course, as you know and most
8 people in this room know, paragraph (k) sets forth
9 procedures which permit the Commission to receive
10 information in camera on the request of the
11 Attorney General of Canada, to release a part or
12 summary of the information received in camera in
13 order to maximize disclosure to the public of
14 relevant information and for you to indicate if
15 it's in your opinion that the release of part of a
16 summary of the information received in camera
17 would provide insufficient disclosure to the
18 public.

19 You, quite rightly in my view,
20 interpreted section K, subsection 3 of the terms
21 of reference, and the term "inadequate disclosure
22 to the public," as involving the same test as a
23 reviewing judge would apply under section 38.06(2)
24 of the Canada Evidence Act, that is balancing of
25 the public interests in disclosure against the

1 potential injury to international relations,
2 national defence, or national security resulting
3 from disclosure.

4 The important procedural condition
5 imposed on you under the mandate is of course that
6 you have to first advise the Attorney General
7 under section 38.01 of the Canada Evidence Act
8 with the evidence in issue having to be heard in
9 camera before the second decision on public
10 interest balancing tests can be made, with the
11 effect that once notice is given to the Attorney
12 General, you cannot disclose without authorization
13 or agreement of the Attorney General or by order
14 of the Federal Court judge.

15 I would like to confirm, for the
16 benefit of all parties here today, that the Office
17 of Amicus Curiae for this Commission is fully
18 independent from both the Commission and its
19 counsel. Mr. Cameron, my assistant, and I, are
20 not Commission counsel. While we stay informed of
21 the progress of the Commission by reviewing the
22 evidence and by consulting with counsel for all
23 parties, Mr. Cameron and I do not meet or consult
24 privately with you and we are not advocates for
25 any position taken by the Commission or its

1 counsel. We may agree or disagree with the
2 Commission and its counsel on issues of national
3 security confidentiality, and all parties will
4 hear from us at the appropriate times on those
5 issues.

6 I might say, regretfully, I think
7 as an indication of this independence, we have not
8 received copies of the written submissions of the
9 parties to today's proceedings.

10 --- Laughter / Rires

11 We have not received them, as
12 might have been presumed, from Commission counsel
13 because we are not part of Commission counsel. I
14 think that's a graphic illustration of the
15 independence that currently exists.

16 THE COMMISSIONER: And a
17 shortcoming that shouldn't occur again.

18 MR. ATKEY: Thank you.

19 As amicus curiae, I did
20 participate in the hearing held on July 5th before
21 you in response to a motion filed by counsel for
22 Mr. Arar for disclosure of records that contain or
23 relate to information that is already in the
24 public domain. By that point, I had reviewed not
25 only the materials filed as counsel for Mr. Arar

1 in support of her motion but also some CSIS and
2 DFAIT materials that were then regarded as subject
3 to NSC.

4 As amicus curiae, I took the
5 position before you on July 5th that the motion of
6 Mr. Arar's counsel was not premature and raised
7 important issues concerning disclosure of
8 information relevant to the inquiry. But what I
9 agreed to with you at that hearing was that a
10 decision at that point on your part to grant
11 disclosure, without further review at in camera
12 proceedings of specific documents and hearing
13 certain testimony that relate to the information
14 in the public domain, would be premature.

15 I also submitted to you that the
16 issue of whether information is legitimately in
17 the public domain appears to go to the core of the
18 mandate of the Commission to determine whether the
19 conduct of public officials was improper because,
20 for example, unauthorized disclosure might have
21 been taking place in order to harm or with the
22 effect of harming Mr. Arar and his reputation.

23 And then on July 29th, I concurred
24 with your ruling to in effect make NSC decisions
25 after hearing all of the factual in camera

1 evidence and to put that evidence in the proper
2 context, rather than to at that time move in and
3 out of in camera proceedings.

4 The potential harm to the public
5 interest caused by non-disclosure during this
6 period of in camera hearings was to have been
7 reduced somewhat by your undertaking to produce a
8 summary of evidence heard in camera, providing the
9 public with an indication of the evidence over
10 which the Attorney General claimed NSC, and you
11 undertook at that time to produce summaries before
12 all the in camera hearings had been completed.

13 It should also be noted for the
14 record that you indicated on July 29th that after
15 completing the in camera hearings you would
16 prepare an omnibus ruling addressing the two
17 issues, NSC and the balancing of the public
18 interest, and I take it, Mr. Commissioner, that
19 this omnibus ruling is still yet to come.

20 What happened next occurred
21 largely during the months of September and
22 October, with the hearing of CSIS witnesses in
23 camera, following public evidence of the
24 contextual sort by CSIS and RCMP personnel in
25 September.

1 As planned, you prepared your
2 first summary of information that had been
3 received in camera that should, in your opinion,
4 be released to the public. Now, this summary was
5 carefully reviewed by me and my assistant,
6 Mr. Cameron, and we were both of the view that the
7 information in the summary should be released to
8 the public under the combined grounds set forth in
9 paragraph (k)(1) and (k)(3) of the Rules of
10 Procedure.

11 The government made NSC claims
12 related to CSIS investigative interests and CSIS
13 information sharing interests respecting damaging
14 relations with foreign law enforcement agencies or
15 foreign security intelligence agencies, and as
16 required by section 55 of your mandate, a copy of
17 the proposed summary was provided to the Attorney
18 General for a period of at least ten business days
19 to allow comment prior to its public release.

20 Despite efforts of all parties to
21 try to come up with a document that could be
22 disclosed publicly, agreement could not be
23 reached, and the government brought its
24 application under section 38.04 of the Canada
25 Evidence Act to prevent public disclosure of

1 heavily redacted portions of the draft summary.

2 The Federal Court application was
3 adjourned on successive occasions while protracted
4 discussions were undertaken by the parties. This
5 led to eventual discontinuance of the government's
6 application at the end of March and your ruling to
7 abandon the preparation of summaries for the time
8 being, postponing the court litigation to a later
9 time, if necessary, and to allow the Commission to
10 get on with its work of completion of in camera
11 hearings, commencement of public hearings next
12 week, hearings and submissions in August, and
13 submitting an interim report to the government
14 with both findings of fact and conclusions in
15 respect of the actions of Canadian officials in
16 relation to Mr. Arar.

17 You made it very clear that you
18 would convene an in camera hearing prior to
19 submitting your interim report. At that time the
20 Attorney General would be given an opportunity to
21 lead evidence and make submissions with respect to
22 the government's NSC claims and also if the
23 government disagreed with the public disclosure of
24 the Commission's interim report or parts of the
25 report, then such disagreements would be addressed

1 as contemplated by the terms of reference, which
2 is probably back to the Federal Court.

3 My submissions, Mr. Commissioner,
4 are these:

5 Let me make it clear that, for the
6 record, neither Mr. Cameron nor myself were
7 invited to or participated in the in camera
8 proceedings which were commenced in mid-September
9 and which concluded last week. These in camera
10 hearings have involved witnesses representing
11 CSIS, the RCMP, the Ottawa Police Service, the
12 Ontario Provincial Police, the Canadian Border
13 Security Agency, and the Department of Foreign
14 Affairs and International Trade. However,
15 Commission counsel have given us full access to
16 the written transcripts and exhibits filed at all
17 of these hearings, and we have reviewed between
18 the two of us, Mr. Cameron and myself, virtually
19 all of them, acknowledging, of course, that this
20 has not been a suitable substitute for the
21 observation and examination of witnesses.

22 I should also add that we have
23 received the utmost cooperation from Commission
24 counsel in explaining to us developments at these
25 hearings.

1 It is safe to say, as a result,
2 that the amicus curiae is satisfied that the
3 procedure adopted by you on July 29th last -- that
4 is, to hear all of the in camera evidence first
5 before going into public hearings -- was the most
6 practical and efficient way of getting on with the
7 mandate of the Commission to investigate and get
8 to the bottom of the actions of Canadian officials
9 in relation to Maher Arar in the U.S. and Syria
10 and on his return to Canada.

11 Much information has been provided
12 to Mr. Arar and the public, most recently public
13 DFAIT documents covering his detention in the
14 U.S., documents which have come to me recently in
15 the form of a disc, which I may say resulted in a
16 pile of paper over two feet high on my desk this
17 Monday morning and complaints from the printing
18 shop that they had run out of toner because of the
19 redactions that occurred.

20 --- Laughter / Rires

21 They said, "What's all this black
22 stuff?" I said, well, those are redactions
23 that's occurred and that's the circumstances that
24 exist.

25 Of course, there's possibly a very

1 helpful chronology on public information and
2 events covering the period from September 2001
3 until the date of the government announcement
4 concerning a public inquiry on January 28th, 2004.

5 You also publicly released
6 detailed rulings on May 4th, 2004, July 29th,
7 2004, December 3rd, 2004 and April 7th, 2005, with
8 as much information as possible, allowing for
9 redactions which are subject to government NSC
10 claims.

11 We are supportive,
12 Mr. Commissioner, of your efforts, your continued
13 efforts to maximize disclosure to the public of
14 relevant information, as is your mandate under the
15 rules, appreciating the complexity served up to
16 you by section 38 of the Canada Evidence Act.

17 However, I should say I am not so
18 optimistic concerning the culture of secrecy that
19 continues to prevail in respect of the
20 government's NSC claims. I regret that agreement
21 was not reached last December respecting public
22 disclosure of your draft summary of CSIS evidence,
23 but I am cognizant of the fact that section 38 of
24 the Canada Evidence Act loads the dice against
25 you.

1 I fear that the public disclosure
2 of your interim public report, to be submitted to
3 the Government next fall, may never see the light
4 of day because of continued NSC claims. This is
5 neither fair to Mr. Arar nor to the Canadian
6 public.

7 Mr. Cameron and I are particularly
8 concerned about the impression that the parties
9 and the public have gained as a result of the
10 evidence censoring by government parties of the
11 facts that are plain and credibly in the public
12 domain. The indication by the government parties
13 of section 38 of the Evidence Act to prevent you
14 from stating publicly what is already known to the
15 public from credible sources runs the risk of
16 damaging the credibility of this Commission.

17 Allow me at this point to assert
18 two primary considerations that amicus curiae has
19 and will be applying in testing NSC claims of the
20 government under section K of the terms of
21 reference.

22 The first, and much has been
23 discussed about this, is the public's right to
24 know. This was most recently articulated by the
25 Supreme Court of Canada in the Vancouver Sun case

1 last year dealing with the open court principle.
2 The Court regarded this principle as a hallmark of
3 democracy, the cornerstone of the common law,
4 guaranteeing the integrity of the judiciary and
5 inextricably linked to the freedom of expression
6 guaranteed by section 2(b) of the Canadian Charter
7 of Rights and Freedoms.

8 The Supreme Court of Canada made
9 clear that this open court principle should not be
10 precipitously displaced in favour of an in camera
11 process and extends to all judicial proceedings
12 and inferentially to public commissions of
13 inquiry.

14 Mr. Cameron and I will have more
15 to say of this in our submissions made to you on
16 August 19th.

17 The second factor relates to
18 fairness to Mr. Arar. He is the person, after
19 all, who caused this public inquiry. You are
20 asked to investigate and report on the actions of
21 Canadian officials in relation to him in several
22 contexts under your factual inquiry. Virtually
23 all of the evidence adduced to date, either in
24 public or significantly in the in camera
25 proceedings, has been from the government or its

1 agencies, CSIS, RCMP, DFAIT, and others.

2 Other than the information
3 publicly disclosed, Mr. Arar or his counsel have
4 little opportunity to know what is being said
5 about him, so that he can, through his counsel,
6 challenge that information and adduce his own
7 evidence as to what actually occurred.

8 Mr. Commissioner, you have noted
9 this potential unfairness to Mr. Arar and are
10 doing everything you can to remedy the situation,
11 including this hearing today in receiving
12 submissions from this counsel and from his counsel
13 and others.

14 My submissions to you today are
15 simply to underscore the apparent unfairness to
16 Mr. Arar, given the way this has played out.

17 As amicus curiae, Mr. Cameron and
18 I stand ready to assist you in the future testing
19 of the government's NSC claims, recognizing that
20 the public's right to know and the fairness to
21 Mr. Arar should be guiding factors for you to be
22 balanced against NSC claims based on national
23 security, national defence or international
24 relations.

25 I am mindful of the complexities

1 that arise in issues numbers 2 and 3 and the
2 discussion held here today, and we have listened
3 with interest to the submissions of the parties
4 and to determine whether there is any useful role
5 that we as amicus curiae can play in the
6 proceedings that can or will be worked out.

7 Let me disclose for the record
8 that in preparation for today's hearings,
9 Mr. Cameron and I have met informally with counsel
10 representing the British Columbia Civil Liberties
11 Association, Canadian Council On American-Islamic
12 Relations, Amnesty International, the
13 International Civil Liberties Monitoring Group,
14 and the Intervenors' Committee, as well as counsel
15 for Mr. Arar and for the Attorney General. Their
16 views as to the appropriate role of amicus, in
17 light of the new procedures set out in your
18 rulings on summaries, will no doubt be helpful to
19 you going forward.

20 Needless to say there has been no
21 unanimity of views, particularly how the role of
22 amicus curiae can and should differ from that of
23 Commission counsel related to NSC claims.

24 Having listened to these different
25 views, Mr. Cameron and I have worked out a

1 possible approach to suggested new procedures
2 outlined first by Mr. Cavalluzzo in his
3 distribution of February 16th, 2005, and we wish
4 to table them with you today and all parties.

5 There is a memorandum which is
6 similar to but not identical to that submitted in
7 draft to Mr. Cavalluzzo on March 11th, and it
8 consists of seven short paragraphs which I shall
9 read into the record so you will know where we are
10 coming from.

11 The first paragraph of the
12 memorandum suggests that:

13 "Amicus curiae will continue
14 to familiarize itself with
15 the transcripts of oral
16 testimony and exhibits filed
17 in the in camera proceedings
18 held during the months of
19 September through to April,
20 and we will attend public
21 hearings in May and June so
22 as to be in a position to
23 test Government claims to
24 national security
25 confidentiality and to

1 participate in the in camera
2 proceedings that occur as a
3 result."

4 Amicus curiae will also prepare a
5 written brief, as I indicated, to be filed with
6 you on August 19th, containing submissions on the
7 legal basis for national security confidentiality
8 claims in practice and as set forth in the
9 jurisprudence, and we will also comment generally
10 on the evidence adduced from witnesses
11 representing CSIS, RCMP, DFAIT and the other
12 Canadian agencies.

13 However, amicus curiae in its
14 written brief and oral submissions to follow will
15 not make reference to specific pieces of evidence
16 until it is determined later in the proceedings
17 which evidence Commission counsel will be relying
18 upon in response to his various submissions
19 in-chief, suggesting alternative findings or
20 conclusions that are available to you.

21 The third paragraph:

22 "Until such time as you make
23 findings of fact and
24 conclusion in your interim
25 report, all amicus curiae

1 submissions related to
2 evidence for which national
3 security confidentiality is
4 claimed should be received in
5 camera."

6 The fourth paragraph:

7 "Amicus curiae shall have an
8 opportunity to file a written
9 brief by August 26, 2005,
10 commenting on various
11 submissions in-chief as they
12 may relate to issues of
13 national security
14 confidentiality."

15 Paragraph 5:

16 "In submitting any interim
17 report to the government with
18 findings of fact and
19 conclusions, the Commissioner
20 will consider the submissions
21 of amicus curiae in
22 expressing his opinion as to
23 which parts of the interim
24 report should be disclosed to
25 the public."

1 Paragraph 6:

2 "If there is disagreement in
3 relation to what parts of the
4 interim report may be
5 disclosed to the public, an
6 NSC hearing will be conducted
7 in accordance with the Order
8 in Council with full standing
9 given to the amicus curiae."

10 And the seventh and last paragraph
11 is that:

12 "Upon public disclosure of
13 the interim report, if there
14 are further witnesses to
15 testify, amicus curiae will
16 continue to participate in
17 the proceedings and we
18 reserve the right to make
19 submissions to you respecting
20 the claim to national
21 security confidentiality."

22 In closing, let me offer the
23 observation that, having read most of the
24 transcripts of the in camera proceedings, having
25 met with Commission counsel and counsel for the

1 various parties and intervenors, there seems to be
2 a consensus emerging that NSC claims may have been
3 made too aggressively and that the Commissioner's
4 obligations toward public disclosure may have been
5 somewhat thwarted by the very nature of the
6 complex process that has been visited on you.

7 I cannot help but contrast the
8 government's approach to NSC claims in these
9 proceedings with the approach of U.S. officials
10 under the current Presidential Executive Order for
11 Classification, which has permitted a much fuller
12 public disclosure of current issues of concern,
13 and I refer specifically to the 9/11 Commission
14 report.

15 Notwithstanding that the U.S.
16 classification categories are in their formal
17 iteration very similar to those which are
18 operative in Canada, apart from the procedures in
19 section 38 of the Canada Evidence Act, which
20 appears to have been drafted in haste in the fall
21 of 2001, I see nothing wrong with the
22 classification categories applicable in Canada.
23 They are truly reflective of security concerns
24 which envelope the mandate of this Commission:
25 international relations, national defence,

1 national security. But sometimes it is their
2 application and interpretation by government
3 agencies, such as CSIS or the RCMP, supported by
4 positions submitted by counsel for the Attorney
5 General, that have left the impression of
6 rigidity, which may not be in the public interest.

7 This is going to be played out in
8 the public hearings, which will proceed this month
9 and next, and the government's NSC claims made in
10 the course of these public proceedings in
11 circumstances of further in camera proceedings and
12 in your eventual omnibus ruling on national
13 security confidentiality next fall.

14 Mr. Commissioner, as amicus
15 curiae, Mr. Cameron and I are available to assist
16 you and the Commission in navigating through the
17 complex process towards an effective public report
18 to the government in a timely way.

19 Thank you.

20 THE COMMISSIONER: Thank you very
21 much, Mr. Atkey. I appreciate, as I said earlier,
22 the time and the role that you have played in the
23 inquiry, and Mr. Cameron as well, and the
24 assistance that you are going to provide in
25 future. I think it greatly enhances the work of

1 the inquiry, and certainly from my personal
2 standpoint it is of great assistance and I
3 appreciate it.

4 I'm just wondering -- and this is
5 really just an open invitation -- having heard the
6 discussion and the submissions on points 2 and 3,
7 do you feel, first of all, it would be
8 appropriate, and second, would be of value for you
9 to comment on either of those issues?

10 MR. ATKEY: I think it would be
11 the position of Mr. Cameron and myself that we are
12 available, if the parties wish, to participate in
13 the public hearings and to hear the claims made to
14 national security confidentiality and then go with
15 the parties into the proceedings in which you will
16 make a ruling as to whether NSC applies.

17 There's no smooth way of doing
18 this. It's seamless in its nature. Do you do it
19 at the end of the day? Do you do it at the end of
20 the week? Do you do it one week after you hear a
21 week of public evidence and park it in that
22 instance? I don't know.

23 But I am sceptical of the ability
24 you would have and the wisdom of your trying to
25 stake out areas in advance and saying these are

1 off limits. There may be some clear limits that
2 you want to establish in areas which are clearly
3 untouchable, such as disclosure of sources, but I
4 would be wary, if I were you, of staking out in
5 broad terms what are areas of NSC before you hear
6 what the claims are.

7 THE COMMISSIONER: Fine. Thank
8 you.

9 Thank you very much then. That
10 completes your submission. I appreciate it.

11 What was the order,
12 Mr. Cavalluzzo, on this issue?

13 MR. CAVALLUZZO: The order would
14 be, after Mr. Atkey is Ms Edwardh and the
15 intervenors.

16 THE COMMISSIONER: And the
17 government.

18 MR. CAVALLUZZO: The government
19 and Mr. Bayne.

20 THE COMMISSIONER: Ms Edwardh?
21 SUBMISSIONS / SOUMISSIONS

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

24 I trust that Mr. Atkey's chilling
25 comments, that the concern he has over perhaps

1 overbroad claims of national security
2 confidentiality may mean that your interim report
3 may never see the light of day, are nothing but
4 cautionary to all of us about the need to be
5 realistic and work together and that there be some
6 give-and-take in this process, acknowledging both
7 the need to protect that information as well as
8 the need to have adequate information in the
9 public domain.

10 We have, in our written
11 submission, addressed a number of points about the
12 role of amicus.

13 First, let it be noted that we
14 were a little surprised and not entirely pleased
15 that Mr. Atkey and Mr. Cameron were not active
16 participants in the hearings, the in camera
17 hearings, as we had understood that in that
18 process, not only would you hear evidence but you
19 would hear purported explanations, justifications,
20 and actual evidence about why the claim needed to
21 be maintained and the harm that might flow from
22 not maintaining the claim, and we had thought that
23 Mr. Atkey and Mr. Cameron were about the business
24 of testing those kinds of assertions made on
25 behalf of the Government of Canada.

1 Unfortunately, that has not been
2 the case, so we now stand before you asking for an
3 expanded role for amicus.

4 We, as counsel for Mr. Arar, do
5 not have any knowledge of the factual matrix that
6 makes up the in camera hearing, although Mr. Atkey
7 and Mr. Cameron do. As a result, it is our
8 position that they should be participants in the
9 public hearing process. They should be there to
10 add whatever comments can be made to an objection,
11 any submissions responding to ours, agreeing with
12 ours, agreeing with the government, even if you
13 ultimately reserve your determination and even
14 require an evidentiary hearing.

15 The public has a right to know
16 something about this process. Equally, we believe
17 that Mr. Atkey should be an active participant
18 with Mr. Cameron in any future in camera hearings
19 where his role should extend to testing and
20 challenging the justifications and the
21 explanations for the claims put forward.

22 Finally, we take a rather unusual
23 position in paragraph 54, and it goes, I think,
24 beyond what Mr. Atkey intended his role, but it is
25 apparent from the proposals that have now been put

1 forward that in August, when submissions are made
2 on the content of the interim report, that your
3 counsel do not at this time intend to make
4 submissions.

5 If that is true, then to the
6 extent that the interim report will reflect not
7 only a public record but an in camera record,
8 counsel for Mr. Arar have to work in a vacuum in
9 respect of the portions of the in camera record
10 that could be public. We need amicus to be a
11 light in that area because they alone -- and I
12 mean they alone -- will be privy to the in camera
13 evidence that in their position ought to be drawn
14 to your attention for release, for public release.

15 So we are very concerned, and
16 indeed this may not be the last you hear of it,
17 that your counsel will not be making submissions
18 even of a general kind at that time.

19 It is in this context where amicus
20 takes on his dual role of acting in the context, I
21 suppose, both of the public interest but also,
22 because we are not in a position to know what
23 happened in the in camera hearing, protecting
24 Mr. Arar's interest. And in that way, amicus
25 operates on a model that is much more similar to

1 the way amicus curiae operate in a court, when an
2 unrepresented accused person faces a criminal
3 accusation and the court declines to go forward
4 with the trial unless amicus is there to assist
5 the court.

6 Although this is not a criminal
7 trial, and I certainly agree it is not, I do point
8 out that in those areas that Mr. Arar cannot
9 assist you or his counsel can't assist you, we
10 believe amicus plays a very important role to
11 ensure fairness to Mr. Arar.

12 We have set out some of the areas
13 in which amicus has been effective in our written
14 materials to you. So at the end of the day we ask
15 that he be present during the public hearings,
16 that he make public submissions on objections that
17 are addressed, if they are addressed in the public
18 hearings, that he be present in all in camera
19 hearings, and should be given the task to examine
20 witnesses and address national security issues in
21 the context of the in camera hearings.

22 Only then, in my respectful
23 submission, is there a mechanism of independence
24 that protects Mr. Arar's interest.

25 Finally, there should be full

1 submissions made by amicus on both the factual
2 issues falling within your mandate and the
3 national security confidentiality issues.

4 We move to the factual issues and
5 call upon his assistance and participation there
6 because he holds in trust Mr. Arar's interest in
7 processes which we have been cut out of.

8 Subject to any question you have,
9 Mr. Commissioner, I think my submissions set out
10 in detail how we expect amicus to assist you.

11 THE COMMISSIONER: Thank you very
12 much, Ms Edwardh.

13 Mr. Neve? Mr. Saloojee?

14 SUBMISSIONS / SOUMISSIONS

15 MR. SALOOJEE: Mr. Commissioner,
16 to date, the intervenors have expressed their
17 disappointment that the amicus curiae's role has
18 been underutilized and under-resourced. We have
19 been disappointed, for example, that amicus has
20 not been present in all of the in camera hearings.

21 Moving forward, we would urge that
22 the amicus role be strengthened significantly,
23 that the amicus be, in truth, the voice of the
24 public, and that this role should be considered as
25 independent from the Commission.

1 Given Mr. Atkey's trenchant
2 critique about the overbroad claims the government
3 has been making with regard to national security,
4 we think it is imperative and critical that amicus
5 play a very strong and vigorous and robust role.

6 This role is critically important
7 for five reasons:

8 First, almost all of the inquiry
9 has been held in camera, and the government has
10 been reluctant to allow for a reasonable level of
11 disclosure.

12 Second -- and I think this was
13 evident during these hearings -- the vagaries of
14 some of the national security confidentiality
15 claims, in the example surrounding the redacted
16 documents. There's a great deal of vagary and we
17 think capriciousness regarding those claims, and
18 we really do need an independent, robust voice to
19 test those claims.

20 Third, there's a great deal of
21 evidence in the public realm, the difference being
22 in this case that much of that evidence we think
23 was instigated premeditatedly with the intent to
24 damage the reputation of a Canadian citizen. It
25 was not simply released benignly in the public

1 realm, and we do need to ensure that the
2 information that exists out there is not used as a
3 shield to deny critical answers to Mr. Arar.

4 Fourth, the amicus has access to
5 all the evidentiary record, which Mr. Arar's
6 counsel clearly does not have.

7 Lastly, the public inquiry was
8 called by the government, which ideally would
9 represent the public interest. The intervenors,
10 in our experience thus far, do feel the government
11 has not acted in the public interest, in the best
12 public interest.

13 To give you an example, the
14 current Minister of Justice, Mr. Irwin Cotler, has
15 recused himself of all matters relating to
16 Mr. Arar's case, and he in fact has appointed an
17 acting Minister of Justice, Mr. Geoff Regan, who
18 is the Minister of Fisheries and Oceans, for the
19 purpose of playing this role.

20 In our correspondence with
21 Mr. Regan, he has indicated to us that he is not
22 involved in this process at all and that we should
23 instead be looking to the Minister of Public
24 Safety and Emergency Preparedness, Ms Anne
25 McLellan.

1 Given the fact that one would
2 expect that the Minister of Justice should be
3 playing a central and meaningful role in such an
4 inquiry, in overseeing in particular the
5 government's conduct in this inquiry, and that
6 does not exist, we feel that that vacuum can be
7 best served practically by an expanded and
8 strengthened role of the amicus.

9 In practical terms, therefore, we
10 feel that the amicus should be able to be present
11 during all public and in camera proceedings, have
12 access to all the documentary evidence, ask
13 questions of witnesses, make submissions on the
14 NSC claims for the purpose of the interim report,
15 and of course fulfil their traditional role of
16 testing the validity of NSC claims and judging
17 whether the public interest outweighs any such
18 claims so as to facilitate in favour of
19 disclosure. Thank you.

20 THE COMMISSIONER: Thank you very
21 much, Mr. Saloojee.

22 Ms McIsaac?

23 SUBMISSIONS / SOUMISSIONS

24 MS McISAAC: First of all, let me
25 say, sir, that the Attorney General has not really

1 to date understood the role of the amicus, and I'm
2 not going to be able to comment on the seven-point
3 paragraph document that Mr. Atkey referred to
4 earlier because I have not seen it.

5 But what I would say is that the
6 key for the Attorney General is that we engage in
7 a constructive debate, an exchange of views with
8 the amicus on issues of national security.

9 Indeed, last summer when we were
10 initially preparing for public hearings, which was
11 how you were going to proceed at first,
12 particularly with respect to Foreign Affairs
13 documents, we were in fact engaged in what I saw
14 as a constructive debate with Mr. Atkey over
15 certain claims for national security with respect
16 to those documents; and most particularly, the
17 debate over whether, if you adopt the proposition
18 that protecting communications with foreign
19 officials is a worthwhile and necessary issue of
20 national security confidentiality, how did you
21 apply that to a particular document?

22 And we had a very productive
23 exchange of views with Mr. Atkey, which actually
24 resulted in a number of changes or refinements to
25 the way in which documents were redacted. Then,

1 of course, we proceeded to have the evidence of
2 the CSIS witnesses in camera. You produced your
3 summary.

4 Throughout the CSIS evidence, we
5 led detailed evidence as to why certain categories
6 of information were, in the view of the
7 government, subject to our claims for national
8 security confidentiality. We then completed the
9 CSIS evidence. You prepared your draft summary.
10 We reviewed the draft summary, and we provided you
11 with our views as to why certain parts of that
12 summary, in our view, ought not to be released
13 because of injury to national security. You
14 convened a hearing and we had an extensive
15 argument on that at that hearing.

16 Mr. Cameron and Mr. Atkey were not
17 present at that hearing, and we never understood,
18 nor did we engage with them in any kind of useful
19 debate, as to why they disagreed with our views
20 with respect to national security, if in fact that
21 was the case. That, in my submission, is not the
22 way we need to proceed.

23 So whatever role for the amicus is
24 adopted as we go forward, however the amicus is to
25 participate in the proceedings, it is our view

1 that that is most constructive if we have an open
2 engagement between the Government of Canada and
3 the amicus on issues of national security so that
4 we can fully understand each other's positions,
5 explain them, and reach agreement, if that's
6 possible, or if not reaching agreement, at least
7 understand why we disagree with each other.

8 Thank you.

9 THE COMMISSIONER: Thank you.

10 Mr. Bayne, do you have anything to
11 say on this subject?

12 MR. BAYNE: I do not.

13 THE COMMISSIONER: Mr. Atkey, do
14 you have anything in reply?

15 MR. ATKEY: No reply.

16 THE COMMISSIONER: Thank you for
17 those submissions. That completes item number 4.

18 There is an additional matter.
19 Ms Edwardh has filed a motion and she wishes to
20 speak to that.

21 Please go ahead, Ms Edwardh.

22 MOTION / REQUÊTE

23 MS EDWARDH: Thank you very much,
24 Mr. Commissioner. In fact, as you may recall, we
25 have filed two motions.

1 THE COMMISSIONER: Yes.

2 MS EDWARDH: And I am going to
3 briefly start with the first.

4 Last week we filed before you a
5 motion on behalf of Mr. Arar to be relieved of the
6 undertaking that all counsel who appear before you
7 at this Commission have entered into. That
8 undertaking, in substance, relates to our
9 obligation to not disclose to the public documents
10 that we have received through Commission processes
11 until such time as those documents have been filed
12 in the public domain.

13 We understand that obligation and
14 have assiduously tried to abide by it, mostly
15 because that is the only way we get a document,
16 but for the ones we have obtained through Access
17 to Information.

18 The motion asking to be relieved
19 of our undertaking rests really -- it's on three
20 documents, but one is of the most material
21 importance. I'm not going to refer in substance
22 to it, but I want to make this observation about
23 it, if I could.

24 It is a document that we received
25 from the Commission as part of a group of binders

1 of documents relating to the Department of Foreign
2 Affairs and International Trade, and we received
3 it at a time, in the summer of 2004, when it was
4 expected or anticipated that we would commence
5 public hearings into the Department of Foreign
6 Affairs and International Trade in September; so
7 some four or five weeks before, maybe even six
8 weeks before we received these binders.

9 When the public hearings were
10 cancelled, the documents remained in my possession
11 and Mr. Waldman's possession and Mr. Arar's
12 possession, and we used them from time to time to
13 make suggestions to Commission counsel about areas
14 that might be fruitfully developed, and we had
15 from time to time meetings to convey our views. I
16 don't think we ever referred specifically to this
17 document in our conversations with Commission
18 counsel. Mostly they were meetings identifying
19 themes of concern to Mr. Arar.

20 We then received, in the
21 not-too-distant past, a disc of documents, and the
22 disc contained some 818 documents -- I think
23 that's the number. As we methodically went
24 through the disc, we realized that one of the
25 documents, which we have included in this motion,

1 was highly redacted in the disc, redacted to the
2 point that the substance of the document was, in
3 significant respect, lost upon the reader.

4 This document is a document that
5 we, as counsel for Mr. Arar, believed to be
6 important. It is a document that we intend to
7 cross-examine on, and it is a document that we
8 have premised much of our tactical and strategic
9 plans for the public hearing.

10 When we learned about the
11 difference of this document last week, we notified
12 Commission counsel that there was this difference,
13 and Mr. Cavalluzzo suggested to us that we ought
14 to apply to you to be relieved of our undertaking
15 so we could use this document in the upcoming
16 hearings.

17 The document in its entirety is
18 filed as part of a sealed affidavit that we have
19 before the Commission, and I don't expand on it
20 because there is an issue as to whether or not
21 this document may be the subject of a national
22 security confidentiality claim.

23 I need to know the answer.

24 The government has had a week to
25 determine whether or not my document that I have

1 in my possession ought to be in whole or part
2 subject to a claim or whether counsel for the
3 government is prepared to accede to the use of
4 this document or, Mr. Commissioner, you will now
5 relieve Mr. Waldman and I and Mr. Arar from the
6 undertaking so we can use this document properly.

7 We can schedule this motion for
8 more developed arguments, but it's really very
9 simple: I have a relevant document. I have
10 adjudged it important for the purpose of
11 developing Mr. Arar's interests at the inquiry. I
12 don't intend to use it for any other purpose but
13 at the inquiry, and it doesn't form part of your
14 record. Your record is more redacted than mine.
15 So we want to be relieved of the duty to not use
16 it.

17 THE COMMISSIONER: Is what you're
18 saying to me, Ms Edwardh, that at this point you
19 do not know the Government's position as to
20 whether they claim national security
21 confidentiality over the additional redactions?

22 MS EDWARDH: No, we do not know
23 whether they claim it. I have not been able to
24 ascertain an answer to that question. Indeed, I
25 raised it just before we started this afternoon.

1 Then, of course, there's the very
2 interesting issue of, whether or not they claim it
3 or not, having provided it to the Commission,
4 having provided it to me -- I have it, Mr. Arar
5 has it, Mr. Waldman has it -- whether or not it's
6 appropriate to give effect to any claim.

7 There are two ways to approach
8 this. One is to ask you to relieve me so that I
9 can prepare for Monday. Monday's not very far
10 away. And, two, to ask the Government its
11 position now. They've had ample time to consider
12 it. I'm sure my friend is interested about the
13 process in which it came into my hands, but really
14 that's irrelevant to the issue of the claim.

15 THE COMMISSIONER: Either there is
16 an NSC claim or there's not.

17 MS EDWARDH: We will deal with the
18 fact whether the disclosure of it to us, in any
19 event, abrogates the claim.

20 If we have to schedule a different
21 kind of hearing, which is an adjudication on the
22 claim, then we should do that.

23 THE COMMISSIONER: That would be
24 an NSC hearing.

25 MS EDWARDH: That's correct. And

1 my only observation about that, of course, is
2 because we have the document and indeed have
3 reflected on it considerably over the last eight
4 or nine months, we, as counsel for Mr. Arar, and
5 Mr. Arar would wish to participate in that
6 hearing, to call evidence because, in our
7 submission, to uphold such a claim in these
8 circumstances would be to uphold a very overbroad
9 claim.

10 THE COMMISSIONER: Thank you.

11 Ms McIsaac, do you wish to
12 respond?

13 REPLY / RÉPLIQUE

14 MS McISAAC: I believe I have to
15 respond, sir, although I was not aware that we
16 would be dealing with this motion today.

17 In fact, I was led to believe that
18 we would not, and I am not prepared to deal with
19 the motion, but I am prepared to put on the record
20 the following.

21 My understanding is that the
22 document in issue was released last summer through
23 a misunderstanding. It was not provided by the
24 Government of Canada to the Commission for the
25 purposes of release to Mr. Arar and his counsel.

1 As you know, we have been in
2 discussions with your counsel in order to
3 ascertain how this happened and what the
4 consequences of it having happened are.

5 The Government claims national
6 security confidentiality over the document, and
7 the issue to be determined -- which I think can
8 only be determined once we figure out what
9 happened -- is whether, in some manner, that claim
10 for national security confidentiality is lost or
11 whether it's pointless to maintain it.

12 But I reiterate that the
13 Government is of the view that that document was
14 released as a result of a mistake. It was not an
15 authorized release.

16 And our view has been that we need
17 to get to the bottom of that issue first. Then we
18 can deal with Ms Edwardh's motion.

19 THE COMMISSIONER: That is helpful
20 in that you've answered the first question she
21 raised, which was whether or not the Government
22 claims national security confidentiality over the
23 document, and the answer to that is yes, is it?

24 MS McISAAC: I thought that was
25 always clear.

1 THE COMMISSIONER: Well, that was
2 one of the reasons I asked you to speak to it.

3 With respect to the circumstances
4 surrounding its release, as you're aware,
5 Ms McIsaac, I've undertaken to do a review from
6 the Commission standpoint and will be providing
7 the Government with my discussion or outline as to
8 what happened from the Commission's standpoint,
9 how that was released, in due course. I hope to
10 do that relatively shortly.

11 That said, it leaves us with a bit
12 of a difficulty in terms of how we proceed from
13 here.

14 The government is claiming
15 national security confidentiality over the
16 document, so it would strike me that any
17 discussion of what use could be made of the
18 document would necessarily involve a review of the
19 Government's national security confidentiality
20 claim and a ruling by me with respect to the claim
21 on that specific document.

22 I tend to agree, and let me just
23 put this out not as a ruling but as something to
24 be discussed here so we can move the issue ahead,
25 if we are to have a national security

1 confidentiality hearing to deal with that claim, I
2 would agree with you, Ms Edwardh, that there
3 should be an opportunity for parties on both sides
4 to call evidence with respect to it and I hear
5 your request that you should participate in the
6 hearing.

7 I'm wondering, does anybody else
8 have a reaction to that? I think the only parties
9 that are involved in this issue are you,
10 Ms Edwardh, and the government.

11 MS EDWARDH: Mr. Commissioner, I
12 wonder if I could make one observation --

13 THE COMMISSIONER: And Mr. Atkey
14 too.

15 MS EDWARDH: Yes.

16 THE COMMISSIONER: Do you have any
17 comment about the -- I think what we seem to be
18 moving ahead to on this case is the need to
19 schedule a national security confidentiality
20 hearing, a hearing at which there would be an
21 opportunity to call evidence, a hearing at which
22 Mr. Atkey would be present.

23 The issue on the table is whether
24 or not Mr. Arar's counsel would also be present.
25 They obviously have the document in its unredacted

1 form.

2 MS McISAAC: Well, sir, I think
3 two things have to happen first. I think, with
4 all due respect, we need to understand how this
5 document was released in the first place.

6 Having done that, we move on to
7 the second issue which is whether, in the
8 circumstance, the Government would be prepared to
9 forego the claim for national security
10 confidentiality or whether it wishes to maintain
11 it.

12 At that point we would determine
13 how we are going to proceed and what role
14 Ms Edwardh would play in that proceeding. I'm not
15 prepared to make any further submissions right
16 now, sir.

17 THE COMMISSIONER: Okay. One
18 thing I don't want to do is have this issue unduly
19 delay the public hearings.

20 I take your point, and I'm not
21 sure how long it will take the Government to react
22 to the review I do of what happened in the
23 Commission and indicate its position.

24 But so we don't have any delay and
25 on the assumption that the Government maintains

1 its national security confidentiality position
2 with respect to the document, I'm going to ask
3 Commission counsel to discuss the scheduling of a
4 national security confidentiality hearing on the
5 assumption that we're going to have to go ahead
6 with that.

7 My inclination now is that
8 Mr. Arar's counsel should participate in that
9 hearing and should --

10 Therefore the scheduling should
11 take place with their participation in mind.

12 As well, Mr. Atkey should
13 participate.

14 If there's some submissions to the
15 effect that Mr. Arar's counsel should not
16 participate, the Government can notify me and make
17 those submissions. I'll deal with that in due
18 course.

19 In the meantime, I think we should
20 proceed with the evidence, leaving aside the RCMP
21 evidence, but the DFAIT evidence that's scheduled
22 to begin next Wednesday.

23 I understand your point,
24 Ms Edwardh, that this may affect your
25 participation and your cross-examination.

1 Depending on the outcome, it may be necessary to
2 recall some of the witnesses who have given
3 evidence to allow you to further cross-examine
4 them if the document is disclosed.

5 MS EDWARDH: Thank you,
6 Mr. Commissioner.

7 I appreciate that, because from
8 our perspective it has a central role to play in
9 our approach.

10 THE COMMISSIONER: I understand.
11 What I wouldn't want to do is to delay the
12 witnesses that are now scheduled.

13 It would be unfortunate if it
14 necessitates recalling them at a later date, but
15 if that be the case, I understand the importance
16 of the issue to you and you'll be given a full
17 opportunity at some point to cross-examine the
18 witnesses who are called publicly, should the
19 document eventually be released, to cross-examine
20 them on the basis of the document in issue. Okay?

21 MS EDWARDH: Can you,
22 Mr. Commissioner, give us any idea when we might
23 know whether we're commencing on Monday or on
24 Wednesday, and if so, with whom?

25 THE COMMISSIONER: Next point,

1 yes.

2 --- Laughter / Rires

3 MS McISAAC: Sorry about that.

4 THE COMMISSIONER: We're going to
5 have on Thursday an in camera hearing dealing with
6 the RCMP evidence.

7 At the conclusion of that, I am
8 going to have to prepare a ruling. I don't know
9 what that ruling will be at this point.

10 I think it's unrealistic to expect
11 that we're going to be able to proceed with RCMP
12 evidence next Monday and Tuesday, subject to what
13 Mr. Cavalluzzo says to me about that.

14 What I would be proposing is --
15 one shouldn't read into that, by the way, one way
16 or the other, how I'm going to rule. I'm just
17 simply dealing with the practicality of it. It is
18 an important issue, and it's something that I'm
19 going to want to write some reasons on. I'll do
20 it as quickly as I can.

21 That said, I would like then to
22 proceed with the evidence that's now scheduled,
23 which is due to begin next Wednesday, and to
24 follow the schedule that has currently been
25 circulated by Commission counsel.

1 Should I rule that RCMP evidence
2 will be called, then we would reschedule that
3 later in the public hearings.

4 Is there anything else,
5 Mr. Cavalluzzo?

6 MR. CAVALLUZZO: Yes. Just to
7 ensure that counsel are aware that we will be
8 commencing the hearings every day at 10:00 with
9 the normal schedule.

10 Also, there may be an additional
11 witness that may we plug in on Wednesday of the
12 second week, which I will talk to counsel about
13 this afternoon.

14 So just assume that we will be
15 proceeding on Wednesday and Thursday with
16 Ms Girvan from DFAIT.

17 THE COMMISSIONER: Let me just say
18 that with respect to the other issues, I will be
19 issuing a ruling on each of the issues that I
20 heard today -- I will do that as quickly as I can,
21 and I don't expect it to be a long time -- so that
22 everybody is given direction and we know how we're
23 proceeding.

24 Let me thank everybody for their
25 submissions today. It was very helpful to me and

1 I appreciate the thought and effort that everybody
2 put into preparing and presenting them in a very
3 clear and coherent way.

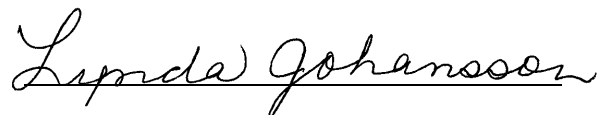
4 Thank you very much.

5 We stand adjourned until next
6 Wednesday morning at 10:00.

7 THE REGISTRAR: Please stand.
8 Veuillez vous lever.

9 --- Whereupon the hearing adjourned at 4:41 p.m.
10 to resume on Wednesday, May 11, 2005,
11 at 10:00 a.m. / L'audience est ajournée
12 à 4 h 41 pour reprendre le mercredi
13 11 mai 2005 à 10 h 00.

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Lynda Johansson,

C.S.R., R.P.R.