

**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 lundi 12 septembre 2005

**Held at:**

Algonquin Room  
Old City Hall  
111 Sussex Drive  
Ottawa, Ontario

Monday, September 12, 2005

## APPEARANCES / COMPARUTIONS

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Mr. Lorne Waldman Ms Marlys Edwardh Ms Breese Davies Ms Brena Parnes	Counsel for Maher Arar
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Ms Lori Sterling Mr. Darrell Kloeze Ms Leslie McIntosh	Ministry of the Attorney General/ Ontario Provincial Police
Mr. Faisal Joseph	Canadian Islamic Congress
Ms Marie Henein Mr. Hussein Amery	National Council on Canada-Arab Relations
Mr. Steven Shrybman	Canadian Labour Congress/Council of Canadians and the Polaris Institute
Mr. Emelio Binavince	Minority Advocacy and Rights Council
Mr. Joe Arvay	The British Columbia Civil Liberties Association

## APPEARANCES / COMPARUTIONS

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

2 --- Upon commencing on Monday, September 12, 2005

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

4 lundi 12 septembre 2005 à 10 h

5 THE REGISTRAR: Please be seated.

6 Veuillez vous asseoir.

7 THE COMMISSIONER: Mr. Cavalluzzo?

8 MR. CAVALLUZZO: Commissioner, the  
9 procedure this morning will be, as you know, that  
10 Mr. Arar's counsel will commence their argument.

11 I thought we might go to 11:15 or 11:20, or  
12 thereabouts, and there is going to be a change in  
13 counsel. Mr. Waldman will start and then  
14 Ms Edwardh will commence after the break.

15 In terms of the, if we can call  
16 it, the line-up for tomorrow, I will be a little  
17 more specific. As it stands right now, we don't  
18 refer specifically to the intervenors that will be  
19 making submissions, nor to the OPP or the OPS, as  
20 well as amicus, but during the day I will be  
21 speaking to counsel and will get very specific as  
22 to who and when will be making submissions  
23 tomorrow.

24 Finally, there will be some  
25 housekeeping matters later in the day. I will be

1           introducing other public exhibits, in particular,  
2           the chronologies pursuant to your recent ruling,  
3           and other than that, we are prepared to proceed.

4                         THE COMMISSIONER:   Okay.

5           Mr. Waldman, you're leading off?

6                         MR. WALDMAN:    Yes, thank you.

7                         THE COMMISSIONER:   Good morning.

8           SUBMISSIONS

9                         MR. WALDMAN:    Good morning,  
10           Mr. Commissioner.

11                        Mr. Commissioner, what I thought I  
12           would do -- perhaps we could just explain how we  
13           have broken this up.

14                        I'm going to introduce our  
15           submissions and the primary purpose of the  
16           introduction is to discuss Mr. Arar and to put a  
17           human face to it.

18                        Mr. Arar, as you know, because of  
19           circumstances, has not been able to testify.  And  
20           what I hope to do in my first remarks is to talk a  
21           bit about how this has affected him.

22                        After that, we have divided the  
23           evidence into four time periods:  The first period  
24           up until September 26, the investigative period;  
25           the second period from September 26th until

1           October 22nd, that would be the deportation and  
2           its aftermath; then the period in Syria; and then  
3           the period from his return.

4                         I will cover the first two  
5           periods.  However, there will be some areas in  
6           which I, because it was a bit of an artificial  
7           break, in some places -- for example, I'm going to  
8           deal with the leaks to some extent and that covers  
9           the whole period because that deals with the  
10          impact on Mr. Arar.

11                        And we apologize in advance if  
12          there is some duplication.  The time frames were  
13          rather merciless, and we were all up until the  
14          very last minute.  We e-mailed our submissions to  
15          you at five o'clock on the dot.  I'm sure you must  
16          have noticed that.  If there is some duplication,  
17          we apologize in advance.  We have done the best we  
18          could, we know your concerns but they have taxed  
19          us to the limit, and I think I'm speaking for  
20          Government counsel, especially since they had to  
21          do two submissions as opposed to one.  So I just  
22          wanted to make those preliminary remarks.

23                        THE COMMISSIONER:  Let me,  
24          Mr. Waldman, before you begin, expression my  
25          appreciation.  I have read submissions and

1 Government submissions and I haven't finished the  
2 ones that are for tomorrow, but I will, and I  
3 think it's just a remarkable piece of work by all  
4 counsel to prepare submissions of that quality  
5 within those time frames, and I appreciate very  
6 much -- I mean, as you know, the hearings became  
7 more extended than we initially thought, and as  
8 that happened, the time during which counsel were  
9 required to prepare written submissions shortened,  
10 and having gone over it, the quality of the work  
11 is really exceptional. So I'm, as I say, very  
12 genuinely to everybody who prepared those  
13 submissions, thank you very much. I appreciate  
14 it. I think the inquiry will benefit; I think the  
15 public will benefit.

16 MR. WALDMAN: So,  
17 Mr. Commissioner, having made those introductory  
18 remarks, I'd like to talk a bit about Mr. Arar.

19 This inquiry is about Mr. Arar.  
20 Mr. Arar is a Canadian citizen, a husband, a  
21 father of two young children, an engineer with a  
22 promising professional career, whose life was  
23 dramatically and irrevocably changed due to  
24 circumstances which were completely beyond his  
25 control. For him, everything started on October



1 12th, 2001, when he had a coffee with an  
2 acquaintance of his, Abdullah Almalki, at the  
3 Mango Restaurant. This was a meeting that  
4 probably wouldn't have been significant to either  
5 of the two of them, and would have been forgotten  
6 shortly thereafter except there was one fact that  
7 was unknown to either of them, and that is that  
8 Mr. Almalki had become the target of a national  
9 security investigation by a group we know now as  
10 A-OCANADA and was under surveillance. Mr. Arar's  
11 casual meeting on that day led to a chain of  
12 events, which brings us all together today.

13 After the meeting, Mr. Arar became  
14 a peripheral person of interest, a person of  
15 interest, a subject of a national security  
16 investigation, a possible target, or a potential  
17 witness. All of these descriptions have been used  
18 and found somewhere in the documents.

19 These various descriptions are  
20 even more alarming given that inspector Cabana  
21 asserted in his evidence that throughout the time  
22 he was at Project A-OCANADA until February of  
23 2003, Mr. Arar remained as interest only as a  
24 potential witness, and was never a target.

25 After he was seen at Mango, the

1 RCMP obtained his lease from Minto Properties.  
2 They obtained information about his travel records  
3 from the Canadian Customs and Revenue Agency. At  
4 some point, personal details and information about  
5 Mr. Arar were provided to U.S. investigators who  
6 were working closely with A-OCANADA.

7 We know that in January 2002, the  
8 RCMP did not feel there was enough evidence to  
9 obtain a search warrant on Mr. Arar but did seek  
10 to interview him. When Mr. Arar found out about  
11 this, he felt he had nothing to hide. He called  
12 from Tunisia, and when he returned, he spoke to  
13 his lawyer. He wanted to be interviewed. But his  
14 lawyer imposed conditions. The RCMP declined to  
15 interview Mr. Arar.

16 After that, he heard nothing, and  
17 went on with his life as usual. He didn't think  
18 there was anything unusual going on.

19 Little did he suspect that as a  
20 result of the information provided by the RCMP, he  
21 had been put on a terrorist watch list. So when  
22 he decided to come back from Tunisia for business  
23 reasons in September of 2002, he thought nothing  
24 of travelling through Kennedy Airport. But the  
25 Americans were advised of his arrival prior to him

1 arriving at Kennedy because he had been put on a  
2 watch list based on information that had come from  
3 Canada.

4 The Americans communicated this  
5 information to the Canadians and asked for  
6 questions for Mr. Arar. The RCMP provided the  
7 list of questions that they had prepared in  
8 January of 2002, saying, "Well, maybe they're a  
9 little bit outdated," and they complied with the  
10 request notwithstanding the fact that Mr. Arar had  
11 asked that conditions be imposed, in terms of the  
12 request in Canada, and that the RCMP had rejected  
13 those conditions.

14 So Mr. Arar arrives at Kennedy  
15 Airport on September 26th, 2002. One can only  
16 imagine his shock and surprise when he is pulled  
17 out of the line at immigration and taken for a  
18 secondary interview. He had never been in trouble  
19 before. He had travelled to the United States on  
20 many occasions prior to this.

21 So when he was told by the  
22 investigators that they were going to ask him a  
23 few questions and he'd be allowed to continue with  
24 his travel, he complied with their requests. He  
25 thought, naively, that if he cooperated, he would

1 be allowed to continue on on his journey. Little  
2 did he know that the U.S. officials had other  
3 plans.

4 He was taken to the notorious MDC  
5 detention center in New York where he was  
6 handcuffed and shackled. This was a man who had  
7 never been detained, ever. He was told that he  
8 was suspected of being a member of al-Qaeda and he  
9 was to be deported to Syria. His access to the  
10 phone was severely restricted, and in the one call  
11 he makes to his family he desperately tells them  
12 that they're going to deport him to Syria.  
13 Frantically, his brother calls DFAIT with the  
14 news. In his only meeting with Canadian Consul  
15 Maureen Girvan, he also tearfully tells her the  
16 fear of being deported to Syria but DFAIT does not  
17 take the threat seriously.

18 When the U.S. officials concluded  
19 that they did not have enough information to  
20 charge Mr. Arar, they told the Canadians this, and  
21 asked, "Well, do you have enough information?"  
22 The Canadians said no. So instead of being  
23 deported back to Canada, he was smuggled out of  
24 the MDC and put on a chartered executive jet, a  
25 luxurious executive jet, so you can imagine the

1 shock in Mr. Arar's mind.

2 I can only imagine what was going  
3 through his mind in these moments. Here we have a  
4 successful Professor with two children, converted  
5 without warning, without due process, into a  
6 suspected terrorist and deported to Syria.  
7 Mr. Arar knew only too well what was waiting for  
8 him in Syria. He knew only too well that the  
9 Syrians use torture to force confessions out of  
10 detainees.

11 On October 9th, 2002, despite his  
12 protestations that he would be tortured, Mr. Arar  
13 arrives in Syria.

14 During the first two weeks of his  
15 detention, he is interrogated and beaten with  
16 electric cables. After being forced to confess,  
17 he is allowed consular contact. For 10 months and  
18 10 days, Mr. Arar lived in deplorable conditions.  
19 He was held in a dark cell measuring 3 by 6 by 7.  
20 I tried to imagine what it would be like to live  
21 in a cell 3 by 6 by 7, and someone suggested to me  
22 that the best way to picture it is two coffins  
23 standing upright. That is what Mr. Arar lived in  
24 for 10 months and 10 days, two paces from one end  
25 to the other, one pace from one side to the other.

1 No sunlight, no light, no communication with other  
2 people, alone, many times the only sound the  
3 screams of other inmates being tortured.  
4 Undoubtedly there are moments when Mr. Arar  
5 thought he would go crazy, but somehow he managed  
6 to keep his grip on his sanity.

7 One year and ten days after he was  
8 detained in New York, Mr. Arar is allowed to  
9 return to Canada. Again, he naively thought that  
10 when he arrived here, the psychological abuse  
11 would be over. But in the interim, his case had  
12 obtained notoriety, in large part to the efforts  
13 of his wife, Monia Mazigh, Kerry Pither, Alex  
14 Neve, and others who had taken up his cause.  
15 There was a public outcry. Canadian officials  
16 didn't apologize to Mr. Arar for the treatment he  
17 had suffered. Instead, they began leaking  
18 information to the media that intimates that  
19 Mr. Arar is a terrorist.

20 So when he arrives home, Mr. Arar  
21 discovers that the persecution will not end. He  
22 is under a cloud of suspicion. Weeks after his  
23 arrival, a leak occurs to the media, and thus on  
24 October 21st, 2003, in a CTV report, "Recent Leaks  
25 in the Case of a Canadian Deported to Syria,"

1 anonymous government officials are quoted as  
2 saying that Mr. Arar gave information to Syrian  
3 officials about al-Qaeda, the Muslim Brotherhood,  
4 and another radical group with connections to bin  
5 Laden, worse still they provided information about  
6 a sleeper cell and suggests that he gave  
7 information about individuals in Canada, including  
8 Mr. Harkat. I remember when that leak came out,  
9 Mr. Arar called me on the phone desperately  
10 saying, "How can they say this about me? Poor  
11 Mrs. Harkat, she's upset. She thinks I gave  
12 information that has led to her husband being  
13 arrested in Canada. It's not true."

14 A week later, Mr. Arar gives his  
15 press conference where he tells Canadians of his  
16 ordeal. He asks for a public inquiry and he makes  
17 three demands, and I want to tell you that these  
18 sort of guided our submissions, Mr. Commissioner.

19 The first is, he wants his name to  
20 be cleared. The second is, he wants to find out  
21 who is responsible. And the third is, he wants to  
22 make sure it never happens to other Canadians  
23 again. Those three requests or demands form the  
24 basis upon which we have written our submissions,  
25 and I will come to that in a minute.

1                   Three days after this press  
2 conference, another leak. Juliet O'Neill is given  
3 access to the secret dossier of Maher Arar. We  
4 know it's true. We know she was given access to  
5 top secret files about Mr. Arar. The message is  
6 the same: Mr. Arar is not as innocent as he  
7 seems.

8                   The leaks continue. Another  
9 faceless official says Mr. Arar is not a virgin in  
10 terms of his affiliation with terrorist  
11 activities.

12                  As Mr. Arar's counsel during this  
13 period, I can tell you that I witnessed firsthand  
14 the impact that this had on him. I felt impotent.  
15 He had no way to defend himself against these  
16 faceless accusers who hid behind a veil of  
17 anonymity to avoid public scrutiny. Each leak  
18 caused him anguish, but in the end, it steeled his  
19 resolve to achieve his three objectives.

20                  Mr. Arar is not the same person as  
21 the one that landed in Kennedy on September 26th,  
22 2002. His professional career is in shambles. He  
23 suffers serious physical and emotional sequelae as  
24 a result of the torture and detention, it has  
25 affected his family life and the emotional



1 well-being of his children, his wife, and his  
2 extended family. He has found it impossible to  
3 obtain work in his profession. This, in  
4 conjunction, with the year he spent in detention  
5 when he was unable to work has significantly  
6 altered the family's economic well-being. Indeed,  
7 Mr. Commissioner, you will recall that other  
8 members of Mr. Arar's family suffered. We wrote  
9 you, and indeed there was a public press  
10 conference about Morad, Mrs. Mazigh's brother, who  
11 was detained and questioned on two occasions in  
12 Syria. Other members of the family, because  
13 they -- in Tunisia, sorry.

14 Other members of the family have  
15 also suffered reprisals but they're not on the  
16 public record so we won't mention them now.

17 The public inquiry was called in  
18 the aftermath of the public outrage over the RCMP  
19 raids on Juliet O'Neill. The day the inquiry was  
20 called, Mr. Arar was overjoyed. He believed that  
21 finally he would achieve his objectives: He would  
22 clear his name, and the public would know what  
23 happened to him and why.

24 However, it became quickly  
25 apparent to Mr. Arar that the Government of Canada

1 did not want the truth to become public. He was  
2 confronted with overbroad security claims to the  
3 government. Instead of receiving information  
4 about what happened and why, Mr. Arar received  
5 blackened pages where most of the information was  
6 redacted in the name of national security.

7 First, he was told he would  
8 testify. Then he was told he couldn't testify  
9 because it would be unfair. We were then told we  
10 would wait for the in camera summaries to be  
11 released. Then the Commissioner was forced to  
12 abandon the preparation of summaries, so public  
13 evidence was given without summaries, and it has  
14 been severely curtailed. Mr. Arar has not been  
15 able to tell his side of the story, and I'm sure  
16 you have seen it from time to time, this has been  
17 a great cause of frustration to Mr. Arar.

18 So even the inquiry process itself  
19 has become the source of frustration and  
20 disappointment because of the refusal of the  
21 Government to allow much of the relevant  
22 information to become public.

23 I recall these events not as a  
24 criticism of you, Mr. Commissioner, but also to  
25 give you a sense that even the inquiry process

1           itself has affected Mr. Arar.

2                           The short history has been  
3           intended to assist you, Mr. Commissioner, in  
4           understanding how this process has affected  
5           Mr. Arar. I don't think words could really  
6           describe it fully, but I hope, that by  
7           highlighting some of these things, I have given  
8           you some insight into what Mr. Arar has gone  
9           through.

10                           Therefore, while we recognize that  
11           the inquiry raises issues of national and  
12           international importance, we would ask you to not  
13           lose sight of the fact that it is first and  
14           foremost an inquiry about a man, a husband, a  
15           father, who was subjected to horrific experiences.

16                           Before his detention in the U.S.,  
17           Mr. Arar was unaware he was the subject of any  
18           investigation. He had never been charged with any  
19           offence. Although it will be for the Commission  
20           to determine the degree of responsibility of  
21           Canadian officials in Mr. Arar's detention and  
22           deportation, there is no doubt that had it not  
23           been for this casual meeting with Abdullah Almalki  
24           on October 12th, and the subsequent decision of  
25           the RCMP to commence an investigation and share

1 information with U.S. authorities, Mr. Arar would  
2 never have been deported to Syria and subjected to  
3 the horrible treatment there.

4 As Ms Edwardh and I make our  
5 submissions, we have in mind Mr. Arar's three  
6 objectives: To clear his name, to find out who  
7 was responsible, and to make sure this never  
8 happens.

9 Touching on Mr. Arar's first  
10 concern: to clear his name. While we are aware  
11 that the question of Mr. Arar's involvement in  
12 terrorist activities was not directly part of your  
13 mandate, Mr. Commissioner, we believe it has  
14 become so as a result of the evidence that has  
15 been placed on the public record, or leaked to the  
16 media by government officials.

17 The fact is that the public  
18 evidence of the position taken by the RCMP and  
19 CSIS concerning the wording of the Gar Pardy  
20 letter and the insistence that the letter not  
21 indicate that there was no evidence that Mr. Arar  
22 was involved in terrorist activities has clearly  
23 put this question before the Commissioner.

24 The Commissioner has received all  
25 of the in-camera evidence, and we believe that

1 first and foremost Mr. Arar is entitled to a  
2 finding from the Commissioner as to whether or not  
3 he has engaged in any kind of terrorist activity.

4 Anything short of this will leave  
5 Mr. Arar under a perpetual cloud of suspicion and  
6 will make it impossible for him to get on with his  
7 life.

8 Only if there's a clear finding  
9 from the Commissioner will Mr. Arar be able to  
10 feel that he will be able to be free of the shadow  
11 that has been cast over his character by all the  
12 leaks from shameless and cowardly government  
13 officials.

14 This leads to a second point which  
15 we wish to make in our introductory remarks. The  
16 terms of reference require the Commissioner to  
17 only look at the role of Canadian officials in  
18 relation to Mr. Arar's detention in the United  
19 States, his deportation to Syria via Jordan, and  
20 his imprisonment and treatment in Syria and return  
21 to Canada.

22 However, paragraph 1(5) permits  
23 the Commissioner to:

24 "Investigate and report on  
25 the actions of officials in

1                   respect of any of the  
2                   circumstances directly  
3                   related to Mr. Arar that the  
4                   Commissioner considers  
5                   relevant to fulfilling his  
6                   mandate." (As read)

7                   While it is conceded that the  
8                   terms do not expressly invite the Commissioner to  
9                   examine the actions of Canadian officials after  
10                  Mr. Arar returned to Canada, it is submitted that  
11                  these actions, particularly in regard to the leaks  
12                  of information to the media, are matters that the  
13                  Commissioner ought to inquire into and report on.

14                  The numerous leaks in this case  
15                  show that some institutions of government, and we  
16                  believe the RCMP and CSIS, were engaged in active  
17                  efforts to discredit Maher Arar, turn the public  
18                  mind against him by allegations of involvement in  
19                  terrorist activities, undermine the public  
20                  discussion as to the benefits of a public inquiry,  
21                  and ultimately deflect criticism that might be  
22                  levelled at them.

23                  This conduct, on the part of some  
24                  public officials, is evidence of both a clear  
25                  disregard for the legal obligations under the

1 Security of Information Act and a willingness to  
2 cause further significant psychological harm to  
3 Mr. Arar.

4 In this respect I recall the  
5 evidence of Donald Payne before the Commissioner,  
6 and he talked about how the ongoing leaks would  
7 have had the effect of re-traumatizing Mr. Arar.

8 The pattern of leaks is highly  
9 relevant in assessing the overall actions of  
10 Canadian officials and clearly should come within  
11 the Commissioner's mandate.

12 In terms of the second priority,  
13 determining who is responsible for what happened  
14 to Mr. Arar and why, we have in our submissions  
15 addressed all of the key actors, DFAIT, the RCMP,  
16 CSIS, and PCO, and as I have said, we have divided  
17 them into four time periods: up to September  
18 26th; September 26th to October 22nd; the period  
19 in Syria; and the period after his return.

20 Ms Edwardh and I have divided it,  
21 and I will deal with the first two time periods,  
22 and Ms Edwardh will be making submissions on  
23 Mr. Arar's detention and post-return.

24 At this point, I'd like to give  
25 some examples of the areas I intend to cover.

1                   Now, Mr. Commissioner, I want to  
2                   say something. Given the time constraints that I  
3                   have in terms of the time of my submissions, I  
4                   have summarized the main concerns now, or some of  
5                   the main concerns, and then I'm going to go  
6                   through them. But given that I have only  
7                   something like 70 minutes, I may find myself  
8                   towards the end of the submission with not enough  
9                   time to review the evidence.

10                   So to the extent that that's  
11                   possible, I would like to at least highlight our  
12                   concerns on the public record, orally, but you  
13                   have our detailed written submissions on all of  
14                   these points because I'm quite -- given that I'm  
15                   already at 25 minutes, quite concerned that I'm  
16                   not going to have enough time to do it all orally.

17                   THE COMMISSIONER: Thank you.

18                   MR. WALDMAN: So the main concerns  
19                   that we have with respect to CSIS involve, first,  
20                   the decision to transfer the file from CSIS to the  
21                   RCMP. We believe it was a serious error. The  
22                   fact that a high profile and expensive national  
23                   security investigation has failed to yield any  
24                   charges after five years is, in our view, strongly  
25                   suggestive that there is no substance to the



1 investigation to begin with.

2 With respect to both CSIS and the  
3 RCMP, we believe that there's no doubt that they  
4 engaged in information-sharing with Syria. We  
5 strongly condemn this and would submit that no  
6 Canadian agency should engage in  
7 information-sharing with rogue states like Syria  
8 that engage in torture.

9 We believe that such  
10 information-sharing makes Canada complicit in  
11 torture, and as Justice Minister Cotler has  
12 recently been quoted as saying in the paper:  
13 "Canada should never be complicit in torture."

14 In terms of the role of the RCMP,  
15 we believe that there is no evidence that would  
16 justify them having made Mr. Arar a person of  
17 interest, peripheral person of interest, in terms  
18 of the investigation as a result of his one chance  
19 meeting with Abdullah Almalki, and we believe that  
20 he was the victim of racial profiling.

21 We're deeply concerned about the  
22 lack of precision in the manner in which the RCMP  
23 referred to Mr. Arar. I've already summarised the  
24 way he was talked about: peripheral person,  
25 target, potential witness.

1                   This lack of precision in the use  
2 of terms undoubtedly was a contributing factor in  
3 Mr. Arar's deportation and detention.

4                   We believe the evidence discloses  
5 that the A-OCANADA team did not have the  
6 specialized expertise to conduct a national  
7 security investigation. They engaged in illegal  
8 searches and broke the law during their  
9 investigation.

10                  They breached RCMP policy  
11 regarding information-sharing. The data dump is a  
12 prime example of this.

13                  They failed to caveat information  
14 shared with the U.S., and their failure to abide  
15 by the caveats set by other domestic agencies is  
16 also a matter of grave concern.

17                  They were willing to share  
18 information with a regime that engaged in torture  
19 without due regard for the public consequences. I  
20 mean, there's no doubt that both Inspector Cabana  
21 and sergeant Lauzon both stated that they had no  
22 problem sharing information with Syria, whether we  
23 know on the public record or not whether such  
24 sharing took place.

25                  Our concerns with the RCMP do not

1 stop there. It's, in our mind, clear that the  
2 RCMP national headquarters failed to provide  
3 effective guidance and control over this delicate  
4 national security investigation.

5 A-OCANADA improperly shared  
6 information with the United States intelligence  
7 agencies, in violation of rules regarding  
8 information-sharing and intelligence operations.  
9 In this regard, the failure of national  
10 headquarters, to take proper corrective action  
11 when they were made aware of this problem, is also  
12 a serious issue.

13 A-OCANADA circumvented Mr. Arar's  
14 constitutional rights for providing to Mr. Arar  
15 questions to be used by the United States during  
16 their interrogation, when they were fully aware  
17 that months earlier Mr. Arar had retained a lawyer  
18 and they had put conditions on the answering of  
19 questions.

20 On top of this, A-OCANADA  
21 investigators then sought to interview Mr. Arar in  
22 the United States, once again in an attempt to  
23 circumvent the conditions set by his lawyers.

24 In our submission, either  
25 officials in the RCMP knew of the detention to

1           deport Mr. Arar to Syria and acquiesced and did  
2           nothing to stop it, or turned a blind eye and were  
3           incompetent and failed to appreciate the obvious  
4           signs of U.S. intent to deport Mr. Arar to Syria.

5                        There is an obvious lack of  
6           coordination between the RCMP, DFAIT, and CSIS  
7           during the time he was detained in the United  
8           States, and that if there had been better  
9           coordination, the deportation might have been  
10          avoided.

11                       With respect to DFAIT, we believe  
12          that it is abundantly clear that DFAIT failed  
13          Mr. Arar when he was in New York. DFAIT officials  
14          were given ample warning, both from Mr. Arar, his  
15          family, and INS officials, that this was an  
16          extraordinary case that required extraordinary  
17          intervention at the highest levels.

18                       Minister Graham and others have  
19          told us that if they had been aware of the threat,  
20          they might have been able to do something to stop  
21          it. DFAIT ignored the obvious signs and failed in  
22          its conduct towards Mr. Arar.

23                       So those are the key points that I  
24          will touch in my submissions as time permits.

25                       But before I do, I think it's

1           important that we deal with a few other  
2           preliminary matters in my submissions, the first  
3           one being the political context.

4                         We didn't have time to read all of  
5           our friend's submissions, and I'm sure she didn't  
6           have time to read all of ours, but we did note a  
7           few points in response to the notion raised by the  
8           Attorney General that the political context and  
9           9/11 excuse everything, and that the conduct of  
10          Canadian officials must be evaluated in the  
11          backdrop of 9/11. We'd like to make a simple  
12          point.

13                        In our submission, there is never  
14          an excuse to ignore the rule of law. If we do so,  
15          we run the risk of undermining our democracy.

16                        It is for this reason that we find  
17          it disturbing that the Attorney General can  
18          suggest that we can justify broken laws, racial  
19          profiling, and improper sharing of information  
20          because of the exceptional post-9/11  
21          circumstances.

22                        In our submission, what underlines  
23          the argument that 9/11 excuses everything is an  
24          admission by the Government that Canadian  
25          officials did play a role in Mr. Arar's detention

1 and deportation, but that the Commissioner should  
2 excuse the failings, the missteps, the mistakes,  
3 the incompetence and the wilful misconduct of  
4 Canadian officials because it occurred under very  
5 stressful circumstances.

6 But the Government of Canada  
7 remains unapologetic. Instead of apologizing to  
8 Mr. Arar and the Canadian public for the conduct  
9 of Canadian officials and promising to do better,  
10 the Government of Canada shifts all of the blame  
11 and responsibility to the United States and Syria  
12 for Mr. Arar's ordeal.

13 In so doing, the Government of  
14 Canada is attempting to erect a shield around the  
15 important role that Canadian officials have played  
16 in Mr. Arar's year-long ordeal.

17 We agree that it is possible that  
18 the political context had a role to play in what  
19 happened to Mr. Arar, but this is precisely why  
20 the Canadian government should apologize to  
21 Mr. Arar, his family, the other Canadian detainees  
22 held in Syria, and to the Canadian public.

23 We will never know what motivated  
24 the Syrian actions and whether or not the  
25 Americans continued to play a role in Mr. Arar's

1 detention in Syria subsequent to his deportation.

2 But in the end we must concern  
3 ourselves with the role played by Canadian  
4 officials in Mr. Arar's arrest, and in our view,  
5 the evidence before the Commissioner discloses  
6 that officials were complicit in his arrest,  
7 detention and torture.

8 Nothing, not 9/11, not any  
9 national emergency can ever justify complicity in  
10 torture.

11 Moreover, 9/11 is not the only  
12 crisis and challenge that our officials will face  
13 in the future. There will be others.

14 Are we being told now that if and  
15 when another crisis occurs, we should expect our  
16 national police to violate the laws of Canada?

17 I would argue that in those times  
18 of great pressure, respect for the rule of law is  
19 more important than ever.

20 The Canadian public deserves to  
21 feel that our government and its officials are  
22 competent, prepared, knowledgeable, and equipped  
23 with rules and policies that will ensure the  
24 rights of Canadians are not trampled under the  
25 guise of national security. We believe that the

1 evidence disclosed that this happened in this  
2 case.

3 The second argument put forward by  
4 the Government is that the Commissioner must  
5 consider the post-9/11 context and that the  
6 Syrians were holding Mr. Arar at the behest of the  
7 Americans and that Canada was powerless to do  
8 anything to effect his release.

9 In response to this we would  
10 suggest there is another context that the  
11 Commissioner must consider, and that context is  
12 the contextual information that the Commissioner  
13 accepted into evidence: the contextual  
14 information of three other Canadians who call  
15 state that they were detained and tortured in  
16 Syria, who all state that while they were detained  
17 and tortured in Syria, it was based upon  
18 information that came from Canadian sources.

19 Given this context, we would  
20 submit that there is evidence of a pattern of  
21 conduct which undermines any claim that what  
22 happened to Mr. Arar had nothing to do with Canada  
23 and was merely an unfortunate consequence of  
24 political circumstances beyond the control of the  
25 Government of Canada.



1                   We submit that the pattern  
2                   established that Canada had a far greater role to  
3                   play in Mr. Arar's detention and in the detention  
4                   of other Canadians, and was therefore able to  
5                   significantly influence if and when he was  
6                   released.

7                   Another notion we just want to  
8                   deal with briefly at this point is that when we're  
9                   dealing with rogue nations like Syria, we should  
10                  defer to them.

11                  In the evidence that we heard of  
12                  the consular officials, we heard time and again  
13                  that consular officials deferred to the Syrians.  
14                  They didn't want to ask questions. We got the  
15                  sense that they were terrified that if they asked  
16                  to see Mr. Arar, where he was being detained, that  
17                  this would somehow jeopardize consular visits.

18                  The implication of this conduct is  
19                  that when a state is notorious for abusing its  
20                  prisoners, we shouldn't confront them because we  
21                  don't want to anger them and encourage further  
22                  abuse.

23                  We reject this notion. We believe  
24                  that in the case of rogue states, abuse will occur  
25                  in any event and Canadians would be better served

1 if their officials demanded that regimes comply  
2 with international standards.

3 Indeed, in Mr. Arar's case, we  
4 believe that there is evidence that it was the  
5 heightened media interest that helped Mr. Arar.

6 If we recall, it was when the  
7 Syrian Human Rights Commission report, which  
8 alleged that Mr. Arar was being tortured in Syria,  
9 was released that the Canadian government demanded  
10 access to Mr. Arar, and within days of making that  
11 demand, they were granted access, access that had  
12 been refused to them since April -- for many  
13 months.

14 In our submission, it is obvious  
15 that the Syrians were alert and alive to the  
16 attention Mr. Arar's detention was receiving in  
17 Canada.

18 In our submission, the way to take  
19 on a rogue nation is to refuse to defer and to  
20 demand that the nation complies with accepted  
21 national standards.

22 Finally, we would like to dispel  
23 the notion that silence, secrecy, and a lack of  
24 transparency is the best way to help Canadians  
25 detained abroad.

1                   There is no doubt in our mind that  
2                   it was the public campaign of Mr. Arar's wife, of  
3                   Kerry Pither, of Alex Neve and others, and the  
4                   year-long media campaign that pushed the Canadian  
5                   government to action and influenced the Syrians to  
6                   release Mr. Arar.

7                   Mr. Commissioner, I have now  
8                   concluded my opening remarks, and I am going to  
9                   try as best I can, in the remaining 40 minutes I  
10                  think I have left, to cover my two time periods,  
11                  highlighting -- it's going to be rather  
12                  disjunctive, I think, given that I have about 20  
13                  minutes to cover all of the evidence, so I'll do  
14                  the best I can.

15                  What I'm going to basically do is  
16                  pose the questions and then perhaps briefly tell  
17                  you what our conclusions are.

18                  THE COMMISSIONER: And I've  
19                  separated, and I found it very helpful, the way  
20                  you in your written argument set out all the  
21                  questions that you thought I should address. So  
22                  what I have printed out here is a list of every  
23                  one of those questions.

24                  MR. WALDMAN: Thank you. That  
25                  will make it a lot easier for me.

1                   What we're going to do now is I'm  
2 going to go through the questions covering the  
3 first two time periods.

4                   THE COMMISSIONER: Right.

5                   MR. WALDMAN: As I said, this is  
6 covered in our written submission, but I'm going  
7 to try orally to highlight some of the points.

8                   I've already touched on the first  
9 issue in my opening comments, and this deals with  
10 the fundamental basic decision to transfer the  
11 file by CSIS to A-OCANADA.

12                   In our submission, the decision of  
13 CSIS to transfer their intelligence files  
14 regarding targets that later became targets of  
15 A-OCANADA was premature, ill-conceived, and  
16 unwise.

17                   This is an extremely important  
18 issue for the Commissioner to address, because it  
19 was that transfer that commenced all of the chain  
20 of events that led to Mr. Arar's ordeal.

21                   Now, in my written submissions  
22 I've summarized a bit of the evidence that we  
23 have. There's not a lot of evidence. But I'd  
24 just like to draw the following conclusions.

25                   The evidence before the Commission

1 of Inquiry raises serious concerns about the  
2 initial decision.

3 At the time of the transfer in the  
4 aftermath of 9/11, the RCMP was overwhelmed with  
5 demands, and was ill-prepared and ill-equipped to  
6 undertake such an investigation. It did not have  
7 personnel with investigative expertise in national  
8 security matters, or matters relating to alleged  
9 Muslim terrorists, to be able to conduct an  
10 effective investigation. They did not have  
11 sufficient resources at the CID to supervise the  
12 project and ensure that the RCMP policies were  
13 complied with.

14 We know there was a long-standing  
15 CSIS investigation into Mr. El Maati and  
16 Mr. Almalki prior to 9/11. We know that from the  
17 contextual evidence. And we know that Deputy  
18 Director Hooper acknowledged that at the time of  
19 9/11 they had made no decision to transfer the  
20 file over.

21 So our question is: What was it  
22 that happened after 9/11 that led them to make  
23 this ill-advised decision to transfer the file?

24 In our submission, the problems  
25 all began here. This was the genesis of

1 everything.

2 THE COMMISSIONER: Let me just --  
3 and I won't interrupt often because of the time  
4 constraints.

5 MR. WALDMAN: That's fine.

6 THE COMMISSIONER: Let me just  
7 alert a question that you didn't ask, and I raise  
8 this for Government without commenting on the  
9 initial decision that you've just referred to --  
10 even accepting, for the purpose of discussion,  
11 that that happened.

12 If an intelligence file is  
13 transferred to a law enforcement agency, should  
14 there be some review and at what point in time  
15 might that become an intelligence matter again?

16 I'm not asking you to address it,  
17 but I'm posing -- you can, if you wish -- I'm  
18 posing the question, though, simply, is that it  
19 seems to me that, certainly stemming from the  
20 Macdonald Commission of Inquiry that there are two  
21 types of different investigations, and if one is  
22 transferred from an intelligence agency to a law  
23 enforcement agency, if circumstances evolve such,  
24 should there be reconsideration periodically and  
25 so on?

1 MR. WALDMAN: It's funny  
2 because -- I'm going to depart a bit from what I  
3 was going to remark and address something that is  
4 very dear to me, and it really goes to your Phase  
5 2, really.

6 It strikes me that what we see  
7 throughout this investigation is a lack of  
8 accountability all the way through, and I don't  
9 want to deal with matters that Ms Edwardh is going  
10 to talk about, in terms of ministerial  
11 accountability and things like that. But it  
12 strikes me that you've hit the nail on the head,  
13 that when a decision is made to transfer a file  
14 from an intelligence to a criminal investigation,  
15 there has to be ongoing and careful oversight. So  
16 the oversight should start from within.

17 In other words, the idea that  
18 there be a centralized investigation --  
19 coordination by the CID is fundamental, and one of  
20 the things that deeply concerns us is it wasn't  
21 even clear to A-OCANADA that this was supposed to  
22 happen and that CID, the national security  
23 headquarters, to the extent that they thought they  
24 were doing -- didn't do it effectively and kept  
25 running against brick walls with A-OCANADA and let

1 the investigation go on, and didn't stop it and  
2 didn't pull in the reins when they became aware of  
3 the resistance to any kind of centralized control.

4 So at the level -- inside the  
5 RCMP. But it goes all the way up the trail. You  
6 know, the role of the Commission, the role of the  
7 cabinet, and ultimately leads to the need for some  
8 kind of independent oversight body.

9 So I think that you're precisely  
10 right, and it highlights the need to understand  
11 fully and completely the accountability, because  
12 the experience that all of us have who work in  
13 national security investigations, quite frankly,  
14 is that they are so dangerous because of the sort  
15 of veil of secrecy.

16 Like, in a criminal investigation,  
17 there's a point at which all the evidence comes  
18 out. But in a national security investigation, it  
19 never does.

20 So you have to rely fundamentally  
21 on the internal accountability mechanisms to  
22 ensure that people's rights aren't trampled, and  
23 so precisely, in the context of a decision to move  
24 from an intelligence investigation to a criminal  
25 investigation, there have to be reviews



1           periodically, there has to be -- there has to be  
2           careful oversight of what's going on and -- I  
3           mean, at a certain point, there has to be a  
4           decision to say, "This should be moved back from a  
5           criminal to an intelligence investigation or  
6           abandoned completely."

7                               And that's really important  
8           because it highlights another matter of concern,  
9           which is the whole question of  
10          information-sharing.

11                              It's quite clear, if you compare  
12          the evidence of CSIS and the evidence of the RCMP  
13          with respect to information-sharing, you see that  
14          the RCMP witnesses saw no problems in sharing  
15          information with their counterparts in the United  
16          States as part of an ongoing criminal  
17          investigation with virtually no restrictions.

18                              But CSIS, looking at it from the  
19          point of view of an intelligence agency, and their  
20          caveats and we have to be much more careful about  
21          how we share information, it becomes a serious  
22          problem in the context of a national security  
23          investigation when you're dealing with  
24          intelligence information.

25                              So in this case, what happened

1 was, you have an intelligence investigation  
2 becoming a criminal investigation, but it's not  
3 really clear to me whether it was really a  
4 criminal investigation or continued to be an  
5 intelligence investigation; yet the people who  
6 were conducting the investigation were operating  
7 as if it was a criminal investigation and were  
8 sharing information on that basis.

9 And so when you compare, for  
10 example, the testimony of Inspector Cabana, and he  
11 says, "I have no problem sharing information with  
12 Syria. As part of my investigation, I'll take  
13 whatever investigative techniques are possible."  
14 And when we asked Sergeant Lauzon, he said the  
15 same thing, and the fact that Syria's a regime  
16 that engages in torture didn't faze him one bit.

17 That's the difference between a  
18 criminal investigation and an intelligence  
19 investigation. Obviously, we have serious  
20 concerns about that attitude, but having said  
21 that, I agree with you completely, that when CSIS  
22 transfers a file over, it has to be subject to  
23 periodic review and subject to oversight and  
24 accountability.

25 THE COMMISSIONER: Thank you.

1                   MR. WALDMAN: I've already touched  
2                   on the next topic to some extent, so I'll  
3                   highlight, very briefly, my thoughts on the issue  
4                   of information-sharing between CSIS and Syria, and  
5                   I will put here the RCMP and CSIS together.

6                   The issue of information-sharing  
7                   with Syria is an issue that involves both the RCMP  
8                   and CSIS. We really don't have a lot of evidence  
9                   on the record about the extent of  
10                  information-sharing.

11                  We know that there was a bout de  
12                  papier that was brought back, we know that CSIS  
13                  was in Syria, and we know from the chronology that  
14                  CSIS brought back records of the interrogation.  
15                  That's all we know.

16                  We know as well that the RCMP was  
17                  willing to share information. We know that  
18                  liaison officers might have had visits to Syria,  
19                  but the extent to which there was sharing of  
20                  information by the RCMP is not something that's on  
21                  the public record. It's something that you know  
22                  in camera.

23                  But from the chronologies of  
24                  Mr. Almalki and Mr. El Maati, we know that Mr. El  
25                  Maati told consular visits at a time when he was

1 visited in Egypt, that he had been tortured in  
2 Syria and was forced to give false information.

3 The chronologies of Mr. Almalki  
4 and Mr. El Maati provide further details of their  
5 experience of torture and how, as a result, they  
6 provided false information, including information  
7 about Mr. Arar.

8 Mr. Almalki indicated during his  
9 interrogation by Syrian Military Intelligence --  
10 and this is on the record in the CAMANT note -- he  
11 concocted a false story.

12 He states that he was forced to  
13 tell interrogators all he knew, including  
14 mentioning Mr. Arar, and that he was tortured and  
15 he told the Syrians that he had seen Mr. Arar and  
16 Mr. El Maati in Afghanistan.

17 At this point, I'd like to mention  
18 briefly the search warrant and the information  
19 from Investigator Randall Walsh.

20 The information alleges that  
21 there's an al-Qaeda terrorist sleeper cell  
22 operating in Canada and that the search warrant  
23 was necessary to collect evidence and information  
24 so that criminal charges could be laid.

25 In the information to obtain the

1 warrant the officer requests a sealing order, in  
2 part because information and material was obtained  
3 by the RCMP in confidence from CSIS and from  
4 several institutions of foreign states.

5                   Given the timing of the warrant,  
6 the fact that the explicit reference is made to  
7 information and materials obtained from foreign  
8 sources, we believe it is reasonable for us to  
9 surmise that the RCMP received the fruits of the  
10 El Maati interrogation prior to the date the  
11 information was sworn. This is consistent with  
12 media reports that were published later.

13                   We don't know how this information  
14 was received and indeed we are speculating. We're  
15 not even sure that it was received. It could have  
16 been received directly from Syria or indirectly.

17                   But in any event, we would ask you  
18 to carefully review the evidence to determine if  
19 information had been passed on to the RCMP by CSIS  
20 or vice versa, whether that information clearly  
21 indicated the source of the information, and  
22 whether the agency indicated that the information  
23 was extremely doubtful for reliability, given that  
24 it came from a rogue state that was known to use  
25 torture during interrogation.

1                   We would request that the  
2                   Commissioner consider whether information was  
3                   shared directly or indirectly by CSIS and the RCMP  
4                   with Syrian authorities.

5                   Both Former Director Ward Elcock  
6                   and Deputy Director Hooper suggested that CSIS  
7                   would only provide information to regimes that are  
8                   known to engage in torture in an absolutely  
9                   extraordinary case. The example given by Elcock  
10                  involved an imminent threat of a bomb explosion in  
11                  Canada.

12                  Deputy Director Hooper agreed with  
13                  the definition and characterization, but I think  
14                  he suggested a more elastic interpretation of  
15                  imminent threat.

16                  The RCMP didn't appear to have any  
17                  threshold for when they would share information  
18                  with the Syrians. Inspector Cabana testified that  
19                  they had shared information in the past, and when  
20                  asked whether he would have any problem with  
21                  sharing information about Mr. Arar, he said he  
22                  wouldn't.

23                  In this context, if CSIS and the  
24                  RCMP did provide information to the Syrians, the  
25                  Commissioner will need to evaluate whether the

1 information was shared in the context of an  
2 imminent threat, and when you consider whether  
3 there's an imminent threat, consider, first, that  
4 the inquiry, at least based upon the public  
5 information, had a strong financial component, the  
6 A-OCANADA investigation, and we also ask that you  
7 consider the two main targets of the A-OCANADA  
8 investigation at the time that this investigation  
9 may have gone on, Mr. Almalki and Mr. El Maati,  
10 were in jail in Egypt and Syria.

11 In this regard, we would ask the  
12 Commissioner to consider whether CSIS has any  
13 written criteria or guidelines that indicate what  
14 would constitute an extraordinary case so as to  
15 justify information-sharing with a regime that  
16 practices torture.

17 In the end, however, we would like  
18 to posit -- take another point. We believe that  
19 information-sharing with rogue states like Syria  
20 that engage in torture is unacceptable under all  
21 circumstances.

22 We believe that Canada cannot and  
23 should not be complicit in torture. We believe  
24 that it is naive to believe that you can share  
25 information with a rogue state regarding a

1 Canadian citizen that is in detention there  
2 without being complicit in his torture.

3 If you ask for information, you  
4 increase the risk that the person will be tortured  
5 by his interrogators in order to obtain  
6 information. If you provide information, you  
7 increase the risk that the interrogators will  
8 torture him with respect to the information that  
9 they have received.

10 In this regard, I should like to  
11 comment briefly on one of the submissions. As I  
12 said, I only had a chance to see very small parts  
13 of the Attorney General's submissions. But in  
14 Chapter 5, they deal with the RCMP, and at  
15 paragraph 72, when dealing with the receipt of the  
16 confession from Syria, the Attorney General states  
17 in defending the receipt of the confession and the  
18 efforts to corroborate it that:

19 "There is no information  
20 available to indicate  
21 conclusively that the  
22 information had been obtained  
23 under torture." (As read)

24 Well, I find it very troubling to  
25 consider that the Attorney General would require



1 conclusive proof that the evidence was obtained  
2 under torture. It strikes me that, given what was  
3 known on the public record, they ought to have  
4 assumed that the evidence was obtained under  
5 torture.

6 For these reasons, we believe it's  
7 crucial that the Commissioner make clear findings  
8 and conclude that there are no circumstances that  
9 would justify receiving information from regimes  
10 that engage in torture.

11 I'm now seriously behind my  
12 schedule, and the Commissioner must bear some of  
13 the responsibility because you did ask me a  
14 question.

15 --- Laughter / Rires

16 THE COMMISSIONER: I'll extend  
17 your time by the time it took you to answer.

18 MR. WALDMAN: No, I appreciate the  
19 question, but given the time we have.

20 What I think I can do is just  
21 highlight a few more points in the 20 minutes I've  
22 got left.

23 Talking about the role of the  
24 RCMP, the first issue is this whole business about  
25 Mr. Arar being a person of interest, what's the

1           appropriate threshold for someone becoming a  
2           person of interest.

3                               We're not privy to what was the  
4           information that was in RCMP possession when it  
5           was decided that Mr. Arar become a person of  
6           interest, but we know that it was after the  
7           October 12th meeting, and we would ask that the  
8           Commissioner carefully scrutinize all of the  
9           evidence and see if there was any other evidence  
10          that would warrant this.

11                              We believe, in fact -- and perhaps  
12          I'm jumping ahead, but I don't want to -- we would  
13          ask the Commissioner to ask himself another  
14          question:  If Mr. Arar had not been Syrian, if  
15          Mr. Arar had been Irish, or Canadian, or  
16          Scottish -- or not Canadian -- but of any other  
17          ethnic origin other than Syrian, whether he would  
18          have become a person of interest and does that not  
19          lead inevitably to the conclusion that there was  
20          racial profiling in this case?

21                              The second issue that we want to  
22          ask you, closely connected to this, and I can only  
23          highlight my concern, is about the appropriateness  
24          of sharing information with the U.S. in  
25          circumstances where someone is not a target of an

1 investigation. We believe that it was  
2 inappropriate and it jeopardized the life of  
3 Mr. Arar.

4 We asked ourselves the question of  
5 whether there should be a targeting committee  
6 within the RCMP, similar to the one in CSIS, and  
7 we posed this question because we're deeply  
8 concerned about the different names that were used  
9 to describe Mr. Arar, person of interest, subject  
10 of interest, peripheral subject of interest,  
11 potential witness.

12 Deputy Director Hooper, when I  
13 asked him about the letter, said the terminology  
14 in the letter, which was subject of a national  
15 security investigation, was meaningless to him,  
16 and for him the only thing that made sense was to  
17 have targets or not when you are dealing with  
18 national security investigations.

19 We believe it's important that the  
20 RCMP adopt targeting committees, that if they're  
21 going to conduct national security investigations  
22 which have an intelligence component, they have to  
23 do so within the confines of clearly understanding  
24 who the targets are and who they aren't, and that  
25 information should be shared with foreign agencies

1           only with respect to persons who are targets.

2                           The next question that I want to  
3 deal with briefly is the question of watch lists  
4 and we've raised watch lists at several points in  
5 our submissions, and perhaps it is convenient for  
6 me to deal with them all now, and I think this  
7 becomes extremely important in the context of the  
8 determination by the Government of Canada to  
9 create a no-fly list as well, and we think that  
10 no-fly lists and watch lists are very dangerous.

11                          We know from some of the public  
12 evidence that Mr. Arar, when he came back at some  
13 point in December of 2001, and we were given  
14 something from Access to Information that said he  
15 was on some kind of terrorism list, which would  
16 suggest to us that he was on a watch list at that  
17 time in Canada.

18                          We believe that it's extremely  
19 important that if we're going to create such  
20 lists, that there be clear criteria as to how  
21 people get put on lists, there must be a clear  
22 threshold before they do so, that there be  
23 coordination, because one of the dangers we see is  
24 that there could be more than one watch list.  
25 There could be a CSIS watch list, there could be

1 an RCMP watch list, the Canadian Border Services  
2 Agency watch list, there could be a Ministry of  
3 Transport watch list.

4 There has to be coordination with  
5 respect to the various watch lists, but most  
6 importantly, the watch lists have to have a  
7 mechanism in place so that if people get placed on  
8 these watch lists, they have to be made aware of  
9 this and they have to have the power to challenge  
10 the determination.

11 In any case, if that's not  
12 possible for national security reasons, I don't  
13 know why it wouldn't be, there must be periodic  
14 oversight by an independent body with respect to  
15 these watch lists, because Mr. Arar's case  
16 highlights the danger that can befall a person  
17 when he's put on a watch list.

18 The next issue has to do with the  
19 lawful authority to obtain the lease, and together  
20 with that, I'd like to deal with the laptop  
21 computer and the Palm Pilot that were seized by  
22 customs.

23 In our belief, there's absolutely  
24 no doubt that the evidence discloses that the  
25 searches were illegal, and we would ask the

1 Commissioner to so find with respect to both the  
2 Palm Pilot, the computer, and with respect to the  
3 obtaining of a lease without warrant.

4 We are deeply concerned about the  
5 decision to obtain the lease in this matter,  
6 especially in light of the evidence before the  
7 Commissioner that the RCMP was of the view in  
8 January of 2002, when they obtained the search  
9 warrant for seven other individuals, that they did  
10 not have enough evidence to obtain a warrant for  
11 Mr. Arar, and yet despite this, they go and obtain  
12 the lease from Minto without a warrant.

13 The next issue is about caveats  
14 and breach of caveats.

15 In our submission, it is  
16 abundantly clear from the public record that the  
17 RCMP and the A-OCANADA investigators breached RCMP  
18 policies with respect to foreign  
19 information-sharing.

20 We've detailed in our submissions  
21 at great length some of the evidence on this  
22 issue, but we just wanted to highlight one or two  
23 points that are of deep concern to us, and one of  
24 them is the effect of the breach of caveats, and  
25 this has to do with the evidence that Deputy

1 Commissioner Loeppky gave.

2 He testified that if there had  
3 been caveats in place, the U.S. would have had to  
4 been required to contact the RCMP before using the  
5 information shared by A-OCANADA in the INS  
6 proceeding, and that would have allowed the RCMP  
7 to make inquiries from the U.S. and understand the  
8 possible consequences.

9 It may have allowed the RCMP to  
10 actually intervene and say, "You can't use our  
11 information to deport Mr. Arar to Syria."

12 So in our submission, the breach  
13 of caveats by A-OCANADA was extremely significant  
14 and not just a technical breach of some  
15 information-sharing rule.

16 Closely connected to that is a  
17 very difficult question, I acknowledge, which is  
18 the extent to which, in light of what Deputy  
19 Commissioner Loeppky said in a memo, are the  
20 different tactics used by the United States in its  
21 war on terrorism as opposed to Canada. Whether we  
22 should and can continue to share information about  
23 Canadian citizens? If we have to impose careful  
24 conditions on the sharing of information with the  
25 United States in light of what happened to

1 Mr. Arar?

2 In any event, we believe that what  
3 this highlights is the need for a review of when  
4 information is shared about Canadian citizens, and  
5 that it should only be shared, if at all, with the  
6 United States in circumstances where there's a  
7 clear threshold reached so that the person becomes  
8 the target of a national security investigation of  
9 one sort or another.

10 Another issue that is of concern  
11 was that, and this all goes back to the lack of  
12 coordination and the lack of supervision and  
13 control by the national headquarters, was the  
14 failure for the information to be shared through  
15 national headquarters.

16 This was a policy that was in  
17 place to ensure that information is carefully  
18 reviewed prior to information-sharing happening,  
19 and we know in this case that there are instances  
20 where it didn't happen.

21 I'd like to deal briefly with the  
22 data dump. The data dump was the biggest breach  
23 of RCMP policy and protocol on the public record.

24 A-OCANADA investigators mirrored  
25 the entire SUPERText database, which included all



1           correspondence, documentary evidence, the fruits  
2           of searches, officers' notes, documents, and  
3           correspondence from other domestic agencies in the  
4           SITREPs, and shared this with the FBI and likely  
5           the CIA.

6                           The information obtained from the  
7           background investigation of Mr. Arar and any  
8           reference to him in the SITREPs was among the  
9           documents shared.

10                           It wasn't vetted for relevancy, it  
11           was never viewed by the investigators and no  
12           caveats were attached.

13                           This is a very serious breach of  
14           protocol which, in our submission, was part of the  
15           genesis of all the problems that happened to  
16           Mr. Arar, and we wish to emphasize, in our view,  
17           that the wholesale sharing of information, without  
18           any evaluation of its relevancy or privacy  
19           concerns, should never be condoned or accepted.

20                           I'd like to move on briefly to  
21           flaws in the management structure of A-OCANADA,  
22           and I've already touched on this, but it's quite  
23           clear that there was -- put together flaws in the  
24           management structure and connect it with lack of  
25           supervision by the national headquarters, and I

1 would suggest to you that there was a clear lack  
2 of coordination by national headquarters.

3 Moving on briefly to the period  
4 between September 26th, during the detention, we  
5 believe it is clear that the RCMP should have  
6 immediately communicated their knowledge that a  
7 Canadian citizen was going to be arrested in the  
8 United States to DFAIT. Clearly, if this  
9 communication had happened, things might have  
10 turned out differently.

11 Was it appropriate for the RCMP to  
12 provide questions to the U.S. authorities to be  
13 used in the interrogation?

14 Obviously, in our view, it was  
15 not. If Mr. Arar had asked to have a lawyer  
16 present and had imposed conditions, it was  
17 unacceptable for the RCMP to try and do through  
18 the back door what it couldn't do through the  
19 front door.

20 Was the RCMP aware, or should the  
21 RCMP -- I've skipped over a few -- should the RCMP  
22 have been aware from their communications with  
23 American officials that Mr. Arar might be sent to  
24 a country other than Canada? If so, did the RCMP  
25 have a duty to inform DFAIT, and did the RCMP have

1 a duty to prevent Mr. Arar's deportation?

2 There's publicly available  
3 information that, in our submission, makes it  
4 abundantly clear that the RCMP officers ought to  
5 have been aware that Mr. Arar was going to be  
6 deported to Syria.

7 American officials told RCMP  
8 officers that they would be refusing Mr. Arar  
9 entry into Canada. If I recall correctly, they  
10 told them that they wouldn't allow him to come to  
11 Canada through the United States. So from very  
12 early on in the process, it was made clear to them  
13 that he was not going to be allowed to come back  
14 to Canada.

15 American officials were interested  
16 in linking him to al-Qaeda. This should have been  
17 enough to warn the RCMP given their knowledge that  
18 they should have had of extraordinary rendition.  
19 But even what was going on in the United States  
20 and Guantanamo Bay.

21 Then we have the famous October  
22 5th phone call with Sergeant Flewelling, where the  
23 U.S. official indicates that he feared that the  
24 U.S. didn't have enough to support criminal  
25 charges. The use of the word "fear" ought to have

1           been a clear indication that the United States was  
2           very concerned about allowing Mr. Arar to go free  
3           and therefore allowing him to come back to Canada.

4                         During the same conversation,  
5           there was reference to Mr. Arar being a dual  
6           national and therefore Sergeant Flewelling was  
7           well aware that he could be removed to Syria  
8           because of his dual nationalities. No RCMP  
9           official asked the Americans where Mr. Arar would  
10          be deported. Counsel for Mr. Arar submits the  
11          only reasonable conclusion that can be drawn from  
12          this evidence is that the RCMP was aware, or at  
13          least ought to have been aware, that Mr. Arar  
14          would be deported to Syria.

15                        They were aware early on that the  
16          U.S. decided he could not return directly to  
17          Canada. They were aware that the U.S. had  
18          concerns that he was connected to A-OCANADA. They  
19          were aware that he was free -- that the U.S. was  
20          afraid that he might go free. They were aware he  
21          was a dual national and his other nationality was  
22          Syrian.

23                        All of these things should have  
24          made it clear to the RCMP officials that there was  
25          a substantial risk of deportation to Syria.

1                   On this basis, we believe that the  
2 Commissioner ought to find that the RCMP knew, or  
3 ought to have known, of the risk of deportation to  
4 Syria.

5                   One of the central issues in this  
6 case, Mr. Commissioner, is whether the RCMP in any  
7 way encouraged or failed to act to prevent the  
8 deportation of Mr. Arar to Syria.

9                   We submit to you that there is  
10 already evidence on the public record in the form  
11 of statements from two high-level American  
12 officials that could support a finding that the  
13 RCMP gave the Americans the green light to deport  
14 Mr. Arar. So Ambassador Cellucci and Secretary of  
15 State Powell said that in public statements.

16                   There was a lack of central  
17 coordination with Project A-OCANADA, and Sergeant  
18 Flewelling testified he wasn't the only person in  
19 contact with the Americans. So it's impossible to  
20 preclude the possibility that one of the other  
21 inspectors involved -- or investigators  
22 involved -- gave the green light, or tacit or  
23 implicit approval, for Mr. Arar to be sent to  
24 Syria.

25                   And I've already talked about this

1 phone call and, in our view, Sergeant Flewelling  
2 ought to have been aware that deportation to Syria  
3 was likely or a serious risk, and the failure to  
4 react, in our submission, leads inexorably to the  
5 conclusion that either they knew and were  
6 negligent, or knew and didn't do anything or were  
7 wilfully blind.

8 The last area that I want to touch  
9 deals with the role of DFAIT.

10 Did DFAIT ignore obvious warnings  
11 with respect to the risk of deportation to Syria?

12 In our submission, a review of all  
13 of the evidence establishes clearly that DFAIT  
14 ought to have been aware there was a serious risk  
15 Mr. Arar would be deported to Syria and failed to  
16 take the necessary steps to protect him.

17 Minister Graham, Gar Pardy, and  
18 Nancy Collins all testified that had they been  
19 aware of the risk to Syria, they could have taken  
20 steps that might have prevented it from happening.  
21 There were several warning signs which should have  
22 alerted DFAIT officials of the serious risk.

23 On October 1st, Mr. Arar's brother  
24 phones Nancy Collins in a state of panic and says  
25 his brother has been told that he's going to be

1           deported to Syria. On October 1st, DFAIT  
2           officials learned that Mr. Arar was being held at  
3           the MDC, a rather notorious detention centre  
4           which, generally speaking, on the ninth floor only  
5           held people who are suspected of terrorism.

6                         The next day, Ms Girvan confirms  
7           that he's being held in a secure wing there. She  
8           testified she was aware that the secure wing was  
9           used to detain suspected terrorists. Ms Collins  
10          testified she did not attach any significance to  
11          the fact that Mr. Arar was being held there. In  
12          our submission, this was a highly serious  
13          circumstance, and one which should have rang alarm  
14          bells in the minds of DFAIT officials.

15                        Prison officials wouldn't tell  
16          Maureen Girvan the charges over the phone. On  
17          October 1st, Ms Girvan spoke with the supervising  
18          official at INS -- and this is a key piece of  
19          information that was ignored, in our submission.  
20          She was informally said that the seriousness of  
21          the case was such that it should be taken up at  
22          the highest level, and suggested our ambassador in  
23          Washington should contact the Department of State.  
24          One wonders what might have happened if that  
25          advice had been taken at that time.

1                   On October 3rd, she has a consular  
2                   visit, and Mr. Arar again repeats he's been told  
3                   he's going to be sent to Syria.

4                   She becomes aware of the serious  
5                   allegations being made during that time: That  
6                   he's allegedly a member of al-Qaeda.

7                   DFAIT had instituted a travel  
8                   bulletin on September 2nd where they warned of  
9                   intrusive measures by the U.S. under the NSEET  
10                  program regarding persons born in certain  
11                  countries of certain nationalities, including  
12                  Syria. So this was already on the radar screen.

13                  DFAIT officials should have been  
14                  aware of the risks that Mr. Arar would be held  
15                  incommunicado and tortured if he were sent back to  
16                  Syria.

17                  And in our submission, DFAIT  
18                  officials ignored the numerous warning signs of  
19                  Mr. Arar's imminent deportation to Syria. They  
20                  placed undue and unwarranted reliance on the  
21                  actions taken in the Baloch and Jaffri cases, but  
22                  there were significant differences and I won't  
23                  discuss these here because of the time  
24                  constraints.

25                  In our submission, DFAIT weren't



1 alert and alive to the clear signals that Mr. Arar  
2 would be deported to Syria and they failed in  
3 their mandate to provide consular protection to  
4 him.

5 Mr. Commissioner ...

6 --- Off-microphone remark / Remarque sans  
7 microphone

8 MR. WALDMAN: Mr. Commissioner, I  
9 just wanted to close by perhaps making a few brief  
10 comments about some of the things that I think  
11 I've gleaned from this, and I guess I would like  
12 to highlight, in my view, two key  
13 recommendations -- a few key recommendations that  
14 I'd like you to make, or consider making.

15 I think from the point of view of  
16 the time periods that I have covered, the key  
17 issue for me is really one of information-sharing.

18 I've covered all of the different  
19 aspects of that, but I want to emphasize that, in  
20 my view, the decisions that we make in terms of  
21 who we share information with and how we share  
22 information will go a large way to defining  
23 ourselves as a society.

24 It's extremely important that we  
25 be aware of the risk that we run when we engage in

1 information-sharing with states that we know are  
2 likely to torture, and in my submission, the risks  
3 that are involved outweigh any possible benefits  
4 that could be achieved by obtaining information  
5 that in any event would be highly suspect and  
6 unreliable.

7                   The second point that I would like  
8 to just touch on briefly is the whole question of  
9 oversight, and I'm well aware that this is really  
10 part of the second part of your mandate, but I  
11 think I would be remiss if I didn't point out to  
12 you that to a large extent I believe that a lot of  
13 the things that happened in this case happened  
14 because of the lack of oversight.

15                   So I think when you consider the  
16 questions of oversight, Mr. Arar's fact situation  
17 gives you a very helpful point of departure.

18                   Oversight does not just mean the  
19 body at the top that oversees, like SIRC or  
20 whatever body. It's all the way through the  
21 process, and I think in my part of the submissions  
22 I've highlighted some of the areas where I think  
23 that there were failures in the oversight.

24                   The main one in my time frame  
25 really has to deal with the failures of

1           headquarters to oversee a national security  
2           investigation. Ms Edwardh will touch on other  
3           aspects in her submissions.

4                         But at the end of the day,  
5           oversight is fundamental and key to the  
6           preservation of our democratic values because  
7           national security investigations are all  
8           conducted, and I think as you've experienced,  
9           probably more than you were aware of at the  
10          beginning, behind this veil of secrecy, and I'm  
11          always sitting on the other side looking in.

12                        We're given, when we deal with  
13          immigration cases, we're given summaries that are  
14          not nearly as complete as the summaries that you  
15          tried to give us in the CSIS case, and we're  
16          supposed to deal based on those summaries.

17                        If there isn't effective  
18          oversight, then we, who are sitting on the other  
19          side, can have very little confidence in the  
20          democratic process.

21                        So I've finished my remarks. I'm  
22          going to follow up on a tradition that Mr. David  
23          started, and I'm going to thank -- if I could have  
24          one more minute, I'd like to thank a few people.

25                        I'd like to thank all Commission

1           counsel. I think at times it's been trying.  
2           There's a few times that --

3                           THE COMMISSIONER: I don't  
4           remember them.

5           --- Laughter / Rires

6                           MR. WALDMAN: There are a few  
7           times I think I walked out of Commission counsel's  
8           room in a bit of a huff, but I think they've done  
9           a remarkable job under incredibly difficult  
10          circumstances, and I salute them all, and I'm very  
11          appreciative of the fact that they disrupted their  
12          family lives to come to Ottawa to work on this  
13          Commission, and I salute them.

14                          I commend Government counsel. I  
15          think they've had an extremely difficult task, and  
16          we've had our moments too, but in the end, I think  
17          we all tried our best to represent our clients'  
18          interests as best we could.

19                          I'd like to thank Ms Parnes who  
20          worked so hard with me. She did way more work  
21          than I did, and she's due much more credit, and my  
22          other co-counsel there. When Mr. Arar -- when the  
23          inquiry was called and Mr. Arar told me -- we  
24          discussed it and I said this is way too much, I've  
25          never done an inquiry. The only person who came

1 to mind was Ms Edwardh, and I was so thrilled when  
2 she agreed to work with us and she's unbelievable  
3 and it's been a joy to work with her.

4 I'd like to thank you,  
5 Mr. Commissioner. It's been a wonderful  
6 experience working with you. You've made a  
7 difficult task easier for all of us by your  
8 pleasant manner and your demeanour. But the thing  
9 I'll remember most about my participation here is  
10 the question you asked me when I got up every  
11 time, "How long are you going to take?" And the  
12 look on your face every time when I said, "A few  
13 hours."

14 --- Laughter / Rires

15 MR. WALDMAN: Really, thank you.  
16 It's been a joy.

17 Last but not least, I'd like to  
18 say something about Mr. Arar.

19 I feel that -- I think Ms Edwardh  
20 and I both feel that we've been connected to  
21 Mr. Arar by electronic cable, by telephone, and I  
22 don't know spiritually, but these last two years.  
23 It's been -- I tried, in my opening remarks, to  
24 give you some kind of sense of what this has been  
25 like for him. I don't think my words conveyed a

1 fraction of what it was like, and what it's been  
2 like and how it's affected him.

3 But I think Canada owes a great  
4 debt to him to have the courage to speak out, to  
5 withstand all of this, and to come forward and to  
6 raise issues that are of such fundamental  
7 importance to our democracy.

8 I mean, we have to recall that  
9 this is the only public inquiry which is dealing  
10 with these issues anywhere in the Western world,  
11 and the recommendations that you make take on even  
12 more importance in light of that and in light of  
13 recent events elsewhere.

14 So I wish to pay my deepest  
15 respect to Mr. Arar for the courage that he's  
16 displayed. There are lots of moments when I think  
17 he almost wished that he had sort of melted into  
18 the scenery when he came back to Canada, but I  
19 know him and I know his commitment for justice, so  
20 I wanted to just pay my personal respects and  
21 thanks to him.

22 Thank you, Mr. Commissioner. If  
23 we could take -- I guess Ms Edwardh needs a few  
24 minutes to move --

25 THE COMMISSIONER: We will. Let

1 me just say this.

2 Thank you for your submissions. I  
3 thought they were, as I said, your written  
4 submissions were enormously helpful. I thought  
5 your oral submissions were very appropriate and  
6 very useful. I thought the way you made use of  
7 your time was indeed very helpful.

8 MR. WALDMAN: Thank you.

9 THE COMMISSIONER: I will save my  
10 comments to the end, when we finally finish, to  
11 thank everybody. Let me at this stage just  
12 respond to one point. I think you and Ms Edwardh,  
13 counsel for Mr. Arar, have done a terrific job in  
14 a most difficult brief.

15 I practised law long enough as a  
16 counsel, I think, to have some appreciation of the  
17 challenges that your team went through in handling  
18 this case in a situation where you did not have  
19 access and couldn't have access to some of the  
20 information.

21 The skill that you all brought to  
22 this in those circumstances, and the professional  
23 way that you approached it has been really a  
24 remarkable thing for me to watch, and I'm deeply  
25 appreciative.

1 MR. WALDMAN: I just want to say,  
2 I mentioned to Mr. Cavalluzzo that I have an  
3 appeal in the Federal Court of Appeal tomorrow.  
4 So I'm going to be leaving this afternoon, but  
5 that's not to be taken as a reflection of anything  
6 other than switches in scheduling that disrupted  
7 my life, which was part of this process too.

8 THE COMMISSIONER: We'll take a  
9 break for ten minutes.

10 THE REGISTRAR: Please stand.

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

12 Suspension à 11 h 21

13 --- Upon resuming at 11:36 a.m. /

14 Reprise à 11 h 36.

15 THE REGISTRAR: Please be seated.

16 THE COMMISSIONER: Ms Edwardh?

17 SUBMISSIONS

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

20 It is obviously now my privilege  
21 to have an opportunity to address you, and  
22 fortunately, I can adopt Mr. Waldman's submissions  
23 and his thanks and will not repeat them again.

24 The focus of my submissions is  
25 going to be on the period of time from October



1 22nd, 2003, until Mr. Arar's return, and then I  
2 will have some brief comments about the  
3 post-return period.

4 And I'm sorry I didn't ask as many  
5 questions as he did, because I see that you've  
6 made a note of all those questions, and I have, I  
7 think, endeavoured to answer many of the questions  
8 we have posed about the time period after October  
9 22nd.

10 I want to make a couple  
11 preliminary observations, if I could.

12 Mr. Commissioner, in our  
13 submissions, we will call upon you to make  
14 difficult findings of fact.

15 Some of those findings of fact  
16 will involve the careful assessment of individuals  
17 and their credibility and whether, in fact, they  
18 were candid when they testified in front of you.

19 It is difficult in any legal  
20 process to be called upon to reject evidence, but  
21 we will call upon you to do so; and I ask you to  
22 approach these findings fearlessly, and indeed the  
23 Canadian community deserves no less.

24 There is one other observation  
25 about limits about findings of fact. You will

1 recall, and indeed we state -- if you want to  
2 follow it all, I am going to follow some of our  
3 submissions.

4 We state in paragraph 9 of the  
5 introduction, that Mr. Arar, having not testified  
6 because of an absence of procedural fairness that  
7 could be accorded to him, despite his desire to  
8 testify, does leave you, Mr. Commissioner, in this  
9 situation:

10 It means that when you approach  
11 the findings that you can make in the interim  
12 report, you have to say, when you are dealing with  
13 areas of evidence that you know Mr. Arar has not  
14 yet spoken to, that you cannot simply adopt the  
15 position of the witness, such as Mr. Martel in  
16 describing what was said on August 14th, and you  
17 cannot adopt it because you have yet to hear  
18 Mr. Arar, whose testimony has been technically  
19 deferred as a result of your ruling.

20 I also want to make another  
21 preliminary observation --

22 THE COMMISSIONER: Just before you  
23 leave that, though.

24 MS EDWARDH: Yes?

25 THE COMMISSIONER: It would be

1 open to me to describe the evidence and to say, on  
2 the basis of that evidence, I make the following  
3 observation ...

4 MS EDWARDH: Certainly. Or you  
5 can certainly identify areas where there is no  
6 dispute.

7 THE COMMISSIONER: Yes.

8 MS EDWARDH: And the areas where  
9 there's a clearly delineated dispute that you know  
10 Mr. Arar could address are those areas that I ask  
11 you to back away from because you have not heard  
12 from him.

13 For example, let me be very  
14 precise. Mr. Martel is very clear that Mr. Arar  
15 did not tell him certain things. You know that  
16 that is an area of dispute. We've heard much  
17 evidence about it. I would ask you not to simply  
18 adopt his version of the conversation in  
19 circumstances where you know there is dispute, and  
20 you know that Mr. Arar has not shared with you his  
21 understanding and recollection of those moments.

22 THE COMMISSIONER: And you've  
23 identified some of those in your written argument.

24 MS EDWARDH: We have.

25 THE COMMISSIONER: Have you

1 identified all of them in your written argument?

2 MS EDWARDH: The vast majority of  
3 them, Mr. Commissioner.

4 I want to take another brief  
5 moment in this introduction to speak on behalf of  
6 all of our team and express our very serious  
7 concern about the overbreadth of the NSC claims  
8 that we have seen in the public hearing phase of  
9 this inquiry.

10 We have seen important examples of  
11 that overbreadth and the most obvious one we draw  
12 to your attention in paragraph 12, and the one I  
13 found so troubling, was the redaction in the  
14 documents released through our processes here that  
15 had the phrase "his needs were all taken care of  
16 by his Syrian hosts," but what was redacted was  
17 that this was dictated to him.

18 That redaction, of course, fell by  
19 the wayside, when we produced an Access to  
20 Information document. But what's troubling is why  
21 that would be redacted. Such a redaction enures  
22 to the benefit of the Government, and it does so  
23 by minimizing the evidence on the public record  
24 that ought to have disclosed to any  
25 reasonable-thinking person Mr. Arar's risk of

1           torture.

2                           I was equally troubled by the  
3           appearance of a document on the eve of  
4           Mr. Martel's cross-examination which was a  
5           document that was produced wherein he is alleged  
6           to have described in some detail what Mr. Arar had  
7           said to him, including that he was beaten. That  
8           is the only document, other than handwritten  
9           notes, if you look at the whole of the record,  
10          that confirms Mr. Arar's account of what he said  
11          in the plane and what he said on August 14th.

12                          What's most troubling about it,  
13          every other document that Mr. Martel reviews or  
14          drafts denies that that conversation took place.

15                          And we ask again, when you look at  
16          these redactions, we ask you to look at them very  
17          carefully to ensure that they are, in fact,  
18          redactions which survive a test of NSC and do not  
19          point to any direct or other purpose for any such  
20          claims.

21                          I want now to go, if I could, and  
22          I don't think I need to say anything more about  
23          the National Security Confidentiality claims, but  
24          you have our views and our concerns and they are  
25          set out in our written submissions to you.

1                   Let me turn then to the third  
2 period, which is the area I wish to speak to you.  
3 You'll find it at page 121 of the submissions,  
4 Mr. Commissioner, commencing -- actually, I'm  
5 going to commence at page 122 -- and I'm going to  
6 look at the role of DFAIT officials, and I want  
7 you to take a moment to focus on the consular  
8 framework because, Mr. Commissioner, it is against  
9 this that you must measure their conduct.

10                   If you turn to paragraph 321, you  
11 begin with the evidence of Minister Graham, where  
12 he asserted that consular services necessarily  
13 entail obtaining information from a detainee,  
14 obtaining information about the nature of the  
15 charge, the basis of the charge, and the  
16 detainee's response.

17                   We make the observation there's no  
18 one other than the detainee's lawyer who would  
19 have that same kind of information automatically.  
20 And why that's important, Mr. Commissioner, I want  
21 to put this word right up front, it's called  
22 "trust," and indeed that is why the Government of  
23 Canada makes it clear in its publications to  
24 persons who receive consular assistance, who are  
25 detained, that that information will remain

1 completely confidential and is protected under  
2 Canada's Privacy Act. It will not be passed on to  
3 others, and even should the RCMP or other police  
4 forces acquire information, rest assured it's not  
5 going to come through DFAIT.

6 And this promise, and the Minister  
7 spoke of it, is, in fact, essential because it  
8 builds the relationship of trust between the  
9 consular, and I pause also to note the language  
10 used, "and their client."

11 Canadians are promised that  
12 consular officers will assist in ensuring they  
13 have access to counsel -- this is over at page  
14 124, paragraph 324.

15 "They will have a list of  
16 lawyers with expertise in the  
17 type of cases involved, and  
18 those lawyers will have  
19 represented Canadians in the  
20 past." (As read)

21 Canadians are promised that they  
22 will be assisted in communicating with their  
23 representatives and their family and their  
24 friends, and also every effort taken to ensure  
25 they get adequate nutrition, medical care, and

1           that their conditions of confinement comport with  
2           the minimum standards set out in international  
3           law.

4                           We took the time in our submission  
5           to you, Mr. Commissioner, in paragraph 326,  
6           because there are minimum standards, and it is to  
7           these any consular officer must have regard.

8                           Obviously there will be places  
9           that fail to meet these standards, but when you  
10          ask yourself, as a consular officer, "Is this  
11          person being cared for in a manner that is  
12          consistent with international standards," this is  
13          the measure.

14                           Is the person registered at the  
15          facility and is the authority to hold him there  
16          clear?

17                           If a person is working or living  
18          in a cell, are the windows large enough to enable  
19          the prisoner to read by natural light?

20                           Is there a sanitary installation  
21          to allow every prisoner to meet the needs of  
22          nature when necessary in a clean and decent  
23          manner?

24                           Adequate bathing in a temperate  
25          climate at least once every week. The provision



1 of water and toilets articles? Food of adequate  
2 nutritional value? Drinking water to be available  
3 whenever it is needed?

4 Every person who is not employed  
5 in outdoor work shall have at least one hour of  
6 suitable exercise in the open air.

7 Medical services must be  
8 available. Prisoners should be seen as soon as  
9 they enter and thereafter as necessary. And  
10 what's most interesting for my purposes today is  
11 there is a limit on punishment. Punishment for  
12 disciplinary offenses.

13 This is in paragraph (1).

14 Punishment for disciplinary  
15 offenses shall not include placing a person in a  
16 dark cell.

17 There must be services or  
18 provision to communicate and also there must be  
19 consular access.

20 Remarkably, Konrad Sigurdson, the  
21 current Director General of Consular Affairs gave  
22 you a clear map, what is to be done when persons  
23 are not getting fair treatment, adequate nutrition  
24 or care.

25 First of all, it is raised

1           informally with local officials; and if that  
2           doesn't work, he was very clear that the issue  
3           must proceed to a more formal intervention, such  
4           as a diplomatic note. And if you can't do  
5           anything there, Mr. Sigurdson said, you then have  
6           to go to your legal department at the Department  
7           of Foreign Affairs and they'll measure what is  
8           happening against the international instruments  
9           and consider what steps can be taken.

10                         Mr. Sigurdson also made the  
11           observation, at the very beginning of these  
12           proceedings, that the Department had a right to  
13           demand access to permit a confidential  
14           conversation with a detainee, and I acknowledge  
15           that no instrument makes it a matter of  
16           international law, but knowing that only such  
17           access can give rise to a full and candid  
18           discussion, it is important to know that the  
19           Department that never made such a request  
20           acknowledges that it should.

21                         Mr. Sigurdson also made the  
22           observation that every consular officer working in  
23           a country where there is a bad human rights record  
24           must approach the circumstances in which a  
25           detainee is held with a suspicious cast of mind

1           because it's that cast of mind that will allow a  
2           more discerning and objective assessment of the  
3           conditions of confinement.

4                       I'm not going to repeat to you --  
5           and we've set it out in paragraph 433 of our  
6           submissions and thereafter, the country conditions  
7           in Syria. Mr. Commissioner, you've heard them a  
8           hundred times, and I need not.

9                       But I ask you to keep them as a  
10          backdrop, because it is such a powerful  
11          description of a nation that has no regard for  
12          human rights and also the rule of law.

13                      So I want to then -- knowing and  
14          having those matters in mind, let's turn to the  
15          actions of Ambassador Pillarella.

16                      Clearly, Mr. Commissioner, he had  
17          a duty to supervise and direct the functions of  
18          embassy personnel including the provision of  
19          consular services to Mr. Arar. He signed off on  
20          the reports. He gave advice to the Department,  
21          and that advice directed the steps that were  
22          taken.

23                      Now, Mr. Pillarella, although he  
24          acknowledged having no specific training, did  
25          suggest that both he and Mr. Martel had ample

1 on-the-job experience, and with that he then went  
2 on to say that he did not have any indication that  
3 there were serious human rights abuses committed  
4 in Syria. He didn't know of the Palestine Branch  
5 in 2002, nor was he aware of its reputation.

6 And then it is against what was  
7 known by everyone else that he placed his  
8 standard, that he would have to have actual  
9 evidence that a detained Canadian was being  
10 mistreated or abused before he would raise the  
11 matter with Syrians officials.

12 This is ridiculous,  
13 Mr. Commissioner, with the greatest of respect.

14 This is a standard that will never  
15 be met wherever a person is tortured and wherever  
16 they need consular assistance. The index of  
17 suspicion in those circumstances is, in fact, non-  
18 existent.

19 When Mr. Pillarella was asked  
20 whether it would make any difference if in fact he  
21 had been aware that Mr. El Maati was tortured in  
22 the same institution months before, his answer  
23 was, no, it wouldn't make any difference, just  
24 because Mr. El Maati was tortured there was no  
25 reason to increase his index of suspicion that

1 Mr. Arar was experiencing the same abuse.

2 Ambassador Pillarella at first  
3 clung to the view that without direct evidence of  
4 torture, he was not prepared to reach any  
5 conclusion. But, in fact, that's not true,  
6 Mr. Commissioner. He did reach conclusions.

7 He went further than saying there  
8 was no indication or evidence that he could see.  
9 He approved a consular report and said that he had  
10 no -- that Mr. Arar was healthy. He also said  
11 that if he had had an inkling that Mr. Arar was  
12 tortured or abused, he would have reported it to  
13 Ottawa. He did not.

14 We set out at page 131 the  
15 findings that we ask you to make in respect of the  
16 Ambassador's conduct -- no, I'm sorry, it's not  
17 134, it's a little later. That the things that  
18 the Ambassador knew are set out at page 131. All  
19 of the things that in our respectful submission  
20 are red flags that were ignored by the Ambassador,  
21 and we submit to you that those red flags are as  
22 obvious and as clear as any could be.

23 Now, that then brings us to a  
24 submission that we make at the top of page 132.  
25 Mr. Commissioner, we ask you to reject the

1 Ambassador's evidence. We ask you to note the  
2 patrician arrogance in which he delivered it. We  
3 ask you, given the Ambassador's evidence, to find  
4 that he was well aware of Mr. Arar's risk and the  
5 risk he faced of torture, and the very serious  
6 risk, and that the identification and knowledge of  
7 that risk was never acted on or communicated.

8 Remarkably, and one learns this  
9 about Ambassador Pillarella's cast of mind, even  
10 when he had in front of him allegations through  
11 the Syrian Human Rights Committee that there was  
12 an allegation of clear torture, his seeking of  
13 consular assistance is for the purpose of  
14 rebutting that allegation.

15 We ask you then in our next  
16 section, Mr. Commissioner, to look at the  
17 Ambassador's preoccupation with obtaining  
18 information about Mr. Arar.

19 He testified, and we also are  
20 going to ask you to reject this, he testified that  
21 the reason he was seeking information was to help  
22 Mr. Arar. He said, and we quoted at page 132,  
23 paragraph 3(8):

24 "Any information I could send  
25 back to Ottawa and say, look,

1                   this is what the Syrians  
2                   claim, and this could be  
3                   checked whether it was true  
4                   or not. This would be in  
5                   favour of Mr. Arar." (As  
6                   read)

7                   We ask you to reject that  
8                   explanation entirely.

9                   Ambassador Pillarella admitted  
10                  that he asked the Syrians for information about  
11                  Mr. Arar and proof of his affiliation. He brought  
12                  back the November 3rd bout de papier. He never  
13                  communicated anything to Syrian Military  
14                  Intelligence, Mr. Commissioner, that could help  
15                  Mr. Arar. Not a single step.

16                  So we ask you to reject this as an  
17                  explanation for seeking information and ask you to  
18                  find that this was not his interest, that his true  
19                  interest was to build a relationship between  
20                  Syrian Military Intelligence, the RCMP, and CSIS.

21                  He wanted to open the doors to  
22                  facilitate that communication, and he never  
23                  appreciated that the priority he attached to  
24                  intelligence and policing was totally  
25                  inappropriate, that the priority ought to have

1           been given to helping a Canadian citizen who was  
2           facing, on any reading of this record, a  
3           substantial risk of torture, if not actually  
4           having evidence that torture was occurring.

5                           I want to also turn to the  
6           Department of Foreign Affairs and they're  
7           professed objective of providing the RCMP and  
8           CSIS, and indeed other branches of the Government  
9           of Canada, relevant information about the  
10          conditions in the country, including the human  
11          rights record, to inform policy decisions and of  
12          course operational decisions.

13                           Let me make the first observation,  
14          that if the human rights report of which Mr. Arar  
15          and I, and Ms Davis, and Mr. Waldman, and Ms  
16          Parnes have seen but one paragraph, one paragraph,  
17          if that one paragraph is an example of the quality  
18          of information given to the Canadian government by  
19          the embassies, it is woefully shocking, because  
20          even Mr. Martel was able to identify in what  
21          respects that paragraph was simply wrong and there  
22          had been no effort to make any changes in it, and  
23          we set the details of that out in our submissions.

24                           Interestingly enough, of course,  
25          perhaps even conveniently, there is no mention of



1 Mr. El Maati in the Damascus report dealing with  
2 human rights.

3 But, further, in addition to  
4 preparing erroneous and incomplete country  
5 reports, the record shows, Mr. Commissioner, that  
6 DFAIT did not provide advice to either the RCMP or  
7 CSIS on the propriety of sharing information with  
8 Syrian Military Intelligence, or in assessing the  
9 information that was received from the Syrians.  
10 There is truly a disconnect between what the RCMP  
11 know about the country conditions and what DFAIT  
12 believes it knows.

13 Members were not briefed, members  
14 of the RCMP were not briefed, and did not have the  
15 appropriate knowledge they needed to assess  
16 whether information about Mr. Arar ought to have  
17 been given to the Syrians. Similarly, they didn't  
18 get briefed to evaluate the information they  
19 received from the Syrians.

20 Now, let me turn to Mr. Martel's  
21 client, the one we share, Mr. Arar.

22 Mr. Martel admitted deficiencies  
23 in his formal training, but did acknowledge -- and  
24 I'm just going to point you to the fact that he  
25 thought he had considerable experience, that he

1 was aware of the Palestine Branch, he was aware  
2 Syrian Military Intelligence terrorized the Syrian  
3 community, and I want you, Mr. Commissioner, to  
4 look very carefully at the things that happened  
5 over that year where Mr. Martel was Canada's eyes  
6 and ears, because at the end of the day, I'm going  
7 to say, those eyes and ears that were to protect  
8 Maher Arar and to provide Canada with a way to see  
9 what was happening, made Canada blind and deaf.

10 We start at paragraph 356, and we  
11 start with the easy process of looking at these  
12 minimum standards and saying, "What did Mr. Martel  
13 do when indeed Mr. Arar's sister and her husband  
14 arrived in Damascus in June and sought his help,  
15 the embassy's help, to obtain access to her  
16 brother?"

17 He was told, Mr. Commissioner, to  
18 send a diplomatic note. He went on holidays. His  
19 assistant made a phone call, and because  
20 Mr. Arar's sister was, in fact, also a Syrian  
21 national, as was her husband, they were told to go  
22 to the Ministry of Immigration. Nothing could be  
23 done through the embassy.

24 And ultimately no steps were ever  
25 taken to protest this relatively innocuous matter

1 of denying -- I say innocuous from the Syrians'  
2 perspective, hardly innocuous from Mr. Arar's --  
3 but no steps were taken to protest this refusal of  
4 access.

5 Early in Mr. Arar's detention, he  
6 was told -- I'm sorry. Early in Mr. Arar's  
7 detention, Mr. Martel was told that an extended  
8 family member who was also a lawyer, Mr. Anwar  
9 Arar, was looking for help to find Mr. Arar;  
10 wanted, if he could, to attend the November 12th  
11 consular visit.

12 And tragically, rather than even  
13 tell Mr. Arar on November 12th -- this is the  
14 measure of the man -- and letting him know that  
15 there was a person trying to connect, a thread  
16 through the darkness to the outside world,  
17 Mr. Martel says nothing to Maher Arar, nor did he  
18 take any steps to attempt to facilitate that  
19 access. He just assumed -- he just assumed that  
20 there would be no access and didn't even make a  
21 request which, in our view -- you have to  
22 remember, nobody minded saddling up to General  
23 Khalil and asking, "Do you have any more  
24 information, or information for us?" Nobody  
25 minded that request or "Can we have a consular

1 visit?" But no other requests were ever made.

2 Remarkably, on the issue of  
3 counsel, and you see this on page 365 of our  
4 submission, before August 14th, despite Mr. Arar's  
5 wife's active involvement in his situation, no one  
6 ever suggested that they, as a team, trying to  
7 assist him, retain counsel in Syria who might  
8 begin the process of preparing a defence, if one  
9 was called for.

10 In an extraordinary exchange,  
11 Mr. Martel said there was no reason to give  
12 Mr. Arar the list of lawyers because, of course,  
13 he wouldn't be able to call anyone.

14 Well, that hardly is the answer to  
15 the question to the duties of the members of the  
16 embassy, other consular staff, Ottawa, and also  
17 information to be given to Mrs. Arar.

18 Then we turn to August the 14th,  
19 and I'm going to keep within the context of  
20 counsel here for a moment because it shows an  
21 impoverished effort on everyone's part to provide  
22 counsel with any tools.

23 Mr. Arar is told that he is going  
24 to be put on trial within a week. Now it's August  
25 the 14th. In 24 hours, Mrs. Arar has sent

1 information about the two lawyers she would like  
2 the embassy to contact.

3 It would appear from our record,  
4 Mr. Commissioner, that well after the week had  
5 passed when Mr. Arar was to stand trial, finally  
6 there was a clarification and a settling of  
7 information on September 9th.

8 But what I really wish to complain  
9 about, on behalf of Mr. Arar, was the fact that  
10 all this -- all these statements that have been  
11 made to you about assisting him are -- ought to be  
12 regarded as completely shallow. They ring hollow.

13 We set out in paragraph 379, what  
14 did the embassy do when push came to shove? While  
15 Mr. Al Maleh, the lawyer who had been retained,  
16 was searching for any information about the  
17 allegations against Mr. Arar, even details about  
18 the trial, Ambassador Pillarella, Mr. Martel, the  
19 consular bureau in Ottawa, did not take a single  
20 step, not a single step, to provide the  
21 information they had about what the possible  
22 allegations might be.

23 The whole Department of Foreign  
24 Affairs, who knew and had talked about his alleged  
25 association with the Muslim Brotherhood, never

1 told Mr. Arar of the allegation, never told his  
2 lawyer about the allegation.

3 If there was information that  
4 could have assisted about training in Afghanistan  
5 or information that could have assisted in respect  
6 of defeating an allegation that Mr. Arar was a  
7 member of al-Qaeda, it should have been in defence  
8 counsel's hands, and with the greatest of respect,  
9 the reason it wasn't was that this was an  
10 intelligence-gathering activity.

11 We propose to you a series of  
12 harsh findings in respect of Mr. Martel and the  
13 Ambassador, and I will not spend -- I want to  
14 spend a few minutes on two other issues, one the  
15 consular visits themselves, and one the sharing of  
16 the consular information. The consular visits are  
17 found at page 154, commencing paragraph 388,  
18 Mr. Commissioner.

19 Now, for a man who recognized that  
20 the Syrian Military Intelligence struck terror in  
21 the hearts of the Syrian community, he also said,  
22 when he testified before you, and you find this  
23 about halfway through paragraph 389, he described  
24 himself as a person who had "kept abreast" of what  
25 happened to political dissidents who were

1           arrested, arbitrarily detained, and tortured.

2                           He agreed that the fate of persons  
3 who were viewed as security threats and held by  
4 military intelligence would be no different.

5                           He was aware that the Syrian  
6 public position was to line up beside the United  
7 States in the war on terror and oppose the actions  
8 of al-Qaeda.

9                           He knew that Mr. Arar had been  
10 deported from the United States based upon his  
11 alleged involvement in terrorist activities.

12                           He also knew, Mr. Commissioner,  
13 that Mr. Arar had been a disappeared person, and I  
14 use that even though it does not ring  
15 grammatically correct.

16                           Now, I don't intend to review in  
17 detail the consular reports with you,  
18 Mr. Commissioner. Indeed, we don't do so in our  
19 written submission. But, first of all, be mindful  
20 of their purpose.

21                           They are to inform the Government  
22 of Canada through the Department of Foreign  
23 Affairs about necessary information, so that they  
24 can take -- the government and the Department of  
25 Foreign Affairs can take steps to protect the

1 rights of a Canadian citizen.

2 We ask you that you find these  
3 reports woefully inadequate. We ask that you find  
4 Mr. Martel's blindness was either created through  
5 an optimism that was unjustified but that he  
6 should have approached the situation he had at  
7 hand with deep scepticism.

8 He never qualifies adequately the  
9 observations he's made. He never even carefully  
10 describes the limits that have been imposed upon  
11 him by the Syrians.

12 If you look at the first report,  
13 Mr. Commissioner, we ask you to find that it is  
14 literally a mindless cataloguing of observations.  
15 What is catalogued is that Mr. Martel doesn't know  
16 where Mr. Arar is, that Mr. Arar is seated at a  
17 distance, Mr. Arar is not free to answer  
18 questions, that he parroted words spoken or  
19 dictated, that he appeared resigned and submissive  
20 and that his eye movements seemed to be trying to  
21 convey information.

22 We observe that none of these  
23 observations led to any accurate conclusions  
24 and/or an identification of a risk of torture. We  
25 observe that those statements never gave rise to



1 any evidence or an inkling, as the Ambassador  
2 said, "We had no inkling." Nor did they ever ask  
3 to see Mr. Arar in a private, confidential visit  
4 to see whether there was anything different going  
5 on.

6 And while I am tempted to say  
7 Mr. Gar Pardy, a man I know is a bit of a hero in  
8 this piece, in reflection I have decided that that  
9 would be wrong to say.

10 He testified before you,  
11 Mr. Commissioner, that he didn't need Mr. Martel  
12 to tell him of the risk of torture faced by  
13 Mr. Arar. That was his working assumption. It  
14 guided his decisions.

15 And if that's the case -- and I  
16 don't dispute it is -- it's shocking that that  
17 working assumption was not articulated clearly and  
18 made known to those responsible for Mr. Arar in  
19 the Canadian government. It's shocking that  
20 Mr. Pardy did not enlighten Mr. Martel or  
21 Mr. Pillarella.

22 Indeed, one suspects that the  
23 reason he didn't have to was they too knew what  
24 the risk of torture was.

25 And we make the observation, and

1           it's been before you through cross-examinations of  
2           everyone, that perhaps the most troubling  
3           reconstruction of the world comes from the clear  
4           knowledge fixed on Mr. Martel and communicated to  
5           Ottawa in the first consular report, that Mr. Arar  
6           has been held in incommunicado detention, and in  
7           the update issued the same day based on the same  
8           information, Minister Graham is told that he  
9           appears to be healthy and it just isn't clear how  
10          long Mr. Arar has been in Syria. With the  
11          greatest of respect, that is false.

12                         Maybe, unbeknownst to all of us in  
13          the world of diplomacy, which I now submit is also  
14          a world of deceit and deception, maybe somebody  
15          was concerned about offending the Syrians. Maybe  
16          there was a decision made that if we confront them  
17          about holding Mr. Arar incommunicado, we could  
18          have a serious problem with any further access  
19          because of all the things that we don't know  
20          about.

21                         Who should make that decision,  
22          Mr. Commissioner? That's the issue. Did the  
23          Minister know that that was a decision made, or is  
24          that a decision that was made by Mr. Martel and  
25          Ambassador Pillarella in a manner which is quite

1 incompatible with the discharge of the Minister's  
2 obligations to the Department, to Mr. Arar, and to  
3 the Parliament of Canada?

4 As we look at this kind of sorry  
5 exercise of consular services, we note that in  
6 December, Mr. Arar's brother, Bassam, conveys to  
7 Ottawa his concern that Mr. Arar is being held  
8 underground with no light.

9 Does anyone ask anyone? Does  
10 anyone ask the Syrians if that's the case? Does  
11 anyone ask Mr. Arar? No. Does anyone even ask  
12 other detainees? Does anyone do an evaluation, if  
13 you can't ask Mr. Arar?

14 It's not good enough to say, as  
15 Myra Pastyr-Lupul said, "Well, we couldn't pose a  
16 direct question," because, Mr. Commissioner, the  
17 answers to that question lie elsewhere if you  
18 can't get them from Mr. Arar's mouth.

19 Remarkably, the consular service  
20 provided didn't even try and use ruses that could  
21 have given information. For example, Mr. Martel  
22 was instructed to try and obtain a photograph of  
23 Mr. Arar for his wife. Obviously the obtaining of  
24 a photograph would have given important  
25 information to people who knew Mr. Arar: What did

1 he look like? How much weight had he lost? What  
2 is the difference? Is there anything about that  
3 photograph that gives rise to concern?

4 Despite being instructed to ask  
5 for a photograph, Mr. Martel never did, nor did he  
6 ever even inquire about the reading material. He  
7 could have used a simple ruse, "What did you think  
8 of the article that I gave you a month ago?" And  
9 if there was no answer, it would have raised a  
10 question.

11 Now, I want to say one other thing  
12 about Mr. Martel because I want to talk a little  
13 bit about the August 14th visit, which is a matter  
14 of grave concern to us, because I think how you  
15 approach this visit and how you approach  
16 Mr. Martel must be informed by what he failed to  
17 tell, and you, Mr. Commissioner, must assess his  
18 responses by observing what he failed to tell.

19 Of course we are well familiar  
20 with the report where he says nothing about the  
21 fact that Mr. Arar was held, and I put the actual  
22 document from his notes in paragraph 405,  
23 Mr. Commissioner, or a quote from his notes that  
24 were made contemporaneously:

25 "Present conditions: I have

1 not been paralysed. Not  
2 beaten. Not tortured. Very  
3 beginning, very little. 3  
4 by 6 by 7. Sleeping on the  
5 ground." (As read)

6 Well, in fact, if you compare what  
7 was written as a contemporaneous note, that  
8 Mr. Martel must have gone back to the embassy and  
9 created his report from, what he leaves out is the  
10 fundamentally important information about the cell  
11 and the ground.

12 Instead, he sends a good news  
13 message to Ottawa, and writes Ms Pastyr-Lupul  
14 later that day and says he did not see clear  
15 evidence of any trace of violence, which is a  
16 remarkable statement in some ways if you don't go  
17 on to acknowledge that the art of torture today  
18 doesn't leave those marks of violence.

19 So now Mr. Martel tells you,  
20 because his notes are there, that indeed he forgot  
21 to tell anybody, that he didn't click, I think was  
22 his language, and with the greatest of respect,  
23 when your mandate and duty as a consular officer  
24 is to assure the well-being of the detainee, I ask  
25 you to reject the explanation that it didn't click

1 and find as a fact that Mr. Martel had other  
2 reasons for not sending the message back to Ottawa  
3 about the conditions of confinement.

4 Now, one of the more frightening  
5 inferences available from this failure to report  
6 is that at the same time that he hears that  
7 Mr. Arar is being held in these conditions, he  
8 knows Mr. Arar is going to stand his trial now,  
9 and we know, Mr. Commissioner, we know with  
10 absolute certainty, that that's, in a way, very  
11 bad news. To stand your trial is to see another  
12 12 years, at least, in a grave-like cell.

13 In effect, what Mr. Martel knew  
14 when he failed to report was Mr. Arar's voice was  
15 likely to be silenced.

16 The consular report approved by  
17 Mr. Martel, and approved -- I'm sorry, prepared by  
18 Mr. Martel and approved by the Ambassador, does  
19 indeed rebut any allegation of physical or  
20 psychological torture.

21 Here I ask you to ask yourself  
22 why. Was it because rebutting such an allegation  
23 would preserve intelligence interests in dealing  
24 with the Syrian Military Intelligence? Was it  
25 because rebutting it would deflect a focus of

1 criticism on the RCMP's release of the information  
2 to the U.S., to the FBI, and to the CIA? Was it  
3 because it would allow the public face of  
4 government to pronounce to an eager public that  
5 Mr. Arar disavows the suggestion of torture? It  
6 is indeed a difficult task to sort through that,  
7 but we do ask you, Mr. Commissioner, to find that  
8 there were other reasons.

9 One of the pieces of support  
10 you'll find is the subsequent conduct of  
11 Mr. Martel. Despite flying back with Mr. Arar,  
12 despite being told on the plane that Mr. Arar had  
13 been beaten during interrogation, despite giving  
14 that message on October 7th to his colleagues in a  
15 debriefing where notes were made, he writes a  
16 series of documents which we say would have  
17 never -- he would have never, ever said before you  
18 that Mr. Arar told him this, had not those notes  
19 been available, but he would have clung to the  
20 documents he wrote after the meeting, all written  
21 after the meeting, which, in fact, suggest that  
22 none of that description of a beating took place,  
23 that this was all hyperbole, exaggeration,  
24 misrepresentation, driven by claims of lawsuits,  
25 claims of money, other people's political agenda.

1                   That, Mr. Commissioner, is an  
2                   animus towards the person, and in our respectful  
3                   submission it is relevant for you to consider in  
4                   assessing what happened to the consular services  
5                   provided in Damascus.

6                   Let me then turn to sharing  
7                   information, sharing consular reports.

8                   We begin our discussion of that at  
9                   page 172, Mr. Commissioner, and paragraph 417,  
10                  where we talk about the assurances that I have  
11                  touched upon earlier.

12                  The RCMP and CSIS received  
13                  consular reports, and Mr. Pardy initially  
14                  testified that Mr. Arar's consent, given in  
15                  New York, was a consent that operated to permit  
16                  him to give these reports to CSIS and the RCMP,  
17                  and what really irks me, if I can make that  
18                  statement, Mr. Commissioner, is look at the  
19                  conversations with Ms Girvan. They are exactly  
20                  the kinds of conversations that you have with a  
21                  defence lawyer: What did they want to know? What  
22                  information did they put to you in the  
23                  interrogation?

24                  Read them from that perspective  
25                  for a moment. And then ask yourself whether the



1 trust that is supposed to be there to encourage  
2 candour was seriously and profoundly breached by  
3 the conduct of the Government of Canada.

4 Now, you can ask yourself whether  
5 Mr. Pardy was justified in handing those reports  
6 in order to get the Mounties to stand down,  
7 because ultimately, and in cross-examination, I  
8 think he was clear that he wasn't relying on a  
9 consent. The consent wasn't informed. There's no  
10 suggestion it was informed. What Mr. Pardy had  
11 done was give them information so that he would  
12 stand down and not interfere with his consular  
13 mandate and prevent his return to Canada by going  
14 over there and causing the same trouble that CSIS  
15 had caused.

16 We ask you if you will consider  
17 condemning the practice of creating a breach of  
18 trust here, or a serious violation of the promise  
19 held out to Canadians.

20 I'm going to submit to you as  
21 well, Mr. Commissioner, that every lawyer who has  
22 a Canadian citizen in a foreign jail relies on  
23 consular assistance to facilitate the  
24 communication.

25 It is inconceivable that it is

1 permissive under the Privacy Act, and I have  
2 searched for the sections that would give it, and  
3 I can assure you I cannot find a justification in  
4 the Privacy Act where this kind of exchange of  
5 information, without informed consent and without  
6 information being passed back to the Privacy  
7 Commissioner, is justified.

8 Now, I want to turn -- to touch  
9 upon an area my colleague, Mr. Waldman, touched  
10 upon, but do it so in my time frame.

11 I want to touch upon the offer to  
12 provide information made by the RCMP to Syrian  
13 Military Intelligence, and we deal with that,  
14 Mr. Commissioner, commencing at page 175, but in  
15 particular, I'm going to look at paragraph 131 and  
16 thereafter.

17 THE COMMISSIONER: Paragraph ...

18 MS EDWARDH: I'm sorry, 431 and  
19 therefore. Page 175.

20 THE COMMISSIONER: Yes. I have  
21 it.

22 MS EDWARDH: This, of course, is  
23 the telephone conversation between James Gould of  
24 ISI that takes place with Inspector Cabana, the  
25 head of A-OCANADA investigation, on the day that

1 Mr. Arar is found in Syria.

2 And we know that Inspector Cabana  
3 indicates that the RCMP is willing to share  
4 intelligence, but what I want you to note is that  
5 it's not just willing to share information and  
6 intelligence, he says:

7 "If the Syrians feel it would  
8 assist the Syrian  
9 investigation ..." (As read)

10 And that's important because we  
11 know how the Syrians investigate, and it is an  
12 important fact for you to consider when you assess  
13 this type of information-sharing, because  
14 Inspector Cabana doesn't have a clue about the  
15 Syrian human rights record, never sought advice  
16 and never obtained it. Remarkably, even when he  
17 knew, he didn't care.

18 And I suppose, as Mr. Arar points  
19 out to me, he's like Ambassador Pillarella, who  
20 even though -- even had he known by knowing  
21 about -- he knew about El Maati, the Ambassador  
22 said it would make no difference, that information  
23 didn't cause, or wouldn't have caused, either to  
24 stay their decision.

25 So I want to turn very briefly

1 then to the issue of the RCMP and whether or not  
2 their conduct could be regarded as impeding the  
3 efforts of Foreign Affairs to secure the release  
4 of Mr. Arar by refusing to cooperate and sign the  
5 letter.

6                   It's a sorry saga, in my  
7 respectful submission, Mr. Commissioner, that  
8 there were eight months of negotiations between  
9 the Department of Foreign Affairs and the RCMP.

10                   The RCMP in all respects resisted  
11 any letter that would have been truly helpful, and  
12 indeed ultimately proposed language they knew  
13 would be counterproductive.

14                   When you come to assess their  
15 role, I ask you to note the memo of Mr. Pardy that  
16 we, of course, found to be so important, and we  
17 describe its relationship to this issue at page  
18 185. Mr. Pardy, who is a man who I think you must  
19 give considerable credit to for his efforts in  
20 this regard, Mr. Pardy was very clear that both  
21 CSIS and the RCMP wouldn't provide any direct  
22 support in circumstances where they knew that  
23 their support could be useful.

24                   I'm just trying to do some  
25 collapsing here, Mr. Commissioner.

1                   Their perspective on the matter I  
2 think is amply shown by the fear expressed in the  
3 briefing note to Commissioner Zaccardelli, where  
4 what was waved before him was the spectre of  
5 political embarrassment, the spectre of what we  
6 over on this side now call the Khadr effect.

7                   We ask you to find that the  
8 conduct of the RCMP amounts to a direct  
9 obstruction in the steps taken by DFAIT to bring  
10 Mr. Arar home.

11                   We also make the same observation  
12 at paragraph 471 with respect to CSIS. It's in  
13 another part of the submission. The position  
14 taken by CSIS we know on the issuance of the joint  
15 letter is really very similar to that taken. At  
16 best you can describe CSIS as indifferent, but we  
17 think there's evidence upon this record to find  
18 they actually wanted Mr. Arar to stay.

19                   The recommendation on  
20 May 12th, 2003, made to the Solicitor General by  
21 CSIS, was that the Solicitor General should not  
22 sign a joint letter.

23                   And although it is typical for  
24 those of us who are representing Mr. Arar --  
25 there's a lot of redactions on this document -- it

1 is very obvious that CSIS had a principal and  
2 major concern that the U.S. Government may  
3 question Canada's motives and resolve in relation  
4 to the war on terror.

5 Better to let the Department of  
6 Foreign Affairs do its own thing, but don't, for  
7 goodness' sake, undermine any sense that CSIS is  
8 totally committed to the U.S.

9 And again we point out there are  
10 three specific concerns that Mr. Hooper  
11 identified, that really amount to a clear and  
12 precise message. We set them out at 473,  
13 paragraph 473.

14 Don't bring this man home. Don't  
15 bring him home because the Americans will  
16 question. Don't bring him home because he and  
17 other detained Canadians would put a strain on  
18 CSIS resources -- we'll do it, but it's still  
19 expensive. Don't bring him home because if you  
20 bring him home acknowledging torture, then we will  
21 not be able to remove people in the deportation  
22 process, or it will be very difficult to effect  
23 that removal if we are sending people to Syria.

24 Mr. Commissioner, at page 188, we  
25 deal with the other side of this coin that we have

1 found so troubling, where it is clear that we know  
2 the Department of Foreign Affairs didn't give any  
3 information to Mr. Arar, his defence counsel, or  
4 to military intelligence with the objective of  
5 helping him, but, in fact, we also think it  
6 important to draw to your attention that the  
7 absence of this information doesn't sit because  
8 the Deputy Commissioner has said that one of the  
9 roles of the Mounties is to give information to  
10 assist in discharging a consular mandate.

11 If they had the alleged confession  
12 and they put it into the hands of a lawyer who  
13 was, as General Khalil said, entitled to resist  
14 the truth of the interrogation -- Mr. Arar didn't  
15 have to sign off on the interrogations at the  
16 upcoming trial -- if that had been put in the  
17 hands of the embassy to hand to Mr. Arar and his  
18 counsel, or to his counsel, behind the backs of  
19 the Syrians, it would have been a first step in  
20 showing some step of arming whoever was going to  
21 represent Mr. Arar with a piece of information  
22 that could help.

23 And Mr. Pardy made it clear that  
24 that was the role of consular affairs. Deputy  
25 Commissioner Loeppky made it clear that it was the

1           role of the RCMP to support the discharge of that  
2           mandate.

3                           And the question you have to  
4           answer is: Why, in this case, unless the  
5           description of that role by Mr. Pardy, the  
6           Director, and the Deputy Commissioner, is not  
7           truthful -- and I don't suggest that -- why didn't  
8           it happen?

9                           Is it because that once the label  
10          of national security went on, once CSIS was  
11          interested, that all of these entities and persons  
12          backed away from their obligation?

13                           But certainly back away they did,  
14          Mr. Commissioner.

15                           And we set out in that section the  
16          various kinds of information that might have  
17          reasonably been examined by the Department, with  
18          Mrs. Arar's assistance, things as simple as, look  
19          at the question of whether he had any connection  
20          to the Muslim Brotherhood -- those kinds of  
21          issues.

22                           And I believe, although Mr. Pardy  
23          later changed the date, that the only time  
24          Mrs. Arar had some of those conversations were  
25          late in August, weeks before Mr. Arar was



1 released. Not enough time to do the work that had  
2 to be done or could have been done.

3 So what we say, and I believe very  
4 strongly in this recommendation that's set out at  
5 189, as part of the analysis, we need an  
6 interagency mechanism.

7 There must be a mechanism so that  
8 defence information in the brief of the  
9 government, somewhere in its files, can, in fact,  
10 be properly handed over so that a fair trial can  
11 come out of the process if one is to be fair at  
12 all, and I'm addressing that issue to the future.

13 I want to make this observation  
14 too, and I think it's quite important for you to  
15 consider, because you can excuse a lot when people  
16 say, "You know, I didn't know. I never thought  
17 about that as an issue. I didn't know about  
18 Syrian Military Intelligence. It's horrific what  
19 they're saying." But I want to make this clear,  
20 that there was a concerted intergovernmental  
21 effort to get information about Mr. Arar from the  
22 Syrian Military Intelligence after he left.

23 There are a series of steps taken  
24 in the Department. Indeed, the Department is  
25 asking CSIS, CSIS is asking the Mounties, everyone

1 is wondering, have, in fact, the Syrians given  
2 over the major part of the file they promised when  
3 they released Mr. Arar?

4 Well, Mr. Commissioner, if that  
5 isn't a piece of evidence that you want to say,  
6 "Shame." Because, you see, by this time, they all  
7 knew. By this time, Léo Martel had briefed them  
8 on October 7th. Shortly thereafter, Mr. Arar  
9 spoke publicly. He had met the Minister.

10 And so when you really assess the  
11 conduct of the Government of Canada and the  
12 professed concerns they had to either help him or  
13 they were not alive to things, the true answer is:  
14 They didn't care. And when they knew it, they  
15 didn't care either. They acted in disregard of  
16 the knowledge that they're now fixed with about  
17 his torture and the conditions of his confinement.

18 You can only say that there is one  
19 choice we, as a society, have: We can't say, or I  
20 certainly submit we don't want to say, that  
21 there's a little bit of truth that may come out of  
22 torture. Sometimes people might tell the truth.  
23 We can't tell when they're telling the truth and  
24 we can't tell when they're lying.

25 My respectful submission to you

1 is, turn your face resolutely against that  
2 submission. It is an invitation to the most  
3 insidious destruction of values that our legal  
4 system is based on.

5 The record is replete with  
6 opportunities where those who we trust to engage  
7 in law enforcement could have discussed the issue  
8 of torture, could have worried about the  
9 credibility of information, could have consulted  
10 others to say, "What are the reasonable things we  
11 ought to consider when we assess the reliability  
12 of information?"

13 And we point out at paragraph 453  
14 that what's shocking particularly about the  
15 November 6, 2002, interagency meeting, where  
16 they're discussing the bout de papier, is that it  
17 seems clear that no one really raised directly the  
18 question: Are we looking at information that is  
19 the product of torture?

20 Let me jump to -- I may have  
21 jumped a little too fast over some of this. A  
22 couple of other areas, if I could, in the last 15  
23 minutes I have, Mr. Commissioner.

24 Let us begin by acknowledging that  
25 our dancing card has been empty when it comes to

1 CSIS. We know little, of anything, that they did.  
2 We have the occasional utterance by Government  
3 counsel trying to frame the limited amount of  
4 information we have.

5 We know they went there. We know  
6 they may have discussed Mr. Arar. We don't know  
7 much more than that except someone at CSIS was  
8 probably inclined to leak information to the media  
9 to tell us as well that they were there to make an  
10 arrangement.

11 We ask you, in light of the letter  
12 written confirming the Travers article as being a  
13 breach of confidential information, to make a  
14 finding that that's what they were there to do, as  
15 well as to share or discuss Mr. Arar.

16 Mr. Waldman has opined enough on  
17 the issue of this kind of information-sharing, but  
18 I wanted to make the observation that there is  
19 this evidence that they want a more formal,  
20 ongoing arrangement.

21 It's like a bargain with the  
22 devil. You know, you can't but become complicit  
23 in their world by such an arrangement. You can't  
24 but fail to encourage them when you ask for  
25 information. You can't but fail to be complicit

1 in their means when you give them information to  
2 help them in their investigations.

3 We touch in our submissions on  
4 CSIS and the misinformation that somehow the  
5 Government of Syria and the Department of Foreign  
6 Affairs had in respect of CSIS's wishes about  
7 Mr. Arar, and I just wanted to underscore, because  
8 I think it has been touched upon by others,  
9 Mr. Gould's observation.

10 Even if the message, as of  
11 January, was clearer -- and we don't have access  
12 to the confidential information -- there is an  
13 underbelly, Mr. Commissioner, that's very  
14 troubling and reflected in Mr. Gould's  
15 observations of CSIS. It wasn't an observation  
16 about one statement or one meeting; it was an  
17 observation based upon days and months of meetings  
18 that they did not want Mr. Arar back in Canada.

19 It is my submission to you that it  
20 is wrong to think that they would not have  
21 communicated that message to those who are their  
22 American colleagues and even those in Syria. I  
23 respectfully think it's incredible to think that  
24 they could give the impression to everybody else,  
25 but the Syrians, had it all cleared up in mid

1           January.

2                               I want to touch on just two other  
3           areas before I sit down. I want to talk about the  
4           leaks. Mr. Waldman has talked about the pain  
5           those leaks caused at a human level for Mr. Arar,  
6           his family, his friends, and I want to talk about  
7           them in one other context, very briefly.

8                               The leaks are designed to  
9           interfere with the political process. They are  
10          designed to undermine public discussion and to set  
11          an agenda that is not, in my respectful  
12          submission, one that should ever be countenanced.

13                              These aren't the whistle-blowing  
14          leaks of someone who is concerned about some  
15          wrong-doing that has gone on. These are the  
16          whistle-blowing, if you want to call them that,  
17          leaks of manipulation; and as my colleague,  
18          Mr. Waldman, put it, the faceless accusations,  
19          designed to irrevocably change our perceptions of  
20          Mr. Arar, to want to be protective of the work of  
21          the RCMP. They're designed to undermine any  
22          meaningful public discussion of what has happened.

23                              And when you approach the question  
24          of those leaks, I want you to be mindful of the  
25          concern that they were, in fact, undertaken not

1           only to hurt him but to hurt the most fundamental  
2           of processes, the ones we respect in a democratic  
3           society.

4                                Lastly, Mr. Commissioner, and just  
5           for a few minutes, I want to take you to page 225,  
6           where we touch upon, and I'm sure there are many  
7           more examples, and the record may be replete with  
8           others that we should have brought to your  
9           attention but we were giving out at this stage,  
10          and we are concerned about the very character of  
11          modern government.

12                              As Professor Hogg, a man whose, I  
13          think, work we can all regard highly, has  
14          commented, that responsible government and  
15          parliamentary democracy really do depend on  
16          Ministers being given timely, accurate information  
17          so they can provide leadership to their  
18          departments and so that they can be accountable to  
19          the Parliament of Canada.

20                              We have looked at this record, and  
21          we find there to be very troubling examples of a  
22          failure to provide accurate and timely information  
23          to the Ministers.

24                              One is tempted to dismiss the  
25          problem with the Solicitor General Wayne Easter by

1 coming to the conclusion that, really, he didn't  
2 know anything. I mean, he gets a briefing, in a  
3 detailed way, when Mr. Arar returns home. I mean,  
4 that's almost humorous if it weren't so tragic.

5 What has happened, in my  
6 respectful submission, is the police are now using  
7 the necessary distance they must keep to prevent  
8 political interference, to render the Minister  
9 impotent, and to take from him the power to give  
10 meaningful directives.

11 Why isn't the Minister involved in  
12 decisions about a relationship and  
13 information-sharing with Syria? Why isn't the  
14 Minister involved in deciding whether all caveats  
15 are not down? I mean, there's just an entire  
16 absence of political leadership and accountability  
17 to Parliament.

18 We find and urge upon you to  
19 conclude that some of it is deliberate.

20 And then we go to Minister  
21 Graham -- oh, I want to make one other  
22 observation.

23 We know there has been a  
24 November -- we set it out at page 238 -- a note, a  
25 direction given by the Solicitor General, saying,



1 "There will now be -- now Mr. Arar's home and now  
2 that there's huge embarrassment about the fact I  
3 didn't have a briefing, there will now be  
4 briefings."

5 But look in whose discretion it  
6 is. It's in the discretion of the very same  
7 people, the RCMP, who did not bring this matter  
8 forward, did not bring the policy parts forward,  
9 did not get the direction they should have gotten.

10 I ask you to consider whether the  
11 discretion belongs to the Commissioner, or should  
12 you send this recommendation back to them for  
13 reconsideration of whether or not that gives the  
14 Minister the necessary control so that he can be  
15 or she can be political accountable to the  
16 Parliament of Canada.

17 Mr. Graham is a whole other  
18 problem because his briefings, and you have  
19 information before you, often failed to give him  
20 accurate information. And the other part of his  
21 problem, as he put it, was he couldn't get  
22 detailed operational information.

23 And in this section, we explore  
24 the issue of placing the Minister of the Crown on  
25 a lower footing than Mr. Cellucci or Colin Powell.

1           What does it mean when you have to assert your  
2           rights as a nation and your Minister isn't  
3           carrying a full page?

4                         In my submission to you, it dooms  
5           that Minister largely to be ineffectual, unless he  
6           can be armed with specifics when he needs them.

7                         Then we come to the decisions made  
8           by the Department. I think it was very troubling  
9           that when Mr. Arar was told he might go to Syria  
10          when he was in New York, no one raised it at  
11          higher levels even within the Department. It  
12          never left Consular Affairs, as best we can  
13          determine.

14                        It went to Mr. Pardy. But it  
15          didn't go to the Minister. The Minister was never  
16          told, "There is this risk" or "This is being said,  
17          and we can't measure the risk."

18                        And the interesting thing is,  
19          although he would not be critical of consular  
20          officials, he did say that, had he known, it could  
21          have made a difference. He did say that's why he  
22          was prepared to sign on to the Monterrey Protocol.  
23          It's not binding. It invites high-level  
24          discussion. And his belief was apparent before  
25          you, that once it's in that level, it will go to

1 the highest level. There will be discussions, and  
2 no Canadian citizen will be deported to a third  
3 country like Syria.

4 So if you take the Monterrey  
5 Protocol and measure it against the significance  
6 of not bringing it to the Minister's table, we  
7 think you will find that that was a very serious  
8 omission, even if they couldn't assess the full  
9 risk.

10 Then we go to the Minister's  
11 comments about the October 23rd consular report.  
12 You will recall he said, "I was told -- I was told  
13 that he was healthy." And when we put to the  
14 Minister what the report actually said, he said,  
15 "Well, I wouldn't have said he was healthy. I  
16 wouldn't have said that to a Canadian public. I  
17 would have said, 'We're not able to comment at  
18 this time.'"

19 So we have, on an extremely  
20 high-profile case, when many people are clamouring  
21 for specific information, we have misinformation  
22 going to a Minister of the Crown who is  
23 accountable to Parliament; and we want to  
24 underscore how frightening that is in a  
25 parliamentary democracy, because if that Minister

1           doesn't know, he will never be accountable and we  
2           are in a situation where you have to say, Who  
3           makes the foreign policy? Is there a parallel  
4           foreign policy? And if so, does the Minister even  
5           know?

6                           I have just two more minutes, and  
7           I want to talk about a matter that is really a  
8           part of my conclusion, and we, of course, leave to  
9           you the details of our submissions, they are  
10          lengthy, and invite you to give them, and what we  
11          are confident will be, your careful consideration.

12                           It won't surprise you,  
13          Mr. Commissioner, that Mr. Waldman and I, Ms Davis  
14          and Ms Parnes, all take the view that there are  
15          many errors, omissions, and failures, and that we  
16          have tried to begin to chronicle them. We also do  
17          not take the view that there should be no  
18          accountability.

19                           We have one principal  
20          recommendation that we would like to make at the  
21          end of our submissions. Mr. Waldman referred to  
22          the first two.

23                           We ask, when you sit down and look  
24          at this entire affair, that you recommend to the  
25          Government of Canada that they set up a mechanism

1           where, looking at the economic, psychological, and  
2           other losses occasioned with Mr. Arar's rendering  
3           and detention in Syria, and given your assessment  
4           of the roles of the Canadian officials, that they  
5           look at a mechanism to provide compensation to  
6           him.

7                           This is not a new request.  When  
8           the Nova Scotia government, for the first time in  
9           Canada, decided to look at a wrongful conviction,  
10          they looked at Junior Marshall, and at the end of  
11          the Commission of Inquiry, they said, "We ask the  
12          Government of Nova Scotia to set a mechanism to  
13          determine some quantum of compensation."  So too  
14          with Mr. Morin.  So too with Mr. Sophonow.

15                          We ought not, as a civilized  
16          society, simply let Mr. Arar be collateral damage.  
17          That would be wrong to do.  And to that end,  
18          Mr. Commissioner, we would ask that such a  
19          recommendation be made.

20                          Thank you.

21                          THE COMMISSIONER:  Thank you very  
22          much, Ms Edwardh.  That's very helpful.

23                          Okay.  Well, we'll rise until  
24          2:15, and we'll start with the Government's  
25          submissions at that time.

1 THE REGISTRAR: Please stand.

2 --- Upon recessing at 12:57 p.m. /

3 Suspension à 12 h 57

4 --- Upon resuming at 2:17 p.m. /

5 Reprise à 14 h 17

6 THE REGISTRAR: Please be seated.

7 THE COMMISSIONER: Ms McIsaac?

8 MS McISAAC: Good afternoon, sir.

9 THE COMMISSIONER: Good afternoon.

10 SUBMISSIONS

11 MS McISAAC: I thought I'd begin  
12 my submissions this afternoon by giving you a  
13 brief outline of how we propose to proceed with  
14 those submissions.

15 Firstly, as you aware, we have  
16 filed written submissions. They are organized in  
17 seven chapters. There is an overview, and then  
18 for each of CSIS, the RCMP, and the Department of  
19 Foreign Affairs, there is a summary of the public  
20 evidence as well as a chapter which attempts to  
21 discuss for you the issues, as we understand them,  
22 with respect to each of those departments.

23 Partly because of time constraints  
24 we have stove-piped our submissions a little bit,  
25 but obviously, there is a fair bit of overlap at

1 various stages.

2 I will have some opening remarks  
3 which will roughly correspond with the matters  
4 addressed in our overview. Then my colleague,  
5 Mr. Fothergill, is going to deal with the evidence  
6 and issues related to the RCMP, up to and  
7 including Mr. Arar's incarceration in New York and  
8 his removal to Syria.

9 I will then review the involvement  
10 of CSIS, up to and including New York, the  
11 Department of Foreign Affairs in New York, and  
12 events in Syria.

13 We have done it this way because I  
14 think as we move into the period of time when  
15 Mr. Arar was incarcerated in Syria, the roles of  
16 the various departments tend to overlap and be  
17 subsumed to some extent in the lead role played by  
18 the Department of Foreign Affairs, so I hope  
19 that's a logical way for us to present it to you.

20 Before we start, there are two  
21 important points that I want to make at the outset  
22 on behalf of the Government of Canada.

23 The first one is that what  
24 happened to Mr. Arar is unacceptable. It was  
25 unacceptable for a Canadian citizen travelling on

1 his Canadian passport, who is arrested and  
2 detained in New York City, to be subsequently  
3 deported to Syria, or indeed any other country,  
4 when that Canadian citizen wanted to be removed to  
5 Canada and Canada would have accepted that person  
6 as a Canadian citizen.

7 It was equally unacceptable that  
8 Mr. Arar should then be held in a Syrian prison  
9 for close to a year, no charges laid against him,  
10 no indication to him of what the actual charges  
11 were or were considered, and clearly and  
12 unequivocally an individual in the situation of  
13 Mr. Arar should not be subjected to torture,  
14 abuse, or any kind of inhumane treatment.

15 I think there is absolutely no  
16 question or disagreement on any of those points.

17 This is, however, an inquiry into  
18 the actions of Canadian officials. Your terms of  
19 reference request you to look into the conduct and  
20 actions of Canadian officials as it relates to  
21 what happened to Mr. Arar, and without in any way  
22 diminishing what happened to Mr. Arar, or  
23 denigrating what happened to Mr. Arar, the focus  
24 of this inquiry, in a number of ways, has to be  
25 what role, if any, the Canadian officials, who are



1 the subject of the inquiry, played in Mr. Arar's  
2 ordeal.

3 We are confident that, upon a full  
4 review of the evidence, that it shows two things:  
5 First of all, that Canadian officials did not  
6 encourage, condone, or participate in the decision  
7 made in New York City to deport Mr. Arar to Syria  
8 rather than to have him return to Canada or  
9 possibly back to his point of embarkation.

10 We also submit to you that the  
11 evidence, again on a fair and thorough analysis,  
12 does not demonstrate any pattern of Canadian  
13 officials engaged in some sort of process of  
14 outsourcing torture, and we will be addressing the  
15 evidence in this regard as we move through our  
16 submissions.

17 Before we do that, though, I think  
18 that it is important, because of the nature of  
19 this inquiry, for me to make some remarks with  
20 respect to the public versus the in camera nature  
21 and the position of the Government of Canada with  
22 respect to those issues.

23 This is a public inquiry and you,  
24 sir, have no doubt been put in an extremely  
25 difficult position, to conduct a public inquiry

1           when that inquiry necessarily involves the review  
2           of an active police investigation, discussion of  
3           matters involving international relations, and our  
4           discourse with allies and other countries and  
5           involves review of national security  
6           investigations. It is inevitable that in a case  
7           like this, we have to make compromises, and that a  
8           public inquiry can only be held if there is a  
9           recognition that some of the information that you  
10          will require must be dealt with in camera.

11                         But I do stress again, because  
12          it's important for the public to understand, that  
13          though there have to be limits to the public  
14          nature of the inquiry, you and your counsel team  
15          have had unfettered access to documents,  
16          witnesses, and information that you deemed  
17          necessary for you to fulfil your mandate.

18                         It has been a difficult process  
19          for all of us. In many ways, I don't think there  
20          has ever been a process like this, certainly not  
21          in Canadian legal experience.

22                         The Government and your amicus,  
23          Mr. Atkey, whose job is to advise and assist with  
24          respect to issues of national security, have, I  
25          understand, been in broad agreement with respect

1 to the principles that should underlie situations  
2 where information has to be maintained in  
3 confidence.

4 As I understand it, where we  
5 really disagree is with respect to the application  
6 of those principles to particular documents and  
7 particular information.

8 This is a difficult process. And  
9 I assure you and I assure the Canadian public that  
10 the Government has not used the National Security  
11 Confidentiality issue in order to hide  
12 embarrassing information. As I say, national  
13 security and the application of the principles to  
14 particular documents is a difficult process.

15 National security is not some  
16 abstract principle. National security effectively  
17 means the safety of Canadians here in Canada and  
18 abroad, and it's not always easy to determine what  
19 information, if released, will have the effect of  
20 compromising the safety of Canadians.

21 We don't want to find ourselves in  
22 a situation down the line, and there isn't always  
23 a direct correlation between information released  
24 today and something happening tomorrow, of an ally  
25 or a body or another country from which we require

1 important information, takes the position, "You  
2 know, those Canadians, they can't keep a secret."  
3 They may be more circumspect in what they share in  
4 the future. They may unwittingly not share a  
5 vital piece of information, and that vital piece  
6 of information could be the last piece of a puzzle  
7 that helps avert some catastrophic event which  
8 could implicate the safety of Canadians or,  
9 indeed, anyone in the world.

10 Those are the kinds of issues we  
11 have tried to grapple with. No doubt we have made  
12 mistakes. In fact, I know we have made mistakes.  
13 We have probably erred from time to time on being  
14 overinclusive. However, I hope, sir, that when  
15 mistakes, questions, issues, have been brought to  
16 our attention, that the counsel team has moved to  
17 deal with those and to attempt to rectify errors,  
18 if they have been made, and to correct if we have,  
19 in fact, been overinclusive.

20 As we move forward through this  
21 process, no doubt we will have other issues  
22 relating to national security, and we look forward  
23 to having a constructive dialogue with the  
24 Commission and with Mr. Atkey in order to achieve  
25 this difficult process of translating the general

1 principles to the actual documents.

2 One of the results of the fact  
3 that some of the evidence has had to have been  
4 received in camera is that there are some areas  
5 that could not be fully canvassed in public,  
6 either because of national security concerns or  
7 because, as you recognized, if you can only tell  
8 part of the story sometimes, it is better not to  
9 tell that part because it can be misleading and  
10 unfair, and I'm thinking particularly of your  
11 ruling with respect to the evidence of Inspector  
12 Cabana.

13 I think that leads me to caution,  
14 as I know you would yourself, sir, the Canadian  
15 public not to jump to conclusions with respect to  
16 the evidence if, in fact, only part of it is  
17 available, and it would be unwise to be  
18 speculating too much with respect to areas where  
19 necessarily evidence could not be heard in public.

20 But there are vital areas where,  
21 in my submission, there are no gaps, and the  
22 public record is complete.

23 Canadian officials may have made  
24 mistakes from time to time. We all make mistakes.  
25 But in my submission, as I said earlier, there is

1 no evidence, in our submission, that anybody acted  
2 in bad faith. There is no evidence that any  
3 Canadian official knew that Mr. Arar would be  
4 removed from New York in the middle of the night,  
5 in secret, on a specially chartered aircraft with  
6 his lawyer not being present and delivered into  
7 the hands of the Syrian government. No Canadian  
8 official, in my submission, condoned or acquiesced  
9 in that.

10 And when Mr. Arar was acknowledged  
11 to be in Syria, no Canadian official acquiesced in  
12 his continued detention in Syria. In fact, quite  
13 the opposite. They did not condone his  
14 incarceration, they did not condone ill-treatment,  
15 and from the consular officer to the Minister to  
16 the Prime Minister, efforts were made to secure  
17 Mr. Arar's release.

18 The trouble that we must not lose  
19 sight of is that Mr. Arar was a dual national, and  
20 the fact that his dual nationality played an  
21 important role in what Canada and Canadian  
22 officials were realistically able to do.

23 In our submission, on a fair  
24 review of the evidence, in consideration of those  
25 circumstances, the conclusion should be reached

1           that if we pushed too hard, consular access might  
2           well have been cut off, and, in fact, at points in  
3           time it was cut off, and we will canvass the  
4           evidence in more detail later, but in our  
5           submission, the consular officials, both in Ottawa  
6           and on the ground in Damascus, were faced with a  
7           very difficult balancing act as to how far to push  
8           in order to maintain contact with Mr. Arar and yet  
9           not lose that vital contact. How much could they  
10          do?

11                            Another point that I want to make  
12          before we look at the evidence is that we cannot  
13          lose sight of the broader or larger picture. We  
14          have been looking at the circumstances of Mr. Arar  
15          for, well, close to two years now, in terms of the  
16          documents and the evidence, the public and the  
17          in-camera hearings, and I think it important for  
18          you, sir, not to lose sight -- and I know you  
19          won't lose sight -- of the broader picture, that  
20          Mr. Arar's ordeal did not occur in isolation of  
21          world events. We're not hiding behind world  
22          events, we're not erecting a shield, as  
23          Mr. Waldman suggested, we're not using world  
24          events as an excuse. We're simply saying that  
25          when evaluating what people knew, what people did,

1           what people were thinking, the judgment calls that  
2           people made, please don't forget that they were  
3           operating in a context that played a large role,  
4           in our submission, in what was happening.

5                           First of all, 9/11 clearly had a  
6           profound impact on the United States. It did on  
7           the entire world, but particularly on the United  
8           States. American officials have declined to  
9           participate in your hearing, and likely we will  
10          never know for sure what happened in New York from  
11          their point of view, why they made the decisions  
12          they made. But we can make some informed  
13          observations, and we would urge you to keep these  
14          observations in mind.

15                           You know, in retrospect, we may  
16          have underestimated, Canada may have  
17          underestimated, the angst and anxiety suffered by  
18          American officials. We were in a position where,  
19          leading up to the Ressam case, there was a  
20          persistent misapprehension that somehow Canada was  
21          responsible for what had happened in 9/11. There  
22          was this persistent rumour and misapprehension  
23          that somehow the 9/11 hijackers had arrived in the  
24          United States from Canada. Canada was seen, for  
25          some unknown reason, as the weak spot in North



1 America.

2 The U.S. had been on high alert  
3 for some time prior to the events in September of  
4 2000 involving Mr. Arar.

5 We can't ignore the global stage  
6 either. As we have discussed in our overview, and  
7 I won't go through it in great detail,  
8 knowledgeable commentators have remarked about the  
9 unusual relationship that Syria had with the CIA  
10 for a period of time leading up to the Iraq war  
11 and the passage by the United States Congress of  
12 the Syrian Accountability Act, and I refer you  
13 particularly to Mr. Hirsch's comments in his book  
14 "Chain of Command."

15 Again, Syria has declined to  
16 participate in these proceedings, and again, we  
17 will not know for sure what motivated the Syrian  
18 authorities to accept Mr. Arar, to detain Mr. Arar  
19 for as long as they did, and eventually to release  
20 him. But we have to recall that all of this  
21 occurred during a period when Syria was becoming  
22 increasingly isolated. The world was focussed, on  
23 the fall of 2002, on the events in the United  
24 Nations and the question of whether or not Iraq  
25 had weapons of mass destruction; the question of

1           whether or not the United States alone, or with  
2           its allies, or whether under some kind of U.N.  
3           sanction, should invade Iraq; and, in fact,  
4           partway through Mr. Arar's incarceration, Iraq was  
5           invaded, and that clearly would have had some  
6           effect on the concentration of the Syrians, the  
7           attention of the Syrian authorities to Mr. Arar,  
8           or to anything Canada was saying.

9                           There's also a suggestion that by  
10           the latter part of 2003, the Syrian view of their  
11           relationship with the Americans had started to  
12           deteriorate. Syria was lumped by President Bush  
13           as part of the axis of evil, and as I indicated,  
14           there was the Syrian Accountability and Lebanese  
15           Sovereignty Restoration Act. Clearly the  
16           administration, at least, was not keen on  
17           developing or continuing any kind of constructive  
18           relationship with Syria.

19                           In October of 2002, we had the  
20           Bali bombing; the second shoe, if you will,  
21           dropping.

22                           In light of all of this, there are  
23           world events out there that, in our submission,  
24           had to have some effect on what is happening, and  
25           obviously had to play some role in the

1           determinations that Canadian officials were  
2           making. There is a global picture, and we simply  
3           urge you, sir, in reviewing the evidence, please  
4           don't lose sight of that global picture.

5                         Finally, before I move on to some  
6           brief comments with respect to the legal context,  
7           I would like to make a comment with respect to  
8           leaks.

9                         First of all, we agree that the  
10          issue of leaks of information, either during,  
11          obviously, but presumably the leaks that occurred  
12          after Mr. Arar returned to Canada, are within your  
13          mandate if you wish to inquire into those leaks.  
14          The only caution we would have is that there is an  
15          ongoing police investigation pursuant to the  
16          Security of Information Act, and there are ongoing  
17          court proceedings before the Ontario Superior  
18          Court with respect to the search warrants that  
19          were issued, and my understanding is that there is  
20          still an issue with respect to whether or not  
21          those search warrants should be quashed and  
22          whether or not information seized or in the course  
23          of those warrants would be available to the police  
24          or not, and that's a proceeding that is unfolding  
25          in the Ontario Superior Court. So any comments

1           that you might have with respect to, particularly,  
2           the leak to Juliet O'Neill must of course take  
3           into account the fact that those proceedings are  
4           outstanding and your involvement must be  
5           compatible with what is happening in the courts.

6                         Now, I'd also like to take a few  
7           moments, as counsel for the Attorney General, to  
8           make some observations with respect to the legal  
9           framework for Commissions of Inquiry, and I know  
10          I'm not doing these for you, sir, or for your  
11          counsel, I am doing them for the public record, so  
12          that there is some understanding of the nature of  
13          a Commission of Inquiry, and the legal context is  
14          fleshed out in greater detail beginning at page  
15          11, paragraph 52, of our overview chapter.

16                        It's important, in my submission,  
17          for people to understand what an inquiry is, and  
18          perhaps, more importantly, to understand what an  
19          inquiry is not; and most importantly, an inquiry  
20          is not a trial. It has all the trappings, of  
21          course, of a trial. We have a judge presiding, we  
22          have lawyers, we have witnesses, we have  
23          examinations, we have cross-examinations, we have  
24          exhibits. But as we all know, you're not acting  
25          as a judge. You're actually part of the executive

1 branch of government for this period of time, and  
2 on behalf of the executive, you are making an  
3 inquiry and you will report back to the executive  
4 inquiry -- or, pardon me, the executive branch of  
5 government.

6 Now, the courts have had some  
7 important things to say about inquiries.  
8 Inquiries are, in fact, a very important part of  
9 our political context. The Supreme Court of  
10 Canada, in the Phillips Westray inquiry -- most  
11 people will be familiar with the inquiry into the  
12 mine disaster at the Westray mine -- stated:

13 "One of the primary functions  
14 of public inquiries is  
15 fact-finding. They are often  
16 convened, in the wake of  
17 shock ... disillusionment or  
18 skepticism, in order to  
19 uncover 'the truth'.

20 Inquiries are, like the  
21 judiciary, independent,  
22 unlike the judiciary, they  
23 are often endowed with  
24 wide-ranging investigative  
25 powers. In following their

1 mandates, commissions of  
2 inquiry are, ideally, free  
3 from partisan loyalties and  
4 better able than Parliament  
5 or the legislatures to take a  
6 long-term view of the problem  
7 presented."

8 And that's why inquiries, like the  
9 one you're engaged in, sir, often have two  
10 components to them.

11 For instance, there is the  
12 fact-finding component of part 1 of your inquiry,  
13 which involves you making findings of fact as to  
14 what happened and, no doubt flowing from those  
15 findings, various recommendations will recommend  
16 themselves to you with respect to how systemic  
17 issues can be dealt with, but also you have been  
18 given in this particular inquiry a specific  
19 mandate in part 2 to make some recommendations  
20 with respect to an oversight mechanism for the  
21 RCMP.

22 However, there are things that we  
23 need to keep in mind, because as we know,  
24 inquiries into the actions of government are not  
25 inquiries just into the actions of sort of an

1           amorphous thing. Governments are made up out of  
2           people and people do things. And in the context  
3           of the fact-finding process of an inquiry, a  
4           Commissioner is called upon to make findings of  
5           fact with respect to the actions of individuals,  
6           and clearly that is the case here. You are making  
7           findings of fact with respect to the actions of  
8           Canadian officials as they relate to Mr. Arar.

9                           And the Court in the Westray case  
10           was conscious of that issue and had the following  
11           to say:

12   "More importantly for the  
13   purposes of this appeal is  
14   the risk that commissions of  
15   inquiry, released from many  
16   of the institutional  
17   constraints placed upon the  
18   various branches are  
19   government, are also able to  
20   operate free from the  
21   safeguards which ordinarily  
22   protect individual rights in  
23   the face of government  
24   action. These are very real  
25   dangers that must be

1 carefully considered."

2 And I know, sir, that you have  
3 been more than conscious and more than vigilant  
4 about the need to exercise restraint, caution, and  
5 fairness with respect to individual witnesses and  
6 with respect to individuals who may find  
7 themselves the subject of adverse comment in your  
8 report when it is filed.

9 This inquiry is about Mr. Arar,  
10 yes. But more importantly, this inquiry is about  
11 Canadian officials. The focus of this inquiry, is  
12 what did Canadian officials do? These people are  
13 employees of CSIS, members of the RCMP, and  
14 employees of the Department of Foreign Affairs,  
15 and they have been accused of some very, very  
16 serious things. They have been accused of  
17 complicity in Mr. Arar's incarceration and  
18 deportation from New York; they have been accused  
19 of complicity in torture -- not by the Commission  
20 but by other parties in the media and such. And  
21 that raises a very high standard, in our  
22 submission, with respect to the fairness that  
23 these people are entitled to.

24 The public has to understand that  
25 these individuals are not on trial. These



1 individuals have been accused of some very serious  
2 things. But at the end of the day, you will be  
3 making findings of fact but you are not making  
4 findings of criminal responsibility or findings of  
5 civil responsibility.

6           You will no doubt, in the course  
7 of your findings, have to make comment with  
8 respect to things that went wrong, and I urge on  
9 you to recall, and I know you will, sir, that  
10 there are limits on where you should go with  
11 respect to findings of fault on the parts of  
12 individuals.

13           If an individual's miscalculations  
14 or faults do not relate to what happened to  
15 Mr. Arar, they are not essential for determining  
16 what happened to Mr. Arar, in my submission the  
17 Commission should avoid making findings of fault  
18 simply for the sake of making findings of fault.

19           I am not saying if it is necessary  
20 for you to make a finding that someone did  
21 something inappropriately, miscalculated, used the  
22 wrong judgment, and that finding is essential to  
23 your determination of what happened, and most  
24 importantly to your determination of  
25 recommendations that might prevent something like

1           this happening again, that you should not do so.  
2           I am simply cautioning that the role of a  
3           Commission of Inquiry is not to find fault for the  
4           sake of finding fault, the role of a commission of  
5           inquiry is to find out what happened, and in the  
6           context of finding out what happened, to determine  
7           how that should not happen again.  If it's  
8           necessary to lay blame somewhere to do that, then  
9           that may be done, obviously with the appropriate  
10          opportunity for that person to respond.

11                         We have set out in our submissions  
12          the general legal principles that we believe  
13          should guide you with respect to your  
14          deliberations and with respect to the formulation  
15          of your report, and I won't take any further time  
16          going through those particular recommendations.

17                         I think the important thing,  
18          though, at the end of the day, is to recall that  
19          since this is not a trial, you're not obliged to  
20          make conclusions.  If you don't have enough facts,  
21          as you may not have in certain circumstances,  
22          unlike a trial where the judge must choose between  
23          the plaintiff's position and the defendant's  
24          position, because in a trial we have to have a  
25          winner and we have to have a loser, a commission

1 of inquiry is different and it is not necessary --  
2 it is perfectly all right for a commission of  
3 inquiry to conclude that it cannot conclude, there  
4 is not sufficient evidence to reach any  
5 conclusions.

6 But your conclusions are going to  
7 be tremendously important and they're going to be  
8 tremendously important for the following reasons:

9 (1) The Canadian public deserves  
10 to have an understanding of what happened to  
11 Mr. Arar as best this Commission is able to  
12 determine it. For a number of reasons. One, they  
13 need to know what happened. They need to know if  
14 any Canadian official was, in fact, complicit in  
15 any way in what happened, either knowingly or  
16 unknowingly. But most importantly, they have to  
17 have the benefit of your recommendations and  
18 conclusions to the extent you're able to do so, to  
19 do the best we can to ensure that this doesn't  
20 happen to any other Canadian citizen and that we  
21 avoid anything that was done, that could be  
22 changed. That doesn't mean people knowingly did  
23 anything wrong, but it may be that in retrospect  
24 we decide that if things had been done  
25 differently, what happened could have been avoided

1 or, at the very least, ameliorated.

2 And that leads me to the final  
3 point that I'd like to make, sir, and that has to  
4 do with the practical context in which you are  
5 operating. I have already made reference to the  
6 fact that you don't have the whole story, at least  
7 two if not three very important players are here,  
8 we don't have American officials and we don't have  
9 Syrian officials, and to the extent that it would  
10 be helpful, we don't have Jordanian officials. So  
11 there is a large part of the story that we don't  
12 have.

13 Now, we can speculate, and I want  
14 to make an important point here. I don't believe  
15 that there's any reason why you can't reach an  
16 informed conclusion as to what might have happened  
17 or what you think may have been the cause of  
18 something. I do urge you, however, to be careful  
19 that you don't make findings of fault with respect  
20 to Canadian officials based on speculation. I  
21 think that would be unfortunate for them and it  
22 would be unfair to do that, and I know that you  
23 will be conscious of that, sir.

24 The other important context is  
25 that we're sitting here, in the comfort of this

1 room -- although it is getting a bit warm --  
2 several years later, looking back, and I think  
3 it's very important, as it is in all fact-finding  
4 exercises, to be careful that we don't judge the  
5 actions of individuals based upon what we know  
6 today with the benefit of hindsight. Judge the  
7 actions of individuals on the basis of what they  
8 knew, or reasonably could have known, or should  
9 have known, at the time they were making their  
10 decisions.

11                   However, hindsight can be used,  
12 and should be used, and must be used by you to  
13 make recommendations for the future. If we now  
14 know, looking back, that if something had been  
15 done differently there might have been a different  
16 outcome, that may not be the fault of the  
17 individual who made the decision at the time but  
18 the benefit of your comments for the future will  
19 be of great use to the future and to individuals  
20 who are called upon to make similar decisions in  
21 the future.

22                   So hindsight and the ability that  
23 you now have to second-guess decisions is useful  
24 in that context, but not, I would submit, in the  
25 context of judging the actions of particular

1 individuals.

2 So those are the opening comments  
3 of the Attorney General, and as I said,  
4 Mr. Fothergill is going to review the actions of  
5 the RCMP, both the evidence and some discussion of  
6 the issues, up to and including the point in time  
7 that Mr. Arar was removed from the United States.

8 THE COMMISSIONER: Thank you, Ms  
9 McIsaac.

10 Mr. Fothergill?

11 SUBMISSIONS

12 MR. FOTHERGILL: Commissioner, as  
13 Ms McIsaac explained, our submissions are divided  
14 into a series of chapters, and the evidence  
15 relating to the RCMP public witnesses is  
16 summarized in Chapter 4, and the submissions, the  
17 discussion of particular issues is described in  
18 Chapter 5. I'm going to be primarily basing my  
19 comments on Chapter 5. I will point to places in  
20 the evidence summary, where appropriate, but I  
21 think the Chapter 5, which is the shorter  
22 document, will provide a very clear road map of  
23 the sort of things that I would want to address.

24 I want to begin by continuing a  
25 theme that Ms McIsaac began, and that's to do with

1 context and the challenge that we all face in  
2 placing ourselves back in the position that the  
3 Canadian officials were when all these events were  
4 unfolding, and the importance of international  
5 events, specifically from the police perspective  
6 the events of September 11th, 2001, again echoing  
7 Ms McIsaac not really to provide an excuse so much  
8 as to provide an explanation, an insight, into why  
9 certain things unfolded in the way that they did.

10 So necessarily our discussion has  
11 to begin on September 11th, 2001, and the impact  
12 of that event on the national security program of  
13 the RCMP.

14 Now, one point that I think bears  
15 clarification is the mandate of the RCMP in  
16 respect of national security, because we have  
17 heard from time to time that one of the concerns  
18 raised by the Arar case is that perhaps the police  
19 were back in the security game, the game that they  
20 were supposed to get out of in 1984 as a result of  
21 the Macdonald Commission. But you will remember  
22 from our contextual evidence that the RCMP has  
23 always maintained responsibility for investigating  
24 threats to the security of Canada that are also  
25 criminal offences. Indeed, the Security Offences

1 Act which was brought into existence at the same  
2 time as the CSIS Act specifically gave the police  
3 that responsibility. CSIS has no enforcement  
4 power. That means that if CSIS uncovers a threat  
5 to national security that also happens to be a  
6 criminal offence, and if action must be taken to  
7 prevent that offence from occurring, or to  
8 investigate it after it has occurred, it must  
9 inform the RCMP. This is not a post-9/11  
10 phenomenon. We have some fairly prominent  
11 examples of RCMP involvement in national security  
12 investigations before 9/11, the Air India bombing  
13 being a very obvious case, and the Ressay  
14 investigation being another very prominent example  
15 of where the police were engaged in national  
16 security investigations before September 11th,  
17 2001.

18 What September 11, 2001, did,  
19 however, is it dramatically increased the  
20 significance of this aspect of the RCMP's  
21 investigation responsibility, and particularly  
22 amid fears of a second wave of attacks, because we  
23 must remember that there was some sort of  
24 intelligence -- and this is not confidential, this  
25 was widely publicized -- there was some



1 intelligence or suggestion that 9/11 may not be  
2 the end.

3 The police were put in a very  
4 demanding and stressful position of trying to  
5 assess the threat environment here in Canada and  
6 to do everything reasonably possible and within  
7 Canadian law to prevent the threat from actually  
8 turning into another catastrophe.

9 But we need to understand what  
10 infrastructure they had available at that time.  
11 Before September 11, 2001, the national security  
12 program of the RCMP was a relatively modest aspect  
13 of what they did. We had the Ressam case, yes,  
14 and we had the Air India investigation, but beyond  
15 that, we weren't particularly preoccupied with  
16 ideologically motivated crime in Canada. We had  
17 eco terrorism, we had some white supremacy, but  
18 what we now tend to refer to -- and I'm sorry that  
19 this is controversial for some people for me to  
20 use this phrase but it is frequently referred to  
21 as Sunni Islamic extremism -- this was not a very  
22 widely understood phenomenon in Canada before  
23 September 11, 2001.

24 Furthermore, we have to consider  
25 the manner in which the RCMP organizes itself,

1       which I don't think has changed fundamentally over  
2       the last five years in areas other than national  
3       security, but it is very interesting to see how  
4       it's evolved in matters of national security.  If  
5       we put ourselves back into the atmosphere of  
6       September 11, 2001, we had at that time, as we  
7       still do, 14 separate divisions of the RCMP with  
8       different regional responsibilities, and in each  
9       of those was something called the National  
10      Security Investigation Section, which tended to  
11      function more or less like any other section of a  
12      division.  There wasn't a great deal of central  
13      coordination.  Most of these 14 divisions  
14      functioned with a fairly high degree of autonomy,  
15      and these were not very large sections.  So there  
16      weren't a large number of investigators with prior  
17      experience of national security investigations.  
18      Even their superiors would not necessarily have  
19      been very familiar with RCMP policy regarding the  
20      conduct of national security investigations unless  
21      they had previously been involved in one, and as I  
22      said, they weren't all that common at that time.

23                   Quite apart from the investigation  
24      that we're primarily concerned with, Project  
25      OCanada in Toronto and subsequently Project

1           A-OCANADA in Ottawa, we had Project Shock, which  
2           was the response to September 11. The attempt by  
3           the RCMP to make sense of the new threat  
4           environment. They were inundated with  
5           information. They were inundated with requests  
6           for international cooperation from the United  
7           States and also from other countries.

8                           The traditional way in which this  
9           kind of information exchange had taken place was  
10          under the auspices of the central intelligence  
11          directorates at headquarters, and so long as you  
12          are dealing with something in the vicinity of 50  
13          requests a month, that's perfectly acceptable. If  
14          you then have that kind of structure and you have  
15          September 11, 2001 happen, and you have an  
16          environment of a perceived imminent threat,  
17          suddenly this infrastructure, I submit, cannot  
18          reasonably be expected to bear the strain, and it  
19          didn't.

20                          You had, in CID, perhaps five or  
21          six reviewer analysts who were responsible for  
22          somehow shepherding, providing coordination, to  
23          all of the national security investigations in the  
24          country; you had in NSIS units perhaps a dozen  
25          people with prior national security investigations

1           experience.  These people were all assigned to  
2           managing the massive flow of information that came  
3           about through Project Shock.

4                           And then, in the middle of all of  
5           that, you've got CSIS -- very appropriately, in my  
6           submission -- making the decision that there are  
7           certain targets that have been of interest to them  
8           for some time who, in the context of the new  
9           threat environment, can no longer be treated as  
10          simply potential threats to the security of Canada  
11          but are actually people who may be actively  
12          planning criminal offences, and so, in this  
13          climate, CSIS identifies a number of individuals  
14          who warrant criminal attention.

15                           THE COMMISSIONER:  Mr. Fothergill,  
16          from your standpoint, just dealing with the  
17          structure that existed within the RCMP before  
18          9/11, there was, as you point out, special units  
19          that investigated national security offences,  
20          either for prosecution or for prevention.

21                           MR. FOTHERGILL:  Yes.

22                           THE COMMISSIONER:  We have heard  
23          that there was policies specially designed for  
24          national security investigations.

25                           MR. FOTHERGILL:  Correct.

1 THE COMMISSIONER: And that there  
2 were training courses set up to help those who  
3 were going to do these types of investigations.

4 What would you say, from the  
5 RCMP's standpoint, were the features of a national  
6 security investigation that required this special  
7 treatment, both organizationally, training, and  
8 policy-wise?

9 MR. FOTHERGILL: Well, the main  
10 distinction between a national security  
11 investigation and a criminal investigation is  
12 really in its implications because they are in  
13 fact both criminal investigations.

14 THE COMMISSIONER: Yes.

15 MR. FOTHERGILL: And you will hear  
16 some people say they're one and the same thing,  
17 which is actually true --

18 THE COMMISSIONER: They're a type  
19 of criminal investigation.

20 MR. FOTHERGILL: They're a type of  
21 criminal investigation. A very good way of  
22 putting it.

23 What makes them distinct, because  
24 if the offence is carried out or even if the  
25 offence is known to be planned, it has

1           implications that are beyond the normal criminal  
2           implications. So if I give you a practical  
3           example. If there's a large grow operation of  
4           marijuana in British Columbia, that's unlikely to  
5           have a huge impact on our relations with other  
6           states, on our democratic institutions -- perhaps  
7           I could have chosen a less controversial example.  
8           --- Laughter / Rires

9                           THE COMMISSIONER: You just  
10           started down --

11                          MR. FOTHERGILL: Given the company  
12           that I am keeping. In any event ...

13                          Nonetheless, if we take perhaps a  
14           serial murderer, and it's hard to choose  
15           uncontroversial --

16                          MS EDWARDH: Bank robbery.

17                          MR. FOTHERGILL: Bank robbery.  
18           I'm quite prepared to accept the suggestion from  
19           Ms Edwardh. Let's take a bank robbery.

20           --- Laughter / Rires

21                          MR. FOTHERGILL: So long as it's  
22           not actually a threat to our public institutions,  
23           a threat to our place in the world, if I can put  
24           it that way, it's quite appropriate for the police  
25           to give primacy to their functional independence,

1 and others have referred to this -- Ms Edwardh  
2 referred to this in her submissions.

3                   There is a legitimate reason why  
4 the police normally conduct their investigation  
5 with a very high degree of autonomy, it's actually  
6 one of the things that we take a great deal of  
7 pride in in this country, which is we have a non-  
8 politicized police, and the way the police force  
9 stays non-politicized is it does not accept -- it  
10 actively resists political direction of a criminal  
11 investigation.

12                   So to stay with our example of a  
13 bank robbery, you don't really want a Minister of  
14 the Crown suggesting that maybe the investigation  
15 shouldn't be pursued or should be pursued in a  
16 particular way. I think a lot of people would  
17 raise their eyebrows at that.

18                   However, if you're talking about a  
19 threat to blow up an embassy. That's a bit  
20 different. If that is mishandled, the  
21 consequences are going to be something more than  
22 loss of life and loss of property. It's going to  
23 have an impact on how Canada is perceived by its  
24 allies and its place within the world order; and  
25 for that reason, it requires not only greater

1 central coordination but a higher degree of  
2 accountability to the Minister.

3 THE COMMISSIONER: So that would  
4 be -- sorry for interrupting -- but as I hear you,  
5 the way you say, first of all, because of the  
6 implications --

7 MR. FOTHERGILL: Yes.

8 THE COMMISSIONER: -- we might  
9 have a different reporting and a higher level of  
10 accountability in national security.

11 MR. FOTHERGILL: That's right.

12 THE COMMISSIONER: That would be  
13 one thing. Let me lead you where I'm going.  
14 Would another thing be that the nature of a  
15 national security investigation, being very  
16 information-intensive, and I'm not suggesting that  
17 other investigations don't require the collection  
18 of information quickly, but a national security  
19 investigation seems to me, as I listen to it, or  
20 let me put it to you, involves a huge collection  
21 of information and an interaction with other  
22 agencies, both domestic and international in  
23 sharing of information.

24 Would that be something that would  
25 be different about a national security -- perhaps



1 in degree --

2 MR. FOTHERGILL: I would actually  
3 be reluctant to generalize. Because if you look  
4 at international organized crime, the need to  
5 cooperate with other agencies is every bit as  
6 strong, and there are some national security  
7 investigations where, for example, you have a  
8 home-grown zealot who isn't actually presenting a  
9 threat from abroad where you may not actually have  
10 to deal with international agencies particularly.

11 But, again, post-9/11, I think the  
12 world has changed, and you can certainly find in  
13 the CSIS website, indeed, they declared that the  
14 majority of threats to Canada's national security,  
15 in fact, come from other countries.

16 And I think it's reasonable to say  
17 that the majority of the very, very serious  
18 national security investigations will have  
19 linkages that are international. If you're  
20 talking about international terrorism, then  
21 clearly you will have an increased relationship  
22 with foreign agencies.

23 And one thing that I think would  
24 be a fair observation, which maybe wouldn't arise  
25 in organized crime, is your need to deal with

1 security intelligence is going to be a lot higher.

2 So, for example, if you're dealing  
3 with organized crime, tobacco smuggling, something  
4 along those lines, chances are you want to deal  
5 with the FBI. I'm not sure that the CIA,  
6 particularly pre-9/11, would have anything to do  
7 with it.

8 You've heard others say that  
9 post-9/11 things began to happen in the United  
10 States that brought the CIA and the FBI closer  
11 together, because there was a recognition in that  
12 country that the repository of expertise rested  
13 with the CIA and not with the FBI, and these two  
14 organizations were simply mandated to cooperate  
15 and the CIA took on a much greater operational  
16 role.

17 THE COMMISSIONER: Again, let's  
18 talk about a terrorism investigation. Would it be  
19 an advantage for those involved in such an  
20 investigation to have a more sophisticated  
21 understanding than perhaps the average Canadian  
22 citizen or police officer might have about  
23 international political issues and about the  
24 culture, cultural norms, of the types of people  
25 that they're investigating? Would those be the

1 types of things that you'd say, "Yes, they benefit  
2 by increased knowledge?"

3 MR. FOTHERGILL: Absolutely. I  
4 don't think anyone could seriously dispute that.

5 And I think it's also fair to say  
6 that even before 9/11, people who actually worked  
7 in this area, in the national security  
8 investigation section, did have a fair amount of  
9 expertise in this area, to the extent that they  
10 were really dealing with Sunni Islamic extremism.

11 But we do run up against a  
12 fundamental limitation back in that period, which  
13 is that the threat environment seemed to be  
14 intrinsically new.

15 You referred to the national  
16 security investigations training course. It  
17 wasn't actually called that at the time, it was  
18 called the criminal extremism training course. I  
19 don't want to stray to in-camera evidence,  
20 although this is not NSC, I'm not sure that we  
21 dealt with it much in public, but you might want  
22 to consider what happened to that training course  
23 over time and how the content changed.

24 THE COMMISSIONER: Right.

25 MR. FOTHERGILL: And whether even

1 people who worked in NSIS units at the time would  
2 have been all that familiar with this particular  
3 threat.

4 And we'll see when we get to the  
5 composition of Project A-OCANADA, I think there  
6 was some allowance for this within reason, bearing  
7 in mind that NSIS was preoccupied with Project  
8 Shock, there was at least one full-time member on  
9 Project A-OCANADA who was derived from that  
10 section and others who came and went. So there  
11 was an intent to have that sort of knowledge.

12 The reason why I began with this  
13 is because there have been suggestions,  
14 particularly in the submissions of counsel for  
15 Mr. Arar this morning, that there is an issue of  
16 competence and the credentials of those people  
17 conducting the investigation and how could there  
18 be this confusion about the application of  
19 something as fundamental as the national security  
20 investigations policy?

21 And in my respectful submission,  
22 if you're going to be fair to these individuals,  
23 when you evaluate their conduct, you have to  
24 consider that before September 11, 2001 -- first  
25 of all, these sections did have a fairly high

1 degree of autonomy. Second of all, the vast  
2 majority of investigators had never worked on an  
3 investigation of this kind.

4 And so it's understandable that  
5 when you take an investigator who may be very  
6 skilled and experienced who just simply hasn't  
7 worked in this area, that his natural inclination  
8 would be to conduct the investigation as a major  
9 crime investigation, and of course that's what  
10 happened. Superintendent Cabana explained that  
11 perspective.

12 THE COMMISSIONER: But that was  
13 predictable. As you're suggesting that's what  
14 they would do, their experience. Does that lead  
15 to the next question that that would have been  
16 foreseeable to those who asked them to do it, and  
17 was there any sort of obligation in that  
18 circumstance to try to ensure the necessary  
19 training or oversight?

20 MR. FOTHERGILL: A very reasonable  
21 question, and one that I think you will be looking  
22 at closely as you review the evidence.

23 Let me offer you some perspectives  
24 on how the Project A-OCANADA team was assembled  
25 and whether they were the right people for the

1 job, and I will talk a little bit about training  
2 in that context as well.

3 The qualifications of Project  
4 A-OCANADA's personnel I address in the submissions  
5 at page 2, and the evidence about this is  
6 summarized at pages 8 and 9 of the evidence  
7 summary.

8 In my submission, there are  
9 several reasons why the Project A-OCANADA  
10 investigation couldn't reasonably be conducted by  
11 members of the NSIS. I mentioned Project Shock,  
12 they were fully occupied.

13 But you've heard public evidence,  
14 and we are being a little bit careful about how we  
15 characterize the nature of the investigation, but  
16 Superintendent Cabana did say that it included a  
17 significant international financial component and  
18 then it subsequently expanded to include a number  
19 of other terrorist offenses which we can see in  
20 the Walsh ITO. By the time you get to the Walsh  
21 ITO, you can see that it's no longer just that.  
22 But that's how it began.

23 In my submission, it was natural  
24 at that point to select investigators with strong  
25 backgrounds in proceeds of crime, which of course

1 is where Superintendent Cabana came from.

2 There was an attempt to put  
3 together a team within the constraints of the  
4 expertise that was available that touched a great  
5 number of bases: people who had experience in  
6 preparing wiretaps, given that it's a financial  
7 investigation, that's not all that surprising;  
8 people who were experienced with surveillance and  
9 with forensic accounting.

10 But the national security aspect  
11 was not lost, despite the fact that the NSIS unit  
12 was so overwhelmed, there was an individual who  
13 was freed up on a full-time basis and whose  
14 expertise was made available to the group.

15 Now, you may say that that  
16 misstates, or is a misplacement of priorities, and  
17 maybe they should have freed up a more senior  
18 member to lead it.

19 But remember what the real focus  
20 is. The real focus, at least initially, is  
21 financial. So you probably do need somebody who  
22 is a proceeds of crime investigator to lead the  
23 team.

24 So in my submission, it was  
25 reasonable to assemble the team as they did.

1                   I think we have to ask ourselves  
2           whether there was appropriate training available  
3           because of what I said about how the criminal  
4           extremism course evolved, and I think it now is  
5           much more focused on Sunni Islamic extremism than  
6           it used to be, but at that time I don't believe it  
7           had a significant component.

8                   So you have to ask yourself: Is  
9           the relevant training even available?

10                   And then I think you also have to  
11           ask yourself, could the individuals be freed up to  
12           undergo orientation and training in some of the  
13           national security aspects?

14                   Now, if you talk about the role of  
15           CID, I think there what you will see is a fairly  
16           consistent pattern of CID attempting to educate  
17           the investigative team about their role, and you  
18           may conclude that they encountered some  
19           resistance, but investigators, particularly  
20           seasoned investigators, are almost conditioned to  
21           be wary of what they might perceive as  
22           interference with their operational autonomy.

23                   That's not necessarily a bad or an  
24           unhealthy thing. That is a very healthy impulse,  
25           so long as they are prepared to listen reasonably



1 to another perspective.

2 But let's also not forget that  
3 whatever Superintendent Cabana thought of the  
4 application of the National Security Policy, in my  
5 submission, he exceeded its requirements in terms  
6 of keeping CID informed, because the national  
7 security investigations policy at the time had  
8 very modest requirements. You had to inform CID  
9 that you had started a national security  
10 investigation -- of course, it wasn't an issue  
11 here because the assignment came from CID -- and  
12 then you had to keep them updated approximately  
13 every 14 days.

14 In the case of Project A-OCANADA,  
15 they submitted daily situation reports, and you  
16 also heard some evidence about the secure criminal  
17 information system where data were inputted and  
18 could presumably then be reviewed by CID, and CID  
19 was also invited to attend multi-agency meetings  
20 and for the most part they did.

21 So I don't think, despite these  
22 differing perspectives, that you have a situation  
23 where CID genuinely ends up not being aware of  
24 what the investigators are doing.

25 You definitely had some tensions

1           between the two. I think that's obviously clear.

2                               But you will have to make some  
3           determination about how much difference it really  
4           made in terms of the conduct of the investigation,  
5           and this is perhaps a reference to something that  
6           Ms McIsaac said, that we're not engaged in this  
7           process just to see how many deviations from  
8           policy we can find; we are trying to find out  
9           whether Canadian officials caused or contributed  
10          to Mr. Arar's ordeal.

11                              Now, you're obviously entitled to  
12          look at some of it closely and make a  
13          determination of whether, in fact, it did.

14                              But if it didn't, then it's  
15          probably not worth the resources of this  
16          Commission of Inquiry to find fault with  
17          individuals, especially if they were acting in  
18          good faith.

19                              Information-sharing arrangements  
20          is another area that I think falls into this  
21          category, because a number of people have  
22          expressed profound concern about the absence of  
23          explicit caveats on documents that were shared,  
24          and by that I mean an actual written warning that  
25          the information is the property of the Government

1 of Canada or the Royal Canadian Mounted Police and  
2 should not be used, disseminated, acted upon,  
3 except with the permission of the originator.

4 I think the evidence is clear,  
5 particularly in the early stages of this  
6 investigation, this early warning was not always  
7 attached to information that was shared.

8 I want to take a step back,  
9 though, and put all of this in a broader context  
10 before we start analysing specific things, like  
11 the sharing of SUPERText.

12 Let us not forget that in all the  
13 time that Project A-OCANADA had an interest in  
14 Mr. Arar, he was never anyone more than a person  
15 of interest. He was not a suspect. There was not  
16 sufficient evidence to charge him. And, in fact,  
17 Project A-OCANADA specifically informed the  
18 Americans of this on October 4th, but we'll get to  
19 that.

20 But if it's true that Project  
21 A-OCANADA never was able to uncover evidence that  
22 anybody would consider in any way conclusive of  
23 Mr. Arar's involvement in terrorism, what  
24 difference does it make whether there are  
25 conditions placed on subsequent use of that

1 information or not? Because if the information  
2 doesn't implicate him, what good is it?

3 And one of the questions that I  
4 think will be very difficult for us to wrestle  
5 with, given the limitation of our perspective,  
6 being just limited to the examination of Canadian  
7 officials' knowledge, is how can it be that on  
8 October 4th, Canadian officials informed the  
9 United States of America that they have not  
10 completed their investigation of Mr. Arar and they  
11 are unable to connect him to al-Qaeda, and on  
12 October 7th, 72 hours later, the Government of the  
13 United States can issue an order declaring that he  
14 is unequivocally a member of al-Qaeda?

15 Now, logic tells you they must not  
16 be basing that conclusion on Canadian information,  
17 unless they have a much more creative view of that  
18 information than Canadian investigators ever did.

19 But, again, if you're concerned  
20 about these sorts of deviations from policy but if  
21 it had no material impact, I think you should  
22 exercise appropriate restraint in criticizing  
23 people, again especially if they acted in good  
24 faith.

25 The other reason why I think that

1 the controversy over explicit caveats is perhaps  
2 not as significant as some people make it out to  
3 be, is that really a caveat is an explicit  
4 expression of something that is well understood  
5 and almost a matter of common sense. It's the  
6 third-party rule.

7 It's an elementary proposition  
8 that if you get information from somebody, you  
9 don't give it to somebody else without their  
10 permission. This was a rule that I would say is  
11 respected in lots of non-law enforcement and  
12 security intelligence contexts.

13 But considering the law  
14 enforcement and national security context, where  
15 it's a fundamental aspect of the way that these  
16 agencies deal with each other, the fact that there  
17 is no explicit assertion that the information is  
18 the property of the Government of Canada and  
19 should not be used without permission, doesn't  
20 change the fact that it is Government of Canada  
21 information and that these foreign agencies,  
22 particularly U.S. agencies, could be expected to  
23 understand that. It is a fundamental tenet of  
24 international cooperation between agencies.

25 When people speak on the

1 telephone, they don't end the call by saying, "I  
2 just want to reiterate that what I have just said  
3 to you is subject to the third-party rule." They  
4 don't have to do that, because it's such a basic  
5 assumption of international cooperation.

6 THE COMMISSIONER: I'll try not to  
7 interrupt you too often, but since you've raised  
8 the point, I mean, what do I make of it of the  
9 evolving American position that leads to  
10 Mr. Powell saying that we did rely on information  
11 received from Canada? Do I just dismiss that and  
12 say --

13 MR. FOTHERGILL: You wouldn't  
14 dismiss it. You would consider it.

15 I think you have to place a fair  
16 amount of emphasis on the fact that Colin Powell  
17 subsequently retracted that, as did Mr. Cellucci,  
18 and you also have to remember --

19 MR. MARTEL: Well, no, their final  
20 position. They retracted their initial position,  
21 but they didn't retract ultimately that "We  
22 received information from Canada."

23 MR. FOTHERGILL: I think their  
24 final position may still be somewhat ambiguous,  
25 and I'm thinking now of Mr. Easter's meeting with

1 Mr. Ashcroft in November of 2003, which is I think  
2 the first time that he was prepared to confirm  
3 publicly that some information from Canada  
4 contributed to the American decision to stop  
5 Mr. Arar in New York, but then he went on to say,  
6 but it came from sources globally.

7 THE COMMISSIONER: I was thinking  
8 more of Mr. Powell.

9 MR. FOTHERGILL: Who said ...

10 THE COMMISSIONER: I don't have it  
11 right in front of me.

12 MR. CAVALLUZZO: December the 1st.

13 THE COMMISSIONER: December  
14 the 1st, 2003.

15 MR. FOTHERGILL: That we were  
16 responsible or supported or disseminated  
17 information?

18 THE COMMISSIONER: Sorry. It's  
19 not -- I don't want to get into an argument. It  
20 was not that we were responsible. That had been  
21 the initial position. But it was based in part at  
22 least on information that was obtained from  
23 Canada.

24 MR. CAVALLUZZO: To be precise,  
25 Mr. Powell said that if it wasn't for Canada, that

1 Mr. Arar would not have been on our radar screen.

2 THE COMMISSIONER: Yes.

3 MR. FOTHERGILL: I'm not really  
4 inclined to give you a complete response to that  
5 in a public forum. I think you have the answer in  
6 camera about what we know, to the extent that we  
7 know anything, about American information about  
8 Mr. Arar, and I really don't feel comfortable  
9 giving you a complete answer.

10 THE COMMISSIONER: Okay.

11 MR. FOTHERGILL: I will talk a  
12 little bit about initial interest in Mr. Arar  
13 because, in fact, this is quite a good lead into  
14 this area.

15 You made the decision, as much on  
16 the basis of administrative fairness as on the  
17 basis of National Security Confidentiality, that  
18 we would not canvass in a public forum the precise  
19 reasons why Mr. Arar was of interest to the police  
20 and maintained that status over a period of time,  
21 and I think for that reason it's a bit difficult  
22 for me to respond, as fully as I would like, to  
23 some of the concerns that we expressed about some  
24 of the investigative steps that were taken.

25 But I'm going to do my best to



1 address some of the particular concerns that were  
2 raised about particular investigative steps.

3 When I do that, however, I want to  
4 make it clear that I'm not conceding that these  
5 were the only investigative steps that were taken.

6 So to the extent that people might  
7 take from this discussion, because I only refer to  
8 three investigative steps, that, in fact, there  
9 were only three investigative steps. I don't  
10 think that would be a fair conclusion.

11 That's, of course, why we didn't  
12 deal with this in a comprehensive way in public.  
13 You have all of the information in camera.

14 I will try and make a few comments  
15 about some of the issues that I know are of  
16 particular concern to Mr. Arar and also to some of  
17 the intervenors, beginning with racial profiling.

18 Let me state at the outset that if  
19 Mr. Arar was of interest to the police solely  
20 because of his racial or religious background,  
21 then this would indeed be unconstitutional and  
22 morally wrong. So we will align ourselves with  
23 that principle without any reservation.

24 Now, we have another complication  
25 where we try to make sense of the reasonableness

1 of the police conduct in the early stage of the  
2 investigation, at least insofar as it relates to  
3 Mr. Arar, which is, we don't have the benefit of  
4 his testimony.

5 So we don't have the benefit of  
6 his explaining, to the extent that this would help  
7 our understanding, some of the contacts or  
8 connections that were of interest to the police.

9 To make matters even more  
10 complicated, when we talk about misunderstanding  
11 cultural or religious customs or traditions, I  
12 don't think, even on the strength of the evidence  
13 that we've led in the public forum, that we still  
14 have a very clear idea of what we're talking  
15 about, because Professor Badhi and Dr. Kahn and  
16 Professor Antonius, although they had some very  
17 useful things to say about the importance of not  
18 having a superficial understanding but a deeper  
19 understanding of a culture, they tended to  
20 ultimately focus their remarks on things that  
21 really were common to all small communities, new  
22 immigrant communities in particular, and -- so the  
23 suggestion, for example, was that casual contacts  
24 might be misunderstood as somehow signifying a  
25 deeper connection than they really do.

1                   But this is not to do with the  
2 individual's ethnic or racial background, this is  
3 to do with the possibility that they might be  
4 members of the same small community of new  
5 arrivals. This is really what I took from that  
6 evidence.

7                   And so when you consider this idea  
8 of whether Mr. Arar's difficulties began because  
9 of assumptions made about him because of his  
10 racial or ethnic background, I think you may want  
11 to wonder or at least inquire, based not just on  
12 the public evidence but from what you've heard in  
13 camera, about the extent to which he or other  
14 persons are in fact members of the same community,  
15 whether they in fact live in the same city,  
16 whether they in fact have similar ethnic  
17 backgrounds, and whether this provides any sort of  
18 plausible explanation of why the contacts were of  
19 interest to the police.

20                   And I think you may also want to  
21 consider to what extent was the investigation  
22 prompted by information that came from CSIS,  
23 because counsel for Mr. Arar seems to suggest that  
24 one of the potential difficulties that we have  
25 here is that CSIS has some experience in assessing

1       this kind of information, whereas the RCMP does  
2       not.

3                   But let's not forget that the  
4       investigation began because of CSIS information.  
5       The police weren't out roaming the streets looking  
6       for suspects. They received a tip from our  
7       national security intelligence service.

8                   After that, of course, it was  
9       their own responsibility to conduct the  
10      investigation, and I should say in passing that I  
11      think it's a bit of a misapprehension to say that  
12      CSIS transferred the file.

13                  What CSIS does is it informs the  
14      police that there is conduct being engaged in by  
15      certain specified individuals that possibly  
16      warrants criminal attention.

17                  And after that, the police have to  
18      make the independent assessment about whether  
19      they're going to investigate and whether they're  
20      going to continue investigating. CSIS may very  
21      well continue to take an interest. It's not  
22      simply a handing off. The mandates can actually  
23      overlap.

24                  So we're not just talking about  
25      transfer a file and then CSIS disappears and we

1 never hear from them again.

2 That is an ongoing source of  
3 expertise while a national security investigation  
4 unfolds, particularly if the suspect was first  
5 identified by the security intelligence service.

6 So these are all things that I  
7 think will help you understand whether it's a fair  
8 criticism of the police to say Mr. Arar was of  
9 interest to them for no better reason than his  
10 religion or the colour of his skin. We reject  
11 that.

12 But I'm a little bit constrained  
13 in terms of giving you all the reasons why we  
14 reject that in a public forum because it's so  
15 bound up with information in respect of which we  
16 must regrettably assert a claim of National  
17 Security Confidentiality.

18 I want to address some search and  
19 seizure issues to the extent that we can, and let  
20 me just express one small caution here.

21 When we're dealing with search and  
22 seizure, we're dealing with constitutional right  
23 to be free from unreasonable search and seizure.

24 So if you were to find, for  
25 example, as was suggested by I think Mr. Waldman,

1           that the information used to obtain the January  
2           warrants was deficient in some respect, it's going  
3           to be virtually impossible for you to avoid a  
4           finding of civil liability, and that's because  
5           breach of a Charter right is actually actionable  
6           if you are applying that test.

7                         If you are applying a  
8           constitutional test, you will clearly be making  
9           legal determinations, and as Ms McIsaac said, in  
10          that particular example you also have to be  
11          cognizant -- sorry, she was referring to the  
12          O'Neill ITO.

13                        But this ITO too is still before  
14          the courts. So you have to be alive to the fact  
15          that the sufficiency of the information used to  
16          obtain the January searches -- the warrants in  
17          January of 2002 is also a matter --

18                        THE COMMISSIONER: You're not  
19          suggesting I shouldn't look at that and comment on  
20          them.

21                        MR. FOTHERGILL: You're welcome to  
22          look at it and you're welcome to comment on it. I  
23          wanted to ask you to please exercise some caution  
24          about how you comment on it, given that you may  
25          run the risk of getting into this area of making

1 legal determinations --

2 THE COMMISSIONER: On the validity  
3 of the warrants, for example.

4 MR. FOTHERGILL: Precisely. If  
5 you reach a conclusion about that --

6 THE COMMISSIONER: This isn't  
7 necessarily the case at all, but let's assume that  
8 I said, okay, there was a flaw in the information  
9 to obtain, there was something, I guess the next  
10 step is, well, what would that lead to? And you  
11 would say I shouldn't go one step further --

12 MR. FOTHERGILL: That's right.

13 THE COMMISSIONER: -- and say  
14 therefore the warrants should not have been  
15 issued.

16 MR. FOTHERGILL: Precisely. Then  
17 I think you would be entrenching both on what's  
18 going on before the Ontario Superior Court, and  
19 also you would very likely have made a legal  
20 determination that would inevitably result in some  
21 liability.

22 THE COMMISSIONER: Let me make it  
23 clear by way of an example of how one would draw  
24 the line. What I do, as opposed to what a  
25 proceeding who's called upon to determine the

1           legality of the warrant would do.

2                           MR. FOTHERGILL:   So we may have a  
3           similar issue on the Minto rental application and  
4           tenancy agreement, which has been described to you  
5           as a warrant to search and of course it was.

6                           I think there's a very interesting  
7           question about whether a warrant was required in  
8           those circumstances, given that the information  
9           was obtained as background information about  
10          Mr. Arar, who was not at that time -- indeed never  
11          has been -- a subject in a criminal investigation  
12          and it was a document owned by Minto Developments.

13                          So I think it's fair to say,  
14          whether as a matter of law you want to actually  
15          accept this argument or not, it's perfectly  
16          reasonable for an investigator to believe that a  
17          warrant is not required because it's provided to  
18          the investigator on a voluntary basis by the owner  
19          of the document.

20                          Now, you've got some privacy  
21          issues, and I don't want to obviously drag the  
22          landlord into this unnecessarily, but the privacy  
23          issues are probably held more by the company that  
24          hands over the document than by the police who  
25          receive it.



1                   They're entitled to ask. There's  
2 nothing that forces the organization to comply.  
3 But this particular organization did. And in my  
4 respectful submission, it's quite reasonable for  
5 an investigator to say, "May I have a document?"  
6 And if the company says, "Yes, you may," then  
7 there's nothing to prevent the police officer from  
8 receiving it.

9                   If, on the other hand, it  
10 subsequently transpires that the investigation was  
11 sought in respect of an individual who was the  
12 subject of criminal investigation and there is  
13 then an attempt to lead it as evidence, you can  
14 understand that at that point somebody might say,  
15 "Where is your warrant?"

16                   But for intelligence purposes,  
17 background -- it's by no means clear that a  
18 warrant would be required in that setting.

19                   I'm going to touch very briefly on  
20 border searches because counsel for Mr. Arar has  
21 expressed some concern about the fact that Arar's  
22 personal effects were searched and seized at the  
23 border, specifically a computer and a Palm Pilot.

24                   I would only note that the Supreme  
25 Court of Canada has expressed in the Simmons case

1 from 1988, which was confirmed in Dehghani in 1993  
2 and Jacques in 1996 that there is actually a very  
3 reduced expectation of privacy at the border and  
4 people who cross international boundaries should  
5 expect to undergo screening procedures.

6 We should also remember that the  
7 CBSA -- or CCRA at that time, but the modern  
8 CBSA -- administers 95 different federal statutes.

9 It's duties extend well beyond  
10 traditional Customs & Excise matters, and it's  
11 fair to say that the CBSA plays an important  
12 function in Canada's security infrastructure.

13 It is in some ways our first line  
14 of defence, and in my submission it has a  
15 legitimate role to play in gathering security and  
16 criminal intelligence as well --

17 THE COMMISSIONER: Would it be  
18 proper then to use the border search in the  
19 situation where you can't use a search warrant, if  
20 you don't have reasonable and probable grounds, in  
21 order to search somebody's personal computer for  
22 national security investigation purposes?

23 MR. FOTHERGILL: Well, it could,  
24 and it really depends on who is doing the  
25 searching and why and what they're looking for.

1                   But international terrorism does  
2                   have a transboundary dimension, and if a customs  
3                   officer does the search on proper grounds, and  
4                   it's not necessarily reasonable and probable  
5                   grounds such as you would need for a warrant, but  
6                   grounds to suspect that some useful information  
7                   relevant to one of the 95 statutes that's being  
8                   administered may be found, then it can be  
9                   searched. And if information that actually is  
10                  useful to criminal and national security  
11                  investigations is found then section 107 of the  
12                  Customs Act allows that to be shared for that  
13                  purpose.

14                   THE COMMISSIONER: Can the border  
15                   person -- I don't know the answer to this -- then  
16                   set out to do the search for that purpose, saying,  
17                   "I don't have a search warrant, but there may be  
18                   something in this person's computer that has to do  
19                   with a national security/terrorism investigation  
20                   or something, and therefore, as a result of that,  
21                   I'm going to enter the computer, whatever it is,  
22                   and conduct a search."

23                   MR. FOTHERGILL: I think I may  
24                   need to have a bit more time to give you a proper  
25                   answer on that one.

1                   That's obviously something you  
2                   want to look at, whether it is an appropriate use  
3                   of the customs power, because to the extent that  
4                   the Palm Pilot and the computer were, in fact,  
5                   searched, it would initially be under a customs  
6                   authority, and we're going to have to talk about  
7                   whether the customs authority would exist based on  
8                   the information available.

9                   THE COMMISSIONER:   And then, as  
10                  you say, if a search is conducted, there is a  
11                  policy or regulation that deals with sharing  
12                  information --

13                  MR. FOTHERGILL:   With other  
14                  agencies.

15                  THE COMMISSIONER:   -- with other  
16                  agencies.

17                  MR. FOTHERGILL:   If a search  
18                  itself is legitimate, and it doesn't necessarily  
19                  require a warrant because it is a border search,  
20                  then the information can be shared.  I'm not  
21                  saying necessarily that it was shared, but it can  
22                  be.

23                  THE COMMISSIONER:   What about a  
24                  request from another agency?  Is that something  
25                  that's -- can it be used by customs, as a

1 surrogate, so to speak?

2 MR. FOTHERGILL: We'll be getting  
3 there into a fairly sensitive area about lookouts  
4 and the circumstances in which they can be  
5 requested and what they can actually do and the  
6 threshold.

7 We will address that in camera,  
8 certainly, and we will see what we can do about  
9 maximizing full disclosure about that because I do  
10 understand that it's an important issue.

11 THE COMMISSIONER: Right.

12 MR. FOTHERGILL: But you should be  
13 aware that the policy that governs that area is  
14 currently protected.

15 Sharing search results and the  
16 SUPERText database. Concern has been raised both  
17 about the caveat aspect here and the Privacy Act  
18 aspect here, because I think it's fair to say  
19 given the volume of evidence -- Superintendent  
20 Cabana told us about this -- the volume of  
21 evidence was so great that the investigators could  
22 not, they felt, reasonably analyze it within a  
23 short period of time and needed help.

24 THE COMMISSIONER: That was the  
25 fruits of the search carried out.

1 MR. FOTHERGILL: You're quite  
2 right. We will have to divide them into fruits of  
3 the search and file information. So I will do  
4 that.

5 THE COMMISSIONER: Is there a more  
6 felicitous word than "fruits of the search?" I  
7 think I might have started it, and it's a  
8 strange --

9 MR. FOTHERGILL: It has a  
10 strangely organic connotation. We could say the  
11 results of the search.

12 THE COMMISSIONER: Yes, I think if  
13 you can divide.

14 MR. FOTHERGILL: We do need to  
15 make that distinction. I agree with you.

16 The evidence before you is it was  
17 a very large volume of information, and Project  
18 A-OCANADA did not feel that they could analyze it  
19 in a timely way without recruiting the assistance  
20 of others.

21 So they made the decision -- and  
22 in my submission they made the decision with the  
23 knowledge and authority of CID -- that they would  
24 share the results of the search with their law  
25 enforcement and other partners.

1                   So people might reasonably ask,  
2           "Well, how can you do that and comply with the  
3           Privacy Act when you don't quite know what you're  
4           sharing because you haven't analyzed it yet?"

5                   And in my submission, given the  
6           need for assistance to analyze it, first of all,  
7           you have some justification on operational grounds  
8           for what was done.

9                   Second of all, I think there is a  
10          good case for saying that it may have been  
11          necessary to share the information in order to  
12          establish what it actually meant. So it's quite  
13          true that it would have included a lot of personal  
14          information and perhaps e-mail correspondence that  
15          appears at least on its face to be personal in  
16          nature.

17                   But let's remember how  
18          investigations are conducted. Information on its  
19          face may appear innocuous. You may need to share  
20          it with somebody else to make sense of it.  
21          Something which appears to be a routine e-mail  
22          message about -- I don't know, say it was a  
23          shopping centre, may be a coded message.

24                   I'm not offering this in some sort  
25          of paranoid way. It may not, it may actually be

1 an e-mail about a sale at a shopping centre. But  
2 it may not make sense until somebody else who  
3 says: "We've seen an awful lot of e-mail traffic  
4 about that place.

5                   Everybody who doesn't actually  
6 seem to do much shopping is suddenly talking about  
7 a sale at a shopping centre on a particular day at  
8 a particular time, does it mean something else?"

9                   And until you share the  
10 information, you cannot make that linkage.

11                   Why I think this is a useful  
12 example is because I think a recommendation was  
13 made to you today that on its face sounds  
14 eminently sensible, which is that we need clear  
15 criteria about when we share, particularly when we  
16 share information about a person who is not  
17 actually a suspect.

18                   I think that sounds very good, but  
19 it's got to be practical too, and given the  
20 practical limitation of actually being able to  
21 understand the significance of information until  
22 you share it we can't have a set of criteria that  
23 are so rigid that it strips away investigative  
24 discretion.

25                   I don't have an easy answer for



1           you. I strongly anticipate that there will be  
2           among your recommendations something to address  
3           the manner in which information is shared  
4           internationally.

5                           And I can tell you that the  
6           institution is alive to this challenge but it's  
7           got to be practical, and it's not good enough from  
8           an investigative point of view to say, you must  
9           never share information on people whose status you  
10          don't know, because you may need to share the  
11          information in order to either determine that they  
12          are blameless or alternatively to determine that,  
13          no, in fact they are implicated in something.

14                           THE COMMISSIONER: Would one of  
15          the criteria, Mr. Fothergill, be that you might  
16          look upon, if you were sharing information, or  
17          were proposing to in the circumstance you mention,  
18          as to who would then have the authority to make  
19          that type of decision and how would they be  
20          accountable? I'm just testing it --

21                           MR. FOTHERGILL: I certainly think  
22          that that's the kind of approach that we need to  
23          start looking at as opposed to a laundry list of  
24          what you can and cannot share.

25                           Maybe what you want is somebody to

1           make informed and educated decisions about how  
2           that is done, and then of course we're going to  
3           have to look at issues of timely sharing of  
4           information, which is another preoccupation from a  
5           practical perspective.

6                           THE COMMISSIONER:   And ultimately  
7           the issue of accountability which could possibly  
8           move one to the policy review part of it.

9                           MR. FOTHERGILL:   Absolutely.  I  
10          think this is a very worthwhile thing to look at,  
11          but at the same time it has to be done in a way  
12          that doesn't hamstring an investigation.

13                           If we return then just to the  
14          factual inquiry we are engaged in, I think it is  
15          reasonable in the circumstances for the  
16          investigators to think that a full sharing of the  
17          results of the search was necessary, both from a  
18          timeliness perspective, the analysis, and also,  
19          even if they had the time to actually print and  
20          look at all of these things, there might have been  
21          some triage, but there may not have been that  
22          much, because if what you're trying to do is  
23          analyze the correspondence to determine linkages  
24          you probably don't want to start making early  
25          decisions about what's relevant and what's not

1 because you may not be able to do so.

2 So in my submission it's something  
3 we can certainly look at with the benefit of  
4 hindsight, and talk about how it might be done  
5 better done in the future, but in terms of  
6 defining misconduct as such, I think it's fair to  
7 say that particularly for the search results, that  
8 was done in good faith and with authority and with  
9 the genuine belief that it complied with the  
10 Privacy Act.

11 Ms Edwardh points out that it  
12 would probably be a good time to take a break. I  
13 just want to make one point about the other  
14 materials because then I will move on to another  
15 subject.

16 THE COMMISSIONER: This is other  
17 than the search results?

18 MR. FOTHERGILL: Other than the  
19 search results.

20 THE COMMISSIONER: Yes, all right.

21 MR. FOTHERGILL: And I can tell  
22 you that, from an institutional point of view,  
23 we're concerned about that. I don't think we're  
24 really seeking to defend that, particularly.

25 File materials should be reviewed

1 before they're shared. They can only be shared,  
2 and I think this was addressed in Deputy  
3 Commissioner Loepky's contextual evidence, they  
4 can only be shared if it fulfils a valid  
5 investigative purpose, and if you're talking about  
6 things that you identified yourself, you probably  
7 have a much better idea of whether it fulfils a  
8 valid investigative purpose or not.

9 There is also clearly a problem  
10 about sharing third party information without  
11 consent.

12 Again, it will be for you to  
13 decide whether it means anything, because we will  
14 always have to come back to the fact that Project  
15 A-OCANADA were never able to establish links to  
16 al-Qaeda. So to the extent that the Americans  
17 were able to do that, I think there is a very real  
18 question of whether they could have based that on  
19 Canadian information.

20 But leaving that aside, the  
21 consent of third parties should have been  
22 obtained. I don't think there's anything more I  
23 can say about that.

24 THE COMMISSIONER: Okay.

25 MR. FOTHERGILL: So this is a good

1 point to break.

2 THE COMMISSIONER: Yes. It's very  
3 hot in here. I'll see if I can do something at  
4 the break. Okay. We'll rise for 15 minutes.

5 THE REGISTRAR: Please stand.

6 --- Upon recessing at 3:40 p.m. /

7 Suspension à 15 h 40

8 --- Upon resuming at 4:00 p.m. /

9 Reprise à 16 h 00

10 THE REGISTRAR: Please be seated.

11 MR. FOTHERGILL: Commissioner, I'm  
12 now at page 5 of the submissions, and I'd like to  
13 discuss very briefly, if I can, whether the police  
14 investigators were justified in considering that  
15 Mr. Arar had, in effect, refused to be interviewed  
16 while he was still in Canada.

17 There's a formatting error in the  
18 submission. It's presented as if it's a  
19 subheading of information-sharing but it's  
20 actually a discrete topic.

21 I'm not going to spend a great  
22 deal of time on this. The issue, in my  
23 submission, is not so much whether objectively he  
24 had refused, it is whether the police were  
25 justified in saying that the conditions that had

1           been imposed were tantamount to refusal; and it's  
2           true that you can find RCMP documents that are  
3           generated subsequently that say that he was  
4           approached for an interview and he refused, and so  
5           I think the suggestion is that this somehow cast a  
6           more sinister appearance on his actions and  
7           therefore might have been -- might have influenced  
8           other people's conduct subsequently.

9                           I always come back to what I said  
10          earlier.  Something like that doesn't establish  
11          you as a terrorist.  It's a piece of the picture.  
12          And the question that I would ask is:  Were the  
13          investigators justified in thinking that the  
14          manner in which Mr. Arar had responded to the  
15          interview request was tantamount to a refusal?  
16          Were they really unfairly portraying what had  
17          happened?

18                           There may have been some  
19          misunderstandings between Mr. Edelson and the  
20          A-OCANADA investigators.  I recall Mr. Edelson  
21          saying that, for example, for reasons that he  
22          wasn't at liberty to share with us, he didn't  
23          immediately identify Mr. Arar as in fact being  
24          part of the same investigation as the other people  
25          that he was representing and he didn't initially

1 regard this as a conflict of interest. It may  
2 very well be true, but it certainly gave the  
3 conditions that he imposed much greater force in  
4 terms of how awkward they were --

5 THE COMMISSIONER: I guess the  
6 concern would be to a reader who's in intelligence  
7 or law enforcement, the fact that an individual  
8 made a decision, which is, "Mr. Arar refused to be  
9 interviewed," would be a different statement than  
10 "Mr. Arar obtained an experienced criminal lawyer  
11 who attached conditions which the police found  
12 unacceptable." I mean, people may think --

13 MR. FOTHERGILL: Fair enough.

14 THE COMMISSIONER: --  
15 Mr. Edelson's conditions were unacceptable --  
16 whatever one takes on it.

17 I do hear often that in the  
18 intelligence world that every little piece of  
19 information, when put in context, can add up to  
20 the whole --

21 MR. FOTHERGILL: The whole  
22 picture.

23 THE COMMISSIONER: -- picture.

24 MR. FOTHERGILL: And you'll be  
25 entitled to consider that. I would ask you,

1 please, not to apply too much hindsight.

2 THE COMMISSIONER: Right.

3 MR. FOTHERGILL: In light of  
4 everything that happened, you can start to look  
5 through all this -- through a lens, when you begin  
6 to ask yourself, "What were the things that caused  
7 people to regard Mr. Arar as suspicious?" And  
8 perhaps this was one of them.

9 But from the point of view of the  
10 investigators at the time, they were faced with a  
11 situation where Mr. Arar was approached; he  
12 retained, perhaps coincidentally, the same defence  
13 lawyer who was representing other suspects and  
14 persons of interest; and then he imposed a  
15 condition, which Superintendent Cabana described  
16 as one of the most restrictive he had ever seen in  
17 22 years of policing, whereby any statement  
18 obtained through the interview could not be used  
19 in legal proceedings against anyone anywhere.

20 THE COMMISSIONER: Everybody would  
21 know that it was Mr. Edelson that attached the  
22 condition. I mean, somebody --

23 MR. FOTHERGILL: Yes. But  
24 presumably Mr. Edelson makes an informed decision  
25 about what is in the best interests of his client.



1 THE COMMISSIONER: Right.

2 MR. FOTHERGILL: So the impact of  
3 this was not just using the statement in a future  
4 prosecution, but it was understood by  
5 Superintendent Cabana, and you'll have to decide  
6 whether this is objectively an accurate  
7 impression, and if not, whether it was nonetheless  
8 a reasonable one, that he couldn't use the  
9 information in support of an application for a  
10 judicially authorized investigative technique, and  
11 he spoke to us about how fundamentally important  
12 those are.

13 So I don't want to spend a lot of  
14 time deciding -- or asking you to decide whether,  
15 objectively speaking, Mr. Arar refused to be  
16 interviewed or not, but much more so whether it  
17 was reasonable, given the circumstances, for the  
18 investigators to conclude that he had, in effect,  
19 indicated a reluctance to cooperate fully with the  
20 investigation. It may have been an erroneous  
21 impression, but was it justified?

22 Similarly, the question about  
23 whether Mr. Arar left Canada permanently. I don't  
24 know how significant it really is in the general  
25 scheme of things, but you'll have to -- I will ask

1           you, please, to consider why it was that the RCMP  
2           believed that and, whether it was true or false,  
3           whether they were justified in thinking that.

4                       And I would just point out, to the  
5           limited extent that I can refer to factors that  
6           are in the public domain, I think he left without  
7           leaving a forwarding address, he was gone for some  
8           prolonged period of time, and I think you've heard  
9           from the evidence of some Foreign Affairs  
10          officials that they also informed the impression,  
11          rightly or wrongly, that it was in the nature of a  
12          permanent move. So was it a reasonable inference,  
13          even if it was objectively perhaps not the correct  
14          one?

15                      Another issue I wanted to address  
16          very briefly is whether the RCMP should have  
17          notified the Department of Foreign Affairs that  
18          Mr. Arar was detained in New York when they learnt  
19          that he was flying in to New York on  
20          September 26th, 2002?

21                      I address this at pages 6 and 7 of  
22          the submission, or, if you prefer the evidence  
23          summary, it begins at page 35.

24                      The really critical point here, in  
25          my submission, is that when Mr. Arar arrived in

1 New York on September 26th of 2002, A-OCANADA  
2 investigators did not think that he had been  
3 detained. They thought that he was going to  
4 arrive, be refused entry, and returned to his  
5 point of departure; and if you need objective  
6 corroboration for that, I would refer you to the  
7 SITREP of September 27th, 2002, which says later  
8 that day he was removed from the country.

9 So they didn't even think that he  
10 was there. In fact, I think it's fair to say that  
11 they didn't learn that he was still in the United  
12 States until October 2nd, and then the source of  
13 their knowledge was none other than the Department  
14 of Foreign Affairs.

15 So insofar as we can trace the  
16 chronology, Mr. Arar arrived on the 26th of  
17 September. The investigators thought that he  
18 would be asked a few questions, refused entry, and  
19 returned to Zurich. Then the Foreign Affairs  
20 Department learned on September 29th, through his  
21 family, that he was missing, and on October 1st,  
22 it was confirmed that he was detained in the  
23 United States -- I'm sorry, no, I beg your pardon.  
24 Advised by his family of the detention in the U.S.  
25 on October 1st. They confirmed this with the U.S.

1 the following day, and that is the day that the  
2 information then came back to the police  
3 investigates, that contrary to what they believed,  
4 he was still detained.

5 So I don't think it's fair to say  
6 that the police failed to notify the Department of  
7 Foreign Affairs that Mr. Arar had been detained  
8 when they didn't think that he had been.

9 There is, however, a policy issue  
10 that you may want to consider. What if the  
11 situation had been different? And, in fact, they  
12 had believed that he had been detained.

13 I think there is evidence before  
14 you that the RCMP does not generally inform the  
15 Department of Foreign Affairs when they learn  
16 through law enforcement channels that an  
17 individual has been detained in a country and  
18 could conceivably be in need of consular  
19 assistance.

20 The United States has an  
21 independent obligation under the Vienna Convention  
22 to alert Canada that one of its nationals is in  
23 their custody, and they have the obligation to  
24 inform a detainee of consular rights, and they  
25 also have an obligation, as I understand it, to

1 inform the Canadian Consulate that they have  
2 detained a national of that country.

3 So the RCMP does not generally, at  
4 the moment, inform the Department of Foreign  
5 Affairs if they learn through law enforcement  
6 channels that a Canadian is detained abroad, at  
7 least in a country which is not known to  
8 disrespect people's rights. This was a proviso  
9 that Deputy Commissioner Loepky gave us. He  
10 thought the situation might be a little bit  
11 different in a country such as China.

12 But in a country such as the  
13 United States, it's not something that currently  
14 occurs to them because I don't think they really  
15 necessarily address their minds to the consular  
16 dimension of this.

17 THE COMMISSIONER: Presumably, if  
18 the RCMP learn about a detention, it's because  
19 they have some interaction with the host law  
20 enforcement --

21 MR. FOTHERGILL: Law enforcement  
22 as opposed to consular, yes.

23 THE COMMISSIONER: Yes. Do you  
24 think -- would it make any difference, and it may  
25 be a difficult question for you, if there were to

1           be some policy that encouraged informing Foreign  
2           Affairs if it was a national security  
3           investigation? Is there anything different about  
4           that than if it were a bank robber?

5                           MR. FOTHERGILL: I think the one  
6           concern that the police might have, and it may be  
7           rather speculative, but I think the concern is  
8           derived from the fact that sometimes an individual  
9           who is detained chooses not to notify the home  
10          country.

11                           And Mr. Arar did. But there are  
12          people who don't.

13                           And the danger is that if the  
14          Department -- sorry, if the police notify Canadian  
15          Consular Services that a Canadian is detained and  
16          then the Canadians approach that individual to  
17          extend consular services and the individual never  
18          asked for them, that might actually alert the  
19          individual to the fact that he is subject to  
20          police attention in Canada.

21                           That could be a problem from an  
22          investigative point of view, and I think Deputy  
23          Commissioner Loepky referred to safeguarding the  
24          integrity of the investigation.

25                           It's a bit speculative because, as

1 I understand it, Consular Affairs can learn from  
2 any number of sources that an individual is  
3 detained, and the country has then an obligation  
4 to notify --

5 THE COMMISSIONER: So it could  
6 make -- if they didn't disclose their source,  
7 then --

8 MR. FOTHERGILL: As long as they  
9 don't disclose their source. So I think it's  
10 probably manageable.

11 But I can imagine that that's the  
12 kind of thing where you want to see some  
13 consultation.

14 So if you were inclined to make a  
15 recommendation along those lines, rather like the  
16 information-sharing, it can't be too rigid. There  
17 has to be some room for the exercise of discretion  
18 if somebody reasonably believes it would  
19 compromise the investigation for Foreign Affairs  
20 to be notified that an individual has been  
21 detained.

22 Again, on the facts of our  
23 particular case, I don't think the issue arises  
24 because the investigators reasonably believed that  
25 he wasn't detained. They felt he had gone back to

1 Switzerland.

2 This brings me to what is perhaps  
3 the most fundamental question that people are  
4 likely to have about the role of the RCMP in all  
5 of this, which is, how did the RCMP conduct  
6 themselves during that crucial period when  
7 Mr. Arar was detained in New York?

8 And I'm referring to the period  
9 between September 26th of 2002 and October 8th,  
10 when he was actually removed from the United  
11 States, although, of course, the investigators  
12 themselves believed that he was removed I think on  
13 the 9th.

14 This is addressed at pages 7 to 12  
15 of the submission and beginning at page 35 in the  
16 evidence summary.

17 Let me start with a fairly  
18 straightforward proposition.

19 In our submission, there is no  
20 evidence whatsoever that members of the RCMP  
21 conspired with the U.S. to have Mr. Arar deported  
22 to Syria, and I don't think it can fairly be said  
23 that they acquiesced in the decision which was  
24 made unilaterally by the United States pursuant to  
25 U.S. law.



1                   Nobody could have anticipated that  
2                   Mr. Arar would be removed to Syria rather than  
3                   Switzerland or Canada, and now let me try and  
4                   explain why I offer you that conclusion.

5                   The first expectation the members  
6                   of Project A-OCANADA had, and I've already alluded  
7                   to this, when they were advised on September 26th  
8                   that Mr. Arar was going to be flying to New York,  
9                   was that he would be denied entry, asked a few  
10                  questions, and turned around, which is to say,  
11                  sent back to Switzerland because he had flown from  
12                  Zurich.

13                  So I think that the first reason  
14                  why you ought not to conclude that the police  
15                  could reasonably anticipate that he was going to  
16                  Syria is that the first information they had was  
17                  that he was simply going to go back to Zurich.

18                  Before I move on to the next  
19                  stage, though, there were a couple of other things  
20                  also that happened on September 26th in respect of  
21                  which some issues have been raised, specifically  
22                  the decision to send questions and then  
23                  subsequently to try to interview Mr. Arar in New  
24                  York and whether this was some nefarious way of  
25                  trying to circumvent his right to counsel.

1                   Let me say again, Mr. Arar was not  
2                   a suspect at the time. He was regarded as a  
3                   potential witness. He was going to be stopped in  
4                   the United States, which is a country that we  
5                   maintain shares many of Canada's values, and I  
6                   think the RCMP investigators reasonably assumed  
7                   that Mr. Arar would be able to exercise his right  
8                   to counsel under U.S. law, that he would be free  
9                   to answer or refuse to answer any question.

10                   So, in fact, Superintendent Cabana  
11                   said, "Well, Mr. Arar still has a right to  
12                   counsel, but his inclination to answer questions  
13                   might have changed."

14                   So you may say, "Well, yes, it  
15                   might have changed because he's now in a  
16                   vulnerable position, so he may be more inclined to  
17                   cooperate."

18                   But nonetheless, he is in the  
19                   United States. They do recognize right to  
20                   counsel. There's nothing to prevent Mr. Arar from  
21                   saying, "I impose precisely the same conditions  
22                   that I imposed last time. I haven't changed my  
23                   mind, actually, and you can speak to Mr. Edelson  
24                   if you want to speak to me."

25                   But there's nothing that obliges

1 the investigators to contact his counsel. They're  
2 not counsel. I would be under an obligation to  
3 speak to Mr. Edelson, but I don't think  
4 Superintendent Cabana was.

5 So he's entitled to approach  
6 Mr. Arar -- sorry, I'm starting to mix two issues  
7 slightly.

8 The sending of the questions would  
9 be asked by U.S. investigators in the United  
10 States in accordance with U.S. law, and presumably  
11 he would have had the right to counsel under U.S.  
12 law.

13 If the questions were answered and  
14 if it was subsequently attempted to use them in  
15 evidence, somebody could make the argument on his  
16 behalf that he was compelled to answer them and  
17 the questions should not be admissible.

18 But in my submission, there's  
19 nothing wrong with Cabana sending the questions  
20 down to the United States to be asked on their  
21 behalf or even in furtherance of the U.S.  
22 investigation.

23 THE COMMISSIONER: Would there  
24 have been anything wrong with him going down and  
25 asking the questions himself?

1 MR. FOTHERGILL: This is the next  
2 point.

3 He told us that if he had gone  
4 down, he would have in effect taken the Charter  
5 with him. He would have given the section 10(b)  
6 right, at which point Mr. Arar could make an  
7 assessment about whether he wanted to exercise  
8 right-to-counsel, wanted to answer the questions  
9 or not.

10 And I take the point that maybe he  
11 would have felt that it was in his best interests  
12 to answer, and if the evidence was ever sought to  
13 be adduced in a proceeding, somebody could make  
14 the argument that this was not truly voluntary.  
15 But it's not obviously involuntary. There's no  
16 bad faith here.

17 If he goes down to the United  
18 States, as investigators frequently do, and  
19 extends Charter rights under Canadian law, I think  
20 he is discharging what we would expect of him as a  
21 Canadian police officer.

22 THE COMMISSIONER: So you wouldn't  
23 expect him to call Mr. Edelson, who had attached  
24 these conditions earlier, and say, "Mr. Edelson,  
25 by the way, your client is now detained in the

1 United States, and I'm going to be going down to  
2 question him"?

3 MR. FOTHERGILL: Possibly as a  
4 matter of courtesy, but certainly not as a matter  
5 of law. He's not required to. It might be useful  
6 just to maintain good relations. I understand  
7 that Mr. Edelson, in fact, does have good  
8 relations with police officers. That's one of his  
9 strengths as a defence counsel. But that's not  
10 actually a requirement. I leave you with that.

11 Returning to the main theme,  
12 though, whether the police could have reasonably  
13 anticipated that Mr. Arar would be removed to  
14 Syria while he was detained.

15 The next thing that happened that,  
16 in my submission, is significant, is the  
17 October 3rd request for further information from  
18 the United States.

19 We don't have a copy of the  
20 initial request here in public evidence. You have  
21 it in camera. The reason, of course, is it is a  
22 communication we received from a foreign state,  
23 and therefore we have to treat it as confidential.

24 But what we do have in the public  
25 as evidence is the manner in which Mr. Flewelling

1           characterized the request when he forwarded it to  
2           Project A-OCANADA, and he makes it clear that the  
3           U.S. has sought information concerning Mr. Arar  
4           for use in law enforcement proceedings.

5                         And in my submission, what  
6           Mr. Flewelling could fairly take from that is that  
7           Mr. Arar was going to undergo some kind of process  
8           that would be conducted in accordance with  
9           accepted norms of law and due process. Law  
10          enforcement proceedings. And he had other reasons  
11          to believe this as time went on.

12                        If we look at the response that  
13          was provided on October 4th, it has an explicit  
14          caveat on it. It makes abundantly clear that the  
15          information should not be used, should not be  
16          further disseminated, should not be acted upon  
17          without the prior permission of the RCMP.

18                        We know, although it's redacted in  
19          the public version, that there is third-party  
20          information in that document. But what's  
21          interesting about the third-party information is  
22          it has a footnote on it which says, "The third-  
23          party rule may prevent the disclosure of this  
24          information."

25                        So in my submission, that makes it

1 abundantly clear that the police expected to be  
2 consulted if that information was going to be used  
3 for any sort of proceeding.

4 Indeed, it was sent in  
5 contemplation of possible law enforcement  
6 proceedings, the correct caveat was attached, and  
7 the third-party information was identified as  
8 such.

9 THE COMMISSIONER: Does that send  
10 a mixed message for earlier information that  
11 wasn't caveated to say that in some cases the RCMP  
12 does and in some cases they don't attach?

13 MR. FOTHERGILL: In my submission,  
14 no. These are sophisticated recipients.

15 With the greatest of respect, it  
16 is absurdly naive to think that an experienced  
17 agency, such as the FBI, is going to look at a  
18 piece of paper to see if the caveat is there or  
19 not to determine whether it's third-party  
20 information or not.

21 They know it's third-party  
22 information, whether it's explicit or not, and I  
23 think it probably won't be too difficult to find  
24 uncaveated communications between law enforcement  
25 agencies as a matter of course.

1                   It doesn't create ambiguity about  
2           the fact that it's third-party information.  
3           Permission must always be sought.

4                   In this particular case, it  
5           happened to be explicit.

6                   The other thing that's very  
7           noteworthy about that communication, and I've  
8           alluded to this before, is it states two things  
9           about Mr. Arar: it states that the police  
10          investigation about him is incomplete; and that  
11          the police are unable to establish links to  
12          al-Qaeda.

13                   So in that sense, from the point  
14          of view of the story that you ultimately will tell  
15          in your interim report, in my submission this is a  
16          critically important document. When it really  
17          mattered, whatever slight inaccuracies there may  
18          have been about refusal to be interviewed or  
19          permanently departed Canada, when the U.S. was  
20          actually trying to decide what to do with  
21          Mr. Arar, the message from the police was, "We  
22          haven't completed our investigation. We cannot  
23          link him to al-Qaeda."

24                   So if you're looking for warning  
25          signs, for example, that something might be amiss



1 with what is going on in the United States, the  
2 police have been told law enforcement proceedings  
3 are being considered, and they respond factually  
4 with caveated information, and there is no  
5 evidence that there was any further request to use  
6 that information at any time. So to the extent  
7 that any information, I would submit, was used,  
8 either referred to -- referred to in the removal  
9 order, which I think ultimately it was. There is  
10 some Canadian information we can see in the  
11 unclassified portion. To the extent that that was  
12 done, that would appear to be in breach of either  
13 an implicit or explicit caveat. Implicit if we're  
14 talking about information that was shared earlier,  
15 an explicit caveat if we're talking about what was  
16 shared on October 4th.

17 Sergeant Flewelling testified that  
18 again on October 4th he spoke to a member of the  
19 RCMP's immigration and passport section, just  
20 generally about the international laws that  
21 related to removal, and he was advised that the  
22 removal process would normally mean that the  
23 person would be placed on an aircraft belonging to  
24 the airline that brought him in and he would be  
25 returned to the point of his departure, which in

1 Mr. Arar's case once again means Switzerland. So  
2 in my submission as of October 4th, A-OCANADA  
3 investigators and Sergeant Flewelling are still  
4 reasonably of the view that Mr. Arar is going to  
5 undergo some kind of process and he will likely be  
6 returned to the U.S. if he's found inadmissible,  
7 or alternatively if there's enough to charge him  
8 he'll be charged in the U.S. because they're  
9 looking at law enforcement.

10 You heard from Mr. Gregg Williams  
11 who couldn't specifically remember the  
12 conversation with Sergeant Flewelling but he  
13 didn't rule it out either. I thought it was  
14 interesting that according to Stephen Yale-Loehr,  
15 who does know something about U.S. law, he said,  
16 and I'm going to quote him exactly here:

17 "...normally if people come  
18 into the United States and  
19 they are placed in normal  
20 removal proceedings, and they  
21 are determined to be  
22 removable, they are sent back  
23 to the country from which  
24 they came, in which case that  
25 would be Zurich."

1                   Unbeknownst to Sergeant  
2           Flewelling, in my submission, Mr. Arar was not, in  
3           fact, in normal removal proceedings. I don't know  
4           if that decision had been made at that time. I  
5           don't know if that's clear. He certainly hadn't  
6           been told that. What he was told is that Mr. Arar  
7           was going to undergo some sort of proceeding, law  
8           enforcement proceeding, is what the information  
9           was requested for.

10                   I think the idea of the  
11           immigration hearing comes up on the following day,  
12           and the other point I think I'd like to make here  
13           is that the evidence is that he had not yet been  
14           told at this stage about Mr. Arar's personal fear  
15           of removal to Syria. I'm not sure how significant  
16           that is in any event, because when he does finally  
17           learn about that, the source is said to be  
18           Mr. Arar's own fear, and although he is reporting  
19           what he was threatened with by U.S. officials, I  
20           don't think that aspect of it makes it back to the  
21           police. So all they're told is that he personally  
22           has a fear of being removed to Syria, but there's  
23           no official communication from the United States  
24           that that's likely to be the case.

25                   So if we then move to -- sorry,

1 I'm still on October 4th, because that's the  
2 first -- the evening telephone call with the  
3 representative of the U.S. Embassy that takes  
4 place just after six o'clock, and this is when  
5 Flewelling learns that Mr. Arar is scheduled to  
6 undergo an immigration hearing on November 9th of  
7 2002, and it's repeated that he has never  
8 officially entered the United States. The U.S.  
9 official reaffirms what Sergeant Flewelling has  
10 learned from another source, which is that Arar  
11 will likely be put on a plane and returned to his  
12 point of departure, at which point Sergeant  
13 Flewelling says, because -- I suppose there's a  
14 recognition that if he comes back to Switzerland,  
15 he'll probably make his way back to Canada, so  
16 Flewelling said why don't you just take him up to  
17 Montreal, or to Canada, and we can look at  
18 establishing surveillance? And the U.S. Embassy  
19 representative says, well, that's another likely  
20 possibility.

21 So he's left with the impression,  
22 as of the evening of October 4th, that Mr. Arar is  
23 going to proceed before some kind of tribunal or  
24 hearing on October 9th, after which he will either  
25 be removed to Switzerland or, if the Americans

1           want to be practical, he'll be sent up to Canada  
2           and we'll conduct surveillance of him and, in  
3           fact, there's evidence that they did actually  
4           begin arranging for surveillance to be conducted  
5           in Montreal in case he arrived there.

6                           I think it's worth mentioning the  
7           U.S. official with whom Flewelling is dealing with  
8           at this time. It's his counterpart at the U.S.  
9           Embassy here in Ottawa. It's not somebody who  
10          necessarily has direct access to what is going on  
11          in the United States. Sergeant Flewelling told us  
12          that the individual performs a function not unlike  
13          his. He's something in the nature of a liaison  
14          officer. He facilitates information-exchanges,  
15          and he's the local representative of an U.S.  
16          organisation, but here in Canada. So it's not  
17          clear to what extent the U.S. official is himself  
18          all that connected with what is going on, and that  
19          may become significant as we move through the  
20          chronology.

21                           When we go to October 5th then, we  
22          have Sergeant Flewelling's notes of a telephone  
23          call, and the representative here -- same one from  
24          the U.S. Embassy with whom Flewelling has worked  
25          for some time, so they know each other -- there's

1 the question of whether the U.S. was able to read  
2 the report that was provided on October 4th, and  
3 then there are a number of questions that are put,  
4 and it's prefaced, at least in Flewelling's notes,  
5 with the suggestion that the FBI feared they did  
6 not have enough information to make the charges  
7 against Mr. Arar stick.

8 Now, remember that Sergeant  
9 Flewelling has described the conversation as a  
10 matter of fact. It's not melodramatic. "Fear"  
11 may be a figure of speech. You may say, I fear we  
12 won't be able to do that. It doesn't connote  
13 genuine anxiety necessarily. I leave that with  
14 you, whether we should read anything into the word  
15 fear or whether he's just jotting down what this  
16 information is telling him as a matter of fact.  
17 "I fear we'll be unable to make the charges  
18 stick." It may not be a warning of any kind.

19 There's a danger when we do this  
20 kind of analysis in hindsight and in retrospect,  
21 that we will analyse these words to the point of  
22 exhaustion. Maybe it does communicate fear.  
23 Maybe it communicates something like I'm afraid  
24 the charges aren't going to stick.

25 THE COMMISSIONER: The call was to

1 Flewelling at home Saturday evening.

2 MR. FOTHERGILL: Yes. But  
3 remember what Flewelling said, on October 9th  
4 there's a hearing, you can't drag your heels on  
5 this.

6 So they therefore are going to be  
7 looking at deporting him. Arar has dual  
8 citizenship. According to Flewelling this is the  
9 first time the subject has arisen and he's asked  
10 to be deported to Canada. You've heard some other  
11 people saying, I think Stephen Yale-Loehr alluded  
12 to this, there are situations under U.S. law where  
13 you can choose your point of destination when you  
14 are removed. So there's nothing particularly  
15 suspicious in Flewelling being told he's a dual  
16 national and he wants to come to Canada, and then  
17 he asks this question: What's the RCMP's interest  
18 in Mr. Arar and can you refuse him entry?

19 Although, remember, there are two  
20 ways in which that particular question is  
21 depicted, can you refuse him entry or do you have  
22 any objection or laws that would prevent his  
23 entry?

24 So Flewelling gives a forthright  
25 answer, which I think he reasonably believes is

1 going to facilitate Mr. Arar's return to Canada.  
2 He says, "We don't have enough to charge him, and  
3 he's a Canadian citizen, so we can't refuse him  
4 entry." So essentially what he's telling him, in  
5 my submission, is he can be deported to Canada in  
6 accordance with his request.

7                   Again I repeat the way that  
8 Flewelling characterizes the conversation. It's  
9 with his counterpart at the U.S. embassy, they  
10 have a prior working relationship, it's a  
11 constructive working relationship and the  
12 questions are asked in a matter of fact way, and  
13 Flewelling did not form the impression that the  
14 individual is looking for one answer rather than  
15 another. It seems to be administrative in nature.

16                   This is why Sergeant Flewelling  
17 told you that it didn't cross his mind that Arar  
18 might be removed to somewhere other than Canada,  
19 or possibly Switzerland if that was still on the  
20 table. Given the context of his conversation with  
21 the U.S. official the previous evening, he thought  
22 that Mr. Arar would be removed to either  
23 Switzerland or Canada. This expectation was  
24 confirmed by a discussion with a member of the  
25 RCMP's Immigration and Passport Section. He and



1 the U.S. official had also discussed the  
2 possibility of dropping Mr. Arar at the border,  
3 which is the U.S. official said was another likely  
4 possibility, and the RCMP subsequently considered  
5 establishing surveillance in anticipation of  
6 Mr. Arar's arrival in Canada and there's some  
7 evidence that they took some steps in that  
8 direction. And then Sergeant Flewelling at least  
9 recalls that he reported this conversation with  
10 his superior, Sergeant Ronald Lauzon, who didn't  
11 see anything particularly untoward about it  
12 either.

13 I just want to pause and mention  
14 that there's no evidence that any U.S. official  
15 ever suggested to sergeant Flewelling or anybody  
16 else that Mr. Arar would be returned to Canada but  
17 only on the condition that he would be detained.  
18 And I mention that because it's appeared in the  
19 press and I think Senator De Bané informed you  
20 that he had been briefed along these lines. He  
21 may very well have been briefed along these lines,  
22 but what I'm suggesting is there's no evidence  
23 that this kind of conditional offer was ever  
24 actually made.

25 So the following day is the e-mail

1 from Sergeant Flewelling where he uses the  
2 slightly different language to describe the call,  
3 "Do we have any objection or laws that would  
4 prevent Canada from accepting Mr. Arar into the  
5 country?"

6 And then we come to the morning of  
7 October 8th. I should alert you there's a  
8 typographical error in our submission where I  
9 think I suggest that Inspector Roy came to Project  
10 A-OCANADA on the morning of October 9th. It's the  
11 8th in fact.

12 THE COMMISSIONER: Right.

13 MR. FOTHERGILL: This is the first  
14 time that Project A-OCANADA learns of Mr. Arar's  
15 subjective fear, as they understand it, that he  
16 may be deported to Syria, and something that  
17 Inspector Roy has learned from the Department of  
18 Foreign Affairs and he bases it on something that  
19 he's read in a consular visit report, and then  
20 approximately an hour later you have a U.S.  
21 Embassy representative who arrives at Project  
22 A-OCANADA's office who confirms that there are  
23 court proceedings scheduled for the following day.

24 So we have this unusual situation  
25 that on October 8th of 2002, the U.S. Embassy

1 representative is apparently confirming that  
2 Mr. Arar is still in New York waiting to go before  
3 some kind of tribunal the following day, but, in  
4 fact, we learn subsequently that he's already left  
5 the United States very early in the morning of  
6 that day.

7 Now, either Project A-OCANADA  
8 members are being misled by the U.S. official, or,  
9 and here we are now moving into speculation, the  
10 U.S. representative doesn't really know what's  
11 going on, and given that he's based in Ottawa and  
12 given that he performs a function not unlike  
13 Sergeant Flewelling, I think the more credible  
14 explanation is that he's really not all that close  
15 to the events in New York.

16 So I think if -- the next thing  
17 that happens is October 9th when the RCMP learns  
18 through CID that Arar has been removed to Syria.  
19 But if we then move quickly through these  
20 different steps and ask ourselves, was there  
21 anything clearly -- and without the benefit of  
22 hindsight be seen as some sort of signal that  
23 Mr. Arar was going to be sent to Syria -- I'm  
24 referring now to page 10 of my submission -- when  
25 Project A-OCANADA sent questions to be asked to

1 Mr. Arar on September 26th they reasonably  
2 believed that U.S. authorities are already decided  
3 to return him to Switzerland. Then the October  
4 3rd request from the U.S. suggested that they were  
5 exploring law enforcement options. There was  
6 nothing in this request to suggest that he was  
7 going to be dealt with in a manner other than  
8 accorded with norms of law and due process.

9 The response that was provided had  
10 an explicit caveat. It said specifically that  
11 Mr. Arar could not be linked to al-Qaeda by the  
12 RCMP. Then Project A-OCANADA and CID understood  
13 that Arar was going to go before an immigration  
14 hearing on October 9th, after which he would  
15 either be returned to Switzerland or permitted to  
16 complete his journey to Canada.

17 There was some administrative  
18 questions -- and I should refer you also here to  
19 Nancy Collins' testimony. She talked a little bit  
20 about the process of removal from the United  
21 States and said that it was not unusual for  
22 inquiries to be made about an individual's status  
23 and confirming his citizenship and then whether he  
24 could, in fact, be returned to Canada. So that's  
25 not in itself all that suspicious, in my

1 submission.

2                   Sergeant Flewelling provided  
3 accurate, factual responses to the FBI's  
4 questions, that he reasonably believed would  
5 facilitate Mr. Arar's return to Canada, and indeed  
6 Project A-OCANADA made arrangements for  
7 surveillance to be conducted on his arrival in  
8 Montreal.

9                   So by the time Project A-OCANADA  
10 finally was informed of Mr. Arar's fear of being  
11 removed to Syria, he had actually already gone.  
12 And members of the RCMP continued to believe that  
13 he was scheduled to undergo an immigration hearing  
14 on October 9th, at which he would be represented  
15 by a U.S. lawyer, and that he was receiving  
16 consular assistance. So presumably if Mr. Arar  
17 was dissatisfied with the outcome of the  
18 proceeding, it was reasonable to assume that he  
19 could pursue legal remedies through his lawyer.  
20 Nobody expected anything that precipitous. Either  
21 on October 9th the decision would go in his favour  
22 and he would complete his journey to Canada or it  
23 would not go in his favour at which point,  
24 presumably, there would be an appeal, a challenge  
25 much like we see in this country, that this could

1 go on for a very long time. Nobody expected  
2 anything precipitous.

3 And then in the next paragraph I  
4 make the point I've already made to you, that  
5 there seems to be a real disconnect between the  
6 information that Project A-OCANADA has gathered in  
7 relation to Mr. Arar and what the Americans claim  
8 they have, because Project A-OCANADA advises the  
9 United States on October 4th that they cannot  
10 establish links to al-Qaeda and within 72 hours  
11 Mr. Arar receives an order from the U.S.  
12 government stating their conclusion that he's  
13 unequivocally a member of al-Qaeda.

14 THE COMMISSIONER: It doesn't mean  
15 the Americans didn't use information as part of  
16 their decision-making process.

17 MR. FOTHERGILL: No, I think  
18 that's a fair observation. In fact if you have a  
19 look at Exhibit P-20, there is a reference to the  
20 Mangos meeting. So I think you can see Canadian  
21 information at least being alluded to.

22 THE COMMISSIONER: Or that the  
23 Americans don't have a different threshold. We  
24 don't know about that.

25 MR. FOTHERGILL: Even so -- even

1           so -- you've seen what the information is in  
2           camera.

3                           THE COMMISSIONER: Right.

4                           MR. FOTHERGILL: You know  
5           precisely what it is. What we have in public is a  
6           characterization. The investigation is incomplete  
7           and we cannot establish links to al-Qaeda. So how  
8           you get from there to "You are unequivocally a  
9           member of al-Qaeda" is anybody's guess, but it's  
10          not something that we can establish in this forum  
11          because we just don't know fully what motivated  
12          the Americans.

13                          We've got some signals from  
14          politicians which you might want to put less or  
15          more weight on, depending upon to what extent they  
16          were actually involved in the proceedings. You  
17          mentioned the Powell and the Cellucci comments,  
18          which, with the greatest respect, did seem to  
19          change from time to time. And then you have  
20          Easter's meeting with Ashcroft, where he comes out  
21          and says afterwards, "Well, the information came  
22          from sources globally." I don't know what to make  
23          of that.

24                          THE COMMISSIONER: We have  
25          people's observations. Again, I guess it's a

1 question of weight about the Americans being so  
2 much more aggressive when it comes to matters of  
3 this sort and having, I'll use the phrase, lower  
4 threshold, but a number of witnesses have  
5 commented that after 9/11 there was serious  
6 concerns about the American attitude --

7 MR. FOTHERGILL: But I think Ms  
8 McIsaac said as well today that perhaps we didn't  
9 recognize the degree of angst. I'm not sure that  
10 that's a basis to criticize Canadian officials'  
11 inactions at the time, and I still think that it  
12 would be very difficult for you to conclude that  
13 Canadian information alone provided the basis for  
14 what subsequently happened because the Americans  
15 certainly did pursue and are indeed pursuing a  
16 more aggressive war on terror than we are, but  
17 it's still a non-trivial thing to charter a  
18 private jet and fly someone halfway around the  
19 world. That doesn't happen to everybody. I'm not  
20 by saying that in any way trying to dignify the  
21 American action, but presumably there are a lot of  
22 people whose names figure in reports from time to  
23 time and they are not all treated in this way.

24 The other thing that I think we  
25 need to pay special attention to, and this is part



1 of not applying an excess of hindsight is what was  
2 known about extraordinary rendition at the time.

3 I remember that when  
4 Mr. Cavalluzzo was questioning Sergeant  
5 Flewelling, he said what about this clean the  
6 streets of terrorist policy? And I think you'll  
7 want to ask yourself, was such a policy known at  
8 the time or is this based on something that we  
9 read in the last year in The New Yorker?

10 Prior to the Arar case, in my  
11 submission, for the few people who even knew the  
12 term extraordinary rendition, what they understood  
13 that to mean was an abduction outside the United  
14 States of somebody and their forced return to the  
15 United States to face trial. You've had a number  
16 of witnesses telling you that.

17 Julia Hall, I think, provided us  
18 with a very sophisticated, almost academic,  
19 analysis of why it's possible to regard Mr. Arar's  
20 case as part of that -- I almost said tradition,  
21 but it hardly seems to be the appropriate word,  
22 phenomenon. In retrospect you can situate his  
23 circumstances in the phenomenon of extraordinary  
24 rendition, although it takes a certain  
25 sophisticated analysis to do that, because he

1           wasn't actually subjected to extraordinary  
2           rendition.

3                           He was subjected to deportation  
4           under U.S. law to the point that we can actually  
5           pinpoint the statutory provision under which he  
6           was removed. It's an unusual process called  
7           expedited removal, according to Stephen  
8           Yale-Loehr, it's the first -- perhaps only case  
9           he's seen. So in my submission there was nothing  
10          that could reasonably serve as a precedent for  
11          what happened to Mr. Arar on October 8th, 2002,  
12          that would have caused police officers first of  
13          all to recognize that something was amiss and  
14          secondly intercede in some way. And indeed on the  
15          subject of protesting or interceding, we should  
16          bear in mind that they still believed that he was  
17          going to undergo some kind of impartial process on  
18          October 9th.

19                           So even if it had occurred to  
20          Sergeant Flewelling that Mr. Arar might be in some  
21          jeopardy of going to Syria, I suppose he could  
22          have raised it with his counterpart at the U.S.  
23          Embassy, but equally he might have thought, we'll  
24          have to wait until the outcome of this hearing  
25          before the independent immigration judge where

1 Mr. Arar is represented by a lawyer, and  
2 presumably he can make the argument about why he  
3 should not be removed to Syria.

4 And you will remember, sir, that  
5 when Stephen Yale-Loehr talked to us about the  
6 normal process, he said that an immigration judge  
7 would normally hear arguments about the convention  
8 against torture.

9 So in my respectful submission it  
10 would be very unfair to judge the police officer  
11 who dealt with their American counterparts during  
12 that period through the lens of hindsight.

13 There was nothing to signal that  
14 Mr. Arar was in jeopardy or that he would be  
15 removed to anywhere other than Switzerland or  
16 Canada, and Canada was clearly the more likely  
17 proposition. We went to the trouble of  
18 establishing surveillance in Montreal.

19 It might be suggested by some  
20 people, I think you're going to hear about this  
21 quite a bit tomorrow from the intervenors, that  
22 Mr. Arar needs to be understood as part of a  
23 broader pattern that was going on and that this  
24 would have provided some kind of warning that  
25 Mr. Arar was in jeopardy of going to Syria. In

1 fact, some people even offer a more sinister  
2 theory that all of these other individuals who  
3 have ended up in Syria and been questioned under  
4 duress because of some sort of plan orchestrated  
5 by Canadian officials, or at least to which  
6 they're an active participant.

7 In my submission, first of all, we  
8 reject this assertion. Second of all, in my  
9 submission, you are entitled to inquire into that.  
10 You don't need to expand your mandate.

11 If you think that the only way to  
12 understand Mr. Arar's circumstances is to  
13 understand the circumstances of these other two,  
14 you're entitled to look at that.

15 And I would go further and say  
16 that in camera, you have heard extensive evidence  
17 about the extent to which Canadian officials knew  
18 anything about the arrest of Mr. Almalki in Syria  
19 and the arrest of Mr. El Maati in Syria. And you  
20 have also heard extensive information about  
21 whether there were exchanges of information with  
22 the Syrian authorities during the time that any of  
23 those people were detained in Syria.

24 So in my submission, your mandate  
25 permits you to look at that. You have received

1 extensive evidence about it and certainly  
2 sufficient evidence to make an informed decision  
3 about whether or not Mr. Arar's circumstances are  
4 part of a broader pattern.

5 In a public forum I can point to  
6 some things. First of all, Mr. Almalki travelled  
7 to Syria of his own volition, as far as we know,  
8 and certainly Mr. El Maati travelled to Syria of  
9 his own volition.

10 So if we're still looking for  
11 reasons why people might have been concerned that  
12 Arar could be deported to Syria from the United  
13 States, these two individuals do not provide  
14 precedents. They are not even cases of the more  
15 traditional extraordinary rendition of being  
16 abducted somewhere and moved. They simply  
17 travelled.

18 I think, subject to any questions  
19 you may have, those are my submissions.

20 THE COMMISSIONER: Okay. Thank  
21 you very much, Mr. Fothergill.

22 How are we doing timing-wise?  
23 It's a quarter to five. I'm happy to break if  
24 that's going to allow us to stay on schedule?

25 MS McISAAC: We'll definitely stay

1 on schedule. I presume you want us -- we'll start  
2 at ten and finish at what time, sir, tomorrow?

3 THE COMMISSIONER: I think the  
4 time that had been allotted the Government was to  
5 finish at one o'clock.

6 MS McISAAC: Oh yes, easily. Very  
7 much so.

8 THE COMMISSIONER: It is hot in  
9 here, and it's been a long day. So I appreciate  
10 that.

11 So we will rise and resume  
12 tomorrow morning at ten o'clock.

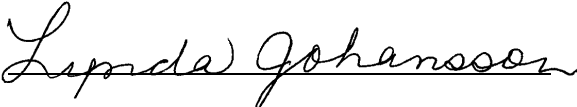
13 THE REGISTRAR: Please stand.  
14 --- Whereupon the hearing adjourned at 4:43 p.m.,  
15 to resume on Tuesday, September 13, 2005,  
16 at 10:00 a.m. / L'audience est ajournée  
17 à 16 h 43, pour reprendre le mardi  
18 13 septembre 2005 à 10 h  
19  
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21

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24

25



Lynda Johansson,

C.S.R., R.P.R.

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